THOMPSON *v.* HOLLIS & COMPANY.

4-4649

Opinion delivered May 10, 1937.

Roy D. Campbell and *W. J. Dungan,* for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellee.

MEHAFFY, J. This action was instituted by appellee in the Pulaski circuit court against L. A. Phillips and Vance M. Thompson, the appellant.

The complaint alleged that the appellee was a corporation engaged in the mill and supply business; that L. A. Phillips and Vance M. Thompson were jointly indebted to it in the sum of $630.16 with interest from January 1, 1936, for goods, wares and merchandise, as set out in verified account.

L. A. Phillips filed answer, in which he stated that the purchase of the goods, wares and merchandise by him was solely and only as the agent of Vance M. Thompson.

Vance M. Thompson filed answer denying all the material allegations of the complaint, and denying liability.

There was a verdict and judgment for appellee against Vance M. Thompson for the amount sued for. Motion for new trial was filed and overruled, and the case is here on appeal.

There is no dispute about the sale of the goods for the Benton Ice & Oil Company, of Benton, Arkansas. It is not disputed that the goods were received and that they have not been paid for.

The Sheridan Ice & Coal Company was incorporated with L. A. Phillips, W. J. Dungan and appellant as the only stockholders. Dungan was issued one share of the stock, or rather one share was made out to him, and he immediately assigned it back. The other stock was issued to Phillips and appellant, but Phillips did not pay anything for his stock, but pledged it to appellant to secure the payment of the stock. All the money that was put into the plant originally was put in by Thompson, and thereafter the profits of the company paid the balance that the Sheridan company owed so that all of the property of the Sheridan company was furnished by Thompson and the profits from the company. The Sheridan Ice Company sold ice at Benton for some time, and Thompson and Phillips decided to put up a plant at Benton. Phillips had no money and Thompson had ample money to finance the construction of the plant. Thompson took a deed to the property in his own name and undertook, according to his own testimony, to furnish the money to construct the plant at Benton. The plant at Benton did not prosper, became involved, and this suit is to collect for goods, wares and merchandise sold by appellee and delivered to the plant at Benton. The appellant claims that they were putting up the plant at Benton for the Sheridan Ice & Coal Company and it was not his individual property.

The appellant testified that he furnished the money to the Sheridan Ice Company to buy the property on which the Benton Ice & Oil Company plant was built; he furnished close to $7,000 or $8,000; he bought the property in his own name, and gave a contract to the effect that he would give a deed when the money was paid to him. He testified that the Sheridan Ice Company put in $100 and that he furnished the rest of the money. It developed, however, that the $100 paid by the Sheridan Company was $100 that it owed Thompson, so that Thompson really put in all the money. He testified that he was to hold the real estate as security until he was reimbursed. He had no understanding with Phillips that he was to purchase goods from Hollis & Company or elsewhere, and he did not give Phillips any authority of any kind. The plant at Benton was leased to Phillips, but he did not give Phillips any authority to buy material. He testified that he was very careful not to. He knew that Phillips could not finance the building of the plant, and he could do so; that Phillips was not his agent and had no authority to bind him.

Phillips testified that he purchased the goods from Hollis & Company and that the account was correct. He constructed the plant at Benton and it was done with Thompson's money. Thompson was to furnish the money, and he was to construct the plant. Thompson owned the property, and bought the material from Malvern Brick Company, and Phillips bought lumber from the Arkansas Lumber Company. Thompson furnished all the money at the plant at Sheridan and took Phillips' stock as collateral for his part. Thompson agreed to furnish the capital to build the plant. The material for the Benton plant was not charged to the Sheridan Company at his direction. When asked about an agreement as to the transaction, he testified that that was Thompson's agreement; that he did not sign it at all. He testified positively that Thompson authorized him to buy the material on his account and his credit. They never did have a meeting of the board of directors in the Sheridan plant; it was not necessary because there were only three of them in the concern.

Appellant contends that the court erred in giving instruction No. 6 requested by appellee, and instruction No. 1 requested by Phillips. Instruction No. 6 reads as follows:

"You are instructed that if you find that the defendant Phillips was acting for the defendant Thompson as his agent in purchasing the equipment in question, but did not disclose to the plaintiff that he was acting for the defendant Thompson then plaintiff would be entitled to recover from the defendant Phillips."

The appellant argues that instruction No. 6 and instruction No. 1, given on behalf of Phillips, authorized the jury to pass upon the question of whether Phillips was the agent of Thompson in purchasing goods, wares and merchandise involved in the suit, when there are no facts in the record upon which to base these instructions. It is argued that there is no testimony to show that Phillips was the authorized agent of Thompson, except the declaration of Phillips himself. We do not agree with appellant in this contention. Phillips' testimony shows that he was the agent of Thompson in the purchase of the goods. This is not a declaration of Phillips, but is the testimony of Phillips.

Appellant calls attention to numerous authorities to the effect that the authority of an agent must be shown by positive proof or circumstances that would justify the inference that the principal had assented to the acts of his agent; and that you can neither prove agency nor the extent of an agent's authority by the declarations of the agent.

The court has many times held that you cannot prove agency or the extent of the agent's authority by proving the declarations of the agent, but it has always held that the testimony of the agent is competent to prove agency, although the agent's declarations are not competent to prove the fact of agency, and may only be introduced to corroborate other evidence tending to establish the fact of agency. The agent's testimony, however, is entirely different from the declarations of the agent.

American So. Tr. Co. v. *McKee,* 173 Ark. 147, 293 S. W. 50; 1 Mechem on Agency, par. 285.

"The rule that the declarations of an agent are, as against his principal, inadmissible to prove the fact of his agency does not apply to his testimony as a witness on the trial in which such fact is in issue; and consequently the testimony of the agent, unless he is disqualified for some other reason, is competent to establish the fact of his agency, and the existence of facts from which the agency may be inferred, at least, where the authority was verbally conferred; and to refuse to allow him to testify and be cross-examined is reversible error." 2 C. J. 933; 3 C. J. S., Agency, 274; 21 R. C. L. 820.

The weight and sufficiency of the evidence is governed by the rules applicable to the weight and sufficiency of evidence in civil actions in general. The fact of agency is established by a preponderance of the evidence, and, as in all other civil actions, the credibility of the witness and the strength of his testimony are questions for the jury. 2 C. J. 951.

"Although an alleged agent's extrajudicial statements are not admissible to prove the fact of his agency, that fact may, when it rests in parol, be established on the trial by the testimony of the agent himself; he is a competent witness to prove the agency, and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject." 2 Am. Jur. 353.

Instruction No. 1 requested by defendant Phillips is lengthy, and we do not set it out in full, but appellant objects to it because he states that it is not supported by the evidence, and second, because it permits the establishment of principal and agent solely on the testimony of the agent himself.

We do not think that the objections to said instruction are well taken. What we have already said shows that the fact of agency may be established by the testimony of the agent.

It is contended that the court erred in refusing to give instruction No. 2 requested by appellant. That in-

struction, in effect, tells the jury that the facts recited, that is, if they find that Thompson entered into an agreement with the Sheridan Ice Company that he would furnish money and material to assist in the construction of an ice plant at Benton, and that said ice plant was to be operated by the Sheridan Ice Company as a branch, and that it was further understood that the title to the real estate and building should remain in Thompson as security until the Sheridan Ice Company should repay Thompson, then such advanced funds and material by Vance Thompson, would not constitute Thompson the owner, and would not make him liable for other materials furnished by appellee, which went into construction of the ice company plant at Benton; unless they further find that the materials purchased by the Benton Ice Company were in fact purchased by said Thompson, or his authorized agent. The evidence clearly shows that the Sheridan company was practically owned and controlled by the appellant, and that he agreed to finance the Benton company, to furnish the money, and, even if all the facts recited in instruction No. 2 were true, he would still be liable under the evidence in this case for the supplies furnished to the Benton plant.

The fact of agency and the extent of the agent's authority, the credibility of witnesses and the weight to be given to their testimony, are all questions of fact for the determination of the jury, and there is ample evidence to sustain the verdict.

We find no error, and the judgment is affirmed.

CHANDLER *v.* NEW YORK LIFE INSURANCE COMPANY.

4-4652

Opinion delivered May 10, 1937.

J. V. Spencer and *Chadd L. Durrett,* for appellant.

Louis H. Cooke, W. E. Patterson and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

McHaney, J. This is a suit by appellant to collect total and permanent disability benefits under two policies of life insurance held by him and issued by appellee. The premium on policy No. 6218204, hereinafter referred to as policy No. 1, issued and dated November 10, 1917, was due on November 10, 1933, was not paid, and the policy lapsed. The premium on policy No. 6787689, hereinafter referred to as policy No. 2, issued and dated July 13, 1920, was due on July 6, 1933, was not paid, and the policy lapsed. Appellant alleged and so testified that he became totally disabled with malaria or influenza in 1931, but didn't make proof thereof to appellee because at that time he thought he would get well, but since that time he has learned that his disability is permanent. It was stipulated that Dr. Moore, if present, would testify that appellant became totally disabled in December, 1930, or January, 1931. In April, 1933, appellant received a cash loan on policy No. 2 of $192, and on May 10, 1933, he received a cash loan on policy No. 1 of $446. After the policies lapsed, the insured not having elected any other option, they automatically went into term insurance, there being sufficient reserve on policy No. 1 to purchase $542 of insurance from November 10, 1933, to November 16, 1936, and on policy No. 2 to purchase $813 from July 6, 1933, to July 5, 1934.

Both policies contained identical provisions relating to total and permanent disability benefits, as fol-

lows: "Whenever the company receives due proof, before default in the payment of premium, that the insured, * * * has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days * * * —then

"1. Waiver of premium.—Commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will on each anniversary waive payment of the premium for the ensuing insurance year, * * *.

"2. Life income to the insured.—One year after the anniversary of the policy next succeeding the receipt of such proof, the company will pay the insured a sum equal to one-tenth of the face of the policy and a like sum on each anniversary thereafter during the lifetime and continued disability of the insured."

Appellant filed no claim for disability benefits, nor did he make any proof of disability, except on March 12, 1936, appellant appears to have written appellee a letter notifying it of his disability. This fact does not appear from appellant's testimony, but only incidentally from a witness for appellee. The complaint was filed March 28, 1936.

The trial court, sitting as a jury, held that because appellant failed to furnish proof of disability prior to the lapsing of said policies, he was precluded from claiming disability benefits, and rendered judgment in favor of appellee. The case is here on appeal.

Counsel for appellant correctly state that the only question to be determined by this court is whether "the language in the benefit certificates makes notice and proof of total and permanent disability before the default in the payment of any premium under said insurance certificates a condition precedent to the right of recovery." We think counsel inaccurately refer to these policies of life insurance as "benefit certificates," a term usually

applied to policies issued by fraternal and beneficiary societies. It is insisted by appellant that the language of the policies above quoted relating to total and permanent disability benefits is not a condition precedent and that the case falls within the rule announced in *Ætna Life Insurance Company* v. *Phifer,* 160 Ark. 98, 254 S. W. 335; *Ætna Life Insurance Company* v. *Langston,* 189 Ark. 1067, 76 S. W. (2d) 50; *Ætna Life Insurance Company* v. *Davis,* 187 Ark. 398, 60 S. W. (2d) 912; *Home Life Insurance Company* v. *Ward,* 189 Ark. 793, 75 S. W. (2d) 379, and *Mo. State Life Ins. Co.* v. *Case,* 189 Ark. 223, 71 S. W. (2d) 199. The language used in the disability clauses in those cases was altogether different from that here involved and we think those cases are not controlling. The language in the policies under consideration is exactly the same as that in *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. (2d) 520, and *New York Life Ins. Co.* v. *Jackson,* 188 Ark. 292, 65 S. W. (2d) 904, the Farrell case being cited and relied upon in the Jackson case. In both cases, we held that the giving of the notice or the making of proof in the manner provided in the policy was a condition precedent to recovery. In the Jackson case we said: "It is insisted, however, that it is the fact of disability, and not proof thereof, which entitled the insured's administratrix to recover for the benefit of his estate the disability benefits to which the insured himself was entitled. This was the theory upon which the Farrell case was tried, and a judgment recovered. The opinion in that case sets out an instruction which permitted a recovery upon the finding that the insured was permanently disabled within the meaning of the policy sued on, which, as has been shown, is identical with the policy here sued on.

"We held the instruction was erroneous, and should not have been given, and in that connection it was said:

" 'This instruction was erroneous and should not have been given. The provisions of the policies are set out above, and each one provides that, commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will waive payments, etc.

" 'It is perfectly plain from this provision of the policy that it waives premiums only commencing with the anniversary of the policy next after proof of loss is made, and it will be observed, from the second paragraph above quoted from the policy, that one year after the anniversary of the policy next succeeding proof of loss, the company will pay. It was therefore improper to instruct the jury that the payments continued throughout the time of appellee's disability. The provisions of the policy providing for payment are plain and unambiguous. The liability attached when the disability occurred and proof of loss was made. The company, however, did not promise to pay from the time the disability occurred, but from the time fixed in the policy itself.' "

It is plainly manifest from the language used that there will be no waiver of premium and no income payments made unless the company "receives due proof before default in payment of premium that the insured * * * has become wholly disabled by bodily injury or disease." In the case before us, there was no proof made before or after default. In *New York Life Insurance Company* v. *Moose,* 190 Ark. 161, 78 S. W. (2d) 64, a clause in the policy provided: "In event of default in payment of premium after the insured has become totally disabled as above defined, the policy will be restored and the benefits shall be the same as if said default had not occurred, provided due proof that the insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the company not later than six months after said default." We held under that clause that the making of proof within six months after default was a condition precedent to recovery of benefits for a disability accruing prior to default. We there said: "Assuming, however, that there was sufficient evidence to go to the jury as to whether total disability occurred prior to default, we are of the opinion that the benefits were granted solely upon the condition that the proofs of total and permanent disability before

default be furnished within six months after default. In other words, the disability must commence before default in premium payment, and the benefits will then be granted 'provided due proof * * * is received by the company not later than six months after said default.' This proviso simply states the conditions under which disability benefits will be granted. It necessarily excludes all others * * *'' and we cited the Farrell and Jackson cases, *supra*. So here, the language used makes the waiver of the premium and the income payments depend entirely upon the fact that the company receives due proof before default. Not having made such proof in the manner provided in the policy, the trial court correctly found in favor of appellee.

The judgment is accordingly affirmed.

JAMES *v.* WILSON.

4-4637

Opinion delivered May 10, 1937.

Osborne W. Garvin, for appellant.

E. R. Parham and *Tom F. Digby,* for appellee.

GRIFFIN SMITH, C. J. The chancery court dismissed the petition of Wilma Ketcher James by which she sought to vacate an order confirming a report of commissioners appointed for the purpose of partitioning certain lands in Pulaski county, and to allot the homestead and dower interest of appellant as widow of M. J. Ketcher.

The surviving heirs of M. J. Ketcher were his mother, Annie Ketcher; a brother, Henry Ketcher; a sister, Rose Harrod, and a nephew, William McCallum, the latter being a minor.

M. J. Ketcher had operated a tin, metal, and roofing business. He had accumulated considerable property, alleged in the petition to be worth $88,151, exclusive of "going value."

Soon after the death of M. J. Ketcher, Carrie E. Wilson, who for ten years had been his secretary, was ap-

pointed administratrix of the estate. This was done by agreement, and all of the heirs except the minor signed the bond. The record shows conclusively that, at the time Miss Wilson was appointed, it was hoped that the business might be continued, at least until its value, under changed conditions, could be determined.

The widow's statutory allowances were not claimed or given, nor was quarantine assigned. In her petition she alleges that she was not advised of her legal rights in these respects.

As grounds for setting aside the order of confirmation, appellant alleges: (1) That fraud was practiced by "the other parties in the proceeding" in obtaining the order and decree; (2) that fraud was practiced upon the court by "the other parties" in that assets were concealed from the court and from petitioner; (3) that the commissioners did not, in fact, view and appraise the real and personal property; (4) that petitioner's attorney was attorney for Carrie E. Wilson, individually, and Carrie E. Wilson as administratrix, and all other parties to the proceeding, and that "said attorney represented and was attorney for the heirs-at-law of M. J. Ketcher at all times prior to the filing of the partition proceedings;" (5) that the value of the real estate was not disclosed to the court nor to the petitioner; (6) that the value of the personal property was not properly disclosed to the court; (7) that the fact that Carrie Wilson was operating the business of M. J. Ketcher and Company was not disclosed to the court, and (8) that homestead, and allowances provided by law, were not assigned to petitioner.

The prayer was that the cause be reopened; that commissioners be appointed to appraise the property, both real and personal; that Carrie E. Wilson be required to produce all books and records, together with inventories, etc.; that dower in assets of the estate, formerly concealed, be assigned to petitioner, and that dower in the real estate and personal property be assigned; that her homestead be selected and assigned, and that she be awarded allowances as provided by law.

Carrie E. Wilson was appointed administratrix on October 18, 1934. Five days later—on October 23—through her attorney, Tom F. Digby, she petitioned the probate court for authority to continue the business, and on the same day such authority was granted. Miss Wilson's petition for appointment contained a statement that the personal property was worth $20,000. For three and a half months after her husband's death, appellant was employed by the administratrix to collect rents and was paid $15 per week.

Probate court records do not show that any other proceedings were had prior to January 26, 1935, at which time appellant executed a document entitled "Agreement for Settlement of Interest in Estate." Appellant says that this agreement was prepared by Mr. Digby. It recites a desire to obtain "a complete settlement of all my interest in said estate," and continues: "Now, therefore, for and in consideration of the sum of one dollar, to me in hand paid by the (above mentioned) heirs, I do hereby agree to accept in full and complete settlement of all my interest in and to said estate, the following described property, real and personal." A description of the real property, without evaluation, was set out; also, three real estate notes, aggregating $11,-515; Home Owners Loan Corporation bonds, $5,000; Arkansas Toll Bridge bonds, $2,000, and Liberty Loan bonds, $2,000. The total of these items of personal property is $20,515. To this was added an automobile and household effects, unevalued.

Another "Agreement for Settlement of Interest in Estate" contains a blank January, 1935, date. It lists four pieces of real property, without evaluation; three real estate notes aggregating, $10,735; HOLC bonds $3,000; State Highway bonds, $2,000; Liberty Loan bonds, $2,000, and cash, $2,000.

On January 29, 1935, Mr. Digby, as attorney for Wilma Ketcher, Harry H. Ketcher, and A. G. McCallum, the latter acting as next friend of William McCallum, minor, filed a petition in chancery court, praying that "all right, title, interest, including the dower and home-

stead interest, of plaintiff, Wilma Ketcher, be assigned and partitioned unto her in fee simple, and that commissioners be appointed to make said assignment." Rose Harrod, Annie Ketcher, C. E. Wilson, and C. E. Wilson as administratrix, answered, denying that the property was susceptible of division in kind, but admitting that the interests of the parties were as alleged in the petition. It was also admitted that the plaintiffs were entitled to the relief prayed for in the complaint. They specifically entered appearances and consented that the court grant the order allotting dower and partitioning the lands, in accordance with the best interests of the parties. The answer was signed by E. R. Parham as solicitor for Rose Harrod and Annie Ketcher.

Carrie E. Wilson answered, alleging her interest to be that of an administratrix. She submitted a list of the real estate, and an inventory of the personal property, and stated that debts owing and unpaid amounted to approximately $8,000; also, the inheritance tax, if any, due the state. The personal property listed amounted to $57,573. Nineteen parcels of real estate were described, without an estimate of values.

The same day the petition was filed, the chancellor found that Wilma Ketcher was endowed with one-half of the real property in fee, and one-half of all the personal property. Interests of the several parties were decreed, including a finding that the administratrix had no beneficial interest in the property, and commissioners were appointed, as requested in the petition.

The report of the commissioners was filed January 29, and contained the following: "We have examined the lands and are of the opinion and find that the same are so situated that they cannot be divided in kind among the owners thereof according to their respective interests therein without great prejudice to said owners, and we further find that it would be to the best interest of the estate and to the parties herein that the following lands be allotted to the said Wilma Ketcher * * * which said lands are less than one-half in value of all the lands of the said M. J. Ketcher, and that she be given the

remainder of her interest in said total estate from the personal property thereof." There was this recommendation: "And after the payment of debts of said estate, that the widow be given the following described personal property, which is less than one-half in value of the personal property of the estate: Note of S. O. and Nellie Carrol, $5,935; note of Mrs. Chas. E. Taylor, $2,500; note of Gladys G., Thomas H., and Harry S. Sharp, $2,280; note of DeWayne Jones, $780; Fourth Liberty bonds, $2,000; Arkansas Toll Bridge bonds, $2,000; Home Owners' Loan Corporation bonds, $7,500; Ford automobile, $600; household furniture and effects, $400." These items total $23,495.

The court approved this suggested settlement. In the order of confirmation the chancellor copied the report of the commissioners, and made the following findings: "And the parties hereto in open court agreeing to the partition and assignment of dower as set out in said report; and the court further finding from the testimony of Henry H. Ketcher, Rose Harrod, C. E. Wilson, Annie Ketcher and Wilma Ketcher, taken orally before the court, that the said lands allotted to Wilma Ketcher, widow of the deceased, are less than one-half in value of the lands of said M. J. Ketcher, and that the personal property, as set out in the report of said commissioners to be allotted to the said Wilma Ketcher, is less than one-half in value of the personal property of the said M. J. Ketcher, deceased; and no cause being shown why said report should not be confirmed * * * the same is hereby declared to be firm and effectual forever."

The specific real property assigned to appellant was then described, and the title was confirmed in appellee, as follows: Lots 1 and 2, block 5, Oakhurst Addition; west 49 feet of lot 3, block 1, Melrose Place Addition; all of lot 9 and part of lot 10 in block 3, Melrose Place Addition; lot 4, block 1, Melrose Place Addition.

It was further ordered that "all taxes and debts and other charges now filed, probated, or hereafter filed or probated within the time prescribed by law, against the estate of M. J. Ketcher, shall be paid by said adminis-

tratrix out of the remaining funds in her hands belonging to the estate; that on the delivery of said personal property heretofore described (referring to personal property of the aggregate value of $23,495 identified in the report and copied in the order of confirmation) to the said Wilma Ketcher, she is hereby directed to execute a complete release to the estate for all of her claims of dower or other interests therein, and that the costs of the action be paid by C. E. Wilson, administratrix."

The order appointing the commissioners contained a finding that the personal property of the estate had a value of $57,573. This value seems to have been fixed by agreement of all parties, and the items making up the total are identified by exhibit "B" to the petition. It listed 26 items, including those assigned to appellant.

On January 29, 1935, appellant executed a release, reciting receipt of certain items of personal property, and releasing the estate of "all claims, interests or demands which I may have or which I may hereafter have against any of the (adverse parties) or the estate of the said M. J. Ketcher, inclusive of any claims which I may now have or which I may hereafter have against said persons or estate as homestead or dower or as widow of the said M. J. Ketcher."

Items listed, with respect to which appellant acknowledged receipt, were: Note of S. O. and Nellie Carroll for $5,935; note of Mrs. Charles E. Taylor for $2,500; note of Gladys G., Thomas H., and Henry S. Sharp for $2,250; note of DeWayne Jones for $780; Fourth Liberty bonds, $2,000; Arkansas Bridge bonds, $2,000; Home Owners' Loan Corporation bonds, $7,500; a Ford automobile, $600; certain household furniture and effects, $400.

These are the items identified in the chancellor's order of confirmation, and are the items appellant agreed to accept in settlement of her apportionment. At the same time she executed a quit-claim deed in favor of Annie Ketcher for life with remainder to William McCallum, Henry Ketcher and Rose Harrod as tenants in common, as to that part of the real estate to which they

were entitled under the decree. She also executed a warranty deed to lot 4, block 1, Melrose Place Addition, in favor of Carrie Wilson. The recited consideration was $10 cash. This is one of the items of real property awarded appellant in the chancellor's order of confirmation.

In testifying in the instant case, Miss Wilson acknowledged that as administratrix she did not file an inventory with the probate court until October 1, 1935—about nine months after the death of the intestate. She said that as secretary to M. J. Ketcher she knew that he owned considerable real property, but did not know about all of it; that about two or three days after Ketcher's death she was advised by appellant that she had been appointed administratrix, affidavit and application for such having been prepared by Mr. Digby; that the value of the personal estate was merely estimated at $20,000; that Digby had been Mr. Ketcher's attorney; that Digby represented or advised her throughout the proceedings, but "I employed Mr. Parham to represent me in the decree;" that Parham was employed at the suggestion of Digby; that after death of her intestate she went with Mrs. Rose Harrod, Henry Ketcher and Annie Ketcher to Digby's office, and "Mr. Digby represented all of us to a certain extent."

She testified that $79 on deposit in the Twin City Bank was "overlooked;" that interest collected on securities and notes from October 15 to January 29 amounted to $181.74, which was not on the statement available to the chancellor; that she had collected $1,688.69, but that of this amount only $607 was collected between October 15 and January 29; that these rents were accounted for on her books, but not included in the inventory; that as administratrix she was not advised that she would be entitled to a fee of $1,618 on $48,966 of assets; that she did not tell appellant, about January 15, 1935, that to the best of her knowledge the estate was worth approximately $70,000; that she knew about the L. M. Gordon note for $1,706.70, and it was left out of the inventory through oversight; that a note of $225

executed by Harry Hill was likewise overlooked; that the list of personal property and real estate filed in the chancery court had been seen by appellant before the chancery proceedings were instituted; that she would estimate the good will of Ketcher & Company at $3,000, and this item was not included in the inventory; that information in her possession was available alike to all of the interested parties, but appellant did not examine these records, although she did look over the list made up by witness; that she was living in the house deeded to her by appellant; that Mr. Digby delivered the assigned securities to appellant; that she (witness) had formerly had possession of the securities as administratrix, but gave them to Mr. Digby the day the partition order was entered; that appellant, after receiving the personal property, brought notes back to witness and asked her to assist with collections; that for a long time witness did not charge appellant anything for making collections, but later made a charge of 2½ per cent.; that witness continued to make collections for appellant until February or March, 1936, at which time appellant made demand for an additional allowance; that accounts receivable at the time Ketcher died amounted to about $2,000, with stock, tools and equipment amounting to $750; that no itemized list of such was furnished appellant; that an item of $2,500 listed among the debts as "cost of administration" included an estimate of attorneys' fees and cost of administration.

It was shown that $1,963.87 was paid the state. The amount was remitted by Mr. Digby with a letter to the Revenue Department dated November 7, 1935. In this settlement, indebtedness of the Ketcher estate was represented to be $8,561.67, including delinquent general taxes, $1,455.10; delinquent special taxes, $3,922.91, and "cost of administration, $2,500." The same witness (W. A. Jackson, attorney for the Revenue Department) testified that according to the files, that portion of the settlement showing interest of appellant, upon which inheritance tax was payable, amounted to $44,075, with exemptions of $6,000, and that the tax on the difference

of $38,075 would be $1,123.02. Of the total of $1,963.87 paid, $57.20 was interest.

W. E. Porterfield, one of the commissioners, testified that he viewed the real property in company with the other two commissioners, and that Mr. Digby prepared the report he read; that they accepted the list of personal property as prepared by Mr. Digby, and presumed it was correct; that the value of the real estate was estimated about four months later. "Mr. Digby told me that an agreement had been made, and we did not set aside any piece of property as the widow's homestead, nor was she requested to make a selection. It was understood that the deficiency in the 50 per cent. of the real estate to Wilma Ketcher was to be made up from the personal property. I would not have made the report had the contrary been true." The testimony of DeWayne Jones, another commissioner, was substantially the same.

Appellant testified that she had her first conference with Mr. Digby about two days after her husband died; that Digby suggested the appointment of Miss Wilson as administratrix, and appellant approved; that she was not advised what her statutory allowances were, but Digby did tell her the widow would be entitled to one-half of the estate, without informing her as to its value; that he did not tell her he was representing the other parties, but did tell her he was representing the estate and that he had a conference with the other members of the Ketcher family, and explained what they would give in settlement; that he never showed her an inventory of the property, although she saw a list of the real estate described by lot and block numbers; that she was about 26 years of age, unfamiliar with real estate, bonds, and securities, and ignorant as to the value of real estate; that Mr. Digby first told her the value of the estate was $20,000; that up to the time of filing the partition suit she was never advised as to the value of the property; that she signed the agreement based upon information of the administratrix that the estate was worth $70,000; that an agreement of settlement signed by her

before the partition report was confirmed listed an undivided one-half interest in lot 8, block 3, Melrose Place Addition, which was omitted from the final settlement, but according to this agreement she was to receive HOLC bonds of the value of $3,000, instead of $5,000, as subsequently provided; that the decree awarded her $7,500 in HOLC bonds, but she gave $2,500 of these to Mr. Digby, who stated that they were for his fee and taxes; that she did not know whether he referred to general taxes, or inheritance taxes.

She also testified that Digby had told her the estate would pay his fee and everything appellant got would be clear; that on the property awarded her she was required to pay $323.35 delinquent taxes for 1934-1935; that the warranty deed to Carrie Wilson was signed in Mr. Digby's office after the chancellor's decree had been rendered, and that the property so deeded was worth $1,800. "Mr. Digby told me Mrs. Annie Ketcher could not deed any of her property on account of the minor, and he wanted me to give a quit-claim deed so Miss Wilson could have the property. He told me I wouldn't be giving the property away, that it wasn't mine, that it belonged to the other side, the heirs * * *. I am seeking by my petition one-half of $88,151, plus one-half of the property not accounted for * * *. The agreement called for $5,000 HOLC bonds and Mr. Digby told me the $2,500 was to be taken out of the estate for legal expenses and immediate expenses. I did not expect to keep the $2,500 any way; it was to pay the taxes and attorneys' fees, and he made a full disclosure of it. He did not give me a statement showing what he did with the $2,500; so far as I know it was expended for things it was supposed to be expended for * * * Mr. Digby told me he was attorney for the estate and that he was working it out the best way he could. He didn't tell me he was attorney for the heirs-at-law."

It is contended by appellant that in addition to the appraised value of the estate, $88,151, certain omitted items would bring the total value to $90,950.54, and that appellant was entitled to one-half of this sum, or $45,-

475.27, but received only $23,995 in personal property and $9,300 in real property, or a total of $33,295. From the real estate she deeded property of the value of $1,800 to Carrie E. Wilson, and turned over $2,500 in HOLC bonds to Digby, leaving net $28,995.

(1) The first assignment of error is that fraud was practiced on the court in obtaining the decree. Our conclusion is that the testimony falls far short of establishing intentional fraud. It is apparent that an error was made in not including the Gordon note in the inventory; also, the deposit of $79 in the North Little Rock bank was overlooked, and so was the Hill note of $225.

(2) It is not shown that assets were purposely concealed, although certain items were inadvertently omitted from the inventory.

(3) Two of the commissioners testified that they viewed the real property, and this testimony was not controverted by any one in possession of the facts.

(4) The evidence is not sufficient to reflect upon the ethics or professional conduct of Mr. Digby or Mr. Parham. Taken as a whole, it is apparent that Mr. Digby's entire purpose was one of helpfulness, and appellant must have known of his relations with the other parties.

(5) The value of the real estate was estimated and conjectural, but the conduct of all parties to the record indicates, based upon available information, that there was an agreement as to values, and appellant is bound by her own acts.

(6) We agree with appellant that the value of the personal property was not disclosed to her, but no affirmative duty rested on those adversely interested to do more than they did—that is, supply a list of the property.

(7) The allegation that Carrie E. Wilson, as administratrix, was operating the business, and that this fact was not disclosed to the chancellor, is without merit.

(8) Failure of appellees to assign homestead and "allowances provided by law" was of no importance in view of appellant's agreement, made in open court.

Appellant knew that the business had been operated from the death of her husband to January 29, 1935, at which time the settlement was made, and she knew that rents had been collected. In fact, she made some of the collections. Any interest she had in the item of $607 was merged with the settlement. The same is true with respect to interest of $181.74 on the securities. Appellant's act in turning over to Mr. Digby $2,500 of HOLC bonds after they had been awarded her by the court was voluntary, and she is estopped to complain. She also voluntarily executed a quit-claim deed to Carrie Wilson, involving part of the real property decreed to her, and the transaction will not be disturbed.

Although the first installment of general taxes was not due at the time the settlement was made, such taxes had matured and their liens attached. One item is $108.75 and another is $85.95, each for, 1934, general taxes, a total of $194.52, payment of which is directed in the decree under its general terms. Special taxes of $128.83 are listed for 1935. There is no evidence showing when the special assessments fell due.

The Gordon note of $1,706.70; the bank deposit of $97, and the Hill note for $225, were unintentionally omitted from the various lists. Appellant's one-half interest in these items, if assigned specifically, would amount to $1,014.35. It is the view of the writer, concurred in by Mr. Justice SMITH, that the decree should be modified by awarding this item, and that to it should be added the general tax item of $194.52, or a total of $1,208.87, with interest at six per cent. from January 29, 1935. It is the opinion of a majority, however, that the record clearly discloses that appellant received preferential consideration and exercised an independent choice in the selection of the assets she received, and that the chancellor was correct in dismissing the complaint for want of equity.

Affirmed.

DIGIACOMO *v.* STATE.

Crim. 4026.

Opinion delivered May 10, 1937.

Robert J. White, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

SMITH, J. By the order and judgment of the Logan circuit court appellant was enjoined from the further sale of beer in his place of business in Paris, Logan county, Arkansas, and the sheriff of that county was directed to destroy the stock of beer appellant then and there had on hand, and this appeal is from that judgment. The suit was brought by the prosecuting attorney of the circuit of which Logan county is a part under the authority of § 6196, Crawford & Moses' Digest.

The petition for the injunction alleged the following grounds for the relief prayed: (a) That the sale of beer is frequently made to minors; (b) that minors are permitted to congregate and buy and drink beer in appellant's place of business; (c) that beer is sold to people already under the influence of intoxicating liquors, and to habitual drunkards. Three other grounds are alleged which we find it unnecessary to discuss. A demurrer to the petition was overruled, to which action of the court an exception was saved.

Section 6196, Crawford & Moses' Digest, appears as § 1 of act 109 of the Acts of the General Assembly of 1915, pages 408 *et seq.* That act is entitled "An act to define certain public nuisances, and to provide for the abatement thereof."

The constitutionality of this act in its entirety was upheld by a divided court in the case of *Marvel* v. *State,* 127 Ark. 595, 193 S. W. 259, 5 A. L. R. 1458. Two members of the court dissented upon the ground that this jurisdiction could not be conferred upon the chancery court, but the dissenting judges concurred in the view that this jurisdiction could be and had been conferred upon the circuit courts. It was the opinion of the majority that the act conferring this jurisdiction upon both chancery and circuit courts was valid and constitutional. It had previously been held, in the case of *Hickey* v. *State,* 123 Ark. 180, 184 S. W. 459, that maintaining a place of business where orders were taken for the sale of intoxicants in violation of law was a nuisance which the circuit courts had been given power to abate by injunction. See, also, *Cole* v. *State,* 144 Ark. 533, 222 S. W. 1060; *Adams* v. *State,* 153 Ark. 202, 240 S. W. 5, and *Nichols* v. *State,* 171 Ark. 987, 287 S. W. 190.

It is insisted, however, that this act of 1915 has been repealed by an act known as the "Arkansas Alcoholic Control Act," the same being act 108 of the Acts of 1935, page 258 *et seq.* The contention stated is based upon the provisions of article I of this Control Act, the purpose of which article was to define the words and terms therein employed. Section 6 thereof reads in part as follows:

"The word 'spirituous' shall mean liquor distilled from the fermented juices of grains, fruits or vegetables and containing more than twenty-one (21%) per centum of alcohol by weight, or any other liquids containing more than twenty-one (21%) per centum of alcohol by weight. The word 'vinous' shall mean the fermented juices of fruits, except wine, and containing more than five (5%) per centum and not more than twenty-one (21%) per centum of alcohol by weight. The word 'malt' shall mean liquor brewed from the fermented juices of grain and containing more than five (5%) per centum of alcohol by weight. Beer containing not more than five (5%) per centum of alcohol by weight and all other malt beverages contain not more than five (5%) per centum of alcohol by weight are not defined as malt liquors, and are excepted from each and every provision of this Act."

The act provides for the manufacture, sale, classification, possession or other disposition of spirituous, vinous, and malt liquors, and makes an appropriation of funds for the administration and enforcement thereof. It provides further for local option elections, and for the license taxes and permit fees to be charged persons who avail themselves of the provisions of the act, and for the revocation of such licenses and permits.

Subdivision (a) of § 1 of article 6 of the act provides that "any person who shall sell, give away, or dispose of intoxicating liquor to a minor or habitual drunkard or an intoxicated person shall be guilty of a misdemeanor * * *." The argument is that this provision does not apply to beer, and that the act itself has repealed all the provisions of other acts regulating and restricting the sale of beer because of the provision relating to beer appearing in § 6 of article 1 first above quoted; in other words, that it is not unlawful to sell beer to minors, or to habitual drunkards, or any other person. It will be observed that article 1 defines the restricted words "spirituous," "vinous," and "malt," and does not employ or define the more comprehensive words "intoxicating liquors" appearing in subdivision (a) of § 1 of article 6. All of these are intoxicating liquors, and

subdivision (a) of § 1 of article 6 makes it unlawful to sell such liquors to a minor, or habitual drunkard, or an intoxicated person. Must we—because of the provision of article 1, above quoted—hold that beer may be legally sold to minors? If such a result has been accomplished by the Act of 1935, it is apparent that there has been a reversal of the policy followed in this state throughout its entire history in regard to prohibiting the sale of intoxicants to minors, at least. We think this was not the legislative intent.

This act 108 does not repeal, in its entirety, act No. 7 of the Acts of the Extraordinary Session of the General Assembly of 1933, page 19, approved August 24, 1933. Indeed, § 6 of article 1 of act 108, above quoted, is immediately followed by a paragraph reading as follows: "It is further provided that malt and vinous beverages containing more than 3.2 per cent. of alcohol by weight and not more than 5 per cent. of alcohol by weight shall be taxed and regulated as provided for malt and vinous beverages containing not more than 3.2 per cent. alcohol by weight under the provisions of act No. 7 of the Acts of the Extraordinary Session of the General Assembly of 1933, approved August 24, 1933." We must, therefore, look to act No. 7 to determine how malt and vinous beverages containing more than 3.2 per cent. of alcohol by weight and not more than 5 per cent. of alcohol by weight, "shall be taxed and regulated," and when we have examined act No. 7 we find that § 26 thereof reads as follows: "Section 26. No sale of beer or wine shall be made to minors." As by way of emphasis, this § 26 contains no other provision. It is, therefore, unlawful to sell beer or wine to minors.

This view is confirmed by recalling the history of our legislation on the sale of intoxicants. There was passed at the 1915 session of the General Assembly act No. 30, page 98, commonly known as the "Bone Dry Law," which prohibited, after January 1, 1916, the sale "of any alcoholic, vinous, malt, spirituous, or fermented liquors, or any compound or preparation thereof commonly called tonics, bitters or medicated liquors within

the state of Arkansas." It was thereafter unlawful to sell any of such liquors in this state until the passage of act No. 7, approved August 24, 1933, at the Special Session of the General Assembly of 1933. At that time the drought was partially broken by this act No. 7, which was "An act to permit the manufacture, sale, and distribution within the state of Arkansas of light wines and beer, and to provide for taxing the manufacture, sale and distribution of such products, and for other purposes." It is in this act, as above stated, where it is enacted that "No sale of beer or wine shall be made to minors." Act 108 was not passed to authorize and regulate the sale of beer. That authority had already been conferred. Act 108 provides an elaborate scheme for the sale of spirituous and vinous as well as malt liquors, but, as has been shown, act No. 7 was not repealed in its entirety, and the prohibition against the sale of beer and wine to minors remains in full force and effect.

The case of *State ex rel. Trimble* v. *Kantas,* appears to have been twice reported, first in 190 Ark., at page 1092, 82 S. W. (2d) 847, and again in 191 Ark. 22. It was there contended that special acts prohibiting the sale of intoxicants had been repealed, not only by act 108 of the Acts of 1935, above referred to, but also by acts Nos. 69 and 109 of the same session. It was there held that this result had been previously accomplished by act No. 7 of the Extraordinary Session of 1933, above referred to, which was recognized as being in force and effect except in so far as it was in conflict with the later acts passed at the, 1935, session. Therefore, if appellant engaged in selling beer to minors, he violated the law, and § 6196, Crawford & Moses' Digest, conferred jurisdiction upon the courts, either circuit or chancery, to abate the business as a public nuisance.

It is argued that the petition filed by the prosecuting attorney failed to state a cause of action, because it did not "define the kind or alcoholic content of any of the substances alleged to have been sold. * * *."

There are several answers to this contention, the first being that the petition did designate the alcoholic

drink sold. It was alleged that appellant sold beer to minors. The second answer is that it is not required that the petition designate the particular kind of liquor sold. It has been frequently held that this allegation is not essential, even in an indictment charging the sale of intoxicants. *Johnston* v. *State,* 142 Ark. 402, 219 S. W. 25; *Rogers* v. *State,* 133 Ark. 85, 201 S. W. 845; *Wald* v. *State,* 136 Ark. 372, 206 S. W. 675; *Gramlich* v. *State,* 135 Ark. 243, 204 S. W. 848; *Rinehart* v. *State,* 160 Ark. 129, 254 S. W. 351; *Jackson* v. *State,* 160 Ark. 198, 254 S. W. 531. And, finally, it is immaterial what kind of liquors were sold to minors if they were in fact intoxicating.

It is urged that the testimony is insufficient to support the finding that appellant sold beer to minors. The testimony offered to support that allegation is to the following effect. Appellant operated a place of business in Paris, Logan county, known as the Green Frog, which was a combination grocery store, meat market and cafe, where wine and beer were sold under licenses issued by both the state and federal Governments.

Lola Woods testified that she was 17 years of age, and that she and two other girls, one 17 and the other 14, went to appellant's place, where she was served with wine and the other girls with two bottles of beer each. The drinks were bought by Joe Lewis, their escort. Lewis bought the drinks, including a bottle of wine, at the counter, and brought them to the table where they were drinking in plain view of all persons in the room. She further testified: "I have been in there several times and drank beer." The beer was not sold to her, but to her escort. She testified that Uel Downs, a boy 14 or 15 years old, had bought beer in appellant's place. He bought beer for her and for himself, which was drunk at one of the tables provided for that purpose. She had seen Uel in there several times drinking beer. He would walk up to the counter and get it.

Ruby Marshall testified that she was 13, and had been with Joe Lewis when he bought beer for her and himself, and that she had seen him do this "just about

two or three times, if that much." They drank the beer at a table "close to the counter" where it was sold. Lola Woods was with her then. The beer was in bottles. The employees "were standing right there." At that time the place was only a meat market and cafe. The grocery store was later installed. She had been there with Lola "over two or three times." On one occasion Lola drank two or three bottles of beer. They were close to the waitress who served them. She had seen Uel drink beer there.

The deputy city marshall testified that he had seen girls in appellant's place, did not know whether they were drinking beer, but he saw them with beer on the table. He carried the Robbins boy out of there drunk, did not know whether the boy had gotten drunk there or not. Certain other testimony was offered to the same effect.

Opposed to this, testimony was offered that appellant did not sell beer to minors, and had directed that it should not be done, and it had not been done. Other witnesses testified that they knew what was required to constitute a place a public nuisance, and appellant's was not such a place. That they had been there frequently and the place was always conducted orderly. Still other witnesses testified that appellant and his place had an excellent reputation.

These were all questions of fact for the court. If beer was sold to minors, the opinion of witnesses as to whether this constituted the place a public nuisance cannot prevail if the law makes it such.

It is true there was no testimony to the effect that appellant had himself sold beer to minors, or had directed it to be done. But it was not essential that this proof be made. This is not an indictment for the illegal sale of beer to minors, and is not a trial under an indictment. The prayer for the injunction is based upon the allegation that appellant conducted and maintained a place where beer was sold in violation of the laws of the state, and if this is established by the testimony, as we think it is, appellant is maintaining a place declared by law to

be a public nuisance, even though the sales were made by his employees, and not by himself, and without his knowledge or consent. It was held, in the case of *Edgar* v. *State,* 45 Ark. 356, to quote the first headnote, that "A sale of liquor to a minor, by the agent or bartender of the owner of a saloon, is a sale by the owner, for which he is liable whether present or not." To the same effect see, also, *Waller* v. *State,* 38 Ark. 656; *Cloud* v. *State,* 36 Ark. 151; *Robinson & Warren* v. *State,* 38 Ark. 641.

We conclude, therefore, that the testimony supports the finding that appellant had violated § 6196, Crawford & Moses' Digest, and the judgment is, therefore, affirmed.

McHaney and Butler, JJ., dissent.

Pacini *v.* Haven.

4-4647

Opinion delivered May 10, 1937.

Brewer & Cracraft, F. F. Harrelson and *Randolph & Randolph,* for appellant.

Marvin B. Norfleet, E. J. Butler and *C. W. Norton,* for appellee.

Humphreys, J. Appellee obtained a decree against appellant in the chancery court of St. Francis county

for $10,500 which amount he alleged he was induced by appellant and his co-conspirators to put into the business of the Memphis Theatre & Equipment Company, a partnership composed of Charles F. Boyd, Nello Pacini and Joe Pacini, through false and fraudulent representation purporting to show the quantity and value of the assets belonging to said partnership, and that the business was a prosperous, growing business; whereas, in fact the business was insolvent and being operated at a loss; or, if the operation of said business was not resulting in a steady loss, then the amount appellee put into the business was wrongfully appropriated by said appellant and his associates together with the earnings of said business, which was operated under their exclusive control.

The allegations of fraud and wrongful conversion of the funds were denied and the issues joined were tried by the court with the above result, from which decree is this appeal.

The partnership business in which appellee and his associate, Harry Bogart, purchased an interest was owned by Charles F. Boyd, Nello Pacini and Joe Pacini. They operated five local cinema theatres in Memphis, Tennessee, under leaseholds. Charles F. Boyd was an experienced motion picture theatre operator having been engaged in the cinema theatre business a long time. L. F. Haven, appellee, had been engaged in the same kind of business for sixteen years in Arkansas and owned and operated cinema theatres in Marianna, Wynne, Brinkley and Forrest City. Harry Bogart managed the Marianna theatre for him. On account of being engaged in the same kind of business Haven and Boyd became acquainted and in May, 1931, began negotiations relative to Haven buying an interest with Boyd in the cinema theatres in Memphis. During that time Haven made several visits to the theatres and made a check on the number of patrons attending them. They had meetings in Memphis and Forrest City to talk the matter over. Boyd informed Haven that they had expended large amounts in repairing and remodeling and

purchasing certain equipment, and, in doing so, had incurred an indebtedness for $6,500 for borrowed money to appellant, the father of his two partners, and of $5,400 to Joe Pacini, one of his partners. He stated that the partnership needed money with which to meet some of the obligations and to carry on the business. Haven suggested that he could put some money into the business, but preferred, in case he did, that they incorporate. It was suggested that Haven take stock for the money he might put in; that Joe Pacini take stock for what they owed him and his interest in the business; that Boyd take stock for the interest he had in the partnership and that they pay appellant what they owed him in cash. The three partners, Haven, Bogart and his attorney, J. L. Daggett, and perhaps Ben C. Welch, the attorney for the partnership, all met in the firm's office in the Ritz Building in Memphis pursuant to an understanding in the forenoon of July 14, 1931, with the view of coming to a definite agreement about the sale and purchase of the partnership assets and business and a plan to incorporate the business. The books and records kept by the partnership were inspected by Haven, Bogart and his attorney. The books reflected that the business had been making money. No final agreement was reached at the morning meeting so they agreed to meet again in the afternoon for further discussion. Appellant met with them in the afternoon on invitation to discuss the debt the partnership owed him. During the morning meeting, Haven objected to paying appellant's debt in cash and suggested that he be requested to take stock in the proposed corporation in payment of his debt. Boyd and his partners represented that the business was a profitable business and exhibited the books and records in substantiation of their statements. Appellant refused to take stock in payment of the indebtedness due him saying that while the business had been profitable he wanted his money to put in another business that he regarded as more profitable. He was urged by both Boyd and Haven to take stock in the proposed corporation in payment of the indebtedness, but he refused to do so. He

agreed, however, to take the individual notes of Haven or the notes of the proposed corporation with Haven's indorsement in payment of his indebtedness. It was then agreed that Haven would execute his individual notes payable in one and two years for $6,500 to appellant and that the corporation would obligate itself to pay the notes, which it afterwards did do by a resolution. It was also agreed that Haven would execute his note to Joe Pacini for $5,400 to cover his indebtedness against the partnership which should be exchanged for stock in the corporation. This was done after the corporation was organized. It was also agreed that Haven would advance $3,500 in cash in payment of stock to be issued which he was to take in the proposed corporation and that said sum would be deposited in a bank in Forrest City for use by the new corporation to be checked out as needed by Haven and the $2,500 advanced by Bogart as a payment on stock in the proposed corporation should be deposited in a bank in Memphis to be checked out by Boyd as needed in the operation of the business. A few days afterwards, a corporation was organized and a charter was obtained from the state of Tennessee to the Memphis Theatre & Equipment Company, Inc. Stock in the new corporation was issued to the several parties as per agreement, the majority thereof being issued to Haven and Bogart. Haven was duly elected president and Boyd duly elected manager of the corporation. Bogart became an employee of the new corporation. The corporation took over the business of the partnership and proceeded to operate the theatres. There were frequent meetings of the stockholders and Board of Directors at which Haven generally presided. Daily reports of the business were made by Boyd to Haven and mailed to him in Forrest City, but Haven finally directed that they be discontinued. Haven sent Boyd checks on the account in Forrest City when requested to do so, but on account of the frequency of the requests finally sent him a check for the entire balance in the bank. The statements sent to Haven by Boyd showed that the volume of business continued for several months to be about

the same the partnership books showed it was prior to the organization of the corporation. Later the business decreased and the expenses increased and both Haven and Boyd bought more stock until Haven, including the first $3,500, had advanced up to $10,500 and, including the $2,500 advanced at first, Bogart advanced a total of $4,200. The advances by Haven and Bogart were made mostly at intervals during the year, 1931. In February, 1932, Haven advanced $1,500 to pay a note for $1,500 for the corporation he had personally indorsed making a total in advances to the corporation of $10,500. A final stockholders' meeting was held on March 11, 1932, at which Haven presided. A resolution was unanimously passed at that meeting that due to the financial depression and to protect the company's creditors it was best to transfer all capital stock to Boyd with full power to so handle the company's assets that it might continue and not become insolvent, and the transfer of the stock was accordingly made. Haven resigned as president and director and Boyd was elected as president. About two months later Boyd being unable to continue the business surrendered the charter to the state and the leases on the various theatres were forfeited to the owners and the corporation ceased to do business. There is no evidence in the record tending to show just what assets were owned by the partnership at the time it was taken over by the corporation; none showing that the books and records of the partnership exhibited to appellee when he bought an interest in the partnership were incorrect; none indicating that they were padded or manufactured for the purpose of deceiving appellee and Bogart as to the condition of the partnership business. The representations made by the partners, which were confirmed by appellant, tallied with the books and records. Representations that the partnership was in need of ready money or cash were made, and all the parties understood at the sale of the partnership and the reorganization thereof into a corporation and the sale of stock to appellee and Bogart was for the purpose of raising money to meet outstanding obligations and to operate

the business. There is no evidence in the record showing that appellant was interested in the business as a partner or that he had ever been. Appellee and all the parties concerned according to the record knew that the partnership was indebted to appellant in the sum of $6,500 for borrowed money and to Joe Pacini in the sum of $5,400 for borrowed money. There is nothing in the record tending to show that appellant had anything to do with the management of the corporation after it was organized or that he ever received a dollar from it while it was in existence. Just what became of all the money is not revealed by the record, but appellee was in a better position than appellant to know what became of the money earned by the corporation and that he and Bogart paid into the corporation for stock. He was its president, a member of the board of directors and he and Bogart owned a majority of the stock. The resolution passed at the last meeting of the stockholders over which appellee presided attributed the financial troubles of the corporation and its losses to the depression.

A reading of the entire record indicates that appellee was a successful operator of this kind of picture shows in Arkansas and that he was quite anxious to acquire a foothold in Memphis in the same business and that after making all the investigations he desired to make of these particular theatres he seized the opportunity to buy an interest in them irrespective of business hazards incident to conducting a business in times of depression.

After the corporation failed and went out of business he made no complaint that deceit and fraud had been practiced upon him in the sale and purchase of the business and took no action to recover the money he had invested in the theatre business in Memphis. The first effort he made in this direction was after he had been sued by appellant on the notes of $6,500 which he had executed to him in 1931.

This court said in the case of *Stuttgart Rice Mill Company* v. *Lockridge,* 185 Ark. 340, 47 S. W. (2d) 596, that fraud is never presumed, but must be proved and

that the burden of proof is on the party alleging it and that while fraud need not be shown by direct or positive testimony, but may be proved by circumstances where, taken together, they are inconsistent with an honest intent; but slight circumstances or suspicion, leading to no certain result, are not sufficient to establish fraud. This court has also said in a number of cases, among them *Welch* v. *Farber,* 188 Ark. 693, 67 S. W. (2d) 588, that one cannot wait an unreasonable time before resorting to the courts to seek redress on the ground of fraud. An examination of this record convinces us that the chancellor erred in finding that a preponderance of the evidence established the allegations of fraud contained in appellee's complaint. Our analysis of the evidence is that no fraud either in the way of representations or in the wrongful conversion of money by appellant was shown. The rule is that fraud alleged must be proved by clear and satisfactory evidence and appellee has failed to bring himself within this rule. On account of the error indicated the decree is reversed, and appellee's complaint is dismissed.

VINCENNES STEEL CORPORATION *v.* DERRYBERRY.

4-4651

Opinion delivered May 17, 1937.

Seymour Riddle, Joe D. Shepherd and *J. M. Smallwood,* for appellant.

Bob Bailey, Jr., and *Bob Bailey,* for appellee.

McHaney, J. On May 6, 1936, appellee, an employee of appellant, Vincennes Steel Corporation, was struck in the right eye by a steel rod which was being passed through a wooden form into which concrete was to be poured, in the construction of a bridge across Illinois Bayou in Pope county. The eye was destroyed and he suffered severe and painful injuries therefrom. The form was about 15 feet high and about 30 feet long, with a space on the inside of about 18 inches. It was made of tongue and grooved flooring called the web wall, nailed to 2 x 4 upright pieces on the outside of the web wall, and on the outside and nailed to the 2 x 4's were 4 x 4's called whalers, evidently meaning wales. These wales extended horizontally around the form, at right angles to the 2 x 4's, and extending from bottom to top at spaces of about 2 feet, for the purpose of preventing the form from spreading when the concrete was poured in. To further safeguard the form from spreading, holes 9/16-inch in diameter were bored through the wales and the web wall on one side and corresponding holes in the web wall and wales on the other side, through which small steel rods ⅜-inch in diameter were inserted, extending through the form and several inches on the outside of the wales. Steel washers with set-screws were then put on the rods and fastened thereto flush with the outside of the wales. Appellee, Luther Summers, foreman, and Burl Wait were engaged, at the time of the injury, in inserting the rods through the holes. Wait was on the west side of the form, Summers on the inside and appellee on the east side. Wait would insert the rod on the west side, pass it through the wale and the web wall, where it would be received by Summers who would guide

it through the web wall on the east side to appellee who would guide it through the wale. It frequently happened that, because the holes did not exactly correspond, appellee experienced some difficulty in getting the rods through the wale on his side, in which event he would maneuver the rod into place with his hand, or his hammer, then, on direction from him to Summers and from Summers to Wait, the latter would strike the end of the rod on his side and drive it through. Neither could see either of the others and Wait could not hear appellee give directions to hit it, so the directions to do so were relayed through Summers.

Appellee brought this action for damages against the Vincennes Steel Corporation and Burl Wait, and alleged as a ground of negligence, as stated by the court in instruction No. 1, the following: "He alleges as the sole cause of his injuries that the defendant, Burl Wait, struck an iron rod which he knocked through what is commonly called a whaler, and hit him in the eye; that the said Burl Wait hit the iron rod without instruction from his boss, Lee Summers, or any one. The defendant denies that Burl Wait so hit the iron bar, but states that Burl Wait hit the same after receiving instructions to do so from his boss, Lee Summers. The defendant further contends that the plaintiff gave instruction to Lee Summers to have the bar hit who transmitted the same on to Burl Wait, and that plaintiff was guilty of contributory negligence and assumed risk which will be hereafter defined."

It will, therefore, be seen that the sole negligence laid and relied upon was that of Wait, in that he hit the rod without a previous direction to do so. Appellant contends that the undisputed evidence is that Summers gave and Wait received an order to "hit it," and that the only dispute in the evidence is whether appellee gave Summers the order. Appellee says he did not give Summers the order whereas the latter says he did. Appellee, also, says that Summers told him to hit it, meaning hit the wale with his hammer, so as to move it up or down to bring the hole in conformity with the rod. Summers

says he gave no order to appellee to hit the wale, as he could not see either the wale or appellee, but did give such order to Wait on the direction of appellee. Moreover, he says it would do no good to hit the wale as it was tightly nailed to the upright 2 x 4's and was immovable. So, the undisputed evidence is that Summers gave an order to hit it; that Wait received the order and obeyed it; that appellee, believing the order was meant for him to hit the wale, did so and was not expecting Wait to hit the rod; that Wait, thinking the order was meant for him, did hit the rod, knocked it through the hole in the wale, and destroyed appellee's eye. Under this state of the record, was Wait negligent?

Trial resulted in a verdict and judgment against both Wait and Vincennes Steel Corporation in the sum of $10,000, the amount sued for.

We are of the opinion that Wait was not shown to be guilty of any negligence and that the trial court erred in refusing to direct a verdict in favor of both upon their motion so to do. The only negligence charged or relied upon against appellant was that of Wait in hitting the rod without a previous order to do so. If Wait was not negligent in this respect, then, of course, under the allegations of the complaint and the instructions of the court, appellant could not be held. As said by this court in *Hecht* v. *Caughron,* 46 Ark. 133, the chief object of our system of pleading is "to compel the adverse parties to disclose to each other the facts upon which they rely to uphold the claim upon the one side, and to maintain the defense on the other, in order that each may know what he is required to establish or repel by proof upon the trial." This statement was quoted in *Harvey* v. *Douglass*, 73 Ark. 221, 83 S. W. 946, with this additional: "In other words, the object of the code system is to force a trial on the merits, and pleadings must furnish the opposite party notice of exactly what is to be relied upon in a trial on the merits." Here the parties went to trial upon an allegation that Wait's negligence was the sole cause of the injury. It developed on the trial that Wait was not negligent, but perhaps Summers was. At least

the evidence was in dispute as to whether appellee gave Summers the order to "hit it" to be relayed to Wait, but there is no dispute that Summers gave such an order. But appellant cannot be held for Summers' negligence under the issue made. If the action had been brought against appellant and based on the negligence of Summers alone, Wait would not have been a party. He being a resident defendant, joined with a nonresident corporation, may have prevented appellant from attempting a removal of the action to the federal court. In any event, appellant was entitled to know which of its employees was charged with negligence, so as to be able to defend the charge intelligently, or take such steps in the premises as it deemed advisable. It could act only through human agency and is responsible only under the doctrine of *respondeat superior.*

Since Wait was not guilty of negligence, appellant cannot be held bound for an act of his which was not wrongful. The judgment will, therefore, be reversed, and the cause dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J. (dissenting). I cannot agree with the majority in holding that the sole negligence laid and relied upon was that of Wait in that he hit the rod without a previous direction to do so.

The appellee, in his complaint, alleges carelessness of the appellants as follows: first, in placing the appellee in such a dangerous and perilous place; second, in striking said heavy rod without warning to the appellee; third, in furnishing the appellee an inside place to work; fourth, in the appellant, Burl Wait, striking said heavy rod without either warning from the boss, Lee Summers, or anyone else, was the absolute cause of injury to appellee, and all could have been avoided by ordinary care.

It will be observed that the second allegation of negligence is the striking of said heavy rod without warning to appellee. It will, therefore, be seen from the complaint itself that the statement in the majority opinion, that the sole negligence laid and relied upon was that of Wait is erroneous. They relied upon the allegation of the negli-

gence of the appellant, and it was probably impossible for the appellee to know, since there were two other servants, which one was negligent; but it was alleged that it was negligence to strike the rod without giving appellee notice, and it seems to me to be wholly immaterial whether Summers was guilty of negligence, or Wait, because if either of them was guilty of negligence in striking the rod or causing it to be struck without notice from appellee, the appellants would be liable.

The evidence shows that the employees were where they could not see each other, and that the rod was not to be struck by Wait until notice was given by appellee. The truth is that the majority got its idea that the sole cause of negligence relied on was that of Wait from appellants' instruction No. 1 which the court gave. That instruction requested by the appellants and given by the court was as follows:

"Ladies and gentlemen of the jury, the plaintiff brings this action against the Vincennes Steel Corporation and Burl Wait to recover for personal injuries which he claims he sustained by negligence of the said Burl Wait, who was at the time of said alleged injury employed by the defendant, Vincennes Steel Corporation. He alleges as the sole cause of his injuries that the defendant, Burl Wait, struck an iron rod which he knocked through what is commonly called a whaler, and hit him in the eye; that the said Burl Wait hit the iron rod without instruction from his boss, Lee Summers, or any one. The defendant denies that Burl Wait so hit the iron bar, but states that Burl Wait hit the same after receiving instructions to do so from his boss, Lee Summers. The defendant further contends that the plaintiff gave instruction to Lee Summers to have the bar hit who transmitted the same on to Burl Wait, and that plaintiff was guilty of contributory negligence and assumed risk which will be hereafter defined."

This instruction should not have been given. There is a long line of decisions of this court to the effect that when evidence is introduced without objection the complaint will be treated as amended to conform to the proof. *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. (2d) 553.

In the instant case, the evidence on the part of the appellants showed that Summers directed Wait to hit the rod. The appellee testified that he did not notify Summers to do this, and the fact that in bringing the suit appellee thought Wait had struck the rod without notice from Summers is immaterial. If Wait struck the rod without notice the appellants would be liable, and if Summers directed him to hit the rod without receiving notice from appellee, the appellants would be liable.

"The fact that appellee adopted an eroneous theory did not disentitle it to amend and proceed under a correct theory. 'It is true that one by his conduct or statements may be estopped from asserting rights which might otherwise have existed, but, before he will be estopped, it must be shown that another has in good faith relied on such conduct or statements and has been thereby led to change his position for the worse.' *Norton* v. *Maryland Casualty Co.*, 182 Ark. 609, 32 S. W. (2d) 172; *Hot Springs Golf & Country Club Ass'n* v. *Community Bank & Trust Co.*, 182 Ark. 715, 32 S. W. (2d) 427; *Thomas* v. *Spires*, 180 Ark. 671, 22 S. W. (2d) 553. There is nothing in the evidence in this case that tends to show that appellant relied on any statements or conduct and was thereby led to change its position for the worse." *Smith-Arkansas Traveler Co.* v. *General Tire & Rubber Co.*, 182 Ark. 818, 33 S. W. (2d) 712.

There is no evidence in the instant case that appellant was misled in any way. On the contrary, it introduced the evidence itself. If appellee had alleged in his complaint that Summers was negligent in giving Wait the order to strike the rod, the appellant could then have shown that Summers did not give the order, but that Wait was negligent, and appellants would then have contended that the appellee relied on the negligence of Summers and, therefore, could not recover.

The fact is that the appellee alleged negligence of the appellants, and the proof established the negligence of the appellants, and the complaint should have been treated as amended to conform to the proof.

The majority opinion concedes that the evidence is in dispute as to whether appellee gave Summers the

order, and notwithstanding this statement in the majority opinion, they say under the state of the record that Wait was not negligent. Wait was a party to the suit, and his evidence is not to be taken as undisputed, but must be submitted to the jury, and the jury determines the credibility of the witnesses and the weight to be given to their testimony.

In the case of *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, Mr. Justice RIDDICK, speaking for the court, said: "It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based as on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury. *Roseberry* v. *Nixon,* 58 Hun. (N. Y.) 121, 11 N. Y. S. 523; *Wohlfahrt* v. *Beckert,* 92 N. Y. 491, 44 Am. Rep. 406; *Thomasson* v. *Groce,* 42 Ala. 431; *Talcott* v. *Meigs,* 64 Conn. 55, 29 Atl. 131; *Miller* v. *White River School Tp.,* 101 Ind. 503; 6 Enc. Plead. & Prac. 696; *Ruiz* v. *Renauld,* 100 N. Y. 256, 3 N. E. 182; *Kelly* v. *Burroughs,* 102 N. Y. 93, 6 N. E. 109.

"In this case the witness was the defendant in the case. He was not only directly interested in the result, but there was the added circumstance that the party upon whom he testified that he served notice swore that he had no remembrance of any such service. If this witness told the truth, the fact that he had no recollection of the service of notice to which defendant testified was a circumstance from which the jury might have inferred that no service was in fact made, and that defendant was mistaken in so testifying. If we could go into a consideration of the weight to be attached to this evidence, we might agree with the trial judge that the judgment for defendant was right; but, as before stated, we are of the

opinion that the matter was one for the jury to determine." *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. (2d) 462; *Oyler* v. *Semple,* 163 Ark. 620, 260 S. W. 744; *American Ry. Express Co.* v. *H. Rouw Co.,* 174 Ark. 6, 294 S. W. 416; *Nelson* v. *Missouri P. Rd. Co.,* 172 Ark. 1053, 292 S. W. 120; *Gibson Oil Co.* v. *Sherry,* 172 Ark. 947, 291 S. W. 66; *Paragould & M. R. Co.* v. *Smith,* 93 Ark. 224, 124 S. W. 776; *St. L. S. W. Ry. Co.* v. *Trotter-Minnis,* 89 Ark. 273, 116 S. W. 227; *Hankinson* v. *Lynn Gas, etc., Co.,* 175 Mass. 271, 56 N. W. 604; *Bank of British N. Amer.* v. *Delafield,* 126 N. Y. 410, 27 N. E. 797.

This court has repeatedly held that courts are not required to receive and accept blindly the testimony of parties to the suit. *Walker* v. *Streeter,* 191 Ark. 604, 87 S. W. (2d) 43. They are not required to accept blindly not only the evidence of the parties to the suit, but of employees and interested parties. But the majority says that Wait was not guilty of negligence. If the court can say that when the testimony is disputed, then I am curious to know what the jury is to decide.

Section 7 of Art. 2 of the Constitution of the state of Arkansas reads as follows:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

If this court, or any other court, can pass on a disputed question of fact, or say that a person is not guilty of negligence when the fact as to whether he is or not is disputed, then the section of the Constitution above referred to is meaningless.

If trial by jury remains inviolate, that necessarily means that every disputed question of fact is to be determined by the jury. The makers of the Constitution, however, not only provided that trial by jury should remain inviolate, but in § 23 of Art. 7 of the Constitution, it is provided:

"Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party."

It appears from the Constitution that the court or judge cannot only not pass on facts, but they cannot charge the jury with regard to facts. They cannot instruct on the weight of the evidence, and yet this court has held that Wait was not guilty of negligence, thereby, in my opinion, violating the sections of the Constitution above referred to.

The majority opinion calls attention to *Hecht* v. *Caughron,* 46 Ark. 132, and *Harvey* v. *Douglass,* 73 Ark. 221, 83 S. W. 946, as to the pleadings disclosing the facts relied on by the parties. These cases have no application for several reasons. In the first place, the statute provides, in § 1224, Crawford & Moses' Digest:

"In construing a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

When the complaint in this case is liberally construed, it alleges beyond any dispute that the appellants were guilty of negligence.

Section 1234 of Crawford & Moses' Digest reads as follows: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown to the satisfaction of the court, and it must also be shown in what respect he had been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just."

The appellants in this case do not claim to have been misled in any way, and they could not have been misled.

The jury saw the witnesses, heard their testimony, had an opportunity to observe their manner and demeanor on the witness stand, and to judge as to the truth of their statements. We have no such opportunity, and that is one reason why the finding of fact by a jury is conclusive. No doubt they were told, as they frequently are, that they are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony. This has been the rule ever since the

adoption of the Constitution, and I think for this court to say that a jury has decided wrong on a disputed question of fact not only violates the constitutional provisions referred to, but is contrary to all the cases decided by this court. The question of Wait's negligence was submitted to the jury on an instruction more favorable to appellants than they were entitled to.

The majority opinion states that Wait, being a resident defendant, joined with a non-resident corporation, may have prevented appellants from attempting a removal of the action to the federal court. The appellee might very well have joined both Wait and Summers. I do not know whether appellants had any idea of removal or not; but it is wholly immaterial, since both Summers and Wait might have been joined as parties defendant.

How the court can say that Summers was probably guilty of negligence, and at the same time not only reverse the case, but dismiss it, I am unable to see. I think the judgment should be affirmed.

McHaney, J. (on rehearing). Appellee, in his brief on rehearing, says this court was not justified in holding that the sole negligence laid and relied upon was that of Wait, in that he hit the rod without a previous direction to do so, and quotes from his complaint the following: "That the carelessness of the defendants, first, in placing the defendant in such a dangerous and perilous place; second, in striking said heavy rod without warning to the plaintiff; third, in furnishing the plaintiff an inside place to work; fourth, in the defendant, Burl Wait, striking said rod without warning either from the boss, Lee Summers, or anyone else, was the absolute cause of injuries to the plaintiff and all could have been avoided by the use of ordinary care."

While it is true that he made these allegations in his complaint, it is, also, true that his proof was directed to one issue only, and the trial court instructed the jury in instruction No. 1, as quoted in our original opinion, at appellants' request, but without objection or exception from appellee, as follows:

"No. 1. Ladies and gentlemen of the jury, the plaintiff brings this action against the Vincennes Steel Cor-

poration and Burl Wait to recover for personal injuries which he claims he sustained by negligence of the said Burl Wait, who was at the time of said alleged injury employed by the defendant, Vincennes Steel Corporation. He alleges as the sole cause of his injuries that the defendant, Burl Wait, struck an iron rod which he knocked through what is commonly called a whaler, and hit him in the eye; that the said Burl Wait hit the iron rod without instruction from his boss, Lee Summers, or any one. The defendant denies that Burl Wait so hit the iron bar, but states that Burl Wait hit the same after receiving instructions to do so from his boss, Lee Summers. The defendant further contends that the plaintiff gave instruction to Lee Summers to have the bar hit who transmitted the same on to Burl Wait, and that plaintiff was guilty of contributory negligence and assumed risk which will be hereafter defined."

This instruction limited appellee's right of recovery to the negligence of Wait, and, the necessary result was, to exclude a recovery on the other allegations of negligence as only the fourth ground of negligence set out above was submitted to the jury. If appellee felt aggrieved by this instruction, he should have objected, and, on the refusal of the court to modify same, have excepted. He did neither. In his brief in chief, he approves said instruction and refers to it in at least two places, saying: "Instruction No. 1, given by the court to the jury was based on the testimony," etc., and "The question of the negligence of Wait was submitted to the jury at the request of the defendant, as follows:" (He then sets out the instruction in full as copied above.)

He now says: "However, even if the court is correct in holding that plaintiff relied upon only one act of negligence in his pleading, the proof is ample to show, and, in fact, the court in its opinion admits, that the other employee, Summers, was guilty of negligence. The testimony showing Summers' negligence was introduced without objection; and, therefore, under our rule, the pleadings were considered as amended to conform to the proof." Appellee uses the word "admits" inadvisedly. What we said was, "but perhaps Summers was" negli-

gent. In other words, a jury question was made as to Summers' negligence if the complaint so charged, or had the trial court treated the pleadings as amended in this respect and so instructed the jury. But the trial court did not do so, nor was any instruction asked by appellee to do so. On the contrary, instruction No. 1, above set out, was given at appellants' request and with appellee's both silent and verbal approval. How can this court treat the pleadings as amended when the case was tried and the jury instructed upon the theory that the negligence of Wait was the sole ground of recovery? At page 53 of the transcript, the following occurred on redirect examination of appellee: "By Mr. Bailey. Q. You were told to take your hammer and knock that whaler? A. Yes, sir. Q. You had been telling Mr. Summers to hit it? A. Yes, sir. Q. You never said hit it that time at all? A. No, sir.

"By Mr. Smallwood: We object.

"By Mr. Bailey: Burl Wait hit this iron rod without any direction from the boss or from any one else, and I allege that. The boss had told him to hit this whaler and knock it up to where the holes would match, and Burl Wait hit this without any notice.

"By the Court: Your objection will be sustained.

"By Mr. Bailey: Note my exceptions. He done exactly what the boss told him to do, to hit that whaler and he hit it without notice. I ask that the record to show that I asked that the complaint be amended to speak the facts. I state here: 'The defendant, Burl Wait, striking said rod without warning either from the boss, Luther Summers, or any one else.' That is my complaint, and this happened simultaneous, at the same time.

"By Mr. Smallwood: That is not in response to the issue.

"By the Court: The objection will be sustained.

"By Mr. Bailey: Note our exceptions."

While counsel for appellee asked "that the complaint be amended to speak the facts," it is not quite clear just in what respect he wished to amend the complaint, but thereafter instruction No. 1 was given without objection which shows he abandoned his request to amend to conform to the proof, whatever his purpose may have been.

It is the general rule that where evidence is introduced without objection which tends to establish a cause of action not covered in the complaint, the trial court may treat the complaint as amended to conform to the proof, and this court will so treat it, but it must be tried here on the same theory it was tried below. In *Banks* v. *Corning Bank & Trust Co.,* 188 Ark. 841, 68 S. W. 452, the court quoted with approval the following from 2 R. C. L., 183: "The authorities are agreed on the proposition that the case on appeal must be decided on the same theory on which it was tried in the court below. Thus, issues which were treated in the lower court by appellant as not involved, cannot be raised on appeal." So, before we can treat the complaint as amended to conform to the proof, the court below must have so treated it. As said in *Roach* v. *Richardson,* 84 Ark. 37, 104 S. W. 538: "The court below so treated the issue as thus joined on the proof, and after judgment we will treat the answer as amended to correspond with the proof." Citing cases. Also, in *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1189, on page 582, it was said: "* * *; and the court below so treated the issue as thus joined on the proof, and the complaint will be treated here as amended to conform to the proof." Citing *Roach* v. *Richardson, supra.* In *Barnes* v. *Hope Basket Co.,* 186 Ark. 942, 56 S. W. (2d) 1014, it was said: "The record before us shows that the trial judge granted the request that the complaint be amended to conform to the proof, but clearly indicates that in his opinion in any view of the evidence no negligence attributable to the defendant was shown, and, without waiting for any amendment to be offered or made, instructed a verdict for the defendant. It is suggested by the appellee that the appellant's failure to amend the complaint precludes him from now complaining * * *. It is always within the sound discretion of the court to permit a complaint to be amended to conform to the proof; and where the allegations in the complaint are insufficient, it is proper at the conclusion of the evidence to treat the complaint as amended to conform to the proof, where there are no objections to the introduction of the evidence and no claim of surprise is made."

Now, if the court below had treated the complaint as so amended, it could and would be so treated here on appeal. No question was raised in the original brief of appellee that the complaint should be treated as amended, but it is now raised for the first time in the petition and brief on rehearing. It comes too late.

We reaffirm the statement in the original opinion that the undisputed proof shows that Wait was not negligent and no recovery can be had under the allegation of the complaint so charging.

The petition for rehearing will be denied in the respects discussed above, but will be granted so as to reverse and remand for a new trial at appellee's request, instead of the former order of dismissal.

GRIFFIN SMITH, C. J., dissents from the remand.

STANDARD GROCER COMPANY *v.* FIRST SECURITY BANK OF IDAHO.

4-4657

Opinion delivered May 17, 1937.

Ingram & Moher, for appellant.

Young, Elms & Macom, for appellee.

BUTLER, J. In August, 1936, the Standard Grocery Company of Stuttgart purchased a car load of potatoes from the Idaho Packing Corporation for the sum of $765.90. A draft was drawn by the Packing Corporation on the Standard Grocer Company, payable to the First Security Bank of Idaho, which draft, with bill of lading attached, was transmitted to the Peoples National Bank of Stuttgart for collection. The consignee, Standard Grocer Company, paid the draft to the collecting bank and immediately filed suit against the Packing Corporation for damages alleged to have been sustained by it on a previous shipment of potatoes, and a garnishment was issued and served on the local bank. This bank notified the bank in Idaho that it had collected the draft, but that the proceeds had been garnished in its hands. The Idaho bank notified the Packing Corporation of this, which, on the 9th day of September, 1936, gave its check to the Idaho bank in an amount equal to the draft for which it had previously received credit on its checking account. Thereafter, on the 20th day of October, 1936, the Idaho bank filed its intervention claiming to be the owner of the proceeds of the draft. The Packing Corporation did not answer, and the case was tried on the complaint, answer of the garnishee and the intervention of the Idaho bank. A jury was waived and the trial court, after having heard the evidence, found in favor of the intervener from which judgment the plaintiff has appealed.

The appellant contends that the recitals on the back of the draft and on the deposit slip given by the Idaho bank to the Packing Corporation established the relation of principal and agent between the two with respect to the draft. The appellee, on the other hand, contends that the relation existing by reason of the deposit was that of debtor and creditor, and the bank, therefore, must be regarded in law as the purchaser of the draft and entitled to its proceeds.

Aside from the recitals on the back of the draft and the certificate of deposit given to its maker, the evidence

is to the effect that the Packing Corporation and the Idaho bank had been banker and customer through a considerable period of time during which the bank had handled transactions for the corporation similar to the one here involved, and, in all cases as in the instant one, had, upon deposit of the draft, entered the sum for which same was drawn to the credit of the depositor's checking account which was immediately subject to the depositor's check as if the deposit had been in cash. The draft in question was deposited with other items on the 11th day of August, 1936, the total amount of the deposit slip being $3,899.25. All of this was subject to be drawn on by the Packing Corporation's checks, but the evidence fails to show how much of this if any sum was withdrawn prior to the intervention of the Idaho bank in the instant suit.

Appellee relies on *Cox Wholesale Grocery Company* v. *National Bank of Pittsburg, Kansas,* 107 Ark. 601, 156 S. W. 187, which states the rule announced in *Burton* v. *U. S.,* 196 U. S. 283, 25 S. Ct. 243, 49 L. Ed. 482, where it is said: "When a check is taken to a bank and the bank receives it and places the amount to the credit of the customer the relation of creditor and debtor between them subsists, and not that of principal and agent." In the decision quoted from, the court cited and quoted from *Taft* v. *Bank,* 172 Mass. 363, 52 N. E. 387: "So when, without more, a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

Our cases, *Brown* v. *Yukon National Bank,* 138 Ark. 210, 209 S. W. 734; *Farmers State Bank* v. *First State Bank,* 142 Ark. 331, 218 S. W. 847; *Merchants Bank, etc.,* v. *Searcy Wholesale Grocery Company,* 166 Ark. 153, 265 S. W. 961, and *Guaranty Bank & Trust Co.* v. *Davis,* 170 Ark. 86, 279 S. W. 357, are cited as supporting the above doctrine, and, also, excerpts from the texts of R. C. L. and C. J., which have been quoted with approval in some of our decisions.

It is the position of appellee that the cases of *Merchants Bank* v. *Searcy Wholesale Grocery Company; Guaranty Bank & Trust Co.* v. *Davis,* and *Farmers State Bank* v. *First State Bank, supra,* are based on facts almost identical with those of the case at bar and decisively sustain the conclusion of the trial court. On the contrary, it is the view of the appellant that the facts of those cases are distinguishable from those of the instant case which brings it within the principle that to pass title to a bank accepting a draft or check for deposit, something more is needed than the immediate credit passed to the account of the deposit, and that is that, in addition to this, the receiving bank must have parted with value to the amount of the credit. "In addition to this (the immediate credit) it must have parted with value to the amount of the credit, else it could not be hurt, had lost nothing, and would be in no position to maintain an action against appellant for the amount of the check. It is true, as was said in *Cox Wholesale Grocery Co.* v. *The National Bank of Pittsburg,* 107 Ark. 601, 156 S. W. 187, that 'when a check is taken to a bank and the bank receives it and places the amount to the credit of the customer, the relation of creditor and debtor between them subsists, and not that of principal and agent,' but it is, also, true that, if the check which has been credited in the depositor's account is unpaid, the bank has the legal right to charge the amount of it back to the depositor's account, where a sufficient credit still remains to cover it. By merely entering credit in the depositor's account the bank has parted with nothing of value. Of course, if the depositor checks out the amount of his credit in the bank, then the bank has parted with value and becomes a holder in due course for value of the instrument." *Kansas City Southern Ry. Co.* v. *First National Bank of Ft. Smith,* 174 Ark. 447, 295 S. W. 357, 60 A. L. R. 241.

It is the established rule that, regardless of any specific guaranty by the depositor that the check or draft will be paid on presentation, there is an implied warranty to that effect and that the bank, although the relation of debtor and creditor may exist, has the right to charge

back to the depositor the amount of the check if not paid on presentation. That appears to be the recognized custom, and in this particular case the stipulation in the certificate of deposit issued to the Packing Corporation reserved that right. It does not appear, however, that the balance to the credit of the depositor was exhausted, or would have been exhausted, by a charge back when the proceeds of the check in question were garnished. What that balance was is not shown by the evidence except that at the time the draft for $765.50 was deposited, other items were deposited making the total deposit the sum of $3,899.25. This situation is quite different to that which obtained in *Scott* v. *W. H. McIntyre Company,* 93 Kans. 508, 144 Pac. 1002, L. R. A. 1915D, 139, cited by appellee, in which a bank had intervened claiming title to the proceeds of a draft deposited with it. That case noted the conflict in the decision relating to the question there considered which is involved in the instant case, and the general rule quoted *supra,* and quotes as follows from 3 R. C. L. 524: "Still, according to the weight of authority, the rule above stated is not an absolute rule, and is *prima facie* merely, and yields to the intention of the parties, expressed or implied from the circumstances." The court observed that some of the conflict in the decisions bearing upon the general aspect of the question could be accounted for by the difference in the facts and the manner in which the issues of ownership had been raised. Referring to the facts in the case before it, the court further said: "Here we regard the result as controlled by the circumstances that the depositor not only received credit for the amount of the draft, but actually drew upon it, and used the full amount. When the item was deposited, the account of the McIntyre Company was overdrawn. The credit operated at once to offset the depositor's debt to the bank. Before the garnishment summons issued, the account was again overdrawn, and the credit thereby exhausted. In this situation the McIntyre Company could not successfully have asserted a claim to the draft or its proceeds against the Auburn bank, and the attaching creditor could gain no higher rights than were possessed by the defendant."

Appellee, in commenting on the point raised by appellant relating to the effect of the payment by the Idaho Packing Corporation on September 9, 1936, of the amount of the draft, contends that the case of *Merchants Bank of Kansas City* v. *Searcy Wholesale Grocery Co., supra,* settles the question against appellant's contention, and that that case is supported by the decisions in *King* v. *Bowling Green Trust Co.,* 145 App. Div. 398, 129 N. Y. S. 977; *Chrisman* v. *Lumberman's Nat. Bank,* (Texas) 163 S. W. 651; *Scott* v. *McIntyre Co.,* 93 Kans. 508, 144 Pac. 1002, L. R. A. 1915D, 139, and *Lummus Cotton Gin Co.* v. *Walker,* 195 Ala. 552, 70 So. 754. We have examined these cases and do not find that they support the case of *Merchants Bank* v. *Searcy Wholesale Grocery Co., supra,* except in their recognition of the general rule. We have quoted from the Kansas case, *supra,* which recognizes the exceptions which might arise to the general rule according to the circumstances of the particular case considered.

The case of *Farmers State Bank* v. *First State Bank, supra,* was a controversy between the bank in which certain drafts were deposited and the correspondent bank to which they were sent for collection. The decision turned upon the sufficiency of the evidence to sustain the defense tendered. The court there said: "This defense, in effect, was that appellee had the drafts for collection only, and that appellant was prevented from remitting the full amount of the drafts by the pendency of the garnishment proceeding. It is apparent that this is a question of fact, and, had a jury so found, we probably would not say that the testimony was not legally sufficient to support the verdict. However, we have the finding of the chancellor against the contention made, and we cannot say this finding is clearly against the preponderance of the testimony." In that case the maker of the draft had deposited the same with the First State Bank and received credit therefor and the draft was transmitted for collection to the Farmers State Bank which collected the same. Afterward, and before remittance could be made to the sending bank, the proceeds

were attached in a suit against the maker and the First State Bank intervened claiming to be the owner of the draft and entitled to its proceeds. After having decided that the finding of the chancellor to the effect that the claim of the First State Bank should be sustained, the court noticed the contention of the Farmers State Bank that the right to maintain the action was defeated by the showing made "that before the trial of this cause Septer (the drawer of the draft) had repaid the appellee bank the amount of the drafts for which he was given credit at the time the transaction occurred," and, in denying this contention, said: "there is nothing to indicate an intention to release appellant from liability than being insisted upon." (Septer, the maker, did not intervene and, while made a party by the warning order, does not appear to have made any defense to the action.)

We perceive an important distinction in the case referred to last above and the instant case. In the former, there is nothing to indicate that the repayment of the drafts was made prior to the intervention. In the latter, before the appellee by its intervention became a party to the suit, which occurred on October 20, 1936, the Packing Corporation had repaid the amount of the draft for which it had been credited and thus satisfied its contingent liability, thus restoring to it the ownership of the draft (if it be conceded that previously title had passed to the Idaho bank) and, therefore, was entitled to possession of the draft. It necessarily follows that, at the time of the intervention of the appellee bank, it had neither title nor right of possession to the proceeds of the draft for which it had intervened. From the final transaction between the Packing Corporation and the bank it affirmatively appears that the bank had lost nothing, was not in any wise hurt, and would be in no position to maintain an action for the proceeds of the draft. *Kansas City So. Ry. Co.* v. *First National Bank, supra.* In that case, the court quoted from *Little* v. *Arkansas National Bank,* 113 Ark. 72, 167 S. W. 75, as follows: "Appellants insist that a verdict should have been directed in their favor, and, in support of this position, they cite cases holding that,

when a bank simply discounts a note and credits the amount thereof to the indorser's account without paying to him any value for it, the transaction does not constitute the bank a purchaser for value of the note." In commenting upon this statement, the court said: "While this statement may be *obiter* as to that case, it appears to us that it is a correct statement of the law," and a number of decisions are cited in support of this conclusion.

From the views expressed, it follows that the judgment of the trial court should be, and is hereby reversed, and the cause remanded for further proceedings in accordance with this opinion.

VINCENNES STEEL CORPORATION *v.* GIBSON.

4-4650

Opinion delivered May 17, 1937.

Seymour Riddle, Joe D. Shepherd and *J. M. Smallwood,* for appellant.

Caudle & White, for appellees.

MEHAFFY, J. John W. Gibson and C. H. Gibson, Lester Perschall, Paul Stormant, J. J. Martin, W. G.

Wipperman and August Dorn instituted separate actions in the Pope circuit court against the appellant for damages to property occasioned by fire. The allegation as to negligence is the same in all the cases. It was alleged that on or about September 7, 1936, the appellant, a corporation organized and authorized to do business in Arkansas, by and through its agents, servants and employees, was engaged in building a bridge with dirt approaches thereto, and across what is known as Illinois River, in Pope county, Arkansas, and was engaged in gathering rock from the lands owned by appellees and on said date, while the appellant, agents, servants and employees were engaged, and while acting within the scope of their employment, and in the performance of their duty, negligently and carelessly ignited and set fire to and permitted to be ignited and set fire to the grass, weeds, trash, timber and debris on lands owned by the appellees, and negligently and carelessly caused and permitted said fire to get beyond the control of appellant, its agents, servants and employees, and caused or permitted said fire to burn across the premises owned by the appellees, burning and destroying meadows, timber and vegetation therefrom, and by burning over said lands, destroying the property described in appellees' complaints. Each complaint described the property claimed to be damaged, and alleged that the property was destroyed by the negligence of appellant, its agents, servants and employees.

The Gibsons sued for $1,000. The other appellees sued for different amounts in damages. Appellant demurred to each of the complaints, which demurrers were overruled, and appellant thereupon filed answers denying all the allegations of the complaints. The cases were then consolidated for trial, and there was a verdict and judgment in the case of Gibsons against the appellant for $500. There was a verdict and judgment in favor of each of the other appellees for different amounts. Motion for new trial was filed and overruled, and the cases are here on appeal.

The appellant insists on reversal first, on the ground that if the fire was set out by one of its employees, said

employee was not acting at the time within the scope of his employment, and second, that appellant was not guilty of negligence in permitting the fire to get beyond the control of said appellant, its agents, servants and employees.

The undisputed facts show that appellant, through its employees, was getting rock from the land of appellees, and the appellant, in its brief, states: "In conclusion, appellant earnestly insists that all of the proof introduced shows conclusively that the fire was started by one of its employees' lighting a cigarette. That the lighting of the cigarette was not in the prosecution of the master's business, and that the employee had departed from the prosecution of the master's business and was accomplishing his own personal desires, solely for his own personal satisfaction."

The fire having been set out by one of the employees, the question is whether the master was relieved from liability because this act of the employee was not within the scope of his employment. To support its contention, appellant first calls attention to *Rex Oil Corporation* v. *Crank,* 183 Ark. 819, 38 S. W. (2d) 1093. In that case we said: "It is the law of this jurisdiction, as settled in numerous decisions, that the master is responsible for the negligent act of his servant, if such act occurs during the time the servant is engaged in the service of the master, although the act itself might have been unauthorized; but it is essential to the master's liability that the wrong complained of must have been occasioned by the negligent conduct of the servant who, at the time, was acting within the scope of his employment."

The court further said, in discussing this question: "The difficulty lies in the application thereof, as there is no definite rule by which it can be said that the acts of a servant are within or without the scope of his employment, each case of necessity depending upon its own peculiar facts and circumstances."

All the authorities hold that if the servant commits an act during the time the servant is engaged in the service of the master, although the act itself might have

been unauthorized, the master is liable. The act of the servant causing the damage may not only be unauthorized, but positively forbidden, yet if it is done while the servant is engaged in the master's business, the master will be liable.

Attention is next called to the *American Railway Express Company* v. *Mackley,* 148 Ark. 227, 230 S. W. 598. In that case the evidence showed that Jeff Hines was in the employ of the express company in the city of Texarkana as a driver, and delivered the perishable express. Mackley was a florist in that city, and his wife worked in his place of business. On the afternoon of March 7, a shipment of flowers was delivered by Hines to the floral shop. Mackley was absent at the time and his wife was in charge. The flowers were delivered in a damaged condition, and Mrs. Mackley asked when they had been received, and when Hines told the number of the train on which they had been shipped, Mrs. Mackley asked Hines why he wanted to lie about it. Mrs. Mackley telephoned to the agent of the express company who sent one Mr. Stuckler and Stuckler and Mackley agreed on an adjustment. Hines left the floral shop without collecting the charges. The flowers had been left there, Hines had performed his duty, and on the next afternoon Hines returned to the floral shop for the purpose of collecting charges and taking a receipt. Mackley walked to the front of the store to sign the receipt book and to pay the charges. There was no disagreement between Mackley and Hines over the charges or the signing of the receipt. While Mackley was signing the receipt Hines referred to the dispute with Mrs. Mackley on the day before. Mrs. Mackley and a friend were seated in the rear of the shop and heard the word "apologize" spoken in a loud tone. Upon looking up Mrs. Mackley saw that her husband's hands were pointed up into the air and that Hines had a pistol pointed in her husband's face. Mrs. Mackley picked up a pistol as she was going past the drawer toward her husband, intending to give it to her husband to defend himself, but before she could do so, Hines shot and killed Mackley, and shot

and seriously injured Mrs. Mackley. It is clear from the facts in this case that Hines was not in any way about the master's business, but he was undertaking to make Mackley apologize for something Mrs. Mackley had said the day before. The court, of course, held that Hines was not in any way connected, at the time, with the business of the express company, but that it was solely because of the personal controversy between Hines and Mackley.

The next case referred to by appellant, *Hough* v. *Leech,* 187 Ark. 719, 62 S. W. (2d) 14, reaffirms the rule announced in the Mackley case, and states the rule to be: "The rule is firmly established that the master is civilly liable for the tortious acts of his servant, whether of omission or commission, and whether negligent, fraudulent or deceitful, when done in the line of his employment, even though the master did not authorize, or know of such acts, or may have disapproved of or forbidden them. But the act must be done not only while the servant is engaged in his master's service, but it must pertain to the particular duties of that employment."

In the case of *Pickens* v. *Westbrook,* 191 Ark. 156, 83 S. W. (2d) 830, the same rule mentioned above is affirmed. All of the authorities are to the effect that if the wrongful act is committed while the servant is about the master's business, has not departed from the master's business, that the master will be liable.

The rule is stated in 18 R. C. L. 795, as follows: "Acts impliedly authorized or such as are within the scope of the employment—that is, wrongs for which the employer may be held accountable—are not susceptible of precise or even very helpful definition by any phrase or short form of expression. Each case must be determined with a view to the surrounding facts and circumstances—the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the employment's scope is ordinarily one of fact for the jury's determination."

"But every departure by the servant from the strict course of his duty, even for a purpose of his own, will

not in and of itself be such a departure from his master's business as will relieve the master of liability for the acts of the servant. The servant may at the same time be combining both his own and his master's business, and in such case the master will be liable for his acts." 18 R. C. L. 797.

We said in the case of *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115: "Much is said in the adjudged cases about the doctrine of slight deviations or 'detours' made by the servant in performing his master's business, and the rule seems to be settled by the weight of authority that where the servant is pursuing the general course necessary to accomplish the purposes involved in his master's business the responsibility of the master is not lessened by the fact that the servant for purposes of his own deviates from the route to be pursued or the particular method to be observed in performing the service. The fact that the servant acts also for himself, while performing service for his employer, and, in doing so, diverts from the usual route or method of performing the service, will not exonerate the employer from the responsibility for misconduct of the servant."

In the instant case, however, although the fire was set out by one of the employee's smoking, there is no evidence that he, at any time, departed from the business of the master. In this case the master sent his employees onto the land of the appellees to get rock, which he was permitted to do by the appellees. If the master himself had gone on the land of another to get rock and while engaged in getting it set out a fire by smoking or otherwise, he would be liable for the damage caused thereby. He has the right to go on the land to get the rock, but with the obligation that no damage will be done to the landowner in getting the rock. Of course, if he would be liable himself for doing the act complained of here, he would be liable if the act was done by an employee whom he had sent there. He takes the right to go on another's land with the obligation that he will remove the rock without committing damages to the landowner.

Having reached the conclusion that the appellant is liable for setting out the fire, it is not necessary to dis-

cuss at length the second proposition. This question was submitted to the jury, under instructions given by the court and not objected to in the argument by appellant. The jury's finding as to the facts are conclusive here, and the appellant does not complain of any instruction given by the court.

We find no error, and the judgment is affirmed.

HICKEY *v.* HARGRAVES.

4-4655

Opinion delivered May 17, 1937.

A. M. Coates and *Edwin Bevens,* for appellant.

J. M. Jackson and *W. G. Dinning,* for appellee.

HUMPHREYS, J. Appellant was appointed a member of the Board of Street Improvement District No. 16 of the city of Helena by the city council and assumed to and did act in that capacity about two and one-half years without having taken the oath of office within the time required, when the council on June 18, 1936, without notice to him, passed the following resolution:

"Whereas, there is now a vacancy in the Board of Commissioners of Street Improvement District No. 16 of the city of Helena, Arkansas, by reason of the failure of H. E. Hickey, who was appointed to this council as a member of the board to qualify by taking the oath of office as required by law.

"Now therefore, be it resolved that Elizabeth Houston be elected to fill the vacancy."

On the 25th of June, 1936, Elizabeth Houston qualified by filing her oath of office with the city clerk and entered upon her duties.

On July 9, 1936, appellant appeared before the city council and requested that the council rescind its action declaring that a vacancy existed in the office on account of his failure to file his oath within ten days after his appointment, alleging that he was a *de facto* officer of the board and was entitled to notice and a hearing before ousting him and selecting another member of the board. A motion was made to rescind the action of the council in accordance with his request which motion was rejected.

Appellant then filed a petition in the circuit court of Phillips county for a writ of certiorari to bring up and review the proceedings of the city council. The writ was granted by the circuit court and in response thereto a transcript of the proceedings by the city council was filed with the circuit clerk and the cause was heard by the circuit court on its merits resulting in a denial of any relief to appellant, from which is this appeal.

This proceeding is in no sense a collateral attack upon the validity of appellant's acts while acting as a member of the Board of Commissioners of Street Improvement District No. 16. If it were a collateral attack on his acts then the authorities cited by him would be applicable. The sole question raised on this appeal and by his petition is whether the action of the city council treating the office as vacant and selecting Mrs. Elizabeth Houston as a commissioner was without authority and void. Sections 5714 and 5715 of Crawford & Moses' Digest are as follows:

"Oath of office. Each member of the board shall, within ten days after his appointment, take the oath of office required by § 20 of art. 19 of the Constitution of this state, and that he will not, either directly or indirectly, be interested in any contract made by the board; which oath shall be filed in the office of the city clerk.

"Failure to take oath. If any member of the board shall fail to take such oath and to file the same in the

office of the clerk of the city within the time allowed herein, he shall be taken to have declined the office, and the council shall at once appoint another person, having the like qualifications, in his place, who shall take and file his oath of office within ten days after his appointment." These statutes are mandatory and where one is appointed a member of the board and fails to take the oath within the time required his failure to do so amounts to a declination of the office and it is made the duty of the city council to select another in his place. Appellant's failure to take the oath within the required time prevented him from acquiring any right or title to the office, and he cannot be treated as a *de facto* officer on direct attack.

The judgment of the circuit court is affirmed.

GLOVER *v.* STATE.

Crim. 4035.

Opinion delivered May 17, 1937.

E. W. Martin, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

GRIFFIN SMITH, C. J. Appellant was tried in the Little Rock municipal court and fined $25 and cost, charged with having violated subdivision "f" of § 1 of act 81 of 1935. He appealed to the circuit court and when tried by a jury was found guilty and fined $100, and has appealed to this court.

As grounds for reversal it is contended (1) that the court erred in admitting certain testimony; (2) that there should have been a directed verdict; (3) that the verdict and judgment are violative of art. 14, § 1, of the Constitution of the United States, and (4) that the appellant was prejudiced by an instruction, given orally.

Act 81 is entitled, "An act for the protection of manufacturers and distributors of liquid fuels, lubricating oils, greases, and similar products." That part of the act invoked by the state provides that "any person who shall aid or assist any other person in * * * depositing or delivering into any tank, receptacle, or other container, any liquid fuels, lubricating oils, greases or like products, other than those intended to be stored therein and distributed therefrom as indicated by the name of the manufacturer or distributor or the trade-mark, trade name, or distinguishing mark, of the product displayed on the container itself, or on the pump, or other distributing device used in connection therewith, or shall by any other means aid or assist another in the violation of any of the provisions of this act, is guilty of a misdemeanor,

and upon conviction for a first offense shall be punishable by a fine of not more than $200, or by imprisonment for not more than thirty days, or both, and for a second or subsequent offense, by a fine of not less than $200 nor more than $500, or by imprisonment for not more than one year, or by both such fine and imprisonment."

Section 2 of the act construes "person" to include every natural person, firm, copartnership, association or corporation. There is this further provision: "If any firm, copartnership, association or corporation shall commit a misdemeanor according to the provisions of this act, every director, officer, agent, employee or member participating in, aiding, or authorizing the acts constituting such misdemeanor shall be guilty of having committed a misdemeanor hereunder and shall be subject to the punishment above provided for."

Appellant is engaged in retailing and wholesaling gasoline and oil products, and operates as Glover Oil Company, on the Arch Street Pike, just out of Little Rock.

R. D. Whitworth and his wife operated a store and filling station on highway 65. At the time the illegal sales are alleged to have been made, the filling station was equipped with pumps and tanks belonging to the Sinclair Oil Company, and the name of the distributor or manufacturer (Sinclair Oil Company) was on the equipment.

Whitworth testified that his station was "a regular Sinclair station." Specifically, the state charged that appellant, through one of his drivers, made deliveries of Glover products to the Whitworth-Sinclair tanks.

The transactions complained of occurred in November or December, 1935. In answer to a question, "Did the truck of the Glover Oil Company make delivery of fuel into your tanks during the months of November and December last year?" Whitworth replied: "Yes, sir, by me flagging. I flagged them on the highway and stopped them. During the six months from July to December 31, I imagine the Glover Oil Company truck stopped about ten times and delivered white gasoline,

commonly known as clear, third-grade gasoline. There would be no 'set' driver. I paid cash and did not take receipts, and did not keep books nor sign delivery tickets. I was not getting good service from the Sinclair Company, and decided to go with Mr. Glover. I asked if he would be interested in giving me a station, and he said that if I wanted to make a change, he would. I did not say anything to him about having sold Glover products while operating a Sinclair station." Asked if, while operating the Sinclair station, he had ever telephoned Mr. Glover for gasoline, the witness replied: "I called the Glover Oil Company and asked them to send out fifty gallons of gasoline. It was delivered by a driver, and I think his name was Taber. That was in December, 1935, I think. I placed a telephone call with the cashier or bookkeeper, or someone at the Glover Oil Company. It was delivered in an hour, or an hour and a quarter."

The witness said that Mr. Glover, personally, did not know of the orders or deliveries.

Mrs. Whitworth, when asked if she bought gasoline from the Glover Company, replied, "Sure did! It was delivered by the first truck I flagged, but I did not telephone in any orders. On one occasion I sent a message to the company that I wanted gasoline, and in response to the message a Glover Oil Company truck came out with fifty gallons, for which I paid cash. I do not know what driver made the delivery. It was put in the 'clear' pump. This pump had a Sinclair 'globe' on it. It was clear gasoline, but when I delivered it to customers it was red. I colored it to attract attention, and when I sold it I told my customers I was selling Glover white gasoline 'colored up.'" Asked if she knew whether the man who brought the gasoline received her message, witness replied: "He drove up and asked if I was the party that wanted some gas."

W. C. Taber testified that he worked for himself, owned his own truck, and "worked up" his own delivery route, but handled Glover Oil Company gas. Had been with the company a little over two years. Thought his

first delivery to the Whitworths was in December. Was stopped by one of the Whitworths and made sale of forty gallons of gasoline. Could not tell how many times he made deliveries. Didn't think he came out with fifty gallons in response to a telephone call. "My truck has Glover Oil Company sign painted on it, but I paid for having that done. I buy from other oil companies and make sales. I have delivered kerosene to the Whitworths, and also on one occasion delivered 25 or 26 gallons of first-grade gasoline. I don't recall whether Mr. Glover ever directed me to go to any particular place. On credit accounts, if the amounts were more than I could stand, I would O. K. the charges to Mr. Glover and he would hold them for me. Sometimes he would give me a slip showing how much my customers owed. It was my business to collect for gasoline and deliver the money to Mr. Glover—I was responsible to Mr. Glover for the charges."

Appellant's testimony was a complete denial of any knowledge of the Whitworth transactions. He maintained that Taber was an independent operator and that his (appellant's) connection with the deliveries was only that of a wholesaler selling directly to his customer, Taber.

(1) Mrs. Whitworth's testimony was properly admitted. She sent a message to the Glover Oil Company by some unknown person, requesting the service. A truck promptly came from the Glover Oil Company and delivered fifty gallons of gasoline. The court did not err in overruling a general objection to this testimony. Although Mrs. Whitworth's act in requesting a stranger to convey a message to appellant was not, standing alone, of sufficient importance to afford information as to appellant's conduct, yet delivery of gasoline shortly thereafter was a circumstance tending to explain cause and effect. It is an accepted rule that a relevant fact will not be rejected because not sufficient in itself to establish the whole or any definite portion of a party's connection, "but all that is required is that the fact must legitimately tend to prove some matter in issue, or to make a proposition in issue more or less probable. Indeed, it is suffi-

cient if the fact may be expected to become relevant in connection with other facts, or if it forms a link in the chain of evidence necessary to support a party's contention, although requiring other evidence to supplement it." 22 C. J., § 91, page 164.

Nor was it error to admit statements of Mrs. Whitworth that she was purchasing white gasoline and coloring it red. It is a matter of common knowledge that many of the high-test gasolines are colored red. If the witness in her effort to direct attention to the commodity offered for sale saw an advantage in simulating the higher grades, and in doing so made use of Sinclair tanks and pumps in the distribution of "white," or "third-grade" Glover gasoline, it was not improper for evidence of this conduct to go to the jury as a circumstance tending to confirm the state's theory that the prohibited service was supplied by the Glover Company.

(2) The trial court properly refused to direct a verdict for the defendant.

(3) It is insisted that the verdict of the jury and the judgment thereon are in violation of art. 14, § 1, of the Constitution of the United States, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Appellant does not mention the manner in which his privileges or immunities have been unlawfully abridged. The Supreme Court of the United States, in *Presser* v. *Illinois,* 116 U. S. 252, 6 S. Ct. 580, 29 L. Ed. 615, held that: "It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A state may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States." The trial court was correct in overruling this objection.

(4) It is finally argued that the court erred in giving the following instruction: "If you believe the defendant, E. D. Glover, participated in or authorized the acts done by Mr. Taber in putting Glover Oil Company prod-

ucts into tanks branded by the Sinclair Oil Company, then he would be guilty. If he did not knowingly participate in it, then he would not be guilty."

The objection, as reflected by appellant's brief, is that it was a comment on the testimony, confusing, and misleading. The record shows that a general objection was interposed, and the reasons assigned in the brief were not brought to the court's attention. But even if the specific objection had been made, it should have been overruled. The instruction was in no sense a comment on the testimony, nor was it confusing or misleading. On the contrary, it told the jury that, as a matter of law, the defendant would be guilty if he participated in or authorized the acts complained of, and that, if he did not do so, he would not be guilty. This was a correct declaration of the law, and the duty then rested upon the jury to determine as a matter of fact whether the defendant committed the acts charged to him.

Affirmed.

WOOTEN *v.* FIELDER.

4-4668

Opinion delivered May 24, 1937.

Edwin Bevens, J. G. Burke and *G. D. Walker,* for appellants.

J. M. Jackson and *Peter A. Deisch,* for appellees.

MEHAFFY, J. The question of a three-mill road tax was submitted to the electors of Phillips county at the general election held on November 3, 1936, and the election commissioners canvassed the vote, and according to

the count made by them, a majority of the qualified electors voting at said election, did not vote in favor of the tax.

The appellees, qualified electors, citizens and taxpayers, filed with the election commissioners a petition for a recount, said petition showing or alleging reasonable grounds for believing that the return did not give a correct statement of the vote as actually cast.

The election commissioners declined to consider the petition, and appellees thereupon filed in the circuit court of Phillips county, a petition for a writ of mandamus, to compel the election commissioners to recount the vote.

The appellants filed demurrer, alleging first, that the court was without jurisdiction of the subject-matter of the action, and second, that the complaint did not state facts sufficient to constitute a cause of action against the appellants.

The demurrer was overruled by the court, and appellants filed answer denying all the allegations in the complaint.

After hearing the evidence, the court made the following order:

"This cause coming on for hearing this the 8th day of February being an adjourned day of Phillips circuit court, the plaintiffs being represented by J. M. Jackson and the defendants being represented by Edwin Bevens, D. G. Walker and J. G. Burke, and the defendants having been served with notice of the time and place of this hearing for a reasonable length of time in advance hereof, the cause is presented upon the petition of the plaintiffs and the court having examined the evidence and heard oral evidence, consisting of the testimony of A. M. Coates, C. S. Fielder, upon the part of the plaintiffs, and E. R. Crum and Eddins Wooten upon the part of the defendants, and having heard the argument of counsel and being well and truly advised:

"It is ordered, considered and adjudged that A. M. Coates, E. R. Crum and Eddins Wooten, as election commissioners for Phillips county, Arkansas, do proceed at once to recount the votes cast in all the wards and townships in Phillips county, on the question of the

three-mill road tax and canvass said returns, and make declaration of the result thereof and to certify the said results to the county clerk of Phillips county, Arkansas, and said count shall be completed on or before Thursday morning, February 11, 1937, at 10 a. m.

"The defendants asked permission of the court to file their supersedeas in this cause, which is by the court denied, to which ruling of the court the defendants except and ask that their exceptions be noted of record and pray an appeal to the Supreme Court.

"Either commissioner may have a substitute to assist in the recount."

After the trial court had denied the defendants permission to file supersedeas, appellants, on the 9th day of February, 1937, presented to Chief Justice GRIFFIN SMITH and Associate Justice FRANK G. SMITH a petition to stay the judgment until the cause could be heard and determined on appeal. A temporary writ was issued as follows:

"Now on this day this cause is presented to the undersigned judges of the court in vacation upon the duly verified petition of the appellants praying that all proceedings in the execution of the order made by the Phillips circuit court on the eighth day of February, 1937, be stayed, and after due consideration it appears that the petition is reasonable and should be granted, and that the proceedings under said judgment should be stayed until the next succeeding day of this court.

"It is therefore ordered that all proceedings under said judgment of the Phillips circuit court shall be stayed until Monday, February 15, 1937, at which time said petition shall be presented to the court after due notice shall have been given to all parties.

"Dated at Little Rock, Arkansas, this, the 9th day of February, 1937."

The matter came on for a hearing before this court on February 15, 1937, and the court made and entered the following judgment:

"This cause came on to be heard upon the temporary restraining order made in chambers on the 9th day of February, 1937, by the Chief Justice and Associate Jus-

tice F. G. SMITH, holding in abeyance a judgment of the Phillips circuit court, which said temporary order was made returnable on this day, and was argued by counsel, on consideration whereof it is the opinion of the court that the temporary order so made should be dissolved;

"It is therefore considered, ordered and adjudged that the said temporary order issued as aforesaid in chambers, be and it is hereby dissolved, and the judgment of the circuit court of Phillips county be allowed to stand in full force and effect."

That judgment necessarily meant that the court had jurisdiction, that the petition for recount was filed within the time allowed by law, and that the judgment of the lower court requiring a recount must be carried out. That necessarily meant that the election commissioners should recount the ballots on the road tax question, and, therefore, those questions are settled by the judgment of this court above set out.

It is stated, and not denied, that the recount was made and showed a majority of the qualified electors voted for the road tax, and said tax is being collected by the collector.

Whether the recount was properly made, and what the result was, is not before us. These are questions that may or may not arise hereafter, but the only questions involved in this suit are settled by the order made by this court above set out.

We find no error, and the judgment is affirmed.

TOMPKINS *v.* CROSS.

4-4662

Opinion delivered May 24, 1937.

R. P. Hamby and *McRae & Tompkins,* for appellants.

W. F. Denman and *Bush & Bush,* for appellees.

GRIFFIN SMITH, C. J. The appellants, Charles H. Tompkins, R. P. Hamby, and Dan Pittman, were candidates in the democratic primary election of August 11, 1936, for membership on the Nevada County Central Committee as committeemen from Missouri Township. On the ticket with appellants as candidate for a similar position, but not adverse to appellants, was S. B. Scott, there having been four positions to fill.

The names of these candidates were printed on the official ballots. Seventeen electors scratched these names and substituted A. E. Cross, W. F. Denman, Odell Garrett and C. C. Harvey.

On August 17, 1936, a petition for mandamus was filed by appellees in the circuit court, in which it was alleged that Tompkins, Hamby, Pittman and Scott were office-holders, and that § 3764 of Crawford & Moses' Digest made them ineligible to serve as committeemen.

The court found that Tompkins was a member of the State Game and Fish Commission; that Hamby was mayor of Prescott; that Pittman was a city alderman; that Scott was a colonel in the Arkansas National Guard; that C. C. Harvey, one of the plaintiffs, was a member of the County Welfare Board for Nevada county, and that Odell Garrett, also one of the plaintiffs, was a sergeant in the National Guard. The court further found that Tompkins, Hamby, Pittman, and Harvey, being office-holders, were not entitled to serve as committeemen, and declared the offices vacant as to them; that Scott and

Garrett were not ineligible, and that Cross, Denman, Garrett, and Scott were the duly elected committeemen, eligible to serve.

The findings of the court contained the following: "At the election the respondents received a majority of the votes cast for democratic central committeemen for Missouri township, and the plaintiffs received a minority of the votes cast." In appellants' brief, it is shown that they received more than 700 votes, against 17 received by appellees.

Ineligibility of appellants is not properly before this court. The prayer of plaintiffs was based upon the theory, as shown by the complaint, that they were the duly elected members of the committee; that they were "rightfully entitled to certification by the county convention as members of the committee," and that if the defendants were certified as committeemen plaintiffs would suffer "great and irreparable injury."

In *Collins* v. *McClendon,* 177 Ark. 44, 5 S. W. (2d) 734, there is this syllabus: "Where a candidate for mayor who received the largest number of votes was ineligible, being a member of the house of representatives, the election failed, and the candidate who received the second highest number of votes was not entitled to the office." The rule announced in *Swepston* v. *Barton,* 39 Ark. 549, was discussed in the opinion, and applied.

In *Bohlinger* v. *Christian,* 189 Ark. 839, 75 S. W. (2d) 230, it was held that "One who contests the election of another in a primary election must allege and prove that he is entitled to the nomination by reason of having received a majority of the votes." It was further held that ineligibility of the candidate receiving a majority of the votes did not entitle the candidate receiving the next highest number of votes to the nomination.

In *Winton* v. *Irby,* 189 Ark. 906, 75 S. W. (2d) 656, it was held that in a contest of a primary election by a defeated candidate, an allegation in the complaint that contestee was ineligible was properly stricken, "since the only issue was which candidate received a majority of the legal votes." See, also, *Nelson* v. *Gray,* 190 Ark. 179, 77 S. W. (2d) 968.

In the instant case appellees do not claim to have received a majority of the votes, their position being that, since appellants were ineligible, appellees were elected without opposition.

Under the admitted facts, and the findings of the court, appellees were not elected, and the court erred in its judgment. Since the proceedings, as instituted, were erroneous, it is not necessary to discuss other questions raised by the appeal.

Reversed and dismissed.

THOMPSON *v.* CITY OF LITTLE ROCK.

Crim. 4025.

Opinion delivered May 24, 1937.

Robert J. Brown, Jr., for appellant.

McKinley & Thompson, for appellee.

SMITH, J. Appellant was tried in the municipal court of the city of Little Rock, where a fine was imposed upon him for the offense of carrying a pistol as a weapon, in violation of an ordinance of that city. Upon his ap-

peal to the circuit court he was again found guilty and fined, and from that judgment is this appeal.

For the reversal of this judgment it is insisted (a) That the municipal ordinance, under which he was fined, was not introduced in evidence; (b) that the venue was not proved, and (c) that the evidence is not sufficient to sustain the conviction.

Failure to prove the city ordinance was immaterial. Indeed, it is unimportant whether there was a city ordinance upon the subject of carrying concealed weapons, as there is a state law upon the subject. In the case of *Sharp* v. *Booneville,* 177 Ark. 294, 6 S. W. (2d) 295, a headnote reads as follows: "Though a town ordinance under which defendant was prosecuted * * * was void as inconsistent with the state law, a conviction in the mayor's court must stand, where the crime charged was covered by a statute, since the mayor had jurisdiction as justice of the peace to enforce the statute." To the same effect, see, also, *Marianna* v. *Vincent,* 68 Ark. 244, 58 S. W. 251; *Watts* v. *State,* 160 Ark. 228, 254 S. W. 486; *Fly* v. *Fort Smith,* 165 Ark. 392, 264 S. W. 840; *Wilson* v. *Batesville,* 179 Ark. 1094, 20 S. W. (2d) 114.

Upon the question of venue, the testimony was to the following effect. Several officers testified that they were members of the police department of the city of Little Rock, and arrested appellant in a raid of a gambling game called "craps" in a pressing shop on Thirteenth Street between Ringo and Cross streets, behind the curb market. Ten or eleven persons were arrested for gaming and carried to the police station in the patrol wagon. These officers identified themselves as members of the Little Rock police force, and their testimony sufficiently proves the venue by locating the place of the commission of the violation of the law in the city of Little Rock. *Tyra* v. *State,* 192 Ark. 192, 90 S. W. (2d) 505.

As to the sufficiency of the testimony but little need be said. When appellant was first searched in the house no pistol was found on his person, but when searched again by the officer who put appellant in the patrol wagon a pistol was found in appellant's shirt bosom. The pistol was a .38 special, Spanish make, and "was loaded

all around.'' No attempt was made to see whether the pistol would shoot. It was turned in at the police headquarters. It was pointed out by counsel for appellant that there was no testimony showing how long appellant had carried the pistol, nor to whom it belonged.

It is not essential, to constitute the offense of carrying concealed weapons, that it should be shown that the weapon had been carried for any length of time. *Henderson* v. *State,* 91 Ark. 224, 120 S. W. 966.

It was held, in the case of *Carr* v. *State,* 34 Ark. 448, that if a pistol be worn concealed, the jury may presume that it was loaded and worn as a weapon, but that this presumption may be rebutted. There was nothing in the testimony to rebut that presumption.

It was held, in the case of *Hathcock* v. *State,* 99 Ark. 65, 137 S. W. 551, that a pistol may be carried as a weapon although unloaded. The case of *State* v. *Wardlaw,* 43 Ark. 73, is to the same effect. Here the testimony was to the effect that the pistol was loaded, and the state was not required to prove that it would shoot.

Judgment affirmed.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* STATE.

Crim. 4029.

Opinion delivered May 24, 1937.

Jos. R. Brown and *James B. McDonough,* for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

BUTLER, J. November 20, 1935, the appellant, Kansas City Southern Railway Company, was charged with violating the full switch crew law (Crawford & Moses' Digest, §§ 8583-8586, inclusive) on November 19, 1935, by switching cars across public crossings in its Fort Smith yards with a crew of less than six men.

The municipal court tried the cause, and from an adverse judgment, appellant appealed. Appellant's demurrer to the information was overruled by the circuit court. Appellant declining to plead further, a fine was assessed against it and this appeal duly perfected.

The information to which appellant's demurrer was interposed is as follows:

"The said defendant, in the county and state aforesaid, on the 19th day of November, 1935, then and there being the Kansas City Southern Railway Company, a corporation, owning and operating a yard and terminal in the city of Fort Smith, where switching, pushing and transferring of cars are made across public crossings, did unlawfully switch, push and transfer railroad cars across public crossings within the city limits of Fort Smith, a city of the first class, with a crew of less than one engineer, a fireman, a foreman and three helpers."

The pertinent parts of the statute upon which the above information is based are as follows:

"Section 8583. No railroad company or corporation owning or operating any yards or terminals in the cities within this state, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch crew

or crews with less than one engineer, a fireman, a foreman and three helpers."

"Section 8584. It being the purpose of this act to require all railroad companies or corporations who operate any yards or terminals within this state who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one engineer, a fireman, a foreman and three helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this act."

"Section 8585. The provisions of this act shall only apply to cities of the first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred miles in length."

"Section 8586. Any railroad company or corporation violating the provisions of this act shall be fined for each separate offense not less than fifty dollars, and each crew so illegally operated shall constitute a separate offense."

In contending that the information fails to charge an offense within the meaning of the statute, appellant calls attention to the rule that a penal statute must be strictly construed and all questions of doubt resolved in favor of those from whom the penalty is sought, and contends that this rule applies to the full crew statute which is penal in its nature and in derogation of the common law. It is argued that by the act railroads are not required to maintain switch crews in cities of the first and second class. We concede the correctness of the rule contended for by appellant, and that the statute does not require switch crews in all the cities of the first and second class. The principal objection to the information, as we gather from the argument, is the failure to use the descriptive word "switch" before the word "crew" and attention is called to the wording of § 8584, *supra,* which requires railroad companies maintaining yards in cities to operate their "switch crews" with at least six men. Again, at-

tention is called to the provision of the statutes relating to switching across streets where such operation is to be performed by "switch crews." When the information is considered as a whole, it seems clear that the word "crew," used in the information, necessarily means a switch crew. Under the provisions of § 8584, *supra,* switch crews of not less than one engineer, a fireman, a foreman and three helpers are required only where the railroad company "operates any yards or terminals within this state who do switching, pushing or transferring cars across public crossings within city limits."

The information is drawn in the language of the statute quoted, *supra,* and the word "crew" used in it necessarily refers to "switch crew or crews" named in the section, *supra.*

In formal charges of offenses committed, it is sufficient if the state of facts set out charges a specific offense and no charge will be deemed insufficient which does not tend to prejudice the substantial rights of defendant on the merits. Sections 3013-14, Crawford & Moses' Digest, and cases there cited. We are of the opinion that the charge is sufficiently definite to have apprised the defendant of the nature of the offense of which it was accused and the failure to insert the word "switch" before the word "crew" in no wise tends to militate against this certainty.

Counsel for appellant assert that it is the State's contention, as drawn from the information, that switching crews are required in all yards of cities of the first and second class and that, accordingly, the railroad company is required to keep switch crews of at least six men in all cities of those classes through which the railroad operates. We do not so construe the allegations of the information or the contentions of counsel for the state in their argument.

The law contains no requirement for the maintenance of switch crews except in those cities where yards or terminals (as those terms are understood in railroad parlance) exist and where switching, pushing or transferring of cars across public crossings within the city

limits is done. Therefore, the argument of appellant that under the allegations of the information it would be required to maintain switch crews of at least six men in the small cities through which its lines pass is without foundation.

The information charges that the appellant owns and operates a yard and terminal in the city of Fort Smith where the transferring of cars is made across public crossings, and that such switching is done with a crew of less than an engineer, a fireman, a foreman and three helpers. The demurrer admits these allegations, and the trial court correctly adjudged the appellant guilty of the offense named in the statute. The judgment is, therefore, affirmed.

PROGRESSIVE LIFE INSURANCE COMPANY *v.* PRESTON.

4-4670

Opinion delivered May 24, 1937.

Alfred Featherston, Duty & Duty and *E. M. Arnold,* for appellant.

John Owens and *Millwee & Goodson,* for appellee.

BUTLER, J. On December 8, 1934, Alice Preston made application to the appellant insurance company for a joint policy of insurance on her own life and that of Birdie Walker, each to be the beneficiary of the other. The policy was issued on the 13th day of December, 1934, and shortly thereafter delivered to Alice Preston. On February 12, 1935, Birdie Walker died and, upon proof of death being submitted, appellant denied liability. This action followed and was submitted to the court sitting as a jury upon the evidence adduced. There was a judgment in favor of the appellee from which comes this appeal.

There are a number of assignments of error urged for reversal none of which we need notice except the one first argued, namely, that under the contract and undisputed proof a verdict should have been directed for the appellant. Among other grounds is the contention that in the application for the policy appellee warranted that Birdie Walker did not have tuberculosis; that she did not then have, and had never had, any other disease or mental defect, that she had never been in any hospital or institution of like nature for treatment, that she had not consulted a doctor during the eight months preceding the making of the application and was free from disease at that time.

The pertinent provisions of the policy are as follows:

"Section 7 of Part 13—Proofs satisfactory to the company must be furnished of any accident or disability before approval of payment will be made. No obligation is assumed by this company, nor is this contract effective, prior to the date hereof, nor unless the applicants hereunder are alive and in sound health and all premiums paid on the date of delivery and acceptance by them of this policy."

"Part 16. Consideration. This policy is issued in consideration of the application therefor, the original of which is on file with the company and made a part hereof, payment in advance of an initial premium of two

dollars, which provides insurance until the first day of February, 1935, and one dollar for each month's insurance on the first day of each month thereafter, without notice at the home office of the company in Rogers, Arkansas."

It is admitted that the application for the insurance was made without the knowledge or consent of Birdie Walker, who was not a blood relative of appellee. Appellee claims, however, that Birdie Walker was indebted to her in the sum of $50 for money borrowed in 1933 and 1934. It is stated by appellee in the application that Birdie Walker was thirty-five years old. The application contained the following:

"5. Have you any of the following diseases? * * * Tuberculosis? Ans. No.

"6. Have any of you ever had, or do you now have, any other disease, physical or mental defect? Ans. No.

"7. Have you gained or lost in weight in the past year? Ans. No.

"8. Have any of you ever been operated on or been under observation, care or treatment in any hospital or sanitorium, asylum or similar institution? Ans. No.

"10. How recently have any of you consulted a doctor and for what reason (give full particulars, name and address of the doctor)? Ans. About eight months.

"15. Are each of you now free from disease or symptom of disease and in perfect health? Ans. Yes.

"17. The above representations as to our physical condition, age, nationality and occupation are warranties and covenants by us and are to be construed as such, are true and correct and are made to enable us to obtain a policy of insurance in the Progressive Life Insurance Company of Rogers, Arkansas. We further covenant and warrant that we have read each of the foregoing questions and answers before signing our names to this application, and each of said answers is set down exactly as stated by us, and the aforesaid statements and answers are full, complete and true in every particular and are the only statements and answers upon which this application is made. * * *

"18. It is hereby provided and mutually agreed between the applicants and the Progressive Life Insurance Company that this application together with the statements, warranties and agreements herein contained, as above set forth and including all appearing on subsequent pages of this form, shall be a part of the contract and that full compliance by the policy-holder with all rules and requirements herein set forth or referred to shall be a condition precedent to any recovery of benefits that may be provided in a policy issued herein.

"25. We agree, on behalf of ourselves and any person who shall have or claim any interest in any policy issued herein, that the company shall not incur any liability upon this application until the policy has been issued by the company and the first premium has actually been paid to and accepted by the company or its authorized agent, and the policy has been delivered to and accepted by us during our lifetime and good health.

"26. The applicants assume the entire burden of making full and true statements and revelation as to their bodily condition and history, and to fully informing themselves with reference thereto before signing and delivering this application * * *.

"28. We hereby expressly waive, on behalf of ourselves and any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended us, or who may hereafter attend or examine us, from disclosing any knowledge or information thereby acquired by him, and we expressly authorize such disclosure.

"I, the undersigned, whose relationship to applicant is niece, have signed the names of said applicants to this application and in doing so vouch for the truthfulness of all answers to the questions and agree for the applicants to condition made in said application.

"Signed by Alice Walker Preston for applicant."

While the language of the quoted provisions of the policy and application is not literally that of the contract considered in *Springfield Life Ins. Co.* v. *Slaughter*, 183 Ark. 692, 38 S. W. (2d) 13, it is the same in all sub-

stantial particulars. The distinction pointed out by the appellee that in the case cited the application was attached to the policy, while in the instant case the original application was retained in the files of appellant company, is unimportant. The essential fact which renders the two contracts of like nature is the provision in both that the application is a part of the contract. In the application the answers to the questions propounded are warranted to be true, full and complete in every particular; that they are made to obtain the policy of insurance and that the said statements "shall be a condition precedent to any recovery of benefits that may be provided in the policy issued" thereon. Further, the applicants "vouch for the truthfulness of all answers to the questions and agree for the applicants to conditions made in said application."

As is said in the case cited, *supra*, "The provisions of the policy set out above clearly made the answers relating to the health of the insured warranties and not mere representations. They were in the nature of an absolute agreement and not statements of belief." The doctrine of the cited case finds support in *Cunningham* v. *National Americans,* 123 Ark. 620, 185 S. W. 786, and *Royal Neighbors of America* v. *Tate,* 186 Ark. 1138, 57 S. W. (2d) 1055.

Under the contract, the only question to be determined here is the truthfulness or untruthfulness of the answers made to the questions propounded in the application. It conclusively appears that the answers were false. Six disinterested witnesses who knew and had opportunity to observe Birdie Walker in the fall of 1934 and until a short time before her death testified that she acted as, and had the appearance of, a sick woman. One of these witnesses was Birdie Walker's pastor, who saw her when she returned from a trip which she made on a train in October, 1934. He saw her in bed after she returned from that trip. He made frequent visits to her home and some three or four weeks after her return he found her in bed. He called at her home frequently to have prayer and discussed with her the matter of her get-

ting better or worse, and she did not seem to have any confidence in getting well.

In addition to this testimony were the depositions offered in evidence of Dr. W. M. Blackshare, Dr. James R. Waugh and Dr. D. C. Lee of Hot Springs. Before these depositions were offered the trial had commenced and the appellee had testified. When the depositions were offered appellee interposed a general objection to the testimony of deponents as being hearsay "based upon records which were not presented at the time of the taking of the depositions; and for the further reason, as shown by said depositions, that the records from which the testimony was given were not available to the witnesses."

The trial court, in passing on the objections as presented, stated that the objections would be confined to the irregularities in the taking of the depositions, and "if any objection or any incompetent testimony before the depositions are submitted, require you to make specific objections in writing." Immediately after this declaration the depositions were read in evidence. No exceptions in writing were filed specifying grounds of objection filed with the papers of the case and noted on the record as provided by § 4248 of Crawford & Moses' Digest. Neither were any exceptions determined before final submission. Under the doctrine announced in *Seamster* v. *State,* 74 Ark. 579, 86 S. W. 434, this must have been done, otherwise the party offering the depositions had a right to assume that their introduction in evidence would meet with no objection. See, also, § 4250, Crawford & Moses' Digest.

When we examine the depositions, we find that they were taken pursuant to a written notice at the time and place mentioned therein and that counsel for appellee was present cross-examining the witnesses. It is clear that the physicians not only testified as to matters within their personal knowledge, but, also, from records of the clinic where Birdie Walker had been under observation which records were before them at the time their testimony was given, except one who testified from notes he had made from the records. No objection was made to

the giving of testimony by the physicians from the records and no request made for the identification of the records by the persons who had made them, or that copies of the same be attached as exhibits to the testimony of the witnesses. It was further stipulated by the attorneys at the time the depositions were taken that all objections as to the relevancy and materiality of any evidence that might be given should be made in writing at least three days before the trial of the cause, and that the depositions should be filed with the clerk of the court at least ten days before the trial. It is clear that the objections interposed came too late and were, in fact, waived.

Each of the doctors who testified made a personal examination of Birdie Walker, who was admitted to the clinic in Hot Springs on October 12, 1934. The physical findings made by these doctors indicated the presence of pulmonary tuberculosis. Dr. Lee, who was the pathologist of the clinic, ran the test of the sputum of Birdie Walker himself and found it to show positive tuberculosis. The physical examinations made by these physicians also indicated syphilis. There was a marked enlargement of the glands in her neck and a Wasserman test was immediately ordered which showed positive "four plus." On the day following the first Wasserman test, a second was made which also showed positive four plus, indicating that the disease was of four years duration, or longer.

In announcing the reason upon which judgment was based and in commenting upon the testimony introduced by way of depositions, the trial court held that testimony incompetent for the reason that the records from which the physicians testified were the best evidence "and there is no reason why the originals should not have been attached." We think the trial court was in error for the reasons we have previously stated in commenting upon the manner in which the depositions were taken and the time the attempted objections were made. The court also overlooked the testimony relating to the physical examination of Birdie Walker made by the physicians and the sputum test run by one of them which showed positive tuberculosis. All this came within their per-

sonal observation, was not based upon any record, and was sufficient to establish the diagnosis of pulmonary tuberculosis.

Opposed to the testimony of the lay witnesses heretofore noted and that of the physicians was the testimony of Allen Walker, the husband of Birdie Walker, and his brother, Riley Walker. The effect of Allen Walker's testimony was that his wife was sick about three weeks before her death; that up to that time she did house work and cooked meals. Riley Walker testified in effect that Birdie kept her own house until about ten days before her death, and, as well as he remembered, her health was pretty fair about December 8. This testimony in no manner contradicts the evidence showing that she was afflicted with the specific diseases testified to by the physicians. From the undisputed testimony which we think is competent, there is no doubt that Birdie Walker was afflicted with both diseases mentioned by the physicians at the time of the examinations made by them about the middle of October, 1934, and, necessarily, was so afflicted on December 8, following.

We have not overlooked the cases cited by appellee in support of her contention that the statements made in the application were mere representations and, to avoid the policy, must not only have been false, but made with knowledge of that fact and with the purpose to fraudulently obtain the policy, and that, since there was no evidence to show that such statements were knowingly false, liability exists. The first case relied on is that of *Missouri State Life Ins. Co.* v. *Witt,* 161 Ark. 148, 256 S. W. 46, but there the contract itself provided that all the statements made by the insured in the absence of fraud should be deemed representation and not warranty. In *Modern Woodmen of America* v. *Whitaker,* 173 Ark. 921, 293 S. W. 1045, the application was not set out in the opinion because there was no controversy as to the insured's condition of health at the time it was made. However, the case turned on the question as to whether or not the insured warranted her soundness of health at the time of the delivery of the policy. That question was submitted to the jury on conflicting testimony which found

that the insured's good health was established by a preponderance of the testimony.

In *The Maccabees* v. *Gann,* 182 Ark. 1141, 34 S. W. (2d) 456, this court said: "Notwithstanding the assured was in excellent health at the time of the application, and notwithstanding the fact that the company's physician examined her and was advised that she had some ailments, but that she did not think they amounted to anything, still the company seeks to avoid the policy by undertaking to enforce strictly the rule, harsh and unfair as it is, that, if the answers were not literally true, recovery cannot be had, regardless of the good faith of the applicant. * * *

"A warranty is in the nature of a condition precedent; it must appear on the face of the policy; it cannot be created or extended by construction."

In the case at bar the contract establishes a warranty under the rule announced in the last paragraph, *supra.* By express terms the truthfulness of the answers to the questions contained in the application is made a condition precedent to the liability of the insurer under the contract.

In *National Life & Accident Ins. Co.* v. *Threlkeld,* 189 Ark. 165, 70 S. W. (2d) 851, the defense was that the statements by the insured relating to his good health at the time the policy was delivered to him were wilfully and knowingly false and made with the intent to deceive the insurer. The court found that this contention was not sustained by the evidence and correctly rendered judgment against the insurer.

Other cases cited by appellee relate to the rule that the knowledge of the insurer's agent of false statements given by the insured operates as a waiver of the right to avoid liability because of such false answers. These cases have no application to the case at bar for there is no evidence that the agent of the appellant knew that the statements of the applicants were false.

From the views expressed, it follows that the trial court erred in its refusal to instruct a verdict for the appellant, and its judgment is accordingly reversed, and the cause dismissed.

STATE, USE MONTGOMERY COUNTY, *v.* WITT.

4-4659

Opinion delivered May 24, 1937.

Murphy & Wood, John A. Sherrill and *Osro Cobb,* for appellants.

C. E. Johnson, Martin, Wootton & Martin, C. H. Herndon and *Harold Watkins,* for appellees.

McHANEY, J. On January 21, 1926, the county court of Montgomery county, presided over by appellee, W. J. Ellington, entered an order ascertaining and declaring the outstanding indebtedness of the county to be $120,-218. Thereafter, a bond issue was authorized by appropriate orders and bonds were sold in the sum of $112,000, which amount paid off the outstanding indebtedness. On July 30, 1936, more than ten years later, this action was instituted by the then county judge, Joe H. Demby, in the name of the state for the use of the county, charging, in effect, that the indebtedness of the county, prior to the bond issue, amounted approximately to $100,000 represented by county scrip or warrants issued on the basis of fifty cents on the dollar, that is, for a dollar debt a two-dollar warrant was issued; that appellee Ellington was county judge, Watkins was county clerk, Elder was county treasurer and Radford

was president of the bank in which all county funds were kept; that county warrants were worth from thirty to fifty cents on the dollar and could have been bought at such prices during the years 1925-26, which was well known to appellees; that appellees conspired together to buy up the warrants at the price stated, sell bonds and cash the warrants at par and thus defraud the county; that appellee Witt was taken into the conspiracy, because he was a lawyer, to help with the legal phases of the enterprise; that they accomplished the purpose of the conspiracy, and thereby defrauded the county out of a large sum of money and that the matter was not discovered until an audit was made of the county books in 1936 by the State Comptroller, and that the facts had been fraudulently concealed from the prosecuting attorney and the taxpayers. Prayer was for an accounting and for judgment against appellees for the amount the county was damaged or for the profits made by them in the transaction, and for the appointment of a master to determine the matter. To this complaint a demurrer was interposed and sustained, whereupon appellants offered to amend, alleging that Witt was attorney for the county in the matter of refunding its indebtedness; that Radford was the agent of the county in all such matters; that they and the county judge, acting together, secured options on county warrants and claims of the face value of more than $100,000 at from thirty-five to seventy-two cents on the dollar, and that, after the bond issue was sold, the proceeds were placed in Radford's bank, and the county's money used in exercising such options, which warrants and claims were cashed by them at eighty-five cents on the dollar, or a gross profit of more than $35,000; that they caused records to be made which concealed the fact of their purchase and that the records of the treasurer showing to whom the money was paid was removed by them from the clerk's files to conceal the fact that they had received any part of said funds. The court refused to consider this amendment, dismissed the complaint, and the case is here on appeal.

We think the court correctly sustained the demurrer and dismissed the complaint as being without equity.

If a complaint shows on its face that the cause is barred by the statute of limitations, it may be reached by demurrer, unless a ground of avoidance is shown. *Smith* v. *M. P. Rd. Co.,* 175 Ark. 626, 1 S. W. (2d) 48. Here, the complaint shows the transactions complained of occurred in 1925 and 1926. On January 21, 1926, the county court made an order ascertaining and declaring the amount of the county's indebtedness. Section 1 of act 210 of 1925, the enabling act for Amendment No. 10 which authorizes the procedure taken, provides that "any property owner who is dissatisfied may, by suit in the chancery court of the county brought within thirty days after the publication of such order * * * have a review of the correctness of the finding made in such order * * *; but if no such suit is brought within thirty days, such finding shall be conclusive of the total amount of such indebtedness, and not open to further attack * * *." It will be seen by this act that the order of the county court must be published and any property owner who is dissatisfied with the amount of the indebtedness as thus ascertained has thirty days from the date of publication to have a review. If not done in the period stated the order becomes final. This is a collateral attack on the order of the county court ascertaining and declaring the county's indebtedness, and cannot be maintained for the purpose of showing it was wrongfully made. Moreover, the public records of the county reflected the fact that a funding of the county's debts was to be had. The amount of the debts was determined and the amount of the bond issue was fixed by order of the county court, of which all taxpayers had either actual or constructive notice. Suit was not begun against appellees for more than 10 years. No facts are alleged which justify a postponement of the running of the statute of limitations. The fact that the State Comptroller made an audit in 1936, and that the facts were not discovered until that time is not sufficient to toll the statute. The records must have reflected the matters found by the Comptroller, and they were available to any taxpayer. The amendment offered added nothing additional to remove the bar of the stat-

ute. It alleges that appellees Witt, Radford and Ellington removed the county treasurer's records from the clerk's files to cover up the fact that they had received any part of said funds. It does not allege what records of the treasurer were removed from the clerk's files nor when they were removed, whether before or after the statutory bar.

The court correctly sustained the demurrer to the complaint, so the decree is accordingly affirmed.

GRIFFIN SMITH, C. J., disqualified and not participating.

MODERN WOODMEN OF AMERICA *v.* SILVIS.

4-4667

Opinion delivered May 24, 1937.

Abe Collins, George G. Perrin and *George H. McDonald,* for appellant.

Millwee & Goodson, for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Sevier county by appellee against appellant to collect on a benefit insurance certificate in the sum of $1,000 issued on February 9, 1924, to Elphard Luther Silvis by appellant in which appellee, Mary Silvis, was named as beneficiary. The insured died on March 3, 1936, at which time the certificate sued upon was in full force and effect and the proof of the death of the insured was duly made.

Appellant interposed the defense to the suit that at the time of his death the insured was engaged in a hazardous occupation, which, under the terms of its by-laws of 1933, which was a part of the insurance policy, voided all rights of the beneficiary to recover in the action.

The court tried the case, sitting as a jury, and rendered a judgment in favor of appellee for the face value of the certificate, with interest, and cost, from which is this appeal.

A by-law of appellant association, adopted in 1933, which became a part of the contract, provided that in case insured should lose his life while engaged in any of the occupations classed as hazardous therein the beneficiary could not recover thereon. The by-law classed as a hazardous occupation a "driller, blaster, or the helper of either, in wells, quarries, tunnels or mines." The evidence reflects without dispute, that on September 11, 1933, the insured began working as a helper for the Nicklos Drilling Company of Houston, Texas, which was drilling oil wells in the state of Louisiana. He continued in such service until March 2, 1936, when he was fatally injured, resulting in his death on the following day. His duties were to assist in running drill pipes, in running the casing in the hole, in repairing machinery and equipment, in moving the rig from location to location, in laying line pipe, in laying down drill pipe, in cleaning rig and in performing general duties under the direction of the driller in charge. He was standing on the edge of the derrick floor at a time a string of four and one-half-inch pipe was being pulled out of the well when a drilling line broke, which allowed elevator links and traveling block to drop to the derrick floor. One of the links struck insured on the head and shoulder causing severe injuries which resulted in his death March 3, 1936.

Appellant contends for a reversal of the judgment on the ground that according to the uncontradicted evidence the death of the insured is directly traceable to his employment in a hazardous or prohibited occupation. We do not agree with appellant that the occupation in which the insured was engaged at the time of his death was prohibited by its by-laws. The by-law exempts it from

liability in case the insured was engaged in helping a driller in a well at the time he was injured and killed. The insured was not working in a well when injured and killed. It is true he was working as a helper of a driller of an oil well, but this is quite different from working in a well as an assistant to a driller. Had the by-law intended to class as hazardous employment as a common laborer around an oil well it should have said so instead of prohibiting insured from assisting a driller in a well. To prohibit helping a driller in a well means helping one who is drilling a hole in a well in which to deposit explosives to blast out some hard formation. It has reference to open wells which workmen may enter. The plain language of the by-law is unambiguous and really needs no construction. It says what it means. If there was any ambiguity in the language used that might warrant a different construction as to the meaning of the by-law, the construction most favorable to the insured should be adopted. The insured had no voice in the preparation of the by-law. It was prepared or formulated by appellant and should be construed strictly against it as was done by this court in the case of *Sovereign Camp Woodmen of the World* v. *Arthur,* 144 Ark. 114, 222 S. W. 729. In that case a similar provision in an insurance policy to the by-law involved in the instant case was construed as we have construed this by-law. The reasons assigned in that case for the construction given the provision in that policy are sound and convincing.

No error appearing, the judgment is affirmed.

FIRESTONE TIRE & RUBBER COMPANY *v.* INTERSTATE CONSTRUCTION COMPANY.

4-4669

Opinion delivered May 24, 1937.

[redacted]

M. A. Hathcoat, for appellant.
Cotton & Murray, for appellee.

McHaney, J. Appellant brought this action against Dan Crane and appellee, Interstate Construction Company. It alleged that the defendant, Dan Crane, was indebted to it in the sum of $491.22 for various items of merchandise sold and delivered by it to him between the 7th day of June, 1933, and May 15, 1934, as shown by the itemized statement of the account thereto attached. It further alleged that on or about the 18th day of March, 1936, the appellee, Interstate Construction Company was incorporated under the laws of Arkansas with a capital stock of 400 shares of $100 each, 398 of which shares are owned by the defendant Dan Crane; that when Crane contracted the debt to it, he owned valuable personal property, consisting of machinery and equipment used and useful in heavy construction work, the nature of which was not known to it; that on or about March 18, 1936, at a time when Crane was indebted to it, he organized the Interstate Construction Company of which he was subscriber of practically all of the shares of stock, and transferred all of his property to said corporation which left him insolvent with deliberate intent to defraud it and other creditors of Crane, and that said corporation participated in said fraud and is liable with defendant Dan Crane to it for said sum of money. Prayer was that said sale be declared fraudulent or the plaintiff have judgment against both Dan Crane and Interstate Construction Company for the amount of this debt and costs. To this complaint a demurrer was interposed and sustained, and upon appellant's declining to plead further, its complaint was dismissed for want of equity.

We think the court erred in sustaining the demurrer to the complaint. To all intents and purposes the cor-

poration is Dan Crane and he might as well have called it "Dan Crane Incorporated." The complaint alleges that he owns all of the capital stock except two shares, having no doubt given away two shares or one share each to two other persons in order to be able to incorporate. The complaint alleges that he transferred all of his property to this corporation with the deliberate intent to defraud the plaintiff and other creditors, and that the corporation participated in the fraud. The record reflects that no service was had upon Dan Crane, but, under the allegations of the complaint, we think the corporation is liable because, in effect, it stands in the shoes of Dan Crane, having received all of his property for the purpose of defrauding his creditors. In 14 C. J. 307, it is said: "The corporation will also be liable, at least to the extent of the assets received by it, if the transfer to it was in fraud of the creditors of the partnership or other association." A number of cases are cited in the footnote to sustain that statement of the law. While the text refers to a transfer of a partnership or other association, we see no valid reason why the same rule would not apply to an individual, as a partnership is nothing more than an association of individuals.

The judgment of the chancery court 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.

EDELMANN *v.* THE CITY OF FORT SMITH.

4-4658

Opinion delivered May 24, 1937.

Paul E. Gutensohn, for appellant.

Fadjo Cravens, for appellee.

MEHAFFY, J. This action was instituted by the appellee to recover $25 from appellant. The complaint alleged that the appellant was an electrical contractor engaged in business in the city of Fort Smith, and was required to pay a license or tax of $25 per annum for the privilege of engaging in such business, as provided by ordinance of the city.

The appellant answered admitting the allegations of the complaint, but justifying his refusal to pay the license by reason of a certificate issued by the county judge of Sebastian county pursuant to provisions of § 9842 of Crawford & Moses' Digest, alleging that he had made the affidavit required by this section; that he is not and never has drawn a pension from the United States exceeding the sum of $8 per month; that he was a member of the United States Army during the World War, having been properly mustered in and served as a soldier of the United States during such war; he alleged that by reason of the certificate granted to him, he was entitled to engage in the business of an electrical contractor in the city of Fort Smith without paying the privilege tax.

Appellee filed a demurrer to the answer on the grounds that the answer did not state a defense, and that § 9842 of Crawford & Moses' Digest is unconstitutional and void, being in violation of art. 2, § 18, of the Constitution of the state of Arkansas.

The court sustained the demurrer, the appellant declined to plead further, and elected to stand on his answer. The court thereupon rendered judgment in favor of the city against the appellant for the amount sued for.

As stated by the appellant, the sole question presented is whether § 9842 of Crawford & Moses' Digest is unconstitutional as granting to a citizen or class of citizens privileges or immunities not equally belonging to all citizens.

Section 18 of art. 2 of the Constitution reads as follows:

"The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."

Section 9842 of Crawford & Moses' Digest reads as follows:

"It shall be lawful for any indigent or disabled ex-Confederate or ex-United States soldier or sailor and all blind persons having certificate of attendance at blind school, residing in the state, to engage in what is commonly known as hawking and peddling, to give illustrated lectures and magic lantern exhibitions and such other like entertainments, and further he shall be permitted to engage in brokerage or real estate, or any other business that is not prohibited in this state, without either paying state, county, city or town license or tax for the privilege of so doing; provided, that the provisions of this act shall not apply to any ex-Confederate or ex-United States soldier or sailor drawing a pension exceeding eight dollars per month. Before any ex-Confederate or ex-United States soldier or sailor shall be entitled to any of the privileges set out in this act, he shall make an affidavit in writing, before some officer authorized by law to administer oaths, that he is a resident of this state, and that he was properly mustered in and served as a soldier or sailor in the army or navy of the Confederacy or the United States. A certificate of the county judge of the county in which any ex-Confederate or ex-United States soldier or sailor resides, setting forth that said soldier or sailor has complied with the provisions of this act and that he is entitled to the benefits and privileges set out above, shall be sufficient proof of the indigency or disability and of the service of said soldier or sailor in the Confederate or United States army or navy; provided, that nothing in this act shall be so construed as to authorize the peddling of any ardent spirits or intoxicating liquors upon which a license is now imposed by law; provided, further, that the privileges hereunto granted shall not be assignable or trans-

ferable to or used by any other person than the original person or persons to whom a certificate has been issued, as provided by this act."

The question here involved has never been determined by this court. In the case of *Fort Smith* v. *Bruce,* 186 Ark. 423, 54 S. W. (2d) 297, the appellee was engaged in the plumbing business and was an ex-United States soldier of the World War, and had a certificate of disability, showing him to be disabled, and a certificate of the county judge. It was admitted that appellee was drawing compensation under the provisions of the laws of the United States relating to veterans of the World War in the sum of $50 per month. The trial court held that the $50 per month paid appellee was compensation and not a pension. This court held that the $50 per month was a pension, and he was, therefore, not entitled to a certificate under § 9842, because that applies where the amount received is not more than $8 per month. The question of the constitutionality of the statute above referred to was not discussed nor decided.

Does § 9842 grant to a citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens?

There is some conflict of authority, but the weight of authority seems to be that statutes of this character are violative of the constitutional provision.

In the case of *Marallis* v. *City of Chicago,* 349 Ill. 422, 182 N. E. 394, 83 A. L. R. 1222, the statute was held to be violative not only of the State Constitution, but of the first section of the Fourteenth Amendment to the Federal Constitution. In discussing the provisions of the State Constitution, the court said:

"While it is competent for the Legislature to determine upon what difference a distinction may be made for the purpose of statutory classification of objects otherwise having a resemblance, and while the Legislature is not required to be scientific, logical, or consistent in its classification, yet these propositions however stated are always subject to the qualification that the power must not be arbitrarily exercised and that the distinction has a reasonable basis when considered with reference to

the purposes of the legislation. * * * Each person subject to the laws has a right that he shall be governed by general, public rules. Laws and regulations entirely arbitrary in their character, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class. Distinctions in rights and privileges must be based upon some distinction or reason not applicable to others."

A great many authorities are cited in support of this opinion, and the act was held void by the Supreme Court of Illinois.

The following cases, also, hold statutes like the one involved here void: *State* v. *Whitcom,* 122 Wis. 110, 99 N. W. 468; *Adams* v. *Standard Oil Co.,* 97 Miss. 879, 53 So. 692; *State* v. *Garbroski,* 111 Ia. 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am. St. Rep. 524; *Laurens* v. *Anderson,* 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 885, 9 Ann. Cas. 1003; *Ex Parte Jones,* 38 Tex. Crim. Rep., 43 S. W. 513; *State* v. *Shedroi,* 75 Vt. 277, 54 Atl. 1081, 63 L. R. A. 179, 88 Am. St. Rep. 825; *Commonwealth* v. *Hana,* 195 Mass. 262, 81 N. E. 149, 11 L. R. A. (N. S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514.

The statute under consideration unquestionably grants to a class of citizens privileges or immunities, which upon the same terms do not equally belong to all, and is, therefore, violative of § 18 of art. 2 of the Constitution, and is void.

The judgment of the circuit court is affirmed.

BUSCHOW LUMBER COMPANY *v.* ELLIS.

4-4663

Opinion delivered May 24, 1937.

Thomas M. Parker and *W. L. Parker,* for appellant.

W. A. Bates and *Donald Poe,* for appellee.

SMITH, J. Appellee sued Buschow Lumber Company, a foreign corporation, and Eugene Blackwell, for $750 alleged to be due as compensation for services rendered defendants in locating and purchasing timber. It was alleged that Blackwell was the agent or partner of the corporation in the purchase of the timber, but took the title thereto in his own name for the corporation. A verdict was rendered against the corporation only, from which is this appeal. As no judgment was rendered against Blackwell it will not be necessary to consider whether Blackwell had rendered himself personally liable to appellee.

Appellee was engaged in the business of locating and estimating merchantable timber and of buying it for resale or of assisting others in buying it from the owners. It was agreed that the usual compensation for such services in assisting others to purchase timber was 25 cents per thousand feet.

The testimony on appellee's behalf was to the effect that he assisted Blackwell in buying, either for himself or for the corporation, a number of tracts of timber, for all of which he had been paid except for two tracts of timber, one referred to as the Waring tract, the other as the Holoman tract. The estimated stumpage of the Waring tract was two and one-half million feet, that of the Holoman tract five hundred thousand feet. The commission sued for on the Waring tract was $625, on the

Holoman tract $125, making a total of $750, for which amount judgment was rendered in appellee's favor.

Appellee testified that his contract was made with O. C. Buschow, who was the managing officer of the corporation in this state, and that Buschow directed him to report to and co-operate with Blackwell concerning purchases of timber. This he did, and through his efforts contact was made with the owners of the Waring and the Holoman timber, the title thereto being taken in the name of Blackwell by the use of timber deeds furnished for that purpose by the corporation. The contract of employment was made March 1, 1933, and was to continue for the remainder of that year, and was renewed for 1934, and again renewed for the year 1935. A portion of the Waring timber was purchased in 1933, the remainder in 1935. The Holoman timber was purchased between those dates.

Several witnesses were offered to corroborate and sustain appellee's contention; other witnesses, including Blackwell, to contradict it. This conflict in the testimony made a question of fact which was submitted to and is concluded by the verdict of the jury. The instructions submitting these questions of fact are not abstracted, and it will, therefore, be conclusively presumed that the issues were correctly submitted.

A motion was filed to quash the service both as to Blackwell and as to the corporation, but the motion does not appear to have been disposed of. The failure to request a ruling upon this motion was in effect an abandonment thereof. *Plunkett* v. *State National Bank,* 90 Ark. 86, 117 S. W. 1079. At any rate, an answer was filed denying the allegations of the complaint, which did not preserve the question of service. It was, therefore, waived. *Chicago, R. I. & P. Ry. Co.* v. *Jaber*, 85 Ark. 232, 107 S. W. 1170; *Tindall* v. *Layne,* 139 Ark. 590, 214 S. W. 1; *Williams* v. *Montgomery,* 179 Ark. 611, 17 S. W. (2d) 875.

It is finally insisted that the court erred in refusing to grant a new trial on account of newly-discovered evidence. The only reference to this testimony appears in the motion for a new trial. It was held, in the case of

Cravens v. *State,* 95 Ark. 321, 128 S. W. 1037, that "Motions for new trials cannot be used to bring up on the record matters which should appear in the bill of excepceptions." Moreover, the allegations in reference to this newly-discovered evidence were not supported by affidavit, and no showing was made as to the diligence employed in discovering this evidence or to excuse the failure of offering it at the trial. Besides, it appears to be merely cumulative of other similar testimony offered at the trial by appellant, for all or any of which reasons it was not error to overrule the motion for a new trial on account of newly-discovered evidence.

There appears to be no error calling for the reversal of the judgment, and it must, therefore, be affirmed. It is so ordered.

BEENE *v.* HUTTO.

4-4688

Opinion delivered May 24, 1937.

Culbert L. Pearce, for appellants.

R. W. Robins and *Coleman & Riddick,* for appellees.

SMITH, J. The history of this litigation and the facts out of which it arises are set out in the opinion in the case of *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. (2d) 485. See, also, *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. (2d) 68.

In the case of *Beene* v. *Hutto, supra,* a demurrer was sustained to the complaint, and the question presented upon the appeal was the sufficiency of the allegations of the complaint to constitute a cause of action. The suit was brought upon the assumption that the salary act had been initiated and adopted by the electors of Faulkner county, and it was prayed that it should be adjudged that the act had been adopted and that the officers affected be required to receive compensation and to make settlement of the fees which they had collected in accordance with its provisions. It was held upon the appeal that the complaint did state a cause of action, and in the opinion it was said: "The complaint alleges that the election was legally held and a majority of the voters of Faulkner county voted for the initiated act. The demurrer admits these allegations to be true." Upon the remand and trial of the case in the court below, it was found and adjudged that the act had not been legally enacted, and this appeal is from that judgment.

It was essential, to adopt the act, that it should receive, at the election, a majority of all the votes cast on the subject, and if it failed in this respect it is unnecessary to consider the other questions presented and discussed in the briefs.

It was attempted, without success, to prove, by election officers in fifteen out of thirty precincts in the county, that a majority of the votes had been cast for the act. It was shown at the trial from which this appeal comes that the suit was brought more than six months after the date of the election, and, as is said in appellant's brief, "No record of the election returns was kept so far as county and local matters were concerned, and all ballot boxes, tally sheets, certificates, and other documentary evidences were destroyed by the ('election') commissioners, presumably as the law provides." Upon this question, see *Condren* v. *Gibbs,* 94 Ark. 478, 127 S. W. 731, construing § 3838, Crawford & Moses' Digest, which section requires these records to be destroyed, unless the election commissioners have been notified within six months after the election to preserve them

To make proof of the material and essential allegation that the act had been adopted at the election on the subject, appellant offered in evidence a stipulation filed in the first case—the one reported under the style of *Hutto* v. *Rogers, supra*—to the effect that the act had received a favorable and sufficient vote. But the objection was offered: "That was between different parties in the other case. They are not the same parties here in this case." If this objection is well taken, there is a failure of proof to show the adoption of the act.

Many authorities are cited to the effect that it is not within the power of parties litigant to admit or stipulate as to the validity or constitutionality of an act, for the reason that these are judicial questions, and the rights of many other persons may, and probably do, depend upon their decision. Pretermitting this discussion and the insistence also that the parties only stipulated as to what facts were or would be shown by the ballots then in existence, if they were counted which they had the right to do, we announce our conclusion that the former stipulation was inadmissible in the present case. It was filed in a different proceeding, pending in a different court, where the parties were not identical and the relief prayed was not the same. See opinions in the former cases above referred to. The first appeal was disposed of upon the proposition that the sufficiency of a petition for initiating local laws, which the chancery court had the right to determine before the election, becomes a moot question where the election had been held before the jurisdiction of the chancery court was invoked. There were eleven plaintiffs in the chancery case. There are fifteen in the present case. Four of the plaintiffs in the former case were not made plaintiffs in the present case. In the present case four additional defendants were named, these being the circuit clerk, the county treasurer, the sheriff and collector, and the assessor, and the additional relief was prayed in this last case that these officers be required to make account of the administration of their respective offices pursuant to the provisions of the initiated act, which the court was asked to adjudge had been adopted and had become a law.

In no event could the additional defendants be bound by admissions made in a suit to which they were not parties, even though the subject-matter and the relief prayed had been the same in both suits, which was not the case. In the chapter on Evidence in 22 C. J., page 340, it is said: "An agreed statement of facts made for the purpose of one action cannot be received in another action between different parties, merely because the latter action relates to the same subject-matter."

It not having been shown that the salary act was adopted, the cause of action was properly dismissed, and that judgment is affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J. (dissenting). I do not agree with the majority in holding that it was not shown that the salary act was adopted, and in affirming the judgment of the lower court.

In 1910, the people of Arkansas adopted an amendment to the Constitution, the Initiative and Referendum Amendment, commonly known as Amendment No. 10. There was bitter opposition to its adoption, as there always is to any proposed reform in the interest of the people. It was said that the adoption of the amendment would abolish constitutional government. The American Bar Association adopted a resolution appointing a committee to resist the adoption of the Initiative and Referendum where it was submitted to the people. An article was published in the St. Louis Law Journal, by a lawyer, urging the defeat of this amendment, and he said, among other things, if this amendment were adopted it would not be long until some group would propose an amendment to elect United States senators by popular vote instead of by the legislatures, and he claimed this would ruin the country. It was stated in the campaign in Arkansas, not only that adoption of this amendment would abolish constitutional government, but it would carry us back "to darkest Africa." Notwithstanding all this bitter fight against the amendment, it was adopted by the people.

The first section of the amendment adopted in 1910 reads in part as follows: "But the people of each munici-

pality, each county and of the state reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls as independent of the legislative assembly."

The court, in the case of *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S. W. 656, held that a literal reading of the first part of the amendment leads to the meaning that the people of each municipality and each county reserve to themselves the power to propose laws and amendments to the Constitution, and enact or reject the same at the polls. The court held that the meaning of that was that a municipality or county could enact any law or constitutional amendment. This case arose over a petition to initiate a local or special statute in Dallas county. Under the decision in that case, no local legislation could be initiated by the people, although everybody knew that it was the intention of the people in the adoption of the amendment to reserve this power to themselves. But because these words were contained in the same section with the words that reserved the power to the state, the court thought that under it the municipalities and counties could initiate measures to amend the Constitution, and in effect held that the people of the state could not adopt a Constitution that would authorize counties and municipalities to initiate amendments to the Constitution.

It appears to me to be perfectly plain that the people intended, by the adoption of this amendment, to reserve to the people of the state the power to initiate constitutional amendments, and to the people of each county and each municipality, the power to initiate local laws. But the court, in the case of *Hodges* v. *Dawdy, supra,* held: "It is evident that the words 'each municipality' and 'each county' were inaptly thrust into the amendment as originally framed in a way that they express nothing unless they be treated merely as words of emphasis."

The people knew what they wanted, and in 1920 adopted another amendment, and made it so plain that they intended to reserve to themselves the power to enact local legislation, that the court and everybody else could understand it. This last amendment provides in a sep-

arate section, for the initiative and referendum as to counties and municipalities.

We have held that the counties have a right to initiate a law to fix the salaries of county officers, and the amendment itself provides that "powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of *every character* in and for their respective municipalities and counties."

We 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 their acts should not be thwarted by strict or technical construction. We are supported in this idea of more liberal construction by the following case, *Ferrell* v. *Keel,* 105 Ark. 380, 151 S. W. 269. '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. That object and purpose was to increase the sense of responsibility that the law-making power should feel to the people by establishing a power to initiate proper, and to reject improper, legislation.' "

While we said in the case of *Reeves* v. *Smith, supra,* that the acts of the people should not be thwarted by strict or technical construction, yet we know that the acts of the people have been constantly thwarted by strict and technical construction.

This is the third appeal in this case, and the majority holds that the act was not adopted because it did not receive a majority of all the votes cast on the subject. I think it clearly appears that it not only received a majority, but it received all, or practically all, of the votes cast on this question. This cannot be disputed, and will not be disputed by anyone who reads the record. But the majority says that it was attempted, without success, to prove by election officers, in 15 out of 30 precincts in the county, that a majority of the votes had been cast for the

act. The vote was by rubber stamps because the election officers refused to place the question on the ballot. When the petition was filed, the commissioners or the clerk issued a certificate of sufficiency, and the sponsors of the act of course took that as evidence that it would be placed on the ballot. After the certificate of sufficiency was issued and so near the election that they did not have time to take any action against the commissioners, another certificate was issued—a certificate of insufficiency. The sponsors were then advised to have rubber stamps made and vote for the act by that means.

Suit was brought in Faulkner chancery court, and this court held, on appeal of that case, that the chancery court did not have any jurisdiction. It was said that the sufficiency of the petition was a moot question when the suit was filed, and courts will not take and decide questions that are moot. The election had already been held, and it was not a contest of election in any sense, but it was an effort to have the act declared adopted. *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. (2d) 68.

How this court could hold that that case was a contest of elections, I am unable to see. The opinion states that it was brought by taxpayers against the county officers. Then the suit of *Beene* v. *Hutto* was brought. A demurrer was sustained to the complaint, and that case was appealed to this court. The judgment was reversed and the case remanded to be tried by the circuit court. When it was tried the second time in the circuit court, that court held that the initiative petition was insufficient, and by reason thereof the clerk's certificate of sufficiency was improperly issued and invalid; although we had held in the chancery case that this question was moot, and we have held outright that after the election, the sufficiency or insufficiency of the petition is immaterial. The court, also, held that the proposed act was never legally submitted, and any votes cast for it at said election were and are wholly ineffective, although we had held to the contrary in the chancery case.

The majority opinion does not discuss or mention the issues decided by the lower court, but passes on a question that was not passed on by the lower court, and I

think even if the lower court had passed on it, that the majority opinion is wrong. The majority opinion states that the agreed statement of facts showed that the act was adopted. They state that the agreed statement of facts filed in the case of *Hutto* v. *Rogers,* in which it was agreed that the act had been adopted, was inadmissible because it was a different case and between different parties. They cite and rely on 22 C. J. 340, and quote no other authority.

But this section in Corpus Juris relied on by the majority provides: "But if the admissions are on their face unqualified no limitation to the pending trial is implied, and they are receivable as judicial admission, in any subsequent trial of the cause between the parties. A statement connected with the party as having been made or authorized by him, is admissible in another action, even though the admission may have been withdrawn."

In the first place, this is the same action. The purpose of all the cases was to have the initiated act declared adopted. There is no other issue in either of the cases; that is, there is no other purpose stated in the petitions. In the second place, the parties were the same. The suit was brought by taxpayers in each instance against the county officers.

Section 1098 of Crawford & Moses' Digest provides: "Where the question is one of common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all."

The plaintiffs in this suit sued for themselves and all other taxpayers. The suit was against the county officers as such, and the fact that one person was county judge when the suit was begun, and a different person county judge thereafter, is immaterial. Moreover, the stipulation was signed by the attorneys who were the attorneys in all the cases. Rarely is a case tried that cannot be reversed on some technical ground. Everyone knows that the people voted on this act, and everyone knows, who has read the record, that practically all the votes cast on the question, if not all of them, were cast for the act, and

the wishes of the people should not be thwarted by unreasonable or technical construction.

I think the case should have been reversed. Mr. Justice HUMPHREYS agrees with me.

NORTON & WHEELER STAVE COMPANY *v.* WRIGHT.

4-4673

Opinion delivered May 31, 1937.

Rowell, Rowell & Dickey, for appellants.

Madrid B. Loftin, Kenneth C. Coffelt and *Wm. J. Kirby,* for appellee.

BUTLER, J. The appellee brought this suit for damages against the appellants, a partnership engaged in the business of manufacturing staves, because of an injury alleged to have been sustained by him at a time when he was in its employ. The complaint alleged negligence on the part of appellants in the failure to furnish a safe stave buggy which appellee was pulling at the time of his injury; that the buggy furnished had weak, rotten and defective standards of which appellants knew, or, by the exercise of ordinary care and proper inspection, could have known; that because of the defective condition of the standards, one of them broke while appellee was rolling the buggy loaded with staves causing the staves to fall upon him and knock him to the floor inflicting severe injuries.

The answer denied the material allegations of the complaint. On the day set for trial, the appellants filed a motion for continuance because of the absence of certain witnesses. That motion was overruled and the case was submitted to a jury upon the pleadings and testimony adduced. There was a verdict and judgment for the appellee, from which is this appeal.

The principal contention is error of the trial court in refusing to instruct a verdict for the appellants. The request for an instructed verdict was based upon the contention (1) that the testimony failed to establish actionable negligence on the part of appellants or that same was the proximate cause of any injury sustained by appellee; (2) that whatever injury was sustained, if any, was occasioned by a risk assumed by the appellee and was the result of his contributory negligence.

We agree with the appellants that the record seems to present a case where the preponderance of the evidence is against the verdict. A number of witnesses, who were present at the time of the alleged incident from which the injury is said to have grown, contradict in round terms appellee's testimony to the effect that no accident happened and the appellee was not injured as he contended. The verdict must rest on the uncorroborated testimony of the appellee. The question as to where lies the preponderance of the evidence is not for us to say. That is the

duty of the trial judge, who, by his refusal to set aside the verdict, has set his seal of approval upon the truthfulness of the testimony given by the appellee. This conclusion, under settled principles of law, we are forced to adopt. We, therefore, treat the testimony of appellee as true and view it in the light most favorable to him, and if it appears from that testimony that there is substantial evidence to support the verdict, we, too, must approve it.

The material parts of appellee's testimony are as follows: On, or about, the 28th day of February, 1935, appellee was in appellant's employ as a common laborer and was engaged in the work of hauling staves over appellants' platform from the dry kiln to the sizing or jointing saws. In this operation, stave buggies were used. These were equipped with upright standards for the purpose of holding the staves in place upon the buggies. The standards fitted in sockets at the four corners of the buggies. It was the duty of the foreman to see that the buggies were kept in proper condition and that appellee and his fellow-workmen respectively, would take charge of the first buggy they came to and use it in the work; that the platform had holes in it, and, just before appellee's injury, he had loaded a stave buggy in the manner directed by the foreman, and in the operation of transporting the staves he pulled at the front of the buggy and a fellow-workman pushed from behind. Appellee saw the holes in the floor and knew they were there, and, in rolling the buggy along, one of its wheels fell in a hole, the standard broke, the staves fell off the buggy and upon him and knocked him to the floor. He immediately examined the condition of the standard which broke and found that it had become weakened by rot and that it was worm eaten. He notified the foreman of the accident, but thought that his injury was slight so continued at his work for that day and for several days afterward. He grew worse each day, however, and finally was forced to quit work after the eighth day of March. At that time he went to bed, notified the appellants of his need for medical attention, and was examined and treated by

a physician. He finally went to a hospital in Little Rock where he remained seventeen days and had an operation for a perineal abscess. Following this operation appellee developed a hernia and at the time of the trial was still disabled.

The physician who treated appellee testified that from the history of the case it was his opinion that the falling of the staves upon appellee's back was sufficient to cause his trouble; also, that in that type of injury the injured person is able to work for several days following the accident before inflammation sets up to a degree sufficient to cause pain enough to make it necessary for such person to cease to work.

The court submitted to the jury, under proper instructions, the duty of the master to furnish reasonably safe equipment and place for the servant to do his work, and also the duty of the master as to the exercise of ordinary care to keep such place and equipment in a reasonably safe condition; also, whether the lack of due care, if any, on the part of the master was the proximate cause of the injury. We are of the opinion that the testimony was sufficient to warrant the trial court in submitting these questions to the jury.

It is true, the master is not required to furnish absolutely safe appliances, as stated in the case of *Rice & Holiman* v. *Henderson,* 183 Ark. 355, 35 S. W. (2d) 1016. However, the master is required to exercise ordinary care to provide reasonably safe equipment and to keep it in that condition and to use ordinary care in inspecting the same. This is the effect of the rule stated in the cases cited by appellants. *St. L. I. M. & S. Ry. Co.* v. *Gaines,* 46 Ark. 555; *Graysonia-Nashville Lbr. Co.* v. *Whitesell,* 100 Ark. 422, 140 S. W. 592; *K. C. S. Ry. Co.* v. *Cook,* 100 Ark. 467, 140 S. W. 579; *Long* v. *Ellis,* 183 Ark. 137, 35 S. W. (2d) 66.

The trial court properly instructed the jury on the questions of assumed risk and contributory negligence. Under the testimony narrated above it was the duty of the foreman to keep the stave buggies in proper condition and although a defect might have arisen which

could have been discovered by the appellee by proper inspection, he cannot be said, as a matter of law, to have assumed the risk by failing to make such inspection in order to ascertain the condition of the buggy. *Rice & Holiman* v. *Henderson, supra.* Appellants contend, however, that the admission by appellee that he saw the hole in the platform into which the buggy in question ran bars his recovery because the risk was open and obvious. It was the defective standard however which was the alleged defect and the hole in the platform was only the contributing cause to its breaking. It was the defect which was not obvious that was the concurring cause of appellee's injury and it cannot be said, as a matter of law, that appellee was guilty of contributory negligence in using the buggy in its defective condition, or, that he assumed the risk. *Asher* v. *Byrnes,* 101 Ark. 197, 141 S. W. 1176; *Delight Lumber Co.* v. *Henderson,* 105 Ark. 334, 150 S. W. 868.

Complaint is made of the court's refusal to give appellants' requested instruction No. 10, which, in effect, would have told the jury that if the testimony should leave the cause of the injury complained of uncertain and show that one of two or more things might have caused the injury, for one of which the master might not have been responsible, though liable for others, the jury should not speculate as to the cause of the injury and the verdict should be for the appellants. The requested instruction was abstract. If appellee was indeed, injured, there could have been no doubt as to the cause of such injury. Nor was the testimony in dispute. That on behalf of appellants was only to the effect that no such accident happened and that no injury occurred to appellee at that time, or any other.

The appellants requested, and the court refused, instruction No. 17, to the effect that standards of stave buggies are simple tools and that it was an equal duty of the servant and master to inspect them, and if appellee could have detected such defect by the exercise of ordinary care and failed to do so, he is barred from recovery. We think the instruction was properly re-

fused. Ordinarily the simplicity of a tool is but a circumstance to be considered by the jury in determining the duty resting upon the master in furnishing it and of the servant in using it. There are some tools so simple in their nature and in such common use as to preclude the idea of an inspection being necessary and their nature and use is as well known to the servant as to the master. But it cannot be said as a matter of law that stave buggies, consisting of several parts are tools of that simplicity which requires no ordinary care or inspection for maintenance in a reasonably safe condition. *McEachin* v. *Burks,* 189 Ark. 947, 75 S. W. (2d) 794.

In our opinion there was no abuse of discretion by the trial court in the overruling of appellants' motion for a continuance. This motion was based upon the absence of witnesses, Carl Sherill, Verlin Canfield, Aubrey Reed, Sam P. Sanders and J. C. Jentzsch. The granting or refusal of a motion for continuance is always within the sound discretion of a trial court and it is only in those cases where there is a manifest abuse of such discretion that this court will reverse for refusal of such motion. *Burford* v. *State,* 184 Ark. 193, 41 S. W. (2d) 751. If it be conceded that the evidence relating to due diligence offered in support of the motion for continuance is sufficient as to the witnesses Reed and Sanders, this expected testimony was cumulative to that given by other witnesses who appeared and testified for the appellants. In the statement relating to what these witnesses were expected to testify, the allegations were that they were present at the time of the accident to appellee and could have seen it had it occurred and that they would have testified that it did not occur. This is precisely the effect of other testimony introduced at the trial. The trial court, therefore, did not err in overruling the motion as to these witnesses. *Bryan* v. *State,* 179 Ark. 216, 15 S. W. (2d) 312.

As to the other witnesses, there was no testimony offered by way of affidavit or otherwise as to the efforts of appellants to procure their attendance at the trial. Therefore, no diligence was shown and the trial court

correctly overruled the motion. *Finley* v. *Clift,* 164 Ark. 190, 261 S. W. 319.

From the views expressed it follows that the judgment of the trial court is correct, and is, therefore, affirmed. To this conclusion the Chief Justice dissents on the grounds that the lower court abused its discretion in refusing a continuance and that the proof was insufficient to sustain the verdict. In this view Mr. Justice McHaney concurs.

Missouri Pacific Railroad Company et al. *v.* Boyd.

4-4672

Opinion delivered May 31, 1937.

R. E. Wiley and *Henry Donham,* for appellants.

T. W. Campbell, W. F. Denman and *Pace & Davis,* for appellees.

McHaney, J. Appellee is the widow and administratrix of the estate of Charlie Boyd who was a locomotive fireman in the employ of appellants. On February 28, 1935, while engaged in his duties as fireman on a freight train, running from Little Rock to Texarkana, Mr. Boyd fell out of the cab of the locomotive and was

killed. Appellee brought this action against appellants to recover damages for his death and alleged negligence of the head brakeman who was riding in the "dog house," or brakeman's cab, on the back of the tender of the engine, in that the latter, to avoid dust from the coal, went to the cab of the engine, and by use of the squirt hose, wet down the coal and carelessly and negligently permitted water to run down or get on the apron between the cab and the tender and on the steps, which he negligently permitted to remain thereon, and that same froze, and formed a coating of ice on the apron and steps on which the fireman slipped and fell out of the cab, causing his death. Issue was joined on the negligence laid and trial to a jury resulted in a verdict and judgment for $20,000.

For a reversal of the judgment against it, appellant argues two assignments of error: 1. That the evidence is not sufficient to support the verdict and judgment, and that, therefore, the court should have directed a verdict in its favor at its request; and 2, that the deceased assumed the risk as a matter of law.

As to the contention that the evidence is insufficient to support the verdict, it is insisted that (a) the evidence fails to establish that the brakeman negligently spilled any water on the apron or deck of the engine while wetting down the coal; or (b) that ice formed on the apron of the engine from water spilled by the brakeman; or (c) that the fireman was caused to slip and fall by reason of ice on the apron or deck of the engine.

The following facts are undisputed: Appellee's intestate was 41 years of age and had worked for appellants nineteen years. He became a fireman in 1916, was promoted to engineer in 1925, but had been demoted to fireman during the depression. About 9:20 a. m., on February 28, 1935, the train left Little Rock for Texarkana. It was rather cold the night before and, at 9 a. m., the Government thermometer at Little Rock showed a temperature of 33 degrees and at 10 a. m., 39 degrees. The cab of the engine was provided with curtains on each side to shut out the cold air. When the train had reached

Bryant, some 12 miles north of Haskell, the head brakeman decided to and did wet down the coal, to prevent the coal dust from interfering with his visibility. The fireman turned on the water for him to do so with the squirt hose, and when he had finished the former cut the water off and replaced the hose. The brakeman then resumed his place in the "dog house." As the train approached Haskell a signal was seen that a train order was to be picked up on the run, without stopping. This was to be accomplished by the telegraph operator fastening the order to a hoop and handing it up to the fireman who would stand on the deck or apron of the engine, hold on to the grabiron with his right hand, lean outward and run his left arm through the hoop, thus getting the train order. The train was running 35 or 40 miles per hour. When the train was within about 200 yards of the operator with the order, he saw the fireman plunge out of the cab head first, striking his head on an adjacent track and receiving injuries from which he shortly died. The engineer did not see the accident, but soon discovered the absence of the fireman, stopped his train and backed up to the scene of the tragedy. A number of witnesses saw the fireman fall; some of them saw him leave his seat in the cab, open the curtain on his side of the cab and slip and fall out. A number of witnesses testified that icicles were hanging from the steps and deck of the engine and one witness testified he climbed up on the steps of the engine and saw ice on the apron which indicated that the fireman had slipped, as the ice was broken. The operator thought he remembered seeing icicles on the tank. The trainmen testified that they did not see any icicles on the steps, the tank or the deck of the engine. The engineer testified there was no ice on the deck or apron of the engine. The head brakeman testified there was no ice on the apron when he wet down the coal, and that he did not spill any water on the deck and that it could not run down on the deck from the coal. Under this state of the record, was a question of fact made for the jury?

The action was brought under the Federal Employer's Liability Act and recovery is sought under the

terms thereof alone. In such cases it is incumbent on the plaintiff to establish negligence by a preponderance of the evidence, and there is no statutory presumption of negligence by the fact that deceased was killed by the operation of a train. *St. L.-S. F. Ry. Co.* v. *Smith,* 179 Ark. 1015, 19 S. W. (2d) 1102; *New Orleans & Northeastern Ry. Co.* v. *Harris,* 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167. These principles are conceded by both parties. The principal bone of contention is whether appellee proved her case by showing that the head brakeman negligently spilled water on the apron which thereafter and within about 10 or 12 minutes formed ice on which deceased slipped and fell out of the cab. The brakeman says he did not. No one says he did. Do the attendant facts and circumstances contradict him, so as to make a jury question? In the first place, he cannot be said to be a disinterested witness. He was called by appellee, it is true, but only to establish the fact that he did wet down the coal, and he is an employee, charged with having committed the negligent act. He, also, said there was no ice on the apron when he wet the coal down. The engineer said there was no ice there at any time. But several witnesses at the scene of the accident say there was ice on the steps and at least one said there was ice on the apron. Unless we disregard the testimony of these witnesses, we cannot say there is no evidence that ice was on the steps and apron. If, as the jury has found, there was ice on the steps and apron, how did it get there, if not by the act of the brakeman in wetting down the coal? It is suggested by appellant that it may have gotten there when the fireman washed out the deck of the engine and wet down the coal before leaving North Little Rock, as was his usual custom and as the engineer testified. But he, also, testified there was no ice on the apron on that trip at any time and the brakeman said there was none when he wet the coal down. We think the jury had the right to conclude from these facts and circumstances, not only that there was ice on the steps and apron of the engine, but that the ice caused the fireman to slip and fall from the cab. The proof shows he was an efficient employee,

skilled in the work he was doing, careful and prudent in the performance of his duties. As we said in the Smith case, *supra*: "There must be substantial testimony of essential facts, or facts which would justify a reasonable inference of such essential facts, on which to base a verdict, before it will be permitted to stand." Here the essential facts to be established were that water had been carelessly spilled on the apron of the engine by the head brakeman which formed ice and the decedent slipped on it and fell resulting in his death. There was substantial evidence that ice was there when decedent fell, that he slipped on the ice and these facts would justify the inference that the headbrakeman spilled the water carelessly and that this act was the proximate cause of the injury.

We do not think the rule announced in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 362, is controlling here. It was there said: "It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. And without adding to or subtracting from the rule thus stated, we announce our approval thereof."

Here, the evidence points to the fact that the employer was negligent through the act of the head brakeman, and the evidence fails to show that any one of a number of things may have brought about the injury. There is no evidence that decedent was suddenly stricken with vertigo, paralysis, or other disease; that his hand slipped from the grabiron or that he ever had hold of it; that there was a sudden lurch of the train; or that the track was uneven. On the contrary, all the evidence for appellee points to the fact that he slipped on the ice and

fell and that the ice was there by reason of the negligence of appellant.

We are also asked to say as a matter of law that the heat from the firebox of the boiler carrying 190 pounds pressure of steam would prevent the formation of ice on the apron extending back over the engine deck. Such a suggestion does seem reasonable. But the proof also shows that appellant provides foot warmers for the enginemen which would appear to be unnecessary, if the heat from the firebox would thus warm up the cab. This was a question for the jury and we are unwilling to say, as a matter of law, that ice could not be formed on the apron under the conditions stated. While the temperature when the train left Little Rock was barely above freezing and that an hour later it had continued to rise at Little Rock, there is no evidence as to what the temperature at Haskell was, except that several witnesses said it was freezing weather and that there was plenty of ice. One witness said it was cold enough to freeze the water in her car which had been drained the night before and refilled that morning, and that icicles formed from a leak in the radiator. In determining whether the evidence is sufficient to support the verdict, we must view it in the light most favorable to appellee, and, when so viewed, we cannot say there is no substantial evidence in this record to support it.

Finally, we are asked to say, as a matter of law, that appellee's intestate assumed the risk. We do not feel justified in so doing. It is so insisted because he turned on the water for the brakeman to wet down the coal with the squirt hose and turned it off when the latter had finished, and that "it is reasonable to conclude that if the water was spilled on the apron or the deck of the engine that the fireman observed it and knew it." Such a conclusion does seem reasonable, but this result does not necessarily follow. If it is not a necessary inference, it is a question of fact and not of law. This argument was, no doubt, made to the jury and it was a question of fact for its determination. The fireman had numerous duties to perform and the jury had the right to assume that

he was engaged in the performance of one or more of such duties while the brakeman was wetting down the coal. And it must be remembered that only a short period of time had elapsed between that act and the accident. The curtains to the cab were drawn, no doubt, shutting out some of the light, and we cannot say that the situation was one so open and obvious that the fireman must have known and realized the danger. As said by the Supreme Court of the United States, in *Chesapeake & O. Ry. Co.* v. *DeAtley,* 241 U. S. 310, 36 Sup. Ct. Rep. 564, 60 L. Ed. 1016, "the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Counsel for appellants cite a number of cases to support the contention that the risk was assumed as a matter of law, among them being *Missouri P. Rd. Co.* v. *Lane,* 186 Ark. 807, 56 S. W. (2d) 175, and *Missouri P. Rd. Co.* v. *Martin,* 186 Ark. 1101, 57 S. W. (2d) 1047, both of which were written by the writer of this opinion, but we cannot agree that they are controlling here. To discuss them in detail would serve no useful purpose. A comparison of the facts in those cases with the facts in the case at bar will demonstrate their inapplicability.

We find no error, and the judgment must be affirmed. It is so ordered.

GRIFFIN SMITH, C. J., and FRANK G. SMITH, J., dissent.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* HOLDER.

4-4634

Opinion delivered May 31, 1937.

[redacted]

Frederick L. Allen, J. Ford Smith and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Ross Mathis and *W. J. Dungan,* for appellee.

SMITH, J. The appellant insurance company issued to appellee on April 22, 1922, a life insurance policy carrying an annual premium of $19.14. In the same policy, in consideration of an additional annual premium of $6.42, provision was made for the payment of monthly disability benefits provided the disability occurred before the insured had attained the age of sixty years. In April, 1934, appellee made proof of total disability—a fact conceded to be true. The proof furnished in this connection showed that the disability occurred before the insured had attained the age of sixty years and appellant began making the monthly payments of disability benefits.

The routine investigation made in such cases convinced appellant that appellee did not become disabled until after she had attained age sixty. The policy pro-

vided that in the case of total disability, all premiums would be waived during the continuance of the disability. The application for the policy gave the age of applicant at 47 and contemplated only twelve payments of disability premiums of $6.42 each and the policy issued conformed to this application. No disability premiums were required after insured became sixty for the reason that no benefits were payable for disability accruing after she had attained that age. In response to the question as to the date of her birth in the application, it was answered: "Day, 14. Month, September. Year, 1874. Age last birthday, 47."

The investigation conducted by appellant led to the conclusion that appellee was born in 1872, and not in 1874 as stated, and, if this were true, she was more than sixty years old when her disability occurred and was not, therefore, entitled to the disability benefits.

Appellee was notified that payment of disability benefits would be discontinued and that payment of the premium on the life policy would be required to continue it in force. That payment was made by appellee, but under protest. She thereupon brought this suit to recover the present value of the disability benefits for the remainder of her life expectancy, and from a judgment awarding that recovery is this appeal.

There was abundant and very convincing testimony to the effect that appellee was born in 1872 and not in 1874, but this testimony is not undisputed; nor can the finding of the jury that appellee was born in 1874 be said to be without testimony legally sufficient to support that finding. Her own testimony was to that effect as was also the testimony of two ladies, friends of appellee's girlhood. These ladies gave their own ages. One stated that she was two years older than appellee, the other that she was one year younger, and both stated they had known the respective ages since early childhood.

The verdict of the jury is, therefore, conclusive of the fact that appellee became disabled before attaining the age of sixty years and it is admitted that the disability is total and permanent.

The most important and difficult question in the case is whether there has been such a repudiation of the contract as to sustain the judgment pronounced upon the theory and finding that appellant had renounced and repudiated the disability insurance contract.

We have had numerous decisions, which have not been entirely harmonious, upon the right to recover for the anticipatory breach of contracts of this character. The question has usually arisen where the fact of disability was denied. One of the latest of these is that of *United Fidelity Life Insurance Company* v. *Dempsey,* 193 Ark. 204, 98 S. W. (2d) 943, in which we quoted and reaffirmed the following statement appearing in the case of *Metropolitan Life Insurance Company* v. *McNeil,* 192 Ark. 978, 96 S. W. (2d) 476, "We have never held that mere denial of liability under contracts of indemnity, unaccompanied by other attending facts and circumstances indicating abandonment, constitutes a renunciation of such contracts by the insurer." In the McNeil case, *supra,* we also reaffirmed the holding appearing in the case of *Jefferson Standard Life Insurance Company* v. *Slaughter,* 190 Ark. 402, 79 S. W. (2d) 58, which 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."

It is not, therefore, a repudiation of the contract when the insurer admits liability, in case of disability, but denies only that the disability exists. It is attempted, however, to distinguish this case from the cases cited. The insistence is that there has been a repudiation of the contract here sued on, for the reason that if appellee does not have a present cause of action she can never have such right; that she was admittedly near sixty when her disability accrued, and she is now beyond that age, and under the express provisions of the contract she cannot recover disability benefits unless she became disabled before attaining the age of sixty, and that, therefore, the denial of this recovery is to repudiate the contract.

We have concluded, however, that there is no valid distinction between the instant case and the cases above cited. Appellant does not deny liability under the contract if appellee became disabled before attaining the age of sixty years. Its insistence is that appellee did not become disabled until after she had passed that age. Appellant began making disability payments when proof of disability was furnished, and continued to make them until the investigation, above referred to, was made, and apparently disclosed that appellee was more than sixty years of age at the time she claimed her disability began. Among other circumstances inducing this conclusion was the entry of the date of appellee's birth in a Bible belonging to a member of appellee's family, and her age as given in the application for the license under which she was married. These dates were explained to be erroneous in testimony which will not be reviewed, but which made a question of fact which was submitted to and has been passed upon by the jury. But there is nothing in the testimony to show that the insurer was not acting in entire good faith when it took the position, not that there was no contract, but, rather, that the conditions insured against had not arisen. It was said, in the case of *New York Life Ins. Co.* v. *Viglas,* 297 U. S. 672, 56 S. Ct. 615, 80 L. Ed. 971, cited in the McNeil case, *supra,* (which involved the question whether a contract for disability insurance, which was said to have been repudiated because disability was denied, that "it does not make a showing of a breach so willful and material as to make acceleration of future benefits essential to the attainment of present reparation.")

The judgment for the present value of the benefits which would have accrued during the remainder of appellee's life expectancy will be reversed, and judgment will be rendered for the benefits which had accrued to the date of trial, with interest on each delinquency from date due until date of trial, with the right to recover subsequent installments during the continuance of the disability. *United Fidelity Life Insurance Co.* v. *Dempsey,* 193 Ark. 204, 98 S. W. (2d) 943. The cause will be re-

manded with directions to enter a judgment in accordance with this opinion.

STATE EX REL. PROSECUTING ATTORNEY *v.* BALL.

Criminal 4028

Opinion delivered May 31, 1937.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, and *Claude M. Erwin, Jr.,* for appellant.

Fred M. Pickens, for appellee.

HUMPHREYS, J. On the second day of September, 1936, Ernest Ball was arrested and brought before R. L. Faulkner, a justice of the peace, within and for Village township, in Jackson county, upon a charge of malicious mischief for maliciously and wantonly killing eleven hogs, the property of Sol W. Sullins. After his arrest eleven charges instead of one were preferred against him by the prosecuting attorney and, for the purposes of trial, the eleven charges were consolidated. After hearing the evidence the justice of the peace found him guilty on each charge and entered eleven judgments of conviction against him, imposing a fine of $20, together with dam-

ages, threefold, for the hog to which the judgment related, together with costs. At the conclusion of the trial Ernest Ball asked the justice of the peace to fix the amount of an appeal bond to the circuit court which was fixed at $100 in each case. Not having paid the judgments or given the appeal bonds, on November 5 thereafter, the justice of the peace issued a commitment upon each of the aforesaid judgments ordering the constable of said Village township to demand payment thereof, and in default of payment to take the said Ernest Ball into custody and forthwith deliver him to the jailer of Jackson county, to be by him imprisoned in the manner provided by law until said fines, damages and costs were paid, or until otherwise discharged by law. The constable delivered Ernest Ball to the sheriff and ex-officio jailer under said commitments. On the seventh day of November thereafter, Ernest Ball applied to the county judge, the circuit judge and chancery judge being absent from the county, for a writ of *habeas corpus* and obtained a writ directed to the sheriff and ex-officio jailer to bring Ernest Ball before him and to state by what authority he was being held in jail. The sheriff and ex-officio jailer produced Ernest Ball on the return day of the writ and filed a response alleging that he was restraining him under eleven warrants of commitment issued upon the judgments of conviction of eleven misdemeanors, by a court of competent jurisdiction which commitments were regular upon their face. The commitments were attached to the response.

Upon a hearing of the matter, the county judge held that the eleven warrants of commitment were void for want, in the said justice court, of jurisdiction of the person of the said Ernest Ball; and ordered that the said Ernest Ball be discharged from custody under said warrants of commitment and held under bail in the amount of $1,000 to await trial anew before said justice for the crimes charged against him.

The prosecuting attorney then applied to the circuit judge in vacation and again to the circuit court in term time for a writ of certiorari to bring up and quash the

proceedings before the county judge. Upon hearing, the circuit court denied the writ, from which is this appeal.

A summing up of the proceedings in this case, gleaned from the face of the record, is that Ernest Ball was tried for eleven separate misdemeanors before a justice of the peace who had jurisdiction of the crimes charged, as well as the person of Ernest Ball, and was committed to jail for failure to pay the fines after his time to appeal the cases had expired. Instead of perfecting his appeals to the circuit court, he applied for, and obtained, a writ of *habeas corpus* from the county judge to obtain his release. The county judge had no jurisdiction to inquire into or to correct errors committed in the trial of the cases before the justice of the peace, but was limited to an inquiry into the validity of the warrants of commitment and the jurisdiction of the court that issued them.

State, ex rel. Arkansas Industrial Co., v. *Neel,* 48 Ark. 283, 3 S. W. 631; *State* v. *Martineau,* 149 Ark. 237, 232 S. W. 609; Ex Parte *O'Neal,* 191 Ark. 696, 87 S. W. (2d) 401. The justice of the peace had jurisdiction to try the crimes charged against Ernest Ball and jurisdiction over his person as above stated. He had been brought into court on a warrant on the charge of maliciously killing eleven hogs and eleven charges instead of one were preferred against him. The warrants of commitment were regular on their face. The county judge exceeded his jurisdiction in discharging Ernest Ball and requiring him to give bond to appear before the justice of the peace for a new trial of the cases, which action on the part of the county judge was and is subject to review by the circuit court on writ of certiorari. Ex Parte *Dame,* 162 Ark. 382, 259 S. W. 754. The circuit court should have entertained the application of the prosecuting attorney for a writ of certiorari, and should have quashed the *habeas corpus* proceedings before the county court.

On account of the error indicated, the judgment is reversed, and the cause is remanded with instructions to the circuit court to quash the proceedings before the county judge.

STANTON *v.* ARKANSAS DEMOCRAT COMPANY.

4-4674

Opinion delivered May 31, 1937.

Coulter & Dodds, for appellant.

Carmichael & Hendricks, for appellee.

SMITH, J. Appellant, a minor, who sues by his mother as his next friend, was a carrier engaged in delivering newspapers for the Arkansas Democrat Company —a corporation—the publisher of an afternoon newspaper. He alleged in his complaint that he requested Mr. Casey, the circulation manager, "to give him a statement to a certain subscriber of the Democrat instructing said subscriber that this plaintiff was entitled to collect a portion of a bill due by said subscriber," and he was directed by Mr. Casey to apply to W. T. Crutchfield, another employee of the corporation, for the statement. He went to Crutchfield, "who was in charge of the carriers of said newspaper and requested the aforesaid statement. Thereupon the plaintiff was ordered out of the place by defendant Crutchfield. Plaintiff did not leave immediately, and defendant Crutchfield attacked him," causing him to suffer serious and painful injuries, to compensate which he sued both Crutchfield and the corporation. Separate answers were filed denying all the allegations of the complaint.

At the trial of the cause the jury returned the following verdict: "We, the jury, find for the plaintiff against the Arkansas Democrat, and assess his damages at $500.00." The verdict, signed by the foreman, made no reference whatever to Crutchfield, but a judgment was spread upon the records of the court by the clerk thereof on the day the verdict was returned by the jury, exonerating the defendant, Crutchfield.

On the following day there was filed a "Motion of Defendant, Arkansas Democrat Company, to set aside judgment against it and enter judgment in its favor," and on the same day on which this motion was filed the court made an order setting this judgment aside. In this order, the presiding judge made the finding that at the time of the return of the verdict it was his conception of the law that the master could not be and was not liable unless the servant was also liable. This order contains the further recital that "The court finds that the clerk inadvertently entered judgment against defendant, Arkansas Democrat Company, and a judgment in favor of the defendant, W. T. Crutchfield, and the court finds that

the entry of said judgment was premature and inadvertently done, and should be set aside, which is accordingly done." It was then ordered that the cause of action be dismissed as against both defendants. A motion for a new trial was thereafter filed by plaintiff in which this action of and order by the court is questioned.

In the case of *Mississippi River Fuel Corporation* v. *Senn,* 184 Ark. 554, 43 S. W. (2d) 255, we quoted with approval the following statement of the law appearing in the case of *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468: " 'Where a recovery is sought in an action against a principal and his agent based upon the act or omission of the agent which the principal did not direct and in which he did not participate and for which his responsibility is simply that cast upon him by law by reason of his relationship to the agent, a judgment in favor of and exonerating the agent generally *ex proprio vigore* relieves the principal of responsibility and may be availed of by the principal for that purpose."

While this statement of the law was recognized as being correct in the Senn case, *supra,* it was there said that it could not be applied in all cases, and it was not there applied. In that case the master, a corporation, was held liable to the injured servant, whereas the fellow-servant, whose negligence had occasioned the injury, was exonerated by the verdict of the jury. This was held not to be beyond the power of the jury, for the reason that, while the contributory negligence of the injured servant would constitute a complete defense to the suit against the fellow-servant, such would not be true of the suit as against the master, for the reason that the doctrine of comparative negligence applied as against the master, if a corporation, and that while the injured servant might not recover against his fellow-servant, if his own negligence contributed to his injury, such negligence would not defeat a recovery against the master, but would operate only to reduce the recovery in proportion to the amount of negligence attributable to the injured employee. Section 7145, Crawford & Moses' Digest. For the reason just stated the verdict and the judgment thereon in the Senn case, *supra,* was affirmed although a

verdict had been returned in favor of the servant whose negligence had been the proximate cause of the injury.

It is not contended in the instant case that there was either allegation or proof to defeat the operation of the rule announced in the Risher case, *supra*. The insistence is that there has been no exoneration of Crutchfield, the servant; that the verdict being silent as to Crutchfield the case stands as if he had not been sued, inasmuch as the defendant corporation did not ask that the jury make finding and return as to Crutchfield's liability.

The cases cited by opposing counsel do not appear to be harmonious on this subject; but we do not review them for the reason that this case may be, and we think should be, disposed of upon another ground later to be herein discussed.

Counsel for appellant insist that inasmuch as a judgment had been entered upon the verdict the court thereafter had the jurisdiction only to grant a new trial, and did not have jurisdiction to enter judgment *non obstante veredicto* after having entered judgment on the verdict. The case of *Oil Fields Corporation* v. *Cubage,* 180 Ark. 1018, 24 S. W. (2d) 328, is cited in support of that contention. But there is a very material, and we think controlling, distinction between that case and this. There, as the opinion recites, a final judgment had been entered, evidently under the direction or with the approval of the court. The opinion there recites that "After the verdict was returned and judgment entered upon it, appellant filed a motion for judgment in its favor against appellees, notwithstanding the verdict." That relief was denied, and the appeal was from that order. There a final judgment had been rendered and entered of record. Not so here. The court in the instant case reserved the question whether judgment should be pronounced upon the verdict, and made the express finding "that the entry of said judgment was premature and inadvertently done and should be set aside." There was, therefore, no judgment here.

The clerk is not the keeper of the conscience of the court, nor is it his province to say what action the court should take in a particular case. It is his function to

make a record of what the court orders and adjudges. The statute provides that "The judgment must be entered on the order book and specify clearly the relief granted or other determination of the action." Section 6276, Crawford & Moses' Digest. It is not contended that the presiding judge made any order on his docket or elsewhere which directed the clerk to spread the judgment upon the records of the court. Section 2100, Crawford & Moses' Digest, reads as follows: "Full entries of the orders and proceedings of all courts of record of each day shall be read in open court on the morning of the succeeding day, except on the last day of the term, when the minutes shall be read and signed at the rising of the court."

This section was held to be directory in the case of *Fernwood Mining Co.* v. *Pluna,* 136 Ark. 107, 205 S. W. 822, in that judgments entered of record would not be void because of the failure of the presiding judge to sign the record. But it does contemplate that the judgments entered do not become the pronouncements of the court until they have been approved by the court. Otherwise, why read them to the court? It is a matter of common knowledge that some judges permit the clerks of their courts to enter judgments, which are subject to their approval, while other judges require the submission of precedents for approval before their entry. But in any event and in all cases it is the presiding judge, and not the clerk, who determines whether any judgment has been rendered, and what that judgment was.

There is no uncertainty as to what happened here. The court found that he had rendered no judgment, but had reserved judgment, and that the action of the clerk in anticipating what that judgment would be was premature, and that the entry of the anticipated judgment was an inadvertence of the clerk. There would appear to be no question about the judge having this power if we accord him control of his own action, free from the supervision of the clerk of his court. If it were true that the judgment entered by the clerk had passed beyond the control of the court, then it is true also that it was adjudged that there was no liability on the part of

Crutchfield to the plaintiff, for such is the recital of the judgment, and the doctrine of the Risher case, *supra,* would apply.

It is not questioned that the court had power to grant a new trial; but it is insisted that he could grant no other relief and that he had lost jurisdiction to render judgment for the defendant corporation notwithstanding the verdict.

But that view does not comport with § 6272, Crawford & Moses' Digest: "Where the verdict is special, or where there has been a special finding on particular questions of fact, or where the court has ordered the case to be reserved, it shall order what judgment shall be entered."

This section appears under the 6th subdivision of the chapter on Judgments and Decrees in Crawford & Moses' Digest, under the subhead: "*Upon the verdict of a jury.*" It directs the action of the court under the conditions there stated where the trial had proceeded to a verdict.

Here a verdict was returned which did not mention the name of one of the defendants who had been sued, had answered and had testified in the case. The third condition to which this section has application is "where the court has ordered the case to be reserved." The court's order recites that judgment had been reserved. If so, what shall or may the presiding judge then do? Unquestionably, he may grant a new trial, but the statute does not limit his jurisdiction to granting that relief. On the contrary, it provides that the judge "shall order what judgment shall be entered." The judge exercised that power and performed that function by ordering a judgment to be entered in favor of both defendants. He may have done this erroneously. The plaintiff may have made a case which should have been submitted to the jury, but the court had the jurisdiction to determine whether he had done so.

In the case of *Scharff Distilling Co.* v. *Dennis,* 113 Ark. 221, 168 S. W. 141, a verdict was returned in favor of the plaintiff, which the court set aside, and thereafter entered judgment for the defendant, from which action

an appeal was taken to this court. In the opinion upon the appeal before us it was said that "The ruling of the trial court, however, in not entering a judgment in accordance with the verdict and in setting aside the verdict, was tantamount to reserving the cause for future consideration under the provision of § 6242 of Kirby's Digest." This section, hereinabove quoted, is § 6276 of Crawford & Moses' Digest. It was not there determined whether this section of the statute authorized the entry of a judgment *non obstante veredicto,* that question being reserved, it being there said: "We need not determine whether the court, under the latter section, would be authorized to enter a judgment *non obstanto veredicto,* for if there could be any warrant for such a judgment, not based solely upon matters appearing in the pleadings or as disclosed by the record proper, the testimony justifying such verdict would have to be undisputed so that the court might declare as a matter of law that the party in whose favor the judgment was entered was entitled to it, notwithstanding the verdict in favor of the other party." But the testimony in that case was not undisputed, and for that reason it was held improper to direct a verdict in favor of the party against whom a verdict had been rendered by the jury.

The distinction between that case and this is that there a bill of exceptions was filed, from which it appeared that the testimony was not undisputed. Here no bill of exceptions was filed, and in its absence we must presume that the testimony, or the lack of it, warranted the court in declaring, as a matter of law, that the plaintiff was not entitled to recover judgment against either defendant.

The question there reserved is now decided, and we hold that after a verdict has been returned, but before the entry of judgment thereon, the court has the jurisdiction to determine whether judgment shall be entered, and, if so, what judgment, and if it be found by the court before the entry of judgment that no testimony has been offered to sustain the verdict, and that no cause of action has been shown to exist, the court has the jurisdiction to so declare and to direct the judgment which shall be

entered. If it is thought that the court has acted erroneously a bill of exceptions should be filed, which would afford us on the appeal the opportunity to pass upon the question whether, under the testimony, a verdict should have been directed in favor of the party for whom judgment was rendered.

It is and should be the settled policy of the courts to end litigation as soon as may be, and the jurisdiction of the court to direct a verdict against a litigant who does not offer testimony sufficient to support his cause of action is well established and its exercise has been many times approved.

There is no bill of exceptions in the case, and in its absence it will be conclusively presumed that the testimony, or the lack of it, supported the action of the court. This is an elementary rule of practice, announced in innumerable cases. One of the principal purposes of a bill of exceptions is to bring upon the record the testimony in the case, and we cannot say that the trial court misconceived the effect of the testimony where it has not been preserved. If, therefore, the trial court was of opinion that there was no testimony to support a verdict against either defendant, it was the duty of the court to so direct the jury. The practice in this respect is equally as well settled. This, it must be presumed, is what the court, in legal effect, did. If there was no testimony upon which the servant could be held liable, the court had the jurisdiction to find, both as a matter of fact and as a matter of law, that the master was not liable, inasmuch as there is no liability asserted in this case except that growing out of the rule of *respondeat superior,* and there is no question of comparative negligence in the case. There being no bill of exceptions, we have before us the question only of the jurisdiction of the court to enter the judgment appealed from. We think the court had that jurisdiction, and the judgment is, therefore, affirmed.

MEHAFFY and BUTLER, JJ., dissent.

MEHAFFY, J. (dissenting). Mr. Justice Butler and the writer agree that the lower court had a right to set aside the verdict and grant a new trial, but we do not agree with the majority in holding that the judge had a

right to constitute himself the trier of the facts and enter judgment against the plaintiff.

The majority opinion, in the first place, is based on the idea that the jury found that the employee was not guilty of negligence. The jury did not find any such thing. The jury returned a verdict against the Democrat Company without mentioning Crutchfield, the employee. How anybody can say this was a finding by the jury, that Crutchfield was not guilty of negligence, I am unable to see. The jury could not have found against the Democrat Company without finding that Crutchfield was guilty of negligence. There would be just as much reason in holding that, since the verdict against the Democrat Company was necessarily a finding that Crutchfield was guilty of negligence, in approving the verdict against the Democrat Company and entering judgment thereon, and entering judgment against Crutchfield because the verdict of the jury had necessarily found that he was guilty of negligence, as there would be to hold that the verdict in favor of Crutchfield exonerated the master, even if there had been a verdict in favor of Crutchfield.

The entire argument of the majority is based upon the erroneous theory that there was a verdict in favor of Crutchfield.

The majority opinion calls attention first to the case of *Mississippi River Fuel Corporation* v. *Senn,* 184 Ark. 554, 45 S. W. (2d) 255, and states that we quoted with approval a statement of the law appearing in *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468, as follows: "Where a recovery is sought in an action against a principal and his agent based upon the act or omission of the agent which the principal did not direct and in which he did not participate and for which his responsibility is simply that cast upon him by law by reason of his relationship to the agent, a judgment in favor of and exonerating the agent generally *ex proprio vigore* relieves the principal of responsibility and may be availed of by the principal for that purpose."

That statement of the law, in *Patterson* v. *Risher,* is a quotation from the syllabus in the case of *Bradley* v. *Rosenthal*, 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171. In the California case, the jury returned a verdict in favor of the servant. The court said that the principal could be no more guilty by reason of the act of his agent, than if he had committed the act in person, and the party who was alone charged to have committed the act in person, was conclusively adjudged not guilty.

Finding that the servant or agent is not guilty is a very different thing from failure of the jury to act at all as to the negligence of the servant, as was done in this case. The California court did not hold that a verdict against the master, without finding as to the servant at all, was a finding in favor of the servant, and exonerated the master.

We have never held, until the opinion in this case, that failure to find a verdict either for or against the servant exonerated the master, and I know of no court that has so held. Such holding, in my judgment, is contrary to reason, is not supported by authority, and cannot be justified.

The majority opinion says: "It is not contended in the instant case that there was either allegation or proof to defeat the operation of the rule announced in the Risher case, *supra.*"

The rule announced in the Risher case was based *on the verdict of the jury exonerating the servant.* The majority opinion says that it does not review the authorities cited by opposing counsel because this case should be disposed of upon another ground. It said that the trial court found that he had reserved judgment, and the act of the clerk was premature in entering judgment. That may be true, and it may be that no judgment should have been rendered, but that is not the question in this case.

It is also said in the majority opinion that it is not questioned that the court had power to grant a new trial, but it is insisted that he could grant no other relief, and the majority opinion adds: "But that view does not

comport with § 6272 of Crawford & Moses' Digest." That section of the digest reads: "Where the verdict is special, or where there has been a special finding on a particular question of fact, or where the court has ordered the case to be reserved, it shall order what judgment shall be rendered."

Certainly the majority does not think that this section would abrogate the Constitution and authorize the court to find on the facts and enter judgment according to his findings.

The section following the one just quoted, reads: "Where upon the statements in the pleading, one party is entitled by law to judgment in his favor, judgment shall be so entered by the court, though a verdict has been found against such party." Section 6273, Crawford & Moses' Digest.

That clearly indicates that the judge has no authority to enter a judgment notwithstanding the verdict in any case except where the pleadings themselves show conclusively that one of the parties is entitled to judgment as a matter of law.

Section 6272 of Crawford & Moses' Digest quoted by the majority, in my opinion, has no more application here than the multiplication table.

The court, in the instant case, did not order the case to be reserved. The trial court stated: 'There was no verdict against the defendant, W. T. Crutchfield, and it appearing to the Court from the allegations of the complaint and the testimony introduced in the case, that the relation between the Arkansas Democrat Company and W. T. Crutchfield was that of master and servant, and that the Arkansas Democrat Company was liable for the acts of the said W. T. Crutchfield, because he was acting in a representative capacity for the Arkansas Democrat Company, the court finds there can be no recovery from the Arkansas Democrat Company independent of recovery from the defendant, W. T. Crutchfield, and, disregarding the verdict of the jury,

"It is considered, ordered and adjudged by the court that the plaintiff, Mrs. Fannette Stanton, as mother and

next friend of Arthur Stanton, a minor, recover nothing from either the defendant, Arkansas Democrat Company, or the defendant, W. T. Crutchfield upon her complaint herein."

The court says there can be no recovery from the Arkansas Democrat independent of recovery from the defendant, Crutchfield. Of course, this statement is erroneous, because suit might have been prosecuted against the Democrat Company alone, and judgment have been obtained. In this case, however, the servant or agent was made a party, and the jury, for some reason that does not appear, failed to return a verdict in the Crutchfield case. The court should have sent the jury back with instructions to find a verdict as to Crutchfield.

The majority opinion then discusses the case of *Scharff Distilling Co.* v. *Dennis,* 113 Ark. 221, 168 S. W. 141, but there is no way to get around that opinion. In that case there was a judgment in favor of the plaintiff. The court said, "if there could be any warrant for such a judgment, not based solely upon matters appearing in the pleading or as disclosed by the record proper, the testimony justifying such verdict would have to be undisputed so that the court might declare as matter of law that the party in whose favor the judgment was entered was entitled to it, notwithstanding the verdict in favor of the other party." The court further said: "Therefore, without deciding whether a judgment *non obstante veredicto* could be entered upon undisputed evidence, it suffices to say that the evidence developed at the trial of this cause is not uncontradicted and did not justify the court in declaring as matter of law that the appellee was entitled to recover." This opinion expresses very great doubt as to whether a judgment notwithstanding the verdict can ever be granted except on matters appearing in the pleadings and record.

The majority opinion says that the distinction between the above case and the instant case is that a bill of exceptions was filed in the above case, and none was filed in this case. No bill of exceptions was necessary. The trial judge made it clear that it was his opinion that

there could be no verdict against the Democrat Company where there was none against Crutchfield, and for that reason alone set aside the judgment, and entered judgment in favor of the Democrat Company.

No one who reads the statement of the court in this case can have any doubt that the court granted judgment against the plaintiff in favor of the Democrat Company solely on the ground that there was no verdict returned against Crutchfield.

In a Montana case, the verdict of the jury was silent as to the employee, but found against the employer. The court said: "The conclusions reached by jurors are some-time inexplicable. Often they arbitrarily find against one party and in favor of another without any apparent reason; but if the evidence justifies the verdict as to the party held, there is no reason why it should not be good as to him, notwithstanding there is no finding as to the other. The failure of the jury to find as to Wallace should be regarded as no finding upon the issues as to him at all. So, here, McPherson has not been acquitted of negligence, but the case as to him stands as though it had not been tried. This being true, it also follows that the failure of the jury to find as to McPherson cannot be seriously considered in the light of an irregularity in the proceedings, by which the Raven Company was prevented from having a fair trial. Even if it was an irregularity in the sense of the statute on new trials, we do not see how the company was prejudiced by it; the company still has whatever right of action it ever had against McPherson. It never did have any absolute right to his presence as a defendant in this particular case. That was optional with the plaintiff." *Melzner* v. *Raven Copper Co.*, 47 Mont. 351, 132 Pac. 552.

In a case decided by the Supreme Court of Appeals of Virginia, there was no finding against the servant, but a finding against the master, and the court said, after stating the facts:

"Such being the situation, it seems plain that the verdict cannot be properly construed as finding that the servant clerk was not guilty of negligence. Hence the

rule in question can have no application to the instant case.

"For the reasons above indicated, we are of opinion that the trial court erred in setting aside the aforesaid verdict against the defendant partners and in dismissing the case without executing the writ of inquiry as against the defendant servant; and the case will be reversed and final judgment will, under the statute (Code, § 6365), be rendered for the plaintiff against the defendants, Shannon & Florence, for $5,000, the amount of the verdict, with interest thereon from the 10th day of February, 1922 (the date of the verdict), until paid, and costs in the trial court and in this court, as the facts were fully developed on the trial which has been had, and are thus such before us as to enable us to attain the end of justice by rendering such final judgment." *Dalby* v. *Shannon & Florence,* 124 S. E. 186.

"Although there was no verdict against the motorman, it is not seen how it can be successfully contended that he was not guilty of negligence in running his car into the car on which the plaintiff was riding. If the company had been sued alone, the jury would have been warranted in finding the company guilty of negligence, and in returning a verdict in favor of the plaintiff on that finding. The fact that the jury failed to return a verdict as to the defendant motorman is no reason why a verdict against the company, based on a finding of the jury that the motorman was guilty of negligence, should not stand. The failure of the jury to return a verdict against the motorman cannot be used as a reason for setting aside the judgment rendered against the railroad company." *Whitesell* v. *Joplin & P. Ry. Co.,* 115 Kan. 53, 222 Pac. 133.

A judgment notwithstanding the verdict must be based solely upon matters appearing in the record. It cannot be granted except on the face of the pleadings. 33 C. J. 1183. The proper remedy for a wrong or mistaken verdict is by motion for a new trial, and not by motion for a judgment notwithstanding the verdict. 33 C. J. 1184.

Certainly this minor who was injured, had a right to a trial by jury, and should not be deprived of that right because the jury failed to find any verdict as to the servant. The court probably should have sent the jury back with instructions to find a verdict as to Crutchfield, but he certainly had no authority under the law to direct a verdict against the plaintiff. No case decided by this court can be found, except the majority opinion in this case, that justifies such a holding, and I have been unable to find any case in other courts that would justify the conclusion reached by the majority in this case.

The plaintiff had a right to sue the master without making the servant a party, and if he had done so, judgment against the master would have been sustained. The plaintiff could, at any time, have dismissed or taken a nonsuit as to Crutchfield, and proceeded against the Democrat Company, and certainly when there was no verdict at all by the jury as to Crutchfield, there is no justification in holding that the master was exonerated.

I think the judgment should be reversed, and the cause remanded for a new trial. Mr. Justice BUTLER agrees with me in the conclusions reached.

CLAXTON *v.* MARTIN.

4-4661

Opinion delivered May 31, 1937.

Oscar E. Ellis, for appellant.

Northcutt & Northcutt, for appellees.

GRIFFIN SMITH, C. J. On September 18, 1931, E. L. Cook, as Special Deputy Commissioner of Finance of the state of Missouri, in charge of the insolvent Bank of Moody, filed complaint in the Fulton chancery court, alleging that B. T. Claxton and Mary E. Claxton, in 1921, became indebted to J. F. Divers in the sum of $460, evidenced by a note secured by a mortgage on 80 acres of land, and that the Bank of Moody, in due course, became the owner of the note and mortgage. The prayer was for judgment and foreclosure. Answer was filed on April 12, 1932, but on October 31, 1931, six months before answer was filed, the court gave judgment on the note and decreed that the mortgaged property be foreclosed. On October 10, 1933, appellant filed an intervention, alleging that on November 9, 1929, he purchased the property described in the mortgage, paying B. T. and Mary E. Claxton $500 therefor. He further alleged that at the time the transaction was consummated the mortgage executed in favor of Divers was more than five years old; that no credits had been indorsed on the record, and, therefore, the right to foreclose had been lost. He alleged, in an amendment to his intervention, that on March 26, 1934, he acquired title to the property by virtue of a redemption deed issued by the State Land Commissioner,

such deed having been issued under the provisions of act No. 2, approved January 8, 1934.

On October 13, 1936, R. M. Martin and H. O. Ray filed an answer to the intervention of appellant, alleging that, under authority of the Bank Commissioner for Missouri, the Bank of Moody sold the Divers note and mortgage at public auction, and that they became owners through purchase, such sale having been made August 4, 1934, and confirmed by the Commissioner ten days later. The court treated this pleading as a motion by Martin and Ray to be made parties to the suit.

For reversal of the decree appellant contends (1) that the chancellor erred in not holding that title was conveyed by the redemption deed; (2) that appellant should have prevailed by reason of the deed from B. T. and Mary E. Claxton, and (3) that appellees did not have an assignment of the judgment, and were not proper parties.

(1, 2) The chancellor was right in holding that the redemption deed did not convey title to appellant, unless it can be said that the quitclaim deed from B. T. and Mary E. Claxton to appellant was effective. This document was filed of record October 13, 1931, more than a month after the foreclosure suit of the Special Bank Commissioner had been filed, and prior to appellant's intervention. In fact, the deed was recorded the same day the court rendered judgment and decree on the note and foreclosure, and appellant's intervention came two years later.

Appellant testified that he bought the land from his father, and that the purchase price was paid by a transfer of livestock. At the time the transaction is alleged to have occurred, appellant was between fifteen and sixteen years of age, and was living with his parents. Whether Mary E. Claxton signed the quitclaim deed of November 9, 1929, was an issue before the court. The chancellor asked Mrs. Claxton to sign her name in his presence, and upon comparing the signature appearing on the quitclaim deed with the signature submitted by the witness, he ruled that Mrs. Claxton did not sign the deed, and that the property involved was the homestead

of B. T. and Mary E. Claxton. B. T. Claxton, in response to the question, "Who signed your wife's name to that" (referring to the deed), replied: "She didn't, and I don't think I did." He stated, however, that each acknowledged it.

Appellant's testimony was somewhat vague. He first said that his mother signed the deed, but later admitted he did not know her signature, nor could he identify his father's handwriting. Asked if he knew anything about his father's suit, he said that he did not, but admitted that after it had been filed he knew it was pending. Whether this testimony related to the Cook foreclosure, or to some other action by the elder Claxton, is not clear. Appellant did not know who took acknowledgments to the deed, and had not seen it until after it had been recorded. He did not, personally, have the deed recorded, and "guessed" that his father did.

Since the deed was not recorded until the day judgment was rendered on Cook's complaint, and in the absence of information as to the adverse claim, no duty rested upon the plaintiff to make young Claxton a party to the suit. B. T. Claxton testified in the foreclosure suit, and the record does not disclose that the deed to appellant was an issue at that time.

In view of these circumstances, and a preponderance of the evidence, the chancellor was correct in finding that the attempted conveyance was not binding upon Cook, the original plaintiff, and that there were no outstanding equities on October 13, 1931, when judgment was rendered and foreclosure of the mortgage was decreed. *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, 134 Am. St. Rep. 78. No appeal was taken from the judgment of October 13, 1931, and even though, as contended, the statute of limitations might have been interposed, it is now too late to complain.

The redemption deed to appellant conveyed only such interest as his father had in the property, and that interest had been foreclosed. Consequently, appellant took nothing thereby.

(3) Appellant's objection to appellees' motion and intervention is without merit for the reason that he had no interest in the property.

Affirmed.

MORRIS *v.* DOSCH.

4-4677

Opinion delivered June 7, 1937.

Owens & Ehrman, for appellants.

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

MCHANEY, J. Appellees, sisters of the late Sam Louchheim, and beneficiaries under his will, brought this action against appellants, executors and trustees under said will, to enjoin them from (1) canceling and marking paid two promissory notes, the property of said estate, one executed by Harry Lasker in the principal sum of $6,000, and one by Henry Bullock in the principal sum of $500; (2) also to compel appellants to pay inheritance taxes out of the corpus of the estate; and (3) to enjoin them from amortizing the premium paid for Government bonds over the lifetime of the bonds and deducting this amortization fee from the amount of interest yielded by such bonds. Appellants demurred to the complaint and the court sustained the demurrer as to item (1) above

and overruled it as to items (2) and (3). Both parties declined to plead further, and the court entered a decree accordingly, from which there is an appeal and a cross-appeal.

So much of the will, which is in the handwriting of the testator, as is deemed necessary to a determination of the issues will be set out, and there is no question raised as to its validity or as to its form. After impressing upon the trustees of his will that "I want my requests carried out to the letter" and directing the payment of his debts, etc., he said: "My estate consists of about $90,000 as follows:" then follows a list of assets including "cash in vault $59,000 * * * mortgage, Henry Bullock, $500; * * * Harry Lasker note, $6,000." The will then provides: "I want everything I own turned into cash, except the government bonds, then after paying expenses & what I owe, I want nothing but government bonds bought for same, 'only guaranteed bonds by the government' then I want all the interest money from said bonds paid to Mrs. Harry Lasker she to divide same with my sister Mrs. Wm. Dosch, in case either one should pass on, the one that is still living shall have the entire income for her lifetime, 'interest only' as I make disposition of principle after the death of my two sisters, but before all cash is turned into bonds, I want the following attended to."

He then makes certain specific bequests which are to be paid before bonds are purchased and the will then provides: "After the death of my two sisters I want my estate divided as follows:" Then follows a long list of substantial bequests to churches, orphanages, hospitals, charitable institutions and individuals. Included in this list are: "Harry Lasker (note I hold against him for $6,000. Same was for $13,000, 1st mtg. bonds I sold him for $7,000 (on 8th & Brdwy. property) this note I leave to Harry, mark same paid;" "Mtg. note I hold $500 against Henry Bullock Route 2, No. L. R. give this note to him or his heirs and marked paid a gift from me." The will concluded as follows: "After all expenses, burial, Inheritance tax, etc., are paid I want the balance

of my Estate to be given to charitable Institutions here in Little Rock, Ark. I want included in this, one Colored and they are to share equally with the others, I want, Harry Lasker, Jr., Emmet Morris and the Rabbi at Cong. B'Nae Israel to pass an OK all Institutions. I want same equally divided among those you three select, if any of my Trustees' or Executors should die and if any cannot serve I want the remaining two to select a third, I always want the Rabbi of Cong. B'Nai Israel to act, no matter who he may be.

"I appoint Harry Lasker, Jr., Emmet Morris & Rabbi Sanders to act as Executors & Trustees and if Dr. Sanders should leave here I want the Rabbi who succeeds him to act—

"Reason I did not leave more to my nephew was because Harry will have plenty anyway, I want no one to go in m*orn*ing for me."

The first question presented is the proper disposition of the Lasker and Bullock notes. We think the court correctly held that the appellants should cancel and surrender these notes. We see no real inconsistency in the will in this regard, or rather whatever inconsistency there is is more apparent than real. While the testator does express the want or desire to have "everything I own turned into cash," the language used in connection with the disposition of these notes, in the clause disposing of his property after the death of his sisters, shows conclusively that it was not the testator's intention that these notes should be converted into cash. With reference to the Lasker note, he said, "this note I leave to Harry, mark same paid." As to the Bullock note, he said: "give this note to him or his heirs and marked paid a gift from me." Now, if these notes should be sold to third persons to be converted into cash, then they could not be delivered to the makers marked paid, nor could the Lasker note be left to Harry and the Bullock note would not be a gift from the testator. The manifest intention of the testator was that these notes should be canceled and delivered to the makers by the trustees as a gift from him. As said in *Union National Bank* v. *Kirby,* 189 Ark. 369, 72 S. W.

(2d) 229, "* * * the general rule is that the paramount principle in the construction of wills is that the general intention of the testator, if not in contravention of public policy or of some rule of law, shall control; and such intention is to be ascertained from the language used as it appears from a consideration of the entire instrument. Words and sentences used are to be construed in their ordinary sense so as to arrive at the real intention of the testator. *Witten* v. *Wegman,* 182 Ark. 62, 30 S. W. (2d) 834; *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. (2d) 349; *First National Bank* v. *Marre,* 183 Ark. 699, 38 S. W. (2d) 14; *Lavenue* v. *Lewis,* 185 Ark. 159, 46 S. W. (2d) 649."

As to the inheritance taxes, the court directed appellants to pay such tax out of the corpus of the estate. In this we think the court was correct. It is in exact compliance with the will. It says: "After all expenses, burial, inheritance tax, etc., are paid, I want," etc., as copied above. The obligation to pay these taxes and expenses was not placed on appellees further than it might reduce the income to them from the estate. The direction comes in a sentence referring to expenses that came shortly following the death of the testator, such as burial, court costs, etc. The payment of the inheritance taxes could not be postponed until after the death of appellees and he had the right to direct its payment from the body of his estate.

We are also of the opinion that the trial court correctly held that the appellants had no power or authority to amortize the premiums paid in the purchase of Government bonds and deduct same from interest moneys accruing thereon. The testator was directing his funds to be invested in the safest securities, a foresight that inured to the benefit of the life *cestui* and the remaindermen. Just how much benefit to each would be difficult if not impossible to apportion. Moreover, the testator said in his will: "I want all the interest money from said bonds paid to Mrs. Harry Lasker, she to divide same with my sister, Mrs. Wm. Dosch, in case either one should pass on, the one that is still living shall have the entire income for her lifetime * * *." What he meant by "all

the interest money" and "the entire income" needs no explanation or construction. He meant they should have "all the interest money" and "the entire income" from the bonds, no matter whether bought at a premium or a discount. Suppose appellants have paid a premium for the bonds, and, before maturity, the life *cestui* die, and the bonds at that time are sold at a profit over the purchase price, the remaindermen get all the benefit. But whether a profit or a loss, the remaindermen can take only what the will gives them at the time and in the manner provided therein.

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

KING *v.* STATE.

Crim. 4033

Opinion delivered June 7, 1937.

J. R. Booker, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

MEHAFFY, J. The appellant, Dave King, was indicted, tried and convicted of receiving stolen property. W. H. Coleman testified that he lived in Pulaski county and that on August 25, 1936, a watch was taken from his home. His house was broken into and a 21-jewel white-gold Illi-

nois watch, worth $45, and a new straw hat were stolen. The watch originally cost about $100. He had had it for ten or twelve years, and it was in good condition when it was taken. He knows nothing about the appellant having the watch in his possession.

H. R. Peterson testified that he was a detective of the Little Rock police department and arrested Dave King; he had a stolen watch. Witness said he and other officers had the thief, Robert Barnes, who stole the watch. At the time they took Dave King they found the watch that belonged to Coleman; that the watch exhibited was Coleman's watch. At the time they took the watch from him, King stated that he got it from Robert Barnes, and paid two or three dollars for it. King had the watch in his pocket, and did not say whether he knew it was stolen. The boy who stole the watch was convicted.

Harold Judd, a detective, assisted in arresting appellant. He stated that they found the watch, belonging to Coleman, on appellant. He had the watch in his pocket and stated that he had bought it from a colored boy named Barnes, and paid three or four dollars for it.

Robert Starks testified that he had lived in Little Rock 20 years; that he had the watch which he now sees, in his possession, having received it in 1936 and pawned it to Dave King three or four times, for from three to five dollars; that he did not tell appellant it was stolen. He said he knew the watch by the face, the four-leaf clover and the chain on it. He got it from Robert Williams and pawned it to Dave King. He does not run a pawn shop, but he was in a game and got broke. He pawned it on Sunday and got arrested on Monday; had not had an opportunity to pay King the money so as to recover the watch.

William High testified that he lived in Little Rock and was in a crap game with Dave King and Robert Starks when this watch was produced; Starks had the watch and pawned it to Dave King; he did not say it was stolen; King let him have six dollars on it; said they were in the habit of pawning things to one another.

Dave King testified that he lived on State street in Little Rock and runs a shoe shining parlor at 724 West

Ninth Street; he did not know the watch had been stolen, but he did have it in his possession; got it from Robert Starks; let him have a dollar at a time until it ran up to five dollars. On Monday they arrested Starks and asked him for the watch; he did not have it, but witness did; he told the officers he received it from Robert, but he was talking about Robert Starks; he said they were in the habit of pawning things to each other; he did not know the watch had been stolen. Starks was standing at the car talking to another boy in the car named Mitchell; witness heard Starks testify that he was not there at the time witness was arrested, but he was mistaken; they carried them to the jail at the same time; he did not say to the officers that he bought it from Robert Starks.

Appellant contends, first, that there was no proof on the part of the state that King had guilty knowledge, and he calls attention to Underhill on Criminal Evidence, Fourth Edition, § 527, p. 1058. But a portion of that section reads: "Absolute knowledge that the goods have been stolen is not necessary; a belief on the part of the accused caused by facts and circumstances, may be enough."

These negroes were all engaged in a crap game and evidently knew each other very well. When King was arrested he had the watch in his possession, and the officers testify that appellant told them he bought it, and he testified that Starks had pawned it to him. At any rate he had possession.

Recent and unexplained possession of property, stolen, is admissible in prosecution for receiving stolen goods, as circumstances material to the issues.

This court has said: "Possession of property recently stolen, without reasonable explanation of that possession, is evidence of guilt to go to the jury for their consideration." *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029; *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398.

The evidence was sufficient to sustain the conviction.

Appellant, also, cites Brill's Cyclopedia Criminal Law, Volume 2, § 928. That section merely provides that it is necessary to show that the thing received was stolen,

where the statute makes property so obtained the subject of offense.

Section 931 of the same volume provides: "Knowledge need not be shown by direct evidence, but it may be proved by or inferred from circumstances."

It is next contended by appellant that the evidence is insufficient to sustain a conviction of the crime of receiving stolen property, or any other crime. The evidence shows that the person who actually stole the watch was convicted, and it, also, shows that the watch found in the possession of appellant was Coleman's watch. One of the officers testified that when he arrested appellant he found on him the watch that belonged to Coleman. The facts are sufficient to justify a conviction.

This court does not pass on the credibility of witnesses nor the weight to be given to their testimony. The jury heard the evidence, saw the witnesses, and it is certain from the record that the appellant was arrested, in possession of Coleman's watch. The evidence shows that the watch was worth $45 at the time it was stolen from Coleman. This question was properly submitted to the jury, and its verdict is conclusive.

While the evidence is not entirely satisfactory, yet it was sufficient to submit the question to the jury, not only as to appellant's knowledge that the property was stolen, but, also, as to the value of the property. In determining whether the evidence is sufficient to support the verdict, the evidence is viewed in the light most favorable to the state.

We find no error, and the judgment is affirmed.

COUSINS *v.* ROBINSON.

4-4671

Opinion delivered June 7, 1937.

W. L. Curtis, for appellant.

Robert J. White, Ray Blair and *Arnett & Shaw,* for appellees.

HUMPHREYS, J. Odie Robinson and others brought suit against the Red Glow Coal Corporation in the Northern district of Logan county to recover wages due them for mining coal and to enforce a lien upon the mining leases and equipment owned by the corporation for the payment of same. It was alleged that the wages due them respectively were for mining and producing coal during the months of February and March, 1936; that said corporation was insolvent and was disposing of all its property for the purpose of preventing them from collecting their several claims.

Mrs. C. H. Cousins, wife of C. H. Cousins, filed an intervention in the suit, alleging that on August 1, 1935, said Red Glow Coal Corporation became indebted to her in the sum of $10,000 for which it executed to her five promissory notes in the sum of $2,000 each due in two, three, four, five and six years after date, bearing interest at the rate of eight per cent. per annum, and on the same date executed to her a mortgage on all of its property to secure same, which was filed for record in the office of the circuit clerk of the Northern district of Logan county on August 17, 1935. She alleged that the lien of her mortgage was prior and paramount to that of plaintiffs and prayed for judgment for the amount due her and for a decree of foreclosure of her mortgage.

To the intervention the plaintiffs filed answer, denying that said corporation was indebted to the intervener and alleging that the purported notes and mortgage were without consideration and void.

Joe Anhalt and others brought suit in said court against the Blue Ribbon Corporation and Mrs. C. H. Cousins to recover wages due them for mining coal and to enforce a lien upon the mining leases and equipment owned by the corporation for the payment of same. It was alleged that the wages due them respectively were for mining and producing coal during the months of February and March, 1936; that said corporation was insolvent and was disposing of all of its property for the purpose of preventing them from collecting their several claims.

Mrs. C. H. Cousins filed a separate answer and cross-complaint in this suit, denying the material allegations in the complaint, and alleging that on October 28, 1933, said corporation was indebted to intervener in the sum of $10,000 for money loaned to it, evidenced by five promissory notes for $2,000 each bearing interest at the rate of eight per cent. per annum, which were secured by a mortgage on all of its property, said mortgage being filed and duly recorded in the office of the circuit clerk in the Northern district of Logan county a few days after it was executed. She prayed for judgment and a prior and paramount lien to that of plaintiffs on all of the property owned by said corporation and for a decree of foreclosure and order of sale of said property to satisfy her judgment.

Plaintiffs filed an answer to the cross-complaint denying that said corporation was indebted to Mrs. C. H. Cousins and alleging that the purported notes and mortgage were without consideration and void.

Jewel Mining Company brought a suit in said court against the Blue Ribbon Corporation to recover royalties and rents due it under a lease for $4,165.58, the balance due for coal which had been mined and removed from the land leased and alleged that under the terms of the lease plaintiff was entitled to a lien on the leasehold, machinery, equipment and personal property of every kind located and situated upon the leased premises occupied by the defendant; that the defendant was insolvent and that the mine was about to be flooded with water and that the machinery and equipment were about to be lost; that on

account of the failure to pay rent or royalties plaintiff was entitled to have the lease canceled and to immediate possession of the property under the terms of the lease. Plaintiff prayed for a lien on said machinery and equipment and an order of sale thereof to pay the rents and royalties past due and for a receiver to take charge of the property and preserve it during the pendency of the suit.

The Blue Ribbon Corporation filed an answer denying the material allegations of the complaint.

Mrs. C. H. Cousins filed an intervention in the case, alleging that on October 28, 1933, the Blue Ribbon Corporation was indebted to her in the sum of $10,000 for borrowed money and executed to her five promissory notes in the sum of $2,000 each due and payable respectively on January 1, 1935, January 1, 1936, January 1, 1937, January 1, 1938, and January 1, 1939; and that on the same date it executed to her a mortgage to secure the payment of the notes on all of its property and equipment, which mortgage was filed for record in the circuit clerk's office of the Northern district of Logan county on November 2, 1933; that the notes bore interest at the rate of eight per cent. per annum; that default was made in the payment of the first two notes and that the entire amount of the indebtedness became due on account of the default and that her mortgage lien was prior and paramount to any royalties due plaintiff on account of being recorded before the lease. She prayed for a foreclosure of the mortgage and sale of the property to satisfy her mortgage lien.

Plaintiff filed an answer to the intervention of Mrs. C. H. Cousins denying the material allegations therein and alleging that the notes and mortgage were without consideration and void; and prayed for a dismissal of the intervention for the want of equity.

The three cases were consolidated for the purposes of trial and, after hearing the evidence adduced by the parties, the court dismissed the answers, cross-complaint and interventions of Mrs. C. H. Cousins for the want of equity, from which is this appeal.

The record in this case is voluminous and it could serve no use as a precedent to set out the evidence of the various witnesses. Suffice it to say that we have read the evidence very carefully and according to a preponderance thereof we have concluded that Mrs. C. H. Cousins never loaned either corporation any money and that the notes and mortgages were taken in her name, by her husband, without her knowledge, and that the mortgages were recorded by him as a protection to the corporation against damage suits and other suits that might be brought against them. These corporations and other mining corporations were organized by C. H. Cousins and his relatives and employees became stockholders, directors and officers in them, none of whom paid anything for their stock, and all of whom were subject to his will and control. He absolutely dominated the corporations, their business operations and took charge of all the coal produced by them, sold same, and sent each corporation enough out of the proceeds to pay the respective pay rolls and other expenses of operations irrespective of the amount of coal each shipped him, and continued to do this as long as the Blue Ribbon Corporation and Red Glow Coal Corporation operated their respective mines. About the time these corporations began business he told the officers of each corporation to execute notes and mortgages to his wife in the sum of $10,000, when none of the officers or directors of the corporations knew anything about either one of them being indebted to her. It does not appear when and where she got the $20,000 to loan them and the $10,000 additional to lend the Queen Excelsior Corporation, which was another of Cousin's corporations. It does not appear that she ever turned any of her individual money over to him to invest. C. H. Cousins contents himself with saying that he attended to his wife's affairs for many years, beginning in 1914, and as her agent, loaned these three corporations $30,000 of her money. She testified that her husband, C. H. Cousins, attended to her affairs beginning in 1914 and that she trusted him implicitly, but received no information from him that he had loaned $30,000 of her money to these three corporations, or that he had taken mortgages from

them on their property to secure the payment of said amounts. It appears to us from the meager statement made by both that if she ever had any money she turned it over to him to use as he pleased and without any intention of ever requiring him to account to her for it. He stated to the officers when these corporations were organized that mortgages should be executed to his wife as a matter of protection to them. It is rather significant that each mortgage was for the same amount and that each was large enough to render some protection to the corporation against any suits that might be brought against them in the operation of the mine.

It would be quite a different case if Mrs. Cousins had shown that she had $30,000 of her own money and that she had turned it over to her husband for investment and had required him to make reports to her as to the investments he made and the securities he had taken. She admitted as stated above that she did not know anything about the notes or mortgages. This record also reflects that the money he let these corporations have came largely from other sources and not from his wife.

No error appearing, the decree dismissing intervener's answers, cross-complaint and interventions for the want of equity is affirmed.

GREEN *v.* WILSON.

4-4681

Opinion delivered June 7, 1937.

Coleman & Gantt, for appellant.

O. E. Gates, George H. Holmes and *U. J. Cone,* for appellee.

GRIFFIN SMITH, C. J. This appeal is from a judgment of $500 against appellants on a jury verdict.

Clint C. Green operates a sandwich stand in Rison, and in November, 1934, made regular purchases from the Arkansas Baking Company, of Pine Bluff.

Appellee and a brother were operating a Magnolia service station near Green's sandwich shop. The judgment is based on an allegation that Green purchased a lemon pie from the Arkansas Baking Company; that the pie was improperly made and baked; that it was old and had deteriorated; that Green sold a part of it to appellee who ate it and became violently ill, and that Green was negligent in that no proper inspection of the pie was made before it was sold.

About ten o'clock on the morning of November 8, appellee went into Green's place and asked for a piece of lemon pie. Green told him that he did not have any, but would receive a supply when the truck came. Appellee says that about an hour later Green called to him, saying that the pie had been received. "For breakfast that morning I ate an egg and a piece of toast, and had not eaten anything more until the pie came in. After the truck came I went into Green's place. I saw the delivery boy take a box out of the truck. The box contained a lemon pie; it had meringue; no top crust. I got a ten-cent cut—one piece—and ate it. It tasted all right, and I couldn't tell there was anything wrong with it. Later on, it commenced bothering me. I just got sick at the stomach and dizzy." Witness said that he noticed uneasiness in his stomach 40 or 45 minutes after eating the pie, but didn't get real sick until about half past two o'clock in the afternoon.

Harvey Thomas testified that he was working for appellee on November 8, and became sick that night. Witness did not know what caused his sickness, but remembered that about noon he ate a piece of pie at Green's place.

Tobe Henderson, night officer at Rison, testified that he ate a piece of pie at Green's place at eleven o'clock on the night of November 8, and later became sick. He, too, said that the pie tasted all right, and didn't appear to have anything the matter with it.

Mrs. C. Y. May, a witness for appellee, testified as to her experience as a baker of pies. She said that lemon pies of the kind appellee claims to have partaken should not be eaten after they are two or three days old; that deterioration and fermentation begin to show, and such pies turn dark around the edge if kept too long—"if they are not just right they will make you sicker than anything on earth."

The lemon pies sold by Green was delivered by C. Crouse, salesman for the Arkansas Baking Company. Crouse testified that he did not remember whether delivery was made to Green on the day in question, but that he was then making calls in regular course of business, and Green was being supplied from his wagon. The bakery employed several drivers. If drivers returned from their routes with unsold pies, these were put back on a shelf. If the pie was good, wasn't moulded and wasn't torn up in any way, it was carried out again. Witness identified a statement he had signed, saying that the pie delivered to Green November 8 had been baked the day it was sold; that it appeared to be fresh and in good condition.

Eddie Cochrane, baker for the Arkansas Baking Company, and Ollie McAllister, helper, testified that the pie was fresh. There was other testimony for the defendant baking company to the effect that nothing but standard ingredients went into the products sold, and that the pie in question was baked on the morning of November 8.

Dr. A. J. Hamilton, for appellant, in answer to a specific question, said: "John Sam Wilson had all the

symptoms of some kind of poison, but I don't know where he got it."

This suit is based upon negligence. The complaint alleges that "The Arkansas Baking Company carelessly and negligently prepared and cooked said pie, and that when it was delivered to Clint C. Green by the Arkansas Baking Company, the said Green, without any examination of said pie, carelessly and negligently sold the same to plaintiff, whose life was thereby endangered, and who as a consequence of the carelessness and negligence of the Arkansas Baking Company in cooking and preparing said pie, and because of the carelessness and negligence of the defendant, Clint C. Green, in offering said pie for sale, plaintiff was damaged."

It was further alleged that the Arkansas Baking Company was negligent in selection of materials from which the pie was made and in preparing and cooking it, and in handling it; also, that it was three or four days old when delivered to Green.

Green testified that appellee was present when the pie was delivered, saw it taken out of the container, and saw it cut. In waiting upon appellee, Green dipped a knife into boiling water to keep the meringue on the pie from sticking. The pie appeared to be fresh, and there was nothing to suggest that it was not wholesome. Appellee had the same opportunity of inspection. He, too, saw the pie, and testified that it looked all right. The driver who made deliveries to Green testified that old pies were not sold; and, while he did not remember the particular transaction, he did know the custom with respect to care, and this custom had not been deviated from.

Witnesses for the baking company stated that all pies supplied to the driver who served Green were made on the morning of delivery, and that the making and baking processes were modern and sanitary in all respects, and all ingredients came from nationally-known manufacturers. These ingredients were fresh and had not deteriorated.

Against this evidence is the admitted fact that appellee ate the pie; that three hours later he became violently ill; that his malady was diagnosed as poison-

ing, and that two others claimed to have eaten pie and to have suffered ill effects. Green testified that he and his son ate some pie, and were not affected.

In *Lewis* v. *Roescher,* 193 Ark. 161, 98 S. W. (2d) 956, the distinction between liability under an implied warranty, and liability by reason of negligence, as applied to the sale of foods, is dealt with. Quoting from *Great Atl. & Pac. Tea Co.* v. *Gwilliams,* 189 Ark. 1037, 76 S. W. (2d) 65, the opinion approves the rule laid down in 11 Ruling Case Law, 1118, as follows: "Persons who engage in the business of furnishing foods for consumption by man are bound to exercise care and prudence respecting the fitness of the articles furnished, and they may be held liable in damages if, by reason of any negligence on their part, corrupt or unwholesome provisions are sold and persons are made ill thereby." And again: "In an ordinary sale of goods the rule of *caveat emptor* applies, unless the purchaser exacts of the vendor a warranty. Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands, according to the assertion of many courts, an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it is purchased." The following paragraph in the opinion quoted from (189 Ark. 1037, 76 S. W. (2d) 65) is in point here: "The retail dealer is not a guarantor, and this case is not founded upon that theory, but he is charged with the exercise of ordinary care to sell sound and wholesome products, meaning that degree of care necessary for the protection of customers against impurities or contamination that might ordinarily be discoverable by any usual or ordinary tests. This cannot mean, however, that the retail dealer must make or apply such tests as would in every case operate to insure absolute safety. Hidden or concealed imperfections or contaminations might require microscopical tests or chemical analysis for their discovery. Under present conditions, such requirement would prove so burdensome that

many articles in ordinary use could not be handled by the ordinary dealer, and consumers would be denied the right to buy such products. In other words, such a test, if applied under the ordinary conditions, would be equal to requiring the dealer to become an insurer of the absolute perfection of the commodity sold. The test should not be higher than that commonly or usually practiced by careful dealers under the same conditions and circumstances, which is at least as high as the consumer expects, or has the right to expect of his groceryman or food dealer."

In *Coca-Cola Bottling Co.* v. *Swilling,* 186 Ark. 1149, 57 S. W. (2d) 1029, this court said: "The retailer owes to the consumer the duty to supply goods packed by reliable manufacturers, and such as are without imperfections that may be discovered by an exercise of the care, skill and experience of dealers in such products generally. This is the measure of the retailer's duty, and, if he has discharged it, he should not be mulcted in damages because injuries may be produced by unwholesomeness of the goods. As to hidden imperfections, the consumer must be deemed to have relied on the care of the packer or manufacturer or the warranty which is held to be implied by the latter. The annotated cases cited in the notes to the text quoted appear to sustain the text."

In a more recent case, *Kroger Grocery & Baking Co.* v. *Melton,* 193 Ark. 494, 102 S. W. (2d) 859, the appeal dealt with a claim by appellee that he was made ill by eating pork chops sold by appellant, it having been alleged that appellant was negligent in handling and keeping the chops, and that they became contaminated, or "tainted." Appellee testified that he saw the chops when they were taken from the wrapper, that they were clean, and that he detected nothing wrong. In deciding the case this court said: "It would appear that appellee was unable to detect anything wrong with the chops after handling, cooking, and eating them. Only a microscopic examination would have enabled appellant's salesman to make that discovery. The law imposes no such degree of care upon the dealer. * * * But if it were

sufficiently shown that appellee's illness was in fact caused by eating the chops, that fact alone would not entitle him to recover. He must show, in addition, that appellant was guilty of negligence in connection with the sale of the chops."

In the instant case, appellee had been advised that he would be called to the lunch room when the pies arrived by truck. At eleven o'clock he was informed that his order could be filled. Appellee saw the pie taken from the original package, saw it cut, and immediately ate it. He was in the presence of Green, who dipped in boiling water the knife he (Green) used to cut the pie. It is clear that appellee knew how the transaction was being handled, and it is obvious that he did not rely upon Green to make an inspection. This is sufficient to dispose of the charge of negligence as to Green.

The only showing of negligence upon the part of Arkansas Baking Company is the inference to be drawn from the fact of appellee's illness, and the illness of two others who claim that they partook of the lemon pie. A mere inference is not sufficient to fix liability.

Reversed and dismissed as to both appellants.

ADAMS *v.* EAGLE.

4-4679

Opinion delivered June 7, 1937.

Ralph Ray, for appellant.

Chrisp & Nixon, for appellee.

BUTLER, J. In pursuance to a contract by which appellee agreed to convey by a good and merchantable title in fee simple a certain tract of land in Lonoke county, Arkansas, to the appellant, appellee executed his warranty deed for a consideration of $2,000 in cash and five promissory notes of $900 each, these notes representing the balance of the purchase price. To secure the prompt payment of the notes, appellant executed and delivered to the appellee a mortgage covering the lands purchased.

This suit was instituted by the appellant to cancel the sale and the notes executed and he prayed for judgment against the appellee for $2,000, the amount of cash paid, and interest, and for an order, pending the suit, to restrain the appellee from assigning or pledging the notes. This suit was predicated upon the contention that the appellee was not the owner of a fee simple title in the property, but of a life estate only. The answer admitted the allegations of the complaint except the allegation that the appellee was not the owner of the fee simple title, and pleaded affirmatively that at the time of the sale he was the owner of such title, and by his deed conveyed the same to the appellant.

The case was tried before the lower court upon an agreed statement of facts and resulted in a finding that appellee was vested with a fee simple title to the lands in controversy at the time of the conveyance, and a decree was accordingly entered dismissing appellant's complaint for want of equity.

The facts are that W. H. Eagle, in his lifetime, was the owner of the lands involved together with other lands and personal property. He died leaving a widow who is now, and was deceased for some time prior to the transaction out of which this suit arises. W. H. Eagle left a will disposing of his property, and upon its construction the question presented must be settled. After making certain specific bequests of personal property, the testator devised certain lands to his daughter, "Bessie Eagle and to her bodily heirs," and in like manner he made five other specific devises to other of his children, naming them, and devising to each of them par-

ticular parcels of land, these devises being to each by name and "unto her (his) bodily heirs."

The twelfth paragraph of the will is as follows: "I hereby set apart for my beloved wife, Ada M. Eagle, for her use and benefit as long as she lives, all my lands in sections twenty-seven (27), twenty-eight (28), thirty-three (33), thirty-four (34), and thirty-five (35), in township two south, range nine west, in all twenty-one hundred and twenty acres, commonly known as the Gray Place in Lonoke county. Taxes on said lands and the necessary repairs are to be paid from the profits from the farm." (The lands involved in this action are a part of the foregoing).

Section 16 of the will is as follows: "When my dear wife dies, the plantation set apart for her during her life known as the Gray Place, including all my lands in sections twenty-seven, twenty-eight, thirty-three, thirty-four and thirty-five, in township two south, range nine west, in all twenty-one hundred and twenty acres shall be equally divided in value between all my children * * * (here follows the names of all the children including that of appellee, Franch Eagle), and shall be conveyed to them and to their bodily heirs by order of the probate court of Lonoke county. If any of my said twelve children should die without issue, all the lands bequeathed to them in this will, including the bequest of the Gray Place, and also the money any of them may be possessed of who may die before reaching their majority, shall be equally shared in by their surviving brothers and sisters."

To sustain the conclusion reached by the trial court, appellee cites, and relies upon the cases of *Pletner* v. *So. Lbr. Co.,* 173 Ark. 277, 292 S. W. 370, and *Bowlin* v. *Vinsant,* 186 Ark. 740, 55 S. W. (2d) 927. In the first case the material part of the will is as follows: "I wish my wife, Artemus F. Gillis, to have the benefit of the homestead, together with all the stock and household goods, during her life, and, if that is not sufficient, out of the remainder of my estate for own special benefit. And the one thousand dollars in gold now in the hands of S. W. Godfrey to go to Mary Elmira Godfrey, with the

remainder of my estate to the said Mary Elmira Godfrey and her bodily heirs, and should the said Mary Elmira Godfrey die leaving no bodily heirs, I wish that portion of my estate to be turned over to my nephew, John M. Gillis, and his children, of Perry county, Alabama, Marion P. O."

In the Bowlin case, *supra,* the pertinent part of the will under consideration is as follows: "* * * I give and devise the said dwelling house and premises devised unto my wife during her life, and at her death, or should my said wife not survive me, unto my daughter, Gertrude Vinsant, and the heirs of her body." The question was whether or not Gertrude Vinsant (she having survived her mother) took on the death of her mother a life estate or title in fee simple. Other provisions of the will are not mentioned in the opinion. The court held that on the death of the mother the title vested in fee simple in Gertrude Vinsant and, in support of this conclusion, cited the cases of *Pletner* v. *So. Lbr. Co., supra,* and *Bell* v. *Gentry,* 141 Ark. 484, 218 S. W. 194. The Pletner case turned upon the construction of the word "remainder" as used in the clause containing the devise to Mary Elmira Godfrey which the court said must be construed in its technical sense to carry out the manifest intention of the testator to dispose of his entire estate, vesting a life estate in his wife and the "remainder" in fee simple to Mary Elmira Godfrey. In that connection the court took notice of the well settled definition of the word "remainder" as "an estate or interest in lands or tenements to take effect in possession or enjoinment immediately upon the termination of a prior estate, which is created at the same time and by the same act or instrument, and upon which such first mentioned estate is made to depend." In that case the court, also, said: "This court has often ruled that, where land is conveyed, or devised, to a person and the heirs of the body, children, or issue of such person, such conveyance or devise creates an estate tail in the grantee or devisee, which, under our statute (§ 1499, Crawford & Moses' Digest) becomes an estate for life only in the grantee or devisee and a fee simple absolute in the person to whom the

estate tail would first pass, according to the course of the common law, by virtue of such devise, grant or conveyance. *Horsley* v. *Hilburn,* 44 Ark. 458; *Wilmans* v. *Robinson,* 67 Ark. 517, 55 S. W. 950; *Wheelock* v. *Simons,* 75 Ark. 19, 86 S. W. 830; *McDill* v. *Meyer,* 94 Ark. 615, 128 S. W. 364; *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18, 128 S. W. 581, Ann. Cas. 1912A, 540; *Rogers* v. *Ogburn,* 116 Ark. 233, 172 S. W. 867; *Georgia St. Savings Ass'n* v. *Dearing,* 128 Ark. 149, 193 S. W. 512; *Gray* v. *McGuire,* 140 Ark. 109, 215 S. W. 693; *Bell* v. *Gentry,* 141 Ark. 484, 218 S. W. 194; *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S. W. 379.

"But this familiar doctrine cannot have application here, for the reason that the estate is not devised to Mrs. Mary Elmira Godfrey and her bodily heirs, creating a life estate in her and a fee simple estate in her bodily heirs under the statute, *supra.* The life estate, as we have seen, was previously devised to Mrs. Artemus F. Gillis, and the remainder of the estate, after such life estate, was devised to Mary Elmira Godfrey and her bodily heirs."

In *Bell* v. *Gentry, supra,* the clause of the will considered is as follows: "I devise to my said executrix all the residue of my real estate as long as she shall remain unmarried and my widow with remainder thereof on her decease or marriage to my said children and their bodily heirs in the following manner:"

The court, in holding that the estate created in the children was one in fee, said: "The will created a remainder and provided when it should vest, and that was on the decease or remarriage of the widow. In defining the heirs who should then take the testator employed words of procreation so that only those heirs special, rather than the heirs general, took under the will; but the rights of these heirs became fixed when the remainder was cast, which event proved to be the death of the widow as she died without having remarried. *Harrington* v. *Cooper,* 126 Ark. 53, 189 S. W. 667. At the death of the widow, when the remainder was cast, the son, Dennis, and the daughter, M. F. Smith, survived her and they, therefore, took the fee as remaindermen.

Had they, or either of them, died in the lifetime of their mother, their bodily heirs would have taken the fee; and these bodily heirs would have taken as devisees under the will (and not by descent from Dennis or M. F.), they being the heirs special, or bodily heirs, *in esse* when the event happened upon which the remainder was to vest, that is the death of the testator's widow.

"We are led to the conclusion announced, not only by a consideration of the language set out above, but by the settled rule of construction that the law favors the vesting of estates as early as possible, and we think the construction given this will effectuates the intent of the testator."

The cases cited announce an exception to the general rule that a conveyance by deed or devise to a grantee and his bodily heirs "creates a life estate in the grantee with remainder in fee simple to the children who survive him, and the issue of such as die during his life *per stirpes.*" See cases cited in *Pletner* v. *So. Lbr. Co., supra.* The Pletner and Bowlin cases, *supra,* seem to be of controlling effect in the case at bar. We are not called upon to determine, and pass without deciding, the quantity of the estate conveyed by the specific devises. It is the residuary estate, cast upon appellee, after the termination of the particular estate which is involved, and as to it we perceive no substantial difference in the language of the will, and that of the wills in the cases relied upon by appellee. It is true the technical term "remainder" is not used, but a life estate is clearly created in the widow and necessarily a contingent remainder in the children and their bodily heirs, so that, upon the death of the life tenant, the children, if living, would take the remainder in fee, or, if any children were deceased, his or her bodily heirs would take under the will and not by inheritance from their ancestor, as "special or bodily heirs *in esse* when the event happened upon which the remainder was to vest, that is, the death of the testator's widow." This being true, the trial court was correct, and its decree is, therefore, affirmed.

GRAVES *v.* BURNS.

4-4676

Opinion delivered June 7, 1937.

F. G. Taylor and *Beloit Taylor,* for appellant.

C. T. Bloodworth and *E. L. Holloway,* for appellees.

MEHAFFY, J. Richard H. Hays on April 21, 1935, died intestate in Clay county, Arkansas, leaving lands and personal property in said county. He left surviving him no widow or children or their descendants, or father or mother. His nearest living relative is the appellant, Martha Graves, his sister. The appellees are the children of deceased's brothers and sisters.

This action was instituted in the Clay chancery court by the appellees for partition of the lands belonging to Richard H. Hays. The complaint alleged that the appellant, Martha Hays, as the sister of Richard H. Hays, deceased, is the owner of and entitled to an undivided one-third interest in and to the real estate described; that the appellees, Lucy Burns, Anna Jackson and Jewel Hays, are the children of James Hays, deceased, brother of the said Richard H. Hays, and are the owners of an undivided one-third interest; that the appellees, Albert L. Curry and Bennett R. Curry, are the sole and only heirs of Rachel Hays Curry, deceased, sister of the said Rich-

ard H. Hays, deceased, and are the owners of and entitled to an undivided one-third interest in said lands. The complaint states that there are no debts due against the estate of said Richard H. Hays; that said estate was at all times solvent; that said lands cannot be divided equally or equitably in kind, and that it would be to the interest of all the heirs that the said lands be partitioned by sale of the same as a whole, and the funds divided among the heirs of Richard H. Hays, deceased. The complaint also states that Ewell Vandover has possession of the property, and asked that he be compelled to account for the income received from said real estate, and that he be required to pay into court all sums collected.

The appellant filed a demurrer to the complaint, which was overruled, and she then filed answer admitting that she was a sister of Richard H. Hays, and admitting that said Hays at the time of his death was the owner and in possession of the lands described in the complaint. She denied that appellees were the owners of any interest in said lands, and alleged that she was the sole heir of Richard H. Hays, deceased.

Frank Hays, Mrs. Minnie Hays Willis and Mary Taylor and Ed Wagner filed intervention. The court, in its decree, however, reserved the question of the rights of the interveners for further hearing upon application for distribution, and it is, therefore, unnecessary to set out the intervention.

The court found that the appellant was entitled to an undivided one-third interest in the lands, and that the children of the deceased brothers and sisters of Richard H. Hays were entitled to the other interests. The case is here on appeal.

The evidence shows that appellees, Lucy Burns, Anna Jackson and Jewel Hays were the only children of James Hays, deceased, who was a brother of Richard H. Hays and of Martha Hays; that said James Hays died long before the said Richard H. Hays; that the appellees, Albert L. Curry and Bennett R. Curry, were the only children of Rachel Curry, deceased, who was a sister of the said Richard H. Hays and the appellant, Martha

Graves, and that said Rachel Curry died long before the said Richard H. Hays.

It is the contention of the appellant that the appellees cannot recover or inherit because of act 52 of the Acts of 1933, which amends §§ 3471, 3480, 3481 and 3483 of Crawford & Moses' Digest. Section 3471 reads:

"When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower in the following manner:

"First, to children, or their descendants, in equal parts.

"Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

"Third. If there be no children, nor their descendants, father, mother, brothers, or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

Section 1 of act 52 of the Acts of 1933 amends § 3471 of Crawford & Moses' Digest, and the section of act 52 amending said section of the digest reads as follows:

"Section 1. That § 3471 of Crawford & Moses' Digest of the Statutes of Arkansas be and the same is hereby amended to read as follows:

"Section 3471. When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower in the following manner:

"First. To children, or their descendants, in equal parts.

"Second. If there be no children, then to the father or mother in equal parts, or, if one parent be dead, then the whole to the surviving parent; if no father or mother, then to the brothers and sisters, in equal parts.

"Third. If there be no children, nor their descendants, father, mother, brothers, or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

It will be observed that paragraph 2 of § 3471 has the clause, "if no father or mother, then to the brothers and sisters, or their descendants, in equal parts." The second paragraph of § 1 of act 52, leaves out the words "or their descendants." For this reason, it is contended by the appellant that the descendants of brothers and sisters cannot inherit if there are any brothers or sisters living.

The appellant cites and relies on *Lawyer* v. *Carpenter,* 80 Ark. 411, 97 S. W. 662. That case holds that where the Legislature takes up a whole subject anew, and covers the entire ground of the subject-matter of a former statute, and evidently intends it for a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provision not embraced in the new one.

Attention is, also, called to *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649. That case approves the rule announced in *Lawyer* v. *Carpenter, supra.* Several other Arkansas cases to the same effect are cited.

It is the duty of courts, in construing statutes, to ascertain the intention of the Legislature, if possible, and, in order to do this, it is frequently necessary to consider not only the entire act, but other statutes on the subject. The title of act 52, *supra,* is as follows:

"AN ACT to Amend Sections 3471, 3480, 3481 and 3483 of Crawford and Moses' Digest of the Statutes of Arkansas, so as to Remove Discriminations Against Females in the Laws of Descent and Distribution."

The title of an act is not controlling, but it has force in interpreting the meaning of the lawmakers when otherwise in doubt. *State* v. *White,* 170 Ark. 880, 281 S. W. 678; *Drainage Dist. No. 18 of Craighead County* v. *McMeen,* 183 Ark. 984, 39 S. W. (2d) 713; *Conway* v. *Summers,* 176 Ark. 796, 4 S. W. (2d) 19; *Huff* v. *Udey,* 173 Ark. 464, 292 S. W. 693; *Logan* v. *State,* 150 Ark. 486, 234 S. W. 493; *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45; *Oliver* v. *So. Tr. Co.,* 138 Ark. 381, 212 S. W. 77.

The title of act 52 shows that its purpose was to remove discrimination against females in the laws of descent and distribution, and when the act is considered as a whole, and other statutes on the subject considered, we think it is perfectly clear that the intention of the Legislature was simply to amend the statute so as to remove discriminations against females.

The third paragraph of § 1 of act 52 provides that if there be no children nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, etc. This section makes it plain, we think, that the intention of the Legislature was to provide for the property to descend to the brothers and sisters and their descendants, and that the phrase "or their descendants" was unintentionally omitted from the second paragraph of § 1 of act 52.

Section 3482, which is not amended, provides that relations of the half blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, etc. Not only the title of the act, but the entire law in Arkansas on descents and distributions, indicate that the intention of the Legislature was that the descendants of brothers and sisters should inherit.

"It is a well-settled principle of statutory construction that statutes should receive a common-sense construction, and, where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent of the

Legislature." *State, ex rel. Atty. Gen.,* v. *Chicago Mill & Lbr. Co.,* 184 Ark. 1011, 45 S. W. (2d) 26; Lewis' Sutherland Statutory Construction (2d Ed.), Vol. 2, pages 796, 797.

In order to enable the court to insert in a statute omitted words, or read it in different words from those found in it, the intent thus to have it read must be plainly deducible from other parts of the statute. Lewis' Sutherland Statutory Construction (2d Ed.), Vol. 2, 798.

But if it is plain from the statute, then the statute will be so construed as to carry out the manifest intention of the Legislature. *State* v. *Jones,* 91 Ark. 5, 120 S. W. 154, 18 Ann. Cas. 293.

When the entire act 52, together with the title of the act, and, also, the other sections of Crawford & Moses' Digest on the subject are considered, the conclusion that the words were omitted unintentionally cannot be escaped.

The judgment of the chancery court is affirmed.

BOWSER *v.* STATE.

Crim. 4031

Opinion delivered June 7, 1937.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

MCHANEY, J. Appellant was charged by information, in one count, with the larceny of two jersey cows,

the property of one Kennerson; and in another count with receiving the same property, with the felonious intent to deprive the owner thereof, knowing the property to have been stolen. Upon a trial the jury found him guilty under the second count and fixed his punishment at three years in the penitentiary. Judgment was entered accordingly.

Appellant has not favored us with a brief in his behalf. His motion for a new trial questions only the sufficiency of the evidence to support the verdict and judgment. It is said there is no evidence that he knew the cows he had were stolen; no evidence that the cows he had were stolen; and no evidence that the cows he had were the property of Kennerson. In all of this appellant is mistaken. He did not testify and he called no witness in his behalf. The owner of the cows testified that they disappeared in January preceding the trial and were missing the morning of January 13. He described the cows. He received information they had been sold in Newport, where he went, and traced them to Memphis. Another witness said appellant came to him to find out who was buying cattle in the neighborhood and the next morning he appeared with two cows for which he asked $50 and gave his name as Willie Brown. This witness described the cattle which was substantially the same as that given by the owner. He also identified appellant as the man with the cows, who gave his name as Willie Brown. Another witness testified he bought two cows from appellant on January 13, and that he gave his name as Willie Brown. The witness paid appellant $40 for the cows and sold them to another person who shipped them to Memphis. His description of the cows shows they were Kennerson's. Other witnesses testified to facts and circumstances tending to connect appellant with the theft and unlawful possession of the cattle.

In *Daniels* v. *State,* 168 Ark. 1082, 272 S. W. 833, the late Chief Justice McCulloch, speaking for the court, said: "The rule has long been maintained by this court that unexplained possession of property recently stolen constitutes legally sufficient evidence to warrant a conviction, either of larceny or receiving stolen property. *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029; *Mays* v. *State,* 163

Ark. 232, 259 S. W. 398. The weight to be given to the testimony and the inference to be drawn therefrom are questions for the jury. It was a matter for the jury to determine the reasonableness and sufficiency of the explanation given by the accused of his possession of the stolen property." See also *Dave King* v. *State,* this day decided, *ante,* p. 157, 106 S. W. (2d) 582.

Here, appellant gave no explanation of his possession of the stolen property either by himself or any other witness, and the evidence on behalf of the state was ample and undisputed that the cows were stolen on the night of January 12; that appellant had them in his possession and sold them as his on the 13, and that the cows belonged to Kennerson. While no witness testified that appellant knew the cows were stolen, the burden was on him to explain his possession of the so recently stolen property, to the satisfaction of the jury, which he did not do.

The judgment must be affirmed. It is so ordered.

CENTRAL STATES LIFE INSURANCE COMPANY *v.* SIMMONS.

4-4654

Opinion delivered June 7, 1937.

Buzbee, Harrison, Buzbee & Wright, A. D. DuLaney and *Charles Jacobson,* for appellant.

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

SMITH, J. Appellee prayed and was granted relief by way of a decree directing the specific performance of a contract to convey to him two farms in Arkansas county, and this appeal is from that decree.

Appellee had purchased the farms from different owners, and both were encumbered by a mortgage. He was a customer of the Bank of Gillett, to which institution he had become largely indebted. Portions of the paper evidencing this indebtedness were indorsed and delivered to the American Bank of Commerce & Trust Company as collateral by the Bank of Gillett. To assist in the collection of this collateral the American Bank of Commerce & Trust Company began making advances to appellee to enable him to cultivate and market his rice crops, and this practice was continued by the American Southern Trust Company, which succeeded the American Bank of Commerce & Trust Company. Foreclosure decrees of the liens upon the lands were rendered, pursuant to which both farms were sold and conveyed to W. A. Hicks, trustee, by the commissioner appointed for the purpose of making the sales. The deed under the first decree was executed November 27, 1922, and the consideration for this deed was $5,076.67. The second commissioner's deed to Hicks as trustee was executed March 10, 1925, and the consideration therefor was $14,373. It was not recited in either deed for whom or for what purpose Hicks was trustee.

The testimony establishes the fact that it was agreed between appellee and Hicks, as the representative of the American Bank of Commerce & Trust Company, that appellee should have the right to purchase both farms for the prices paid by the bank, with taxes and other carrying charges added. It was contemplated that such payments would be made out of the proceeds of the sale of appellee's rice crops, but the balance then due by appellee to the bank and the current advances were first to be paid.

On September 3, 1925, Hicks, as trustee, conveyed both farms to the Home Realty Corporation, which appears to have been organized to take over numerous

tracts of land to which the bank had acquired title. Hicks was in fact trustee for the bank. On September 1, 1926, the Home Realty Corporation executed a deed of trust to the American Southern Trust Company to secure an issue of bonds in the sum of $500,000. The lands here in question were included in this deed of trust.

These bonds were sold to various persons and corporations, and $100,000 of them were redeemed and canceled. The Home Life Insurance Company became the holder and owner of $360,000 of the bonds, and the title to and the ownership thereof passed to the Central States Life Insurance Company when that company absorbed and succeeded the Home Life Insurance Company. Much of the history leading to this result is recorded in the opinions in the cases of *American Southern Trust Co.* v. *McKee,* 173 Ark. 147, 293 S. W. 50, and *Central States Life Ins. Co.* v. *State,* 190 Ark. 605, 80 S. W. (2d) 628.

The Home Realty Corporation was adjudged a bankrupt, and S. M. Dent was named as trustee in bankruptcy. In a proceeding before the referee in bankruptcy it was found and adjudged that $400,000 of the $500,000 bond issue was outstanding and unpaid, and that the Central States Life Insurance Company was then the owner and had in its possession $335,000 of the unpaid bonds. The ownership of the remainder was also declared. The referee further found that "The value of the security held by the trustee in said deed of trust for the benefit of said bondholders was and is $287,000." The Home Realty Corporation had given its check for $457,323.22 to the American Southern Trust Company in payment of the lands, and those here involved were valued in the deed to it at the sum of $19,000.65. It was ordered by the referee in bankruptcy that the trustee in bankruptcy convey all the lands to Burk Mann as trustee for the bondholders, and such deed was executed November 24, 1931. Mann as trustee was made a party, and he alleged in his answer how and for what purpose he had acquired title. The answer of the Central States Life Insurance Company alleges conveyances to it from Mann as trustee and from the trustees and owners of the bonds not held and owned

by the Central States Life Insurance Company, so that it is now the real party in interest adverse to appellee.

It was alleged in the various answers that Mann as trustee had acquired the title as an innocent purchaser; but this was denied by appellee, for the alleged reason that he was and had been in possession of the lands at all times under his contract with Hicks as trustee for the repurchase of the lands. Much of the testimony in the voluminous record before us relates to this possession; but we do not review and recite it here for the reason that the case will be disposed of upon another issue.

The transactions between appellee and the American Bank of Commerce & Trust Company and the successor of the latter were very extensive, covering many advances for various purposes and numerous credits, consisting principally of rice sold by the bank for the credit of appellee. Annual statements showing the balance due at the end of each crop year were furnished appellee, and the amount became larger until on January 12, 1927, the balance then due was over $36,000. The records of the bank and the testimony in regard thereto show that the balance did not include the purchase price of the farms which Hicks, trustee, had originally agreed should be reconveyed to appellee upon the condition hereinabove stated.

The bank took chattel mortgages upon appellee's rice crop each year and upon all appellee's personal property used in connection with the cultivation and marketing of the rice to secure current advances and balances carried forward.

Appellee was himself adjudged a bankrupt, and the schedule of his assets there filed was offered in evidence here. Included in the list of his assets was a tract of land not here involved, but the lands here involved were not included. The proceedings there are pleaded here as *res adjudicata;* but it does not appear that any transcript of the actions and orders of the bankruptcy court has been brought into this record, and the plea cannot, therefore, be sustained. *Crow Oil & Gas Co.* v. *Drain,* 171 Ark. 817, 286 S. W. 971; *Williams* v. *Maners,* 179 Ark. 110,

14 S. W. (2d) 1104; *Drew Gravel Co.* v. *Stell,* 180 Ark. 16, 20 S. W. (2d) 609.

The failure, however, of appellee to include the lands here involved in his schedule of assets is a circumstance which cannot be disregarded in determining whether appellee had paid for the lands and is entitled to have the title vested in him. His creditors were entitled to know what, if any, interest he had in the lands, and if it were substantial, as appellee now says it is, then it was a fraud to conceal that fact from his creditors. Appellee attempted an explanation of the omission, the substance thereof being that he depended upon the attorneys in the case, and that the bank was his principal creditor and he had settled with it by turning over all the mortgaged personal property and had been given a receipt in full.

The court entered a decree granting appellee the relief prayed, but found that beginning with the year 1926 the Central States Life Insurance Company had paid taxes amounting to $2,233.88, for which amount a lien was adjudged against the land. Appellant insists that if the taxes should be considered it was entitled to credit for the taxes paid by its predecessors in title, to-wit, by the American Bank of Commerce & Trust Company for the year 1923 and by the American Southern Trust Company for the years 1924 and 1925. We do not consider this question except to say that we do not concur in the finding that appellee has paid for this land and he is not, therefore, entitled to have it decreed him free and clear of all encumbrances except only the taxes, as was done, and if this be true no judgment should have been rendered against him for the taxes.

The decree of the court is responsive to the contention of appellee, which the court evidently found was sustained by the testimony, that appellee had paid for the lands. That he had done this from the sale of his personal property and from profits on his rice crops for the years 1923, 1924, 1925 and 1926, after repaying the banks all the money and the interest thereon which they had loaned him.

We think the testimony does not sustain this finding. The principal testimony to support that finding is that

of Mr. Sam T. Poe, who states that such is the fact, and the contract for the sale of the personal property just referred to. Mr. Poe represented the American Bank of Commerce & Trust Company and its successor in making loans to appellee and other rice farmers, and had general supervision of the cultivation and marketing of their crops. Appellee testified that Poe told him in 1924 that he had made enough profit in 1923 to pay for the first tract of land bought by Hicks as trustee in 1922, and that he later told him other profits had paid for the other farm. Poe corroborated this testimony, and expressed the opinion that the proceeds of the sale of the various rice crops, together with the proceeds of the personal property, were sufficient for this purpose. But we think he was mistaken and that the statement was a mere opinion. Poe did not keep the accounts. These were kept at and by the bank, and Poe's testimony does not show wherein or in what respects the accounts were erroneous.

It is undisputed that the bank did not charge appellee's account with the purchase price of the lands, and these items did not appear in any of the annual statements furnished appellee by the bank. The transaction relating to the purchase of the lands was entered upon the land book of the bank in the name of the Simmons Lands, but this, it was shown, was for the purpose of identification. The bill of sale to the personal property executed January 12, 1927, recites the purchase price of the personal property to be $36,941.75, and this appears to have been about the amount of the account, not including the purchase price of the lands.

The bill of sale, after valuing the personal property, recites that "* * * Said amount to be credited on my indebtedness now due the American Southern Trust Company direct, and which amount is secured by mortgages on all of the above-described property, and the property is to be accepted by the American Southern Trust Company in full of all indebtedness now due it by me, except whatever amount may be due by me to the American Southern Trust Company as assignee of the Bank of Gillett, which indebtedness the American Southern Trust Company now holds as collateral to secure indebtedness

of the Bank of Gillett to the American Southern Trust Company."

It was there further recited that "It is further stipulated and agreed that the above-named $36,941.75 is accepted by the American Southern Trust Company in full and complete settlement of my indebtedness to it, and the sum of $989.50 (the agreed purchase price of certain property described in the bill of sale upon which the Bank of Gillett had a mortgage) is to be accepted by the American Southern Trust Company, as assignee of the Bank of Gillett, which amount is to be credited on the indebtedness now owing by W. F. Simmons to the Bank of Gillett, which indebtedness is now held by the American Southern Trust Company."

After the signature of Simmons appears a recital signed by Hicks, as vice president of the American Southern Trust Company, reading as follows: "The American Southern Trust Company acknowledges receipt of the sum of $36,941.75, the price of the property herein first above listed, in full and complete settlement of all indebtedness now due by W. F. Simmons, and said indebtedness is now hereby satisfied and released."

The personal property there sold for the consideration stated was the property upon which the bank had a chattel mortgage, and Hicks testified unequivocally that the debt there satisfied was the debt which the chattel mortgage secured, and that the settlement took no account of the purchase price of the lands, for the reason that those items had never been a part of the account and were not secured by the chattel mortgage. Hicks testified further that in selling and disposing of the personal property there described the bank sustained a loss of over $16,000, which was charged off as a loss. In other words, the bank received $16,000 less for the property than it had given appellee credit for. The books of the bank fully sustained this statement.

The conclusion appears inescapable that appellee not only paid nothing for the lands, but only paid the current account by being given a credit for $16,000 more than the personal property was worth. It appears very highly improbable that if this transaction, evidenced by

the bill of sale, was intended to pay for the lands, as well as to pay the debt which the chattel mortgage secured, that reference to that purpose was not made in that instrument.

Appellee offered in evidence numerous checks given various persons for various purposes. Many of these appear to cover operating expenses. No credit should be allowed for these expenditures, for the reason that appellee should have paid the cost of making the crops, inasmuch as he was given credit for their proceeds. It is said, however, that some of these checks were for permanent improvements, which would not have been made except for the assumption that appellee was in possession of the lands under a contract to purchase. The principal item is for $4,225.94, which appellee claims to have paid for a new pumping outfit. It is answered, however, that this outfit was not installed on the lands here in controversy, but on an adjacent tract of land owned by appellee, and that there is no pumping machinery of any kind on the lands here involved. It is suggested, but not established by the testimony, that the bank furnished money with which this and other improvements were made.

The appellant insurance company, which now appears to be the only party having an interest adverse to appellee, professes a willingness, even yet, to accept the purchase money which it paid for the lands and the taxes which it has paid, with the interest thereon, in satisfaction of its claim of title to the lands. It appears to us, therefore, that justice will be done if appellee is afforded an opportunity to make this payment.

The decree of the court below will, therefore, be reversed, and the cause will be remanded, with directions to enter a decree dismissing appellee's suit for specific performance, unless appellee shall, within ninety days after the date of the rendition of this opinion, tender into court the purchase money, taxes and interest aforesaid.

WILSON *v.* WILLIAMS.

4-4689

Opinion delivered June 14, 1937.

[redacted]

W. F. Norrell and *Coleman & Riddick,* for appellant.

Rowell, Rowell & Dickey, for appellee.

GRIFFIN SMITH, C. J. This appeal is from an order of the Drew chancery court designated "Judgment on Motion to Vacate Decree," entered January 27, 1937. The decree which the judgment vacates was rendered June 22, 1936, at a prior term. The only questions presented are whether the chancellor had the right to vacate the former decree; or, in the alternative, if such right existed, did the chancellor abuse his discretion in so doing?

In the vacating order, the chancellor stated that action on the motion was continued from the preceding term under the belief that there were other matters affecting the proceedings which had not been disposed of. He found that this was not true, but on the contrary all matters of controversy had been adjudicated, and the decree of June 22 was final.

The court further found that, having lost control of the litigation through lapse of the term, jurisdiction could not be reasserted under the provisions of § 6290 of Crawford & Moses' Digest for the reason, as expressed, that "It is patent upon the face of all the pleadings that the remedy is not available." The court then found that a bill of review would lie, "the object of which is to procure the reversal, alteration, or explanation, of a decree made in a former trial," and that allowance of the writ rested in the sound discretion of the court "to be exercised cautiously and sparingly and only under circumstances which render it indispensable to the merits and justice of the cause."

In the order vacating the decree the chancellor treated the motion as a bill of review, saying: "Our court seems wedded to limiting such bills to errors of law which are apparent on the face of the decree, or on account of new facts discovered since the decree was rendered. But the appellate court has not said that where, under circumstances attending the progress of this cause, proponents have been denied substantial rights under the law, the ancient power of equity to grant relief may not be invoked by the equitable remedy of a bill of review."

The original complaint, filed February 13, 1936, was an action by the Union Bank & Trust Company of Monticello, as executor of the estate of H. M. Wilson and as trustee of the trust created by his will, against Mack Calhoun and others, being the beneficiaries under the will of H. M. Wilson, all of the heirs of H. M. Wilson, and Fannie B. Wilson, the widow of H. M. Wilson. The complaint embraced two distinct causes of action: one to procure construction of certain portions of the will; the other to secure adjudication of title to securities which Fannie B. Wilson claimed as tenant by the entirety. It was alleged that heirs of H. M. Wilson had questioned that an estate by the entirety had been created, or challenged validity of the instrument creating it.

On February 14, the day after the complaint was filed, the heirs of John B. Wilson, appellees here, and nieces and nephews of M. H. Wilson, filed an intervention in the cause in which they concurred in the purposes of the complaint with reference to both causes of action set forth therein. The intervention contained, among other things, the following: "The interveners concur in the bill in equity to construe the will filed by the Union Bank & Trust Company, except in the particulars hereinafter set forth.

"In order to enable the court to properly construe the intention of the testator, H. M. Wilson, they ask that item X be so construed as to determine the validity of any transfer of property thereunder creating a tenancy by the entirety."

Item X of the will is in part as follows: "To my beloved wife, Fannie B. Wilson, I bequeath any and all of my right, title and interest in and to such household and kitchen furniture, utensils, adornments, goods and equipment as I may own, being used in our home or held for use in our home at the time of my death; and also any automobile which I may own at the time of my death. I make no other bequests or devise to my said beloved wife because she already owns as tenant by the entirety with me the homestead where we live and certain land connected therewith, and sufficient stocks and bonds and other personal property which is already hers as such tenant by the entirety, and in which my estate will have no further interest after my death, to amply provide for her comfort during the remainder of her life."

The heirs of Wilson did not file an answer to the Union Bank & Trust Company's complaint. They filed a formal intervention, in which they expressly asked the court "to determine the validity of any transfer of property" by H. M. Wilson creating an estate by the entirety.

An adjourned term of court was held March 16, 1936. It was not attended by the attorney for the heirs of John B. Wilson. Adjournment was taken until April 16, and the record shows that Adrian Williamson, attorney for the Union Bank & Trust Company, wrote R. W. Wilson, attorney for the John B. Wilson heirs, advising R. W. Wilson of such adjournment, and that on April 16 the court would convene for the purpose of hearing and disposing of litigation incident to the will.

When the court met on April 16, counsel for all parties appeared, and the issues involved were argued. According to the testimony of Adrian Williamson, R. W. Wilson stated that he was not ready to complete the hearing at that time, but desired to inspect the stocks and bonds, and the court adjourned until June 8 for a further hearing.

At the request of the attorney for the heirs, all the stocks and bonds were sent to the Union Bank & Trust Company at Monticello for R. W. Wilson's inspection, and he examined them on May 1. There is testimony

that R. W. Wilson stated on several occasions that he did not know whether his clients wanted to contest Mrs. Fannie B. Wilson's claim to the stocks and bonds, and it is admitted by appellant that he did not indicate what their attitude would be at the time he finished the inspection.

On May 1, Williamson wrote Wilson as follows: "This afternoon we had no definite understanding as to the next step to be taken in connection with the personal property which the executor understands to have been owned by H. M. Wilson and Fannie B. Wilson, his wife, as tenants by the entirety with right of survivorship at the time of Mr. Wilson's death, and to be therefore now owned by Mrs. Fannie B. Wilson, being the securities which you inspected this afternoon.

"In case you wish to raise any further question on this point, as to any of the securities in question, please notify us just as soon as practicable so that the executor or Mrs. Wilson can begin to take proof as speedily as possible and get the matter in shape for final adjudication in June."

Williamson, also, wrote to R. W. Williford, at Wortham, Texas, as attorney for W. M. Wilson, and to DeWitt Poe, at McGehee, as attorney for Mrs. Ella McQuistion, and each replied that he did not care to controvert Mrs. Fannie B. Wilson's claim to the securities.

Williamson testified that shortly after May 1, he again urged R. W. Wilson to let him know whether or not be desired to take any testimony or otherwise participate in the adjudication of the issue as to Mrs. Fannie B. Wilson's claim as surviving tenant, and that Wilson said he would let him know in a short time whether he desired to take any proof on that issue.

The court met again on June 8, 1936, and heard additional arguments as to the proper construction of the will. The court decided certain of the issues, and according to Williamson's testimony, R. W. Wilson announced that he was not then ready to say whether he cared to contest Mrs. Fannie B. Wilson's claim, and

the court continued that matter at his request until June 22.

Williamson says that prior to June 22, he called Wilson over the telephone and asked if he had determined whether his clients cared to question title to the stocks and bonds. Wilson replied that he did not care to do so at that time. Williamson says that because of uncertainty as to R. W. Wilson's intentions he suggested to Mrs. Fannie B. Wilson that she employ a lawyer to represent her, for the reason that he (Williamson) represented the bank and could not serve in a dual capacity. She employed W. F. Norrell, and Norrell filed an answer and cross-complaint on June 22. This pleading was identical with an answer and cross-complaint filed by appellant on June 17, *pro se.*

When the court met on June 22, Wilson appeared for the John B. Wilson heirs; Norrell appeared for Mrs. Fannie B. Wilson, and Adrian Williamson appeared for the bank. Williamson says he told R. W. Wilson, and, also, announced to the court, that it was imperative that the claim of Mrs. Fannie B. Wilson be finally adjudicated that day, because H. M. Wilson had died on June 29, 1935, and it only lacked a few days until the period of a year in which the widow had a right to claim a dower interest in the estate would expire. Williamson testified:

"I asked Mr. Wilson again whether he cared to be present at the hearing of that issue. He indicated that he was not interested. Mr. R. L. Hyatt, vice-president of the Union Bank & Trust Company, who handles all trust matters for the bank, was called to the courthouse to testify, and to introduce in evidence the original signed document whereby the personal property in question had been assigned and delivered to H. M. Wilson and Fannie B. Wilson, husband and wife, as tenants by the entirety.

"Mr. Hyatt came into the court room while Mr. Wilson was there, and I remember telling Mr. Wilson that I was going to take some testimony, and he appeared to be irritated, and asked why I was doing so,

inasmuch as he was not raising any objection as to the title of Mrs. Wilson to this property.

"Mr. Wilson, got his hat and brief case and walked out of the room. It was only a few minutes after that before the court was ready to hear us, and I remember going down stairs and to the front door in order to again advise him that we were about ready to take the matter up, but he had left the courthouse, at least I did not see him. The matter was then presented to the court."

After hearing the testimony, the court rendered a final decree, adjudicating that Mrs. Fannie B. Wilson was the owner of the stocks and bonds as surviving tenant by the entirety, and was entitled to the possession of them.

It is insisted by appellees that they were not prepared to meet the issues raised in the answers and cross-complaints filed by appellant on June 17 and June 22; that, as a matter of law, issues between the parties were not drawn until June 22; that the heirs of John B. Wilson lived in different states and were inaccessible; that the testimony of Adrian Williamson, representing the Union Bank & Trust Company, was not antagonistic to the interests of appellant, and indicated a willingness to help her; that the decree was rendered the same day appellant's answer and cross-complaint were filed by Senator Norrell, and was necessarily predicated upon Williamson's testimony. It is also contended that appellees have a meritorious defense, but the nature of this defense was not mentioned, nor was any evidence offered in support of such defense.

In reviewing the case, it should be remembered that the Union Bank & Trust Company's suit was filed February 13, of which all parties in due course had notice. In the final judgment on motion to vacate, the chancellor, after referring to the original complaint, found that the John B. Wilson heirs had answered on February 14, 1936, and had joined in the prayer to construe the will and determine the validity of the estate by the entirety; that Mrs. Fannie B. Wilson filed an answer and cross-complaint on June 17, asserting her title to the property

in question; that on June 22, the court heard evidence and entered its decree adjudicating the estate by the entirety to be valid; that on May 1, attorney for the heirs of John B. Wilson had inspected stocks and bonds included within the estate by the entirety; that on June 22, 129 days had elapsed since the filing of the original bill; that it was the duty of the court to decide the case upon that day, and that a decision would have been made even though Mrs. Wilson had filed no pleadings.

The court further found that on the 14th of September, the John B. Wilson heirs filed a motion to vacate the decree of June 22; that the John B. Wilson heirs were the same parties who had filed the pleading on February 14, asking the court to adjudicate the validity of the estate by the entirety; that the answer filed by Mrs. Fannie B. Wilson raised no new issue in the case; that there was no necessity for her pleading, but that nevertheless her answer may have constituted the initial plea in the case with reference to the validity of the estate by the entirety; that the motion to vacate the decree was filed on the last day of the June term of court and was continued by the court under the mistaken belief that there were other matters affecting the issues not disposed of; but that all issues had been finally adjudicated in the decree of June 22.

The history of this case is set out at length that there may be an understanding of all the steps taken by litigants and their attorneys.

If the contentions of appellees are to be maintained, there must be a finding that appellant's answers and cross-complaints injected new matter into the proceedings. To this proposition we cannot assent. It is our opinion that the issues were made up when the heirs of John B. Wilson answered on February 14. It is true that in her answer and cross-complaint appellant claimed title to certain property, but identical allegations were made in the complaint of February 13, and the chancellor found that there could have been full adjudication if appellant's pleadings had not been filed, and the issue was determined in appellant's favor.

The record is impressive in that from February to June the most meticulous consideration was extended by appellant and those representing her. It is apparent that nothing suggestive of fraud or concealment entered into the negotiations or into the legal relationships.

It is the holding of this court, therefore, that allegations in the bill of review were insufficient to justify the chancellor in vacating the original decree; that such decree contained appropriate findings and the law was correctly declared, and that the order vacating it should be vacated and the original decree reinstated. It is so ordered.

SEWELL *v.* FEDERAL COMPRESS & WAREHOUSE COMPANY.

4-4646

Opinion delivered June 14, 1937.

Oliver Moore, for appellants.

Caudle & White, for appellee.

BUTLER, J., (on rehearing). We have re-examined the record and have concluded that we were in error in affirming the judgment of the lower court in its entirety, that the petition for rehearing should be granted, that our original opinion be withdrawn and the following substituted therefor.

John K. and Anna Sewell are the owners of a farm in Pope county, Arkansas. For the years 1931 and 1932, Glee Young was their tenant. He was to pay as rent on lands put to cotton one-fourth of the amount produced. In 1931, the landlords waived their lien for rent in favor of the United States government in order that Young might finance his operations. In that year he made approximately thirty-nine bales of cotton, but most of it was used in paying the expense of the making of the crop. At the end of that year, the landlords had received no rent, and in the spring of 1932 they brought suit to recover the amount due. That suit was not pressed and was pending in the fall of 1932. In that year, the tenant produced fifteen bales of cotton, twelve bales of which he deposited with the Federal Compress & Warehouse Company and was given receipts for each by which the bales were identified. Young and the Sewells agreed upon a settlement of the rents for 1931 and 1932 and, in pursuance to the agreement, Young delivered nine of these receipts to Honorable Bob Bailey, the Sewells' agent, who, in turn delivered them at a later date to the Sewells.

Young was indebted to the Peoples Exchange Bank for advances made to him in 1931 and, to secure this debt and other debts which might be incurred, he executed a mortgage on his interest in the cotton and other crops grown on a certain part of the Sewell farm. On this part of the farm four bales of cotton were produced in the year 1932. In February, 1933, the bank brought suit in replevin against Young and obtained an order of delivery for the twelve bales of cotton stored in the warehouse. Under this order, the sheriff took possession of the cotton. Later there was a judgment in that suit against Young, and the sheriff was ordered to sell the cotton to satisfy the same. This sale was made through the bank

on or about January 15, 1934, at an average price of approximately eleven and a half cents per pound.

At some time, on a date not disclosed by the testimony, Sewell presented the receipts to the warehouse company and demanded the cotton. This was at a time when the warehouse company had surrendered possession of the cotton, and, it being unable to comply with Sewell's demand, suit was instituted by him to recover the value of the nine bales of cotton.

The warehouse company answered, admitting the storing of the cotton and the issuance of the receipts to Young, but denying that the same had been transferred to the plaintiff. It alleged that in the replevin suit brought by the bank against Young, the Sewells intervened and claimed the cotton, and that upon a final hearing the right of possession to the cotton was found to be in the bank. The bank intervened, filing practically the same answer as the warehouse company, and it and the latter company pleaded the judgment in replevin as a bar to Sewell's action.

The only testimony offered in support of the plea *res judicata* was an unidentified paper, alleged to have been filed by the Sewells in the suit for replevin, in which the claim was made that the Sewells were entitled to the rents on the cotton produced in 1932. The judgment in replevin made no mention of the Sewells, nor was there any other testimony except the unidentified instrument mentioned, to sustain the plea of *res judicata.*

The facts hereinbefore related were established by a clear preponderance of the testimony, and the trial court found in favor of the Sewells for the value of five bales of cotton in the sum of $300.30.

Both the Sewells and the Federal Compress & Warehouse Company appealed, having first filed their motions for a new trial, which were overruled. The intervener bank is designated in the record before us as "cross-appellant."

It is first insisted by the Federal Compress & Warehouse Company and the alleged cross-appellant, Peoples Exchange Bank of Russellville, that the appeal of John K. and Anna Sewell should be dismissed because the judg-

ment appealed from was not a final judgment. It was a final judgment as to the warehouse company. In its judgment the trial court ignored the intervention of the Peoples Exchange Bank and made no mention of the same, but the bank did not complain of this action and did not file a motion for a new trial. Therefore, it has no place in this lawsuit on appeal, and, since the bank is not before this court, the contentions made in its behalf must be ignored. Likewise, the trial court was correct in refusing to transfer to equity.

The appellants contend, first, that the trial court erred in finding the net value of the cotton per pound at eleven cents. This contention is based on the testimony of a cotton buyer to the effect that in September, 1934, for certain cotton, he secured the sum of 13 cents a pound. The appellants contend that they are entitled to the highest market price during the time the cotton was in the possession of the warehouse company. We do not think this contention is correct, but that the value of the cotton, at the time demand was made for it and refused, would be the price to which appellants were entitled. There is no testimony showing the grade of the cotton in question or as to the time the demand was made.

The appellants further contend that the trial court erred in adjudging them to be entitled to only five bales of the nine bales for which they held warehouse receipts. We have concluded that this contention is correct. As noted, there were twelve bales of cotton deposited by Young in the warehouse for which receipts were issued to him. The trial court found that four of these bales were covered by the mortgage of the bank. This finding seems to be supported by the evidence. The court further found that of these four bales the Sewells were entitled to recover one-fourth as rent, or one bale of cotton. This left eight bales which were not covered by the bank's mortgage. Therefore, the Sewells were entitled to recover the value of the nine bales for which they held warehouse receipts.

Section 10427 of Crawford & Moses' Digest provides that a receipt issued by a warehouseman in which it is stated that the goods received will be delivered to the

bearer on demand is a negotiable receipt. This provision appeared in all of the receipts delivered by Young to the Sewells which were in the form provided by § 10428 of Crawford & Moses' Digest and carried the title to the cotton represented subject, of course, to any outstanding superior title.

The Sewells further complain of the failure of the trial court to award to them punitive damages against the warehouse company. We see no merit in this contention. The surrender of the cotton by the warehouseman was not willful, but made in obedience to the order of a court of competent jurisdiction. While that order does not protect the warehouse company from liability to the true owner of the cotton, it does protect it from the award of punitive damages.

The trial court found, and the evidence establishes the fact, that the nine bales of cotton averaged 455 pounds each. Accordingly, a judgment should have been rendered in favor of the appellants for the sum of $450.45, the total value of the nine bales at eleven cents a pound, instead of judgment for the value of five bales.

The judgment will, therefore, be modified in this respect, and, as modified, affirmed. The clerk will enter judgment here in accordance with this opinion.

MILLER *v.* WHYTE.

4-4692

Opinion delivered June 14, 1937.

Arthur D. Chavis, for appellant.

E. W. Brockman, for appellees.

MEHAFFY, J. Caesar Miller, Sr., was the owner of lots 22 and 23 of block 2, LeRoy's Addition to the city of Pine Bluff, Arkansas. This property was the homestead of Caesar Miller, Sr., and his wife, Paralee Miller, until some time in August, 1911, when his wife obtained a divorce from Caesar Miller, Sr., in which proceedings the property herein involved was decreed to Paralee Miller to occupy and use only during her natural life. The title in reversion remained in Caesar Miller, Sr., until the death of Paralee Miller or until his own death.

The decree of divorce, which was introduced in evidence, recites "that by agreement of the parties to this action the property rights have been agreed upon and settled and shall be ordered and decreed herein."

There were introduced in evidence copies of the following instruments:

"1. Deed from William Burke and wife to Caesar Miller, dated December 21, 1901, appearing in deed record 60 at page 594.

"2. Deed from L. T. Sallee, county clerk, to A. G. Kahn, dated June 16, 1926, appearing in deed record 112 at page 570.

"3. Deed from Paralee Miller to Creed Caldwell, dated January 19, 1926, appearing in deed record 121 at page 160.

"4. Commissioner's deed from C. M. Nichol to Creed Caldwell, dated December 17, 1926, appearing in deed record 122 at page 394.

"5. Deed from A. G. Kahn and wife to Creed Caldwell, dated March 21, 1927, appearing in deed record 124 at page 500.

"6. Deed from A. G. Kahn and wife to Creed Caldwell, dated May 12, 1927, appearing in deed record 124 at page 572.

"7. Deed from Caesar Miller and wife, Ella Miller, James Miller and Verne Miller to Paralee Miller, dated November 12, 1924, appearing in deed record 142 at page 256.

"8. The divorce decree in the case of Paralee Miller vs. Caesar Miller, dated August 12, 1911, appearing in chancery court record R at page 504."

Caesar Miller, Sr., died August 18, 1925. Lillie Miller Turner died without issue September 13, 1927. Paralee Miller died December 15, 1929, leaving Caesar Miller, Jr., as the sole surviving heir at law of Caesar Miller, Sr.

This suit was brought by Caesar Miller, Jr., on February 11, 1935, who claimed to be the owner of the above described property, and claimed that all of the conveyances were void.

Answer was filed denying the allegations of the complaint by Charles Whyte, son-in-law, and as administrator of the estate of, Creed Caldwell, deceased, and alleging that the property belonged to the estate of Creed Caldwell, deceased. Creed Caldwell died in December, 1934.

The appellant testified that he was 56 years old and lived at Collinston, Louisiana; that Caesar Miller, Sr., was his father, and that he died August 18, 1925; that his father owned the property involved. He testified that while his father and mother were not living together at the time of his father's death, that they were not divorced. The court record, however, shows that they were divorced. He, also, testified that while his mother lived on the property, that his father paid the taxes until 1925.

We deem it unnecessary to consider or decide whether the deeds mentioned are valid or not, except the deed from A. G. Kahn to Creed Caldwell, because if this deed is valid, the appellant could not recover, even if all of the other deeds and conveyances might be void.

A. G. Kahn and wife made two deeds, one dated March 21, 1927, and the other dated May 12, 1927.

The property involved forfeited for the nonpayment of taxes in 1923, and was deeded to A. G. Kahn in 1926. There is no evidence anywhere indicating that there was any irregularity about the sale of this property or the purchase of it by Kahn, and no evidence of any collusion between Kahn and Caldwell. Caldwell acquired posses-

sion of the property in 1926, and this property was held by his administrator after his death.

The appellant was 56 years old and knew that his father paid the taxes and evidently knew about the agreement as to the property when his father and mother separated. Appellant says that the life tenant permitted the property in question to sell for county and state taxes in 1923, and to be bought by A. G. Kahn, who received a tax deed to same in 1926, after the life tenant, Paralee Miller, had attempted to convey to Creed Caldwell, and then A. G. Kahn conveyed it back to Creed Caldwell by deed in 1927, in an effort to acquire title thereto, or to strengthen his claim of title already acquired from the life tenant.

There is no evidence anywhere that the life tenant was under obligation to pay taxes on the property. The decree of the chancery court awarded her the use of this property during her lifetime. She never paid any taxes, and the appellant testifies that his father paid the taxes until 1925, and the presumption is that that was the agreement between the parties.

Section 10054 of Crawford & Moses' Digest reads as follows: "If any person who shall be seized of lands for life, or in right of his wife, shall neglect to pay the taxes thereon so long that such lands shall be sold for the payment of the taxes, and shall not within one year after such sale redeem the same according to law, such person shall forfeit to the person or persons next entitled to such land in remainder or reversion of all the estate which he or she, so neglecting as aforesaid, may have in said lands, and the remainderman or reversioner may redeem the lands in the same manner that other lands may be redeemed after being sold for taxes; and, moreover, the person so neglecting as aforesaid shall be liable in an action to the next entitled to the estate for all damages such person may have sustained by such neglect."

Appellant contends that it was the duty of the life tenant and those holding under her to pay said taxes during the life tenancy, and said tax sale and purchase will be treated as a redemption of said property, and could not convey any title as against the reversioners.

The section from Crawford & Moses' Digest above quoted has reference to a life tenant whose duty it is to pay the taxes. It provides, also, that the remainderman or reversioner may redeem the land in the same manner that other lands may be redeemed after being sold for taxes. No effort was ever made at any time by appellant or his father, during his lifetime, to redeem the lands.

Appellant calls attention to *Galloway* v. *Battaglia,* 133 Ark. 441, 202 S. W. 836. The court said in that case: "In the case of *Magness* v. *Harris,* 80 Ark. 583, 98 S. W. 362, we said that the manifest purpose of this statute is to afford the remainderman an opportunity to redeem during the last of the two years allowed by law for redemption of lands from a valid tax sale, and to cause a forfeiture of the estate of the life tenant for failure to redeem from such sale within the first year." The statute referred to has no application here, because there is no evidence that the life tenant was to pay the taxes, but the appellant says that Caesar Miller, Sr., paid the taxes to the time of his death.

The evidence in this case shows that the occupancy of the house was given to Paralee Miller as alimony. The court, of course, had the right at any time, if conditions changed, to change his order with reference to alimony, and, as we have said, there is no charge that the taxes of 1923 were improperly assessed against the land, or that there was any irregularity in the forfeiture or sale, and there is no evidence as to any collusion between Kahn and anybody.

The chancellor, after a consideration of the evidence, made a general finding in favor of appellees. We have also considered all the evidence, and are of the opinion that the tax sale to Kahn was valid; in fact, it is not denied that it was valid, and no effort was ever made to redeem it either from this sale or from any other sale.

We have reached the conclusion that the decree of the chancellor is supported by a preponderance of the evidence, and it is, therefore, affirmed.

McCombs *v.* Mansfield.

4-4666

Opinion delivered June 14, 1937.

J. F. Loughborough and *R. E. Wiley,* for appellant.

J. A. Tellier and *John Sherrill,* for appellees.

McHaney, J. Appellant is the widow and executrix of the estate of the late R. B. McCombs. Appellees are the liquidating agents for the American Company of Arkansas, now defunct, but formerly a large wholesale grocery corporation, with a principal office and business house in Little Rock and many branch houses scattered over the state. It was organized as a Delaware corporation in 1926, licensed in Arkansas, and was dissolved on December 31, 1932, and all its assets were assigned to appellees, three former stockholders and directors therein, for the purpose of liquidation. The late M. W. Hardy of Little Rock was the moving spirit in its organization

and was its president from the date of organization until his death in 1929, when appellee Mansfield was elected president in November of that year, and so continued until dissolution. From organization in 1926 to 1931, inclusive, Mr. McCombs was managing director of the company, and as such was general manager of the business, owning a large block of the stock, was a director and a member of the executive committee of the board, composed of Hardy, McCombs and Anderson. McCombs and Hardy were brothers-in-law. At the annual meeting of stockholders held at the close of 1930 or early in January, 1931, there was much sentiment for and considerable discussion of a dissolution of the concern, of which McCombs was cognizant and also knew that the company had sustained substantial losses in its operations, and, apparently to forestall the threat and to allay such sentiment, he submitted to the auditors a padded inventory of the assets, increasing same $118,439.93 over and above the correct amount of the assets, and this nice showing as a result of the falsified inventory, induced the stockholders to continue the business in 1931. The same thing was repeated in the inventory submitted to the auditors in January, 1932, but same was discovered, and, when confronted with same, he left the business, never to return, as he was shortly thereafter accidentally drowned when his automobile ran off the road into deep overflow water.

Thereafter appellees exhibited a claim to appellant as executrix of said estate for $254,536.26 as damages for negligence and breach of trust of R. B. McCombs, as managing director of said company. The claim was disallowed, and this suit was begun on June 16, 1933. The complaint, in addition to some of the matters heretofore set out, claimed damages in connection with operations in 1931 over what it would have suffered through liquidation, if it had liquidated at the close of 1930, in the sum of $97,666.79. This item was disallowed by the court and forms the basis of a cross-appeal by appellees. Another item of damage claimed was for $28,649.76, about which it is alleged that McCombs received for the company special brokerage and rebates from 1926 to 1931, inclusive, which

he wrongfully paid to various employees, including himself, in amounts over and above their authorized salaries, as follows: (Setting out the employees and amounts received by each during these years, totalling the amount aforesaid.) Other items of damage were claimed by appellees and disallowed by the court, about which we do not understand there is any controversy. Of the amount claimed for wrongful overpayment of salaries, the court allowed and entered judgment against appellant for $22,018.56, and disallowed the amount claimed, $6,631.20, because this amount, the court held, was paid out for company benefit. Another item claimed in an amendment to the complaint, filed December 29, 1933, relates to an order for merchandise given by R. B. McCombs to the McGehee branch of the American Company amounting to $1,005.49, to be shipped to his brother, A. P. McCombs, at Thebes, but to be charged to the former at the McGehee office. This was done, but when the account reached the home office in Little Rock, he directed it to be charged to A. P. McCombs. This account was never paid, but of this the court allowed judgment for $412.65. The total amount, including interest, for which judgment was rendered against appellant was $25,809.43. From this decree of the court there is an appeal and cross-appeal.

Disposing of the cross-appeal first, we are of the opinion that the trial court correctly disallowed the claim for $97,667.79. While the court found that the stockholders were induced to continue operations during 1931 by reason of the wrongful padding of the inventories and otherwise inflating the statement of assets by Mr. McCombs which caused them to believe that the financial condition of the company was such as to justify a continuation of the business, and that the company lost said sum by operations in that year, it further found that appellant was not liable therefor, because the loss occasioned by a quick liquidation would have equaled or exceeded that amount, and that it, therefore, suffered no loss on this account. The claim is too speculative and conjectural. It is another case of the hindsight being better than the foresight. It will be remembered that

1930, 1931 and 1932 were depression years, in which many business concerns of good repute and long standing, including banks, went to financial wreck and ruin, and the American Company was one that sustained large losses. At the beginning of 1931 it owed bills payable to banks of $345,000 which were indorsed by the directors, including Mr. McCombs, and about $117,000 of other debts, or a total of nearly one-half million dollars, all of which was paid off by McCombs through operations in 1931. This, of course, involved orderly liquidation by the company itself. It went on a cash basis, sold goods for cash, pressed collections, reduced the number of branch houses, and handled much less merchandise. It had begun to do this in 1930, for in that year it purchased about $1,000,000 less of merchandise than it did in 1929. Such a course of liquidation reduced the total of its assets, but it, also, at the same time, liquidated all its debts. Of course it was wrong, reprehensible, to pad the inventories and otherwise inflate the assets for the purpose of deceiving the stockholders, or creditors, or both. But fraud or deceit without injury is not actionable, and here no injury is shown. No creditor is complaining. There are no creditors. The directors ought not to complain for they have been relieved of indorsements on $345,000 of the company's paper at banks. The stockholders have not been injured. True, the operating loss in 1931 was $97,667.79, but who can say they would have liquidated had they known the true facts. Some of them now say they would have done so, and they truthfully say so thinking they would. But that is a retrospective view. It is hindsight. They might or they might not have done so. And who can say the loss of liquidation would not have been as great as the loss of operation. It is speculation. It is conjecture. The court properly denied the claim, and its action is affirmed on cross-appeal.

As to the small item of $412.65, above mentioned, we think the court fell into error in allowing same. This claim was never presented to the executrix until action was brought on it in the first amendment to the complaint which was filed December 29, 1933. Mr. McCombs died

February 13, 1932, and appellant was appointed executrix a few days later. It was not presented within a year from her appointment and is, therefore, barred by the statute of non-claim of one year, which was pleaded in bar thereof. Ignorance of the claim does not excuse the delay unless caused by fraudulent concealment. There was no fraudulent concealment. McCombs was not there, and he made no representations to deceive those in charge of the books and accounts. *Planters' Mutual Ins. Co.* v. *Nelson,* 80 Ark. 103, 96 S. W. 123; *McKinney* v. *Beattie,* 157 Ark. 356, 248 S. W. 280.

Appellant insists that the judgment against her as executrix of said estate for $22,018.56 and the interest thereon should be reversed, because there was no loss to the company by reason of the payment of salaries, or a portion thereof, out of the brokerage account, and that McCombs had authority to fix salaries and make the payments, and we agree with her in this contention. The brokerage account was, as its name implies, an account to which brokers' fees or confidential rebates, collected from manufacturers or dealers selling merchandise to the company, was credited. Originally, Mr. Hardy and Mr. McCombs organized the Southwest Brokerage Company, a separate corporation, but owned entirely by the American Company or its predecessor, the American Grocery Company. Its purpose was to receive these confidential rebates which some of the manufacturers from whom goods were purchased would not allow and pay directly to the American Company, but which was a substantial source of income to the American Company, amounting to more than $230,000 during its existence. Hardy and McCombs advanced money to the Southwest Brokerage Company and most of the $6,631.20, which the court deducted from the $28,649.76 claimed as wrongfully paid out of the brokerage account, was to reimburse them for advancements made. This is mentioned to call attention to the fact that Mr. Hardy, president of the company, not only knew of this account, but himself received some of the funds from same. He knew, also, from 1926 to 1929, inclusive, that the funds in this account were used for company purposes, among such being the payment of a por-

tion of some of the officers' and employees' salaries therefrom. During that period there was paid from said account salaries to employees in the sum of $12,873.56. During 1930 and 1931, after Hardy's death, while appellee, Mansfield, was president, there was paid to employees from said account $4,775 for each year. It is not suggested that McCombs embezzled any of this money. It was paid out on checks, not drawn by him, but by another officer with his approval. The executive committee knew all about it. It is not suggested that these employees were overpaid, or that the payments were made through fraud or collusion. The salaries of all officers and employees were fixed by McCombs, a member of the board, of the executive committee and managing director. There is no record in the minute book that the board ever fixed salaries or directed salaries to be reduced, although it is testified that it was understood that salaries would be reduced in 1931. McCombs seems to have made such an order, but later had the order disregarded by paying the reductions from the brokerage account. Even so, his motive in doing so is not shown to have been corrupt. On the contrary, the payments were made from month to month to old and trusted employees, nearly all of whom testified in corroboration of the witness McFarlane that all these monthly payments were parts of salaries paid for services rendered by those employees in accordance with the contract rate of pay agreed upon in advance by such employee and McCombs, who had the authority to, and did, fix the pay of all employees. We are, therefore, of the opinion that the payments were made for company benefit, that McCombs had the authority to make them, and that there can be no recovery against his estate on this account.

The judgment will be reversed on direct appeal, and the cause dismissed.

The Chief Justice and Mr. Justice Humphreys hold that there should be a judgment for $4,775, being the salaries paid from the brokerage account during the year 1931, and dissent to this extent.

MASHAW *v.* MOSLEY.

4-4693

Opinion delivered June 14, 1937.

[redacted]

Appellant *pro se.*

Arnett & Shaw, Robt. J. White and *Ray Blair,* for appellee.

HUMPHREYS, J. On the fourth day of March, 1929, T. A. Mashaw and others incurred an indebtedness to Ed Mosley and gave him a note for same. The note was not paid at maturity and suit was brought on it in the circuit court of Logan county, northern district, and judgment, including interest, amounting to $1,446 in all was obtained on the seventh day of January, 1934. Execution was issued thereon and returned *nulla bona.*

Suit was then brought by E. Mosley in the chancery court of said county and district to set aside a bill of sale executed by T. A. Mashaw to appellant, his wife, to an undivided half interest in nine thousand square feet of land on which the Kalamazoo Cotton Gin was located, on the ground that the conveyance or attempted conveyance thereof was without consideration and void, and made with the intent to defraud his creditors. The bill of sale is as follows:

"BILL OF SALE

"Know All Men by These Presents:

"For and in consideration of the sum of $1 and other considerations in hand paid by Lizzie Mashaw, I,

T. A. Mashaw, do hereby grant, bargain, and sell to the said Lizzie Mashaw, my wife, my undivided interest in and to 9,000 square feet of land on which is located the Kalamazoo Cotton Gin in township 8 north, range 26 west, northern district of Logan county, Arkansas, subject to vendor's lien of $3,000 held by August Bartsch Estate. I hereby warrant the title thereto, except as to said vendor's lien to be free from all liens and claims whatsoever.

"Executed in duplicate on this August 21, 1933.

"T. A. Mashaw."

This bill of sale was acknowledged in due form and recorded in book K at page 89 in the record of chattel mortgages in said district and county. By reference to the bill of sale it will be seen that the property had a lien against it for the balance due on the purchase money in favor of August Bartsch Estate, from whom it had been bought. There was no assumption of this debt by appellant. It was subsequently paid out of the earnings from the operation of the Kalamazoo Cotton Gin which was operated by T. A. Mashaw and T. R. Smith, Jr., who owned the other half interest in the property. At the direction of T. A. Mashaw or his attorney and T. R. Smith, Jr., the property was conveyed by warranty deed by Bertha Bartsch, widow, and all the heirs of August Bartsch to appellant and Catherine Smith, the wife of T. R. Smith, Jr. The complaint, also, alleged that the deed was made to appellant, in furtherance of T. A. Mashaw's plan and effort to prevent his creditors from reaching the property and subjecting it to the payment of their claims against him. The prayer of the complaint is for a cancellation of the bill of sale and deed and to subject the property to a payment of plaintiff's judgment. During the pendency of this suit T. A. Mashaw filed a voluntary petition in bankruptcy in the United States court for the western district of Arkansas on the seventh day of January, 1936, and on March 27, 1936, Guy Conley, who was appointed trustee of the estate of T. A. Mashaw, was made a party plaintiff and adopted the complaint of Ed Mosley.

Answers were filed denying the material allegations of the complaint and the case was heard on the pleadings and evidence adduced, by the chancery court, resulting in a decree canceling the instruments and subjecting T. A. Mashaw's half interest in the property to the payment of his creditors, from which is this appeal.

Although T. A. Mashaw testified that he transferred the property to his wife in good faith and without any intent of defrauding his creditors, yet he was forced to admit on cross-examination that he conveyed his equity in the property to his wife without consideration at a time when he owed large amounts for which he was being pressed by them for payment and in doing so denuded himself of the only property he had with which to pay them.

His wife knew of his indebtedness and testified that she bought the property for the purpose of helping her husband out. Since she paid him nothing for it with which to pay his creditors it is hard to understand just how she intended to help him out unless it was an effort on her part to prevent his creditors from subjecting the property to the payment of his debts. His explanation is that by conveying it to his wife he could operate the gin as her agent and draw a salary of about $600 a year, whereas, if he turned it back to the Bartsch estate in payment of the purchase money he would lose his job. He testified that he paid himself a salary of $600 a year and the evidence reveals that in addition he made enough out of the operation of the gin to pay the balance of the purchase money due the Bartsch estate. Of course, if these conveyances are upheld his wife will own and hold the property to the exclusion of his general creditors. The great weight of the evidence reflects that he attempted to give his equity in this property to his wife when he was insolvent. The law is that a man must be just before he is generous. *Rudy* v. *Austin,* 56 Ark. 73, 19 S. W. 111, 35 Am. St. Rep. 85. This court said in the case of *Brady* v. *Irby,* 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054: "The question then presented is whether the voluntary conveyance of this stock, thus made by the husband to the wife, is valid as against his

creditors. This is largely a question of fact, depending upon the financial condition of the husband at the time the gift was made. It has been held that if the donor owes no debts at the time the gift is made, or if his debts are small in amount in comparison with the properties he then owns, and after such gift he retains property amply sufficient to pay all debts then existing against him, the gift made under such circumstances will be valid. But it is, also, well settled that a voluntary transfer of property by one in debt is presumptively fraudulent as to creditors then existing; and if the debtor is at the time of such gift insolvent, or if the gift is of such amount, or made under such circumstances that it will hinder or delay, or defraud existing creditors of such donor, then such voluntary conveyance, therefore, becomes conclusively fraudulent and invalid as to such existing creditors."

Appellant contends that the decree should be reversed because the value of his equity in the property did not exceed $500 and, as a married man and the head of a family, he was entitled to claim that much personal property as exempt from the claims of his creditors and that a transfer of that much of his personal property could not be a fraud upon them. These conveyances indicate that this property is real estate, and it was not his homestead, but if personal property the evidence shows that it was worth more than $500. He earned out of its management $600 a year salary and in addition made enough in the operation of the gin to pay the vendor's lien. It was certainly worth more than $500 if in the operation thereof he earned and made this much money out of it. He paid much more than $500 for his half interest in the property.

No error appearing, the decree is affirmed.

CITY OF FAYETTEVILLE *v.* STONE.

4-4685

Opinion delivered June 14, 1937.

Price Dickson, for appellant.

W. N. Ivie, for appellees.

BUTLER, J. This suit was instituted by the appellees against the appellant to recover damages for the taking of a certain parcel of their lands for the purpose of widening, straightening and paving the west end of Wall street in the city of Fayetteville. Upon testimony adduced by the respective parties, the cause was submitted to the court sitting as a jury, and resulted in a judgment in favor of the appellees in the sum of $540.

Two questions are presented upon appeal. The first is that the evidence was insufficient to support the verdict under the rule announced in *Weidemeyer* v. *Little Rock,* 157 Ark. 5, 247 S. W. 62, which reaffirms that announced in *Cribbs* v. *Benedict,* 64 Ark. 555, 44 S. W. 707, that where the public use for which a portion of one's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation and benefit, and the benefits thus considered must be those which are local, peculiar and special to the owner's land.

After the trial court had heard the testimony in the case he personally inspected the property alleged to have been damaged, and it is argued that the view by the court was not of itself sufficient to enable it to determine the damage. While this may be true, the view made by the

court was proper in that it was thus enabled to understand and analyze the testimony of the witnesses with respect to the situation. The testimony relating to the damage sustained is in irreconcilable conflict, both as to the benefits to the land by reason of the improvement and the damage sustained when these benefits are considered. It is unnecessary to set out this evidence in detail. Suffice it to say, that when the local and special benefits are considered the evidence adduced by the appellees is ample to sustain the judgment of the trial court.

It is finally urged for reversal that the trial court erred in its procedure relating to the production of testimony. This contention is based upon the fact that after the appellees had closed their testimony in chief they were allowed to introduce certain other witnesses whose testimony was not in the nature of rebuttal, but, if admissible at all, should have been introduced before appellees closed their case. If it is conceded that the testimony of these witnesses was of the nature contended for by the appellant, no reversible error was committed by the trial judge in allowing it to be irregularly introduced. The matter of permitting the introduction of testimony out of time is one within the discretion of the trial court, and it is only where there is a manifest abuse of this discretion which results in injury to the party complaining that the action of the trial court will be reviewed. *Chunn* v. *London L. & F. Ins. Co.*, 124 Ark. 327, 187 S. W. 307; *Harger* v. *Harger*, 144 Ark. 375, 222 S. W. 736.

Finding no reversible error, the judgment of the trial court is correct, and is, therefore, affirmed.

WOODMEN OF THE WORLD *v.* BROWN.

4-4678

Opinion delivered June 14, 1937.

[redacted]

Donham & Fulk, Fred A. Donham, Pat Mehaffy and *Milton McLees*, for appellant.

H. A. Tucker, Kenneth C. Coffelt and *Wm. J. Kirby*, for appellee.

GRIFFIN SMITH, C. J. Two beneficiary certificates for $1,000 each were issued by appellant on the life of Homer C. Ford. The first was dated June 19, 1934, and was payable to the assured's four minor children. The second certificate was dated May 31, 1935, and named Ethel Brown, sister of the assured, as beneficiary. Ford died January 9, 1936, and the appellant, T. E. Nethercutt, qualified as guardian and brought suit on certificate No. TE-1202152. Ethel Brown, in her own rights, sued on certificate No. TE-1288782. The causes were consolidated and a jury returned verdicts for the face value of each certificate, upon which the court gave judgment.

Appellant defended upon the ground that Ford had falsely stated in each application that he had not, within five years preceding, suffered any mental or bodily disease or infirmity, and had not, within five years, consulted or been attended by a physician for any disease or injury, nor undergone any surgical operation. It is admitted that the questions were asked, and in each case the response was "No." Appellees do not seriously contend that the answers are not warranties, but insist that the evidence is conflicting as to the time the assured was treated or had consulted a physician, and that in view of this conflict the jury's verdicts should not be disturbed.

Appellant relies principally upon the testimony of Dr. J. P. Randolph, who on direct examination testified that, as well as he could remember, he first treated Homer C. Ford for pellagra and neuritis in 1933 or 1934. This statement appears at page 36 of the transcript, and the inference may be drawn from the record that Dr. Randolph was shown a letter, presumably written by him, or to him, in which reference was made to the doctor's first treatment or examination of Ford,

for the witness said: "From the letter that you showed me I evidently had some data to state it was July, 1934. Possibly I could or would not have stated it was in July unless I had some data at that time. If I put it down as July I had something to go by."

And then, on cross-examination, there is this testimony: Question: "I believe you said you were unable to say whether or not it was in July, 1933, or July, 1934?" Answer: "Yes, sir." Question: "As a matter of fact, Doctor, it could have been in 1935?" Answer: "Yes, sir, might have been in 1935." Question: "You are just testifying from memory?" Answer: "Yes, sir, with the exception there of the letter they have which states July, 1934. I figure I must have had some data to put down the month at least."

On redirect examination this testimony appears: Question: "Doctor, you don't mean to state that your first treatment of pellagra for him could have been last year, in 1935?" Answer: "No, not the first."

The witness then stated that it was his opinion the treatments were in 1933 or 1934, but that he did not know whether he treated Ford in 1935.

The effect of this testimony is that Doctor Randolph treated Ford in 1933 or 1934, and that he may have treated him as late as 1935, but if treatments were given in 1935 they were not the first.

Dr. F. J. Burgess, whose deposition was read in evidence, said that Homer C. Ford came to him and "wanted me to pass on the other fellow's opinion." Dr. Burgess then stated that it was considered unprofessional for one physician to pass judgment upon the diagnosis made by another physician, and he declined to advise or inform Ford, except to say that the symptoms were suggestive of pellagra. "At that time Ford's hands were rough and inflamed like pellagra, but he was up and going. This visit must have occurred two years before he died, or three." Question: "You are positive it was not just this last year?" "Oh, sure—it was not in 1935, because he died in 1936, and I know it must have been two years." On cross-examination Doctor Burgess testified that Ford told him he had been pro-

nounced "pellagran." "He showed me his hands and I told him it looked like it. That was some time after his wife's death." (It was brought out in evidence that Ford's wife died October 30, 1933.)

Miss Pearl Cole testified that she lived half a mile from Ford. "After his wife died I saw him with a breaking-out—kinda dark-looking spots on his hands and arms. Homer didn't mention the name of the disease, but said he was being treated for it by Dr. Randolph at Hot Springs."

In his deposition, read in evidence, Dr. A. H. Tribble testified that he operated on Homer C. Ford for appendicitis on February 20, 1930.

It will be observed that, while Dr. Randolph was not certain that he did not treat Ford in 1935, he was positive such treatment was not the first, and the letter referred to fixed the time as of July, 1934. Dr. Burgess testified that Ford came to him after his wife died in October, 1930, and told him that he had been examined, and that the diagnosis was pellagra, and added that he knew "this must have been two years ago, maybe three."

Miss Pearl Cole's testimony serves to confirm the date, Ford having stated that he was being treated by Dr. Randolph at Hot Springs.

Against the professional testimony offered and the testimony of Miss Cole and other lay-witnesses for appellant were appellees' witnesses, one of whom—Dr. S. R. Crawford—was a physician. Dr. Crawford testified that he knew Ford; saw him three to five times a year, but had never attended him or his family as a physician. Witness had gone hunting and fishing and "had stopped there." He said that Ford "appeared to be in good health, and did not complain."

Walter Paul, who took Ford's application for membership in the Woodmen of the World, said he thought Ford was in good health when the application was taken, but didn't know whether Ford had been treated by a physician, or whether he had pellagra.

William Martindale, financial secretary of appellant's Camp No. 42, testified that he delivered the certificates to Ford. "When I delivered the first one he

was walking in the field; I judge he was plowing. When I delivered the second one he was standing on the porch. In neither instance did I observe anything to lead me to believe he was in bad health."

Testimony given by other witnesses for appellees was to the effect that they had frequently seen Ford; that he appeared to be in good health; that they did not observe anything wrong with his hands or arms, and that he continued to work and care for a farm.

Proof of death and certificate by the attending physician, Dr. Randolph, were forwarded to appellant on January 22, 1936. The certificate recited that Ford's death was caused by lobar pneumonia. Question No. 2 was: "Did you treat or advise deceased prior to his last illness? If so, when, how long, and for what did you treat him?" Answer: "Neuritis and pellagra; six months."

Several days prior to his death, Ford was taken to State Hospital at Little Rock. A sister of the deceased testified that Ford had developed pneumonia. She said Dr. Randolph advised that the patient be taken to State Hospital. Appellant sought through cross-examination to show that Ford's mind had weakened as a result of pellagra, and that because of this he was brought to the hospital in Little Rock. The evidence on this point is not satisfactory, although physicians for appellant testified that insanity was a natural consequence of pellagra.

There is no evidence in the record, other than testimony of a negative character, to dispute Dr. Randolph's diagnosis of pellagra, a finding concurred in by Dr. Burgess. The positive diagnosis made by Dr. Randolph, and the time when treatments were given, are contradicted only by statements of witnesses who testified from appearances. With the exception of Dr. Crawford, none of these witnesses had professional knowledge, and Dr. Crawford merely says that Ford did not complain to him, or have objective symptoms.

Therefore, as a matter of law, it must be said that Dr. Randolph's testimony was not contradicted by anyone who professed to have knowledge of medical facts.

John T. Yates, appellant's secretary, testified that the beneficiary certificates would not have been issued if correct information had been given.

The applications contained this provision: "I hereby certify, agree and warrant, that all of the statements, representations, and answers in this application * * * are full, complete and true [and] shall be warranties, and I agree that any untrue statements or answers made by me in the application, or to the examining physician, or any concealment of facts in this application or to the examining physician, intentional or otherwise * * * shall make my beneficiary certificate void."

There was the further provision that the application, the constitution, and the by-laws of the Association should constitute the basis for and form a part of the beneficiary certificate.

In *Commonwealth Life Ins. Co.* v. *Tanner,* 175 Ark. 482, 300 S. W. 927, this court said: "Warranties as to the health and physical condition of the insured, both at the time of the application for the insurance, and certainly at the time of the delivery of the policy, were false, relieving the insurance company from any liability under the policy on that account, in accordance with its terms."

In *Brotherhood of American Yoemen* v. *Fordham,* 120 Ark. 605, 180 S. W. 206, we said: "One question asked by the defendant association was whether or not the insured had consulted or been examined by a physician within the last ten years. To that question he answered 'No.' His answer was false; and, according to the terms of the policy, was warranted to be true. The answers in question were made in regard to matters which were material to the risk, and did not relate to matters of opinion or judgment about which there might have been an honest mistake on the part of the applicant."

In *Springfield Life Insurance Co.* v. *Slaughter,* 183 Ark. 692, 38 S. W. (2d) 13, the application contained the following stipulation: "I further agree that if it should develop that I have misrepresented any material fact covered by the interrogatories or failed to make full dis-

closures of any material fact, the policy shall be null and void." In the opinion in that case it was said: "The undisputed testimony discloses that the insured was in bad health and had been for a long time when he applied for the policy. He was suffering from dropsy at the time he made the application and died therefrom within two months after the policy was delivered to him. Based upon these facts the trial court should have granted appellant's request for an instructed verdict and dismissed appellee's complaint."

The distinctions between warranties and representations, and their effects upon policies of insurance and beneficiary certificates, have been frequently discussed in decisions of this court, and it is unnecessary to repeat them here.

It is sufficient to say that the record in the instant case discloses that which is a matter of common knowledge—pellagra is a serious disease or malady, frequently resulting in death or insanity, or both; its manifestations or objective symptoms are not constant, but recur ordinarily with seasonal changes, and except in advanced stages physicians experience difficulty in correctly diagnosing the disease unless aided by the patient's history.

Appellant had a right, before issuing the beneficiary certificates, to ask, as it did, whether the applicant had been examined by any physician, and appellant was entitled to truthful answers. Ford knew that he had been treated within five years, and with respect to certificate No. 1202152 he knew that, within such time, he had been operated upon for appendicitis. It may be argued that the operation did not contribute even remotely to the assured's death; yet, the fact of the operation cannot be denied, and appellant had a right to expect a correct answer. But it was of much greater importance to have responsive answers to the other questions, and when the applicant declared that he had not consulted or been treated by a physician within five years, and warranted these answers to be true, he either fraudulently or negligently deceived appellant. The penalty for false answers was agreed upon by the parties—the certificates

should be void. Courts cannot relieve the assured's beneficiaries, innocent though they may be, of the natural consequences of a contract founded on deception.

Under certificate No. TE-1288782, on which Ethel Brown brought suit, $11.19 had been paid in premiums. Under certificate No. TE-1203152, on which Nethercutt as guardian brought suit, $18.41 had been paid in premiums. These amounts were tendered before the complaints were filed, and judgment is here given for such items.

In all other respects the judgments are reversed, and the causes dismissed.

NEAL *v.* NEAL.

4-4675

Opinion delivered June 14, 1937.

Hays & Wait and *J. M. Smallwood,* for appellants.

Caudle & White, Donham & Fulk and *Fred A. Donham,* for appellees.

McHaney, J. Appellants, brother and sister, are two of the heirs at law of Mary J. Neal who died intestate in April, 1932. Appellee, Gladys Neal Brandon, is the granddaughter of Mary J. Neal, and the daughter of William G. Neal who predeceased his mother, leaving his daughter, Gladys, and a granddaughter, Betty Lou Brandon, whom he had legally adopted, as his sole heirs at law. The latter is a minor and is represented in this action by her grandmother, and adoptive mother, Mrs. William G. Neal, as her guardian and next friend. Appellees brought this action against appellants and Thomas C. Neal, another son and heir-at-law of the said Mary J. Neal, (but there was no personal service on him, and he is not affected by the judgment rendered herein), questioning the validity of the disposition of certain real estate and personal property by said Mary J. Neal in her lifetime. On January 1, 1931, when she was 78 years of age and in very poor health, so that she thought it was her last illness, Mary J. Neal executed three separate deeds to real property owned by her—one to appellant Sarah Neal Rogers to what is referred to in this record as the home place and on which a value was fixed by the court of $12,000; another to both appellants to what is known as the drug store building valued by the court at $8,500; and another to appellee, Gladys Neal Brandon, to what is known as the rent house, valued by the court at $1,250. The deeds to appellants were delivered at that time, but the deed to said appellee was not delivered to her until after the death of the grantor and none of the deeds was recorded until after her death, she continuing to remain in possession thereof and collecting the rents and profit therefrom, for more than a year thereafter, or until April, 1932. On January 3, 1931, Mrs. Mary J. Neal caused to be executed and delivered to her four certificates of deposit by the Bank of Russellville, where she had on common deposit more than $25,500, and of which bank appellant, George S. Neal, is and was the president—one to herself and

appellant, Geo. S. Neal, for $11,000, one to herself and appellant, Sarah Neal or Mrs. Brown Rogers, for $6,000, one to herself and Thomas C. Neal for $7,000, and one to herself and appellee, Gladys Neal Brandon, for $1,500. All of said certificates were in the same form and one of them reads as follows:

"Russellville, Arkansas,
"January 3, 1931, No. 3545.

"This certifies that Mary J. Neal and Mrs. Brown Rogers has deposited with the Bank of Russellville six thousand dollars $6,000 payable to the order of either of them or the survivor in current funds, on the return of this certificate properly endorsed, six months after date with interest at the rate of four per cent. per annum. No interest after maturity.

"(Signed) Geo. S. Neal, President.

"Endorsed on Back: Mary J. Neal 4-26-31 Paid."

Three of these certificates of deposit, those to appellants and Thomas C. Neal, were surrendered, canceled and new certificates issued on April 27, 1931, in compliance with Mary J. Neal's letter to the bank of that date, as follows:

"Russellville, Arkansas
"April 27, 1931.

"Bank of Russellville,
"Russellville, Arkansas.
"Gentlemen:

"You will find enclosed herewith certificates of deposit issued by your bank, dated January 3, 1931, and numbered 3544, 3545, 3546, for $7,000, $6,000, $11,000, issued and payable to Mary J. Neal and Thomas C. Neal, Mary J. Neal and Mrs. Brown Rogers, and Mary J. Neal and Geo. S. Neal, respectively, payable in six months from date at 4 per cent. interest to either of us or the survivor.

"I desire that you figure up the accumulated interest on these certificates and issue some new certificates as follows:

"$8,000 to Thomas C. Neal, due 6 months payable to self, Mary J. Neal, either of us or the survivor.

"$8,000 to Sara Neal Rogers, due 6 months payable to self, Mary J. Neal, either of us or the survivor.

"$8,000 to Geo. S. Neal, due 6 months payable to self, Mary J. Neal, either of us or the survivor.

"Thanking you for your attention, I am,

"Very truly yours,

"(Signed) Mary J. Neal."

All of said last certificates were in the same form, one of them reading as follows:

"Russellville, Arkansas,

"April 27, 1931, No. 3622.

"This certifies that Geo. S. Neal has deposited with the Bank of Russellville eight thousand dollars ($8,000) payable to the order of self, Mary J. Neal, either of them or the survivor, in current funds, on the return of this certificate properly endorsed, six months after date with interest at the rate of 4 per cent. per annum. No interest after maturity.

"George S. Neal, President.

"Endorsed on Back: Geo. S. Neal 4-26-32 Paid."

All of them, of both issues, were kept in the possession of Mary J. Neal during her lifetime, as shown by her letter of transmittal of the first issue for cancellation and reissue, and by the undisputed evidence that they were kept in her safety deposit box at the bank, where they were found after her death.

By their complaint appellees sought to have the deeds heretofore mentioned canceled and set aside on the ground of mental incapacity of the grantor and undue influence of appellants; but if it be determined that said deeds were valid and conveyed the properties therein mentioned, then that such conveyances be held to be advancements, and the residue of said estate should be used so as to equalize the respective shares in said estate of the heirs. Also, they sought to have the attempted disposition of the money represented by the certificates of deposit set aside, and that appellants be required to account to them for same, as, also, all other property of which Mary J. Neal died seized and possessed. Appellants answered denying any mental incapacity of the grantor or any fraud or undue influence on their part,

and asserted the validity of the conveyances and other disposition of property made by their mother.

Trial resulted in a decree holding the deeds good and valid conveyances of the respective properties to the respective grantees, but held them advancements; that there was no legal delivery of the certificates of deposit during the lifetime of Mary J. Neal, but delivery was made after her death, and, with accrued interest, were paid by the bank, and that appellants had each received from this source $8,160, to which they were not entitled, but was the property of said estate to be distributed to the heirs according to the laws of descent and distribution. Judgment was rendered against each appellant in the sum of $8,910 for the benefit of said estate, which in addition to the certificate of deposit and interest collected, includes $750 each has received from other assets of the estate, which amount each was ordered to pay into the registry of the court within 15 days, else execution or garnishment would issue at appellees' request. Other orders and directions are made in the decree of the court which are not pertinent to the issue here.

1. For a reversal of the judgment against them, appellants first say that the adoption of Betty Lou Brandon by her grandfather, W. G. Neal, did not give her the right to inherit from Mary J. Neal. This may be true, a question we do not decide, but whether true or not, it does not concern appellants, for her mother, Gladys Neal Brandon, would inherit the whole of her father's share, if Betty Lou were held not entitled to inherit. So, it is a matter that concerns appellees only.

2. It is next contended that the court erred in holding that the deeds to the real estate constituted advancements. "An advancement," said JUDGE WOOD, for the court, in *Holland* v. *Bonner,* 142 Ark. 214, 218 S. W. 665, 26 A. L. R. 1101, "is a gift by a parent to a child in anticipation of that which it is supposed the child will be entitled to on the death of the parent."

"The question as to whether or not a conveyance or transfer of money or property is regarded as a simple gift, or advancement, or a sale, is to be determined by the intention of the parent. The question as to what

was the intention is generally purely one of fact to be ascertained from the circumstances of the transaction. The donor's intention is the controlling principle, and if it can be said from all the circumstances surrounding a particular case that the parent intended a transfer of property to a child to represent a portion of the child's supposed share in the parent's estate such transfer will be treated in law as an advancement. Conversely, if it appears that the ancestor intended that a gift to his child should not be treated as an advancement such intention will prevail. 1 R. C. L., p. 656; § 5, p. 665, §§ 1617-23-27, and other cases in note; *Ruch* v. *Biery,* 110 Ind. 444, 11 N. E. 312; *McMahill* v. *McMahill,* 69 Iowa 115, 28 N. W. 470; *Wallace* v. *Reddick,* 119 Ill. 151, 8 N. E. 801."

It has long been the rule in this court that, where a parent makes a voluntary conveyance or gift to his child, there is a presumption of law that it is an advancement. *Robinson* v. *Robinson,* 45 Ark. 481; *Eastham* v. *Powell,* 51 Ark. 530, 11 S. W. 823; *Goodwin* v. *Parnell,* 69 Ark. 629, 65 S. W. 427; *Jackson* v. *Richardson,* 182 Ark. 997, 33 S. W. (2d) 1095. In the Goodwin case, *supra,* it was said: "The conveyance of land by G. P. Goodwin to his son, Leon Goodwin, being voluntary, in the absence of evidence to the contrary, is presumed to be an advancement, the presumption being that a parent intends 'that all his children shall equally share in his estate, not only in what remains at his death, but equally in all that came from him.' The doctrine of advancement is invoked to effectuate this intention."

This is, also, the general rule, for in 1 R. C. L., p. 668, it is said: "For the doctrine that a parent desires to distribute his estate equally among all his children is so strong, that, in the absence of clear and convincing evidence to the contrary, it will be presumed that a parent who during his lifetime makes a substantial gift to a child intended such gift to be an advancement; and hence it is often stated that a gift to a child or an heir by an ancestor in his lifetime is *prima facie* an advancement. A transfer of land by a parent during his lifetime to a child will be presumed to constitute an ad-

vancement of a portion or the whole of that child's share in the parent's estate, where the consideration expressed is nominal, and natural love and affection.'' See, also, §§ 3485, 3486, Crawford & Moses' Digest.

Applying these rules to the facts presented in this record. Did the court err in holding these conveyances advancements? We think not. The conveyances were to children and a grandchild. The consideration expressed was nominal—''One dollar and natural love and affection.'' The evidence, disregarding the deeds, fails to convince that Mary J. Neal did not intend to treat all of her children and the deceased son's child alike. Gladys Neal Brandon and her mother both testified that Mary J. Neal expressed the intent that Gladys Neal should have her father's part of her estate. Another fact is that the deeds were not put on record and appellees were not advised that they had been executed, until after the death of Mary J. Neal, who, for more than a year and three months after execution, remained in possession and collected the rents and profits. Under this state of facts, we think the court was justified in holding that the presumption of law as to advancements had not been overcome.

3. It is next earnestly insisted that the written signed agreement executed by appellants and appellees for the distribution of the residue of the estate, consisting of cash and notes of the total value of $3,283 cannot be questioned, and that appellees are estopped thereby. We cannot agree with appellants in this regard. This is principally a question of fact, depending on confidential relations between appellees and their uncle, in whom they had the utmost confidence. Whether the confidence reposed was violated or misplaced depends upon the facts and circumstances detailed in evidence, and we think it could serve no useful purpose to set it out. Suffice it to say, that the court's finding in this regard is not contrary to the evidence and must be sustained.

4. It is finally insisted that appellants are entitled to the funds represented by the certificates of deposit. It will be noticed that in the certificates dated January 3, 1931, that Mary J. Neal and the child named therein

appear as depositors. For instance, the language is: "This certifies that Mary J. Neal and Geo. S. Neal has deposited," etc., and "payable to the order of either of them or the survivor in current funds," etc., while in those dated April 27, 1931, superseding and canceling the former, the language is: "This certifies that Geo. S. Neal has deposited," etc., and "payable to the order of self, Mary J. Neal, either of them or the survivor, in current funds," etc. All certificates were signed by George S. Neal, president of the Bank of Russellville, and of course, he knew of their existence all the time. But in his letter to Gladys Neal Brandon, dated April 26, 1932, after his mother's death, he indicated that he had just discovered the certificates. He said: "Sarah and I have invoiced mother's affairs and found that she had an insurance policy. * * * We also found certificates of deposit, which mother had made over as follows:" Mrs. Rogers also testified that she and her co-appellant found the certificates in her mother's lock box while they were making an inventory, and the fair inference is from her testimony that she knew nothing of the certificates until that time, although she said her mother told her "she was going to make a distribution some way." Appellee, Mrs. William G. Neal, testified that, after the death of Mary J. Neal, appellant, George S. Neal, came to her apartment, and she said to him: "Sam, why did you do this to Gladys and Betty Lou? You know if Will (referring to her deceased husband) had been living he would have seen that your children were treated fairly." He answered that he didn't do it, that Sarah did it, and that Mrs. Sam Neal told her the same thing, "that Sarah was the cause of the estate being divided as it was." This testimony was undisputed, except that George S. Neal said that he didn't remember the conversation.

Counsel for appellants conceded in oral argument that the facts and circumstances surrounding the issuance of these certificates do not establish a gift either *inter vivos* or *causa mortis*, and this concession is well taken, for many of the elements of such a gift are lacking. In *Stifft* v. *W. B. Worthen Co.*, 176 Ark. 585, 3 S.

W. (2d) 316, we said: "Gifts *inter vivos,* or *donatio inter vivos,* are gifts between the living, and are perfected and become absolute during the lifetime of the donor and donee. *Hatcher* v. *Buford,* 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507. The elements necessary to constitute a valid gift *inter vivos* were stated by this court in *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030, to the effect that the donor must be of sound mind, must actually deliver the property to the donee, must intend to pass the title immediately, and the donee must accept the gift. It will, therefore, be seen that a gift *inter vivos* cannot be made to take effect in the future, as such a transaction would only be a promise or agreement to make a gift, and, being without consideration, would be unenforceable, and void, and considerations of blood or love and affection are not sufficient to support such a promise. 12 R. C. L. 930. This court, from *Hynson* v. *Terry,* 1 Ark. 83, down to the present time, in an unbroken line of cases, has held that actual delivery is essential, both at law and in equity, to the validity of a gift, and that without it the title does not pass. Mere delivery of possession is not sufficient, but 'there must be an existing intention accompanying the act of delivery to pass the title, and, if this does not exist, the gift is not complete.' *McKee* v. *Hendricks,* 165 Ark. 369-383, 264 S. W. 825, 952, and cases cited."

In the same volume of the reports will be found a case very much in point, involving an alleged gift of certificates of deposit, *Hudson* v. *Bradley,* 176 Ark. 853, 4 S. W. (2d) 534. There, the certificates were somewhat different in that W. T. Hudson or Joe Hudson had made the deposit, "payable to his or either own order" in one bank, and that W. T. Hudson had made the deposit "payable to the order of himself or Joe Hudson, his son," in another bank. It was held there was no completed gift to the son, where they were never delivered to the son, but remained in the father's possession to his death. Here, appellants never had possession of the certificates until after their mother's death and there was no completed gift.

Some contention is made that there was created a joint tenancy in the certificates. It is admitted that an estate by the entirety was not created for many of the essential elements of such an estate are lacking. For the same reason it cannot be held to be a joint tenancy. Such an estate is defined in 7 R. C. L. 811, as follows: "An estate in joint tenancy is an estate held by two or more jointly, with an equal right in all to share in the enjoyment of the land during their lives. Four requisites must exist to constitute a joint tenancy, viz: the tenants must have one and the same interest; the interests must accrue by one and the same conveyance; they must commence at one and the same time; the property must be held by one and the same undivided possession. If any one of these elements is lacking, the estate will not be one in joint tenancy. Hence, where two or more persons acquire an individual interest in property at different times or by different conveyances, the estate created is not joint tenancy, for the unity of time or the unity of conveyance would be disregarded were this to be called a joint tenancy." Under the facts in this case it will readily be seen that there was no joint tenancy, as defined above. It appears to us to be more in the nature of a gift to take effect in the future, or on the death of the donor, which is void under the rule stated in *Stifft* v. *W. B. Worthen Co., supra.*

We think the court correctly held that the attempted conveyance of funds by the certificates of deposit was ineffectual under any theory, and that such funds were a part of the assets of said estate.

We find no error in the trial court's judgment, and it is accordingly affirmed.

Mr. Justice HUMPHREYS holds that the deeds to the real property constitute gifts.

MASON *v.* JACKSON.

4-4694

Opinion delivered June 14, 1937.

[redacted]

S. L. White, for appellant.

McRae & Tompkins, for appellees.

BUTLER, J. On November 15, 1919, J. T. Mason and Lillian Hearon Mason, his wife, executed and delivered to W. D. Jackson, father of the appellees, a warranty deed conveying, by proper description, a certain forty acres of land situated in Nevada county, Arkansas. The granting clause of the deed is as follows: "* * * Do hereby grant, bargain, sell and convey unto the said W. D. Jackson and unto his heirs and assigns forever the following lands lying in Nevada county, Arkansas, to-wit: (here follows description of the lands.)" The habendum clause of said deed is as follows: "To have and to hold the same unto the said W. D. Jackson and unto his heirs and assigns forever with all appurtenances thereunto belonging, except one-half interest in all oil, gas and mineral rights."

J. T. Mason, the grantor in the aforesaid deed, died intestate leaving surviving his widow, the appel-

lant, and certain heirs. The latter executed a quitclaim deed to the appellant on July 31, 1936, conveying to her one-half the mineral interests reserved in the aforesaid deed. On the same day appellant executed an oil and gas lease to the Benedum-Trees Oil Company, whereupon suit was instituted by the appellees against the appellant seeking to cancel the quitclaim deed and the oil and gas lease as clouds upon their title.

This suit was predicated upon the theory that the reservation in the habendum clause of the warranty deed is void. Issue was joined by answer, and upon a hearing of the cause the chancellor found that the reservation in the deed was void and entered a decree granting the relief prayed. In this we think the chancellor was correct.

In the lower court, and on appeal, appellant contends that appellees' suit is barred by limitation and laches and, further, that the reservation in the deed is valid. We think a decision of the last question is decisive of the first. The reservation being void, as the chancellor found, no duty rested upon the appellees to take notice of the same until their title became clouded by conveyances of the estate attempted to be reserved.

From earliest times the rule has obtained that where two clauses in a deed are totally repugnant to each other, the first shall be received and the latter rejected. Cooley's Blackstone, 4th Ed., vol. 1, page 737; *Doe* v. *Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Tubbs* v. *Gatewood*, 26 Ark. 128. Applying this rule to specific clauses, this court, in *Whetstone* v. *Hunt,* 78 Ark. 230, 93 S. W. 979, 8 Ann. Cas. 443, quoted with approval from Washburn on Real Property, as follows: "If there is a clear repugnance between the nature of the estate granted and that limited in the *habendum,* the latter yields to the former."

The appellant concedes that the earlier cases of this court approve the rule above stated, but contends that the "modern" rule should prevail over all technical rules of construction so as to effectuate the intention of the parties. In the earlier cases this rule was recog-

nized. In *Doe* v. *Porter, supra,* the court laid down certain rules for the construction of deeds, which, it said, were so ancient and of such universal application as to become "maxims in the science of the law." Among the rules stated, are the following: "All deeds shall be construed favorably, and as near the intention of the parties as possible, consistent with the rules of law. * * *. The construction ought to be put on the entire deed, and every part of it. For the whole deed ought to stand together, if practical, and every sentence and word of it be made to operate and take effect."

In the case of *Carl Lee* v. *Ellsberry,* 82 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, 118 Am. St. Rep. 60, Mr. Justice BATTLE, in an opinion where many of the leading authorities are reviewed and cited, among them the case of *Whetstone* v. *Hunt, supra,* announced as a rule which has never been disregarded or even seriously questioned that a grantor cannot destroy his own grant however much he may modify it or load it with conditions, and, where an estate is once granted in a deed, no subsequent clause, even in the same deed, can operate to nullify such conveyance. The granting clause of the deed then before the court conveyed to the grantee, "and unto her heirs and assigns forever," certain lands, and the habendum clause recited, "to have and to hold the same unto the said Georgena Ellsberry and unto her heirs and assigns forever, with all appurtenances thereunto belonging; provided, however, that should the said Georgena Ellsberry die without issue, and before her husband, William M. Ellsberry, then the property herein conveyed is to revert to the said William M. Ellsberry." Applying the rule above set forth, the court said: "The granting clause of the deed conveys the lands described to the grantee in fee simple. The habendum defines the estate the grantee is to take to be the fee simple, with a proviso limiting the estate in certain contingencies to a life estate. The proviso or condition is repugnant to the granting clause. Which prevails."

In the case at bar, except for the name of the grantee and the attempted limitation on the grant, the granting

and habendum clauses are identical with those of the deed under consideration in the Ellsberry case: "Do hereby grant, bargain, sell and convey unto the said .....and unto his heirs and assigns forever, * * *. To have and to hold the same unto the said .....and unto his heirs and assigns forever, with all appurtenances thereunto belonging." Then follows the exception. In the instant case, as in the Ellsberry case, the granting clause conveys the lands described to the grantee in fee simple; the habendum defines the estate the grantee is to take in fee simple. The exception in the habendum clause attempts to limit the estate conveyed and is, therefore, repugnant to the granting clause which must prevail.

In *Levy* v. *McDonnell,* 92 Ark. 324, 122 S. W. 1002, 135 Am. St. Rep. 183, the deed under consideration was one which, by its granting clause, conveyed the title in fee simple for a consideration payable in installments in the future. There was a recital following which provided that if the deferred payments were made when due, the instrument would become absolute, but if not, the grantee would be deemed a tenant in possession and liable for a certain sum as rent. The court held that the proviso was repugnant to the granting clause and void and cited the case of *Carl Lee* v. *Ellsberry, supra.*

In the case of *Cole* v. *Collie,* 131 Ark. 103, 198 S. W. 710, the reservation in the habendum clause of the deed under consideration was held by the lower court to be irreconcilably repugnant to the granting clause. The granting clause, after naming the grantor, is as follows: "Do hereby grant, bargain, sell and convey unto the said James J. Lewis and to his heirs and assigns forever the following lands * * *. To have and to hold the same unto the said James J. Lewis and unto his heirs and assigns forever, with all appurtenances thereto belonging * * *, and we accept the manganese and lithograph claim." In its opinion, the court noticed the case of *Carl Lee* v. *Ellsberry, supra,* and that in subsequent cases distinctions were pointed out as to deeds which do not contain in the granting clause express words of inheritance, namely, *Fletcher* v. *Lyons,* 93 Ark. 5, 123 S.

W. 801; *McDill* v. *Meyer,* 94 Ark. 615, 128 S. W. 364, but affirmed the decision of the lower court for the reason that "The present case falls squarely within the rule announced in *Carl Lee* v. *Ellsberry.*"

Appellant complains of the harshness of the rule which, she contends, defeats the manifest intention of the grantor. She also contends that our "early" cases should not be controlling, but that the "modern" rule should prevail so as to defeat technical rules of construction and to effectuate the intention of the grantor. This court has already had before it such a contention on a number of occasions and has always endeavored to construe the separate clauses of the deed under consideration so as to reconcile them if possible. However, in *Stokes* v. *State,* 121 Ark. 95, 180 S. W. 492, Ann. Cas. 1917D, 657, this court said: "And while it can not be doubted that the rule according primary significance to the granting clause still obtains, being sometimes treated as a rule of property, and if two conflicting intentions are expressed, there is no alternative but to construe the deed by the technical rules, even though they may be denominated arbitrary, nevertheless it is only when the clauses are irreconcilably repugnant that such a disposition of the question is required to be made." That this court has endeavored to construe deeds, if possible, to carry out the intention of the grantor is manifest as seen by the case of *Fletcher* v. *Lyon, supra,* where, when the granting clause as a whole was considered, it was adjudged that it did not convey the title in fee simple so as to make inoperative a subsequent clause limiting the conveyance and terminating it upon the happening of a certain event.

In *McDill* v. *Meyer, supra,* there was held to be no repugnancy between the habendum and granting clauses, the granting clause containing no words of inheritance and the habendum providing that if the grantee died without children the title should revert to the grantor, but otherwise it should go to the grantee's children. Also, in *Bodcaw Lumber Company* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578, where the court denied

the contention that the reservation clause in the deed was void as being in conflict with the grant. The court set out the granting clause and said, in support of its conclusion: "It will be observed, however, that the clause in question is a part of the granting clause of the deed, and must, therefore, be read in connection with the grant as a limitation thereon, rather than as being in conflict with it. This is the rule where an exception or reservation is found in the granting clause of a deed. It is otherwise where the clause attempting to limit the grant is contained in the habendum or any subsequent clause of the deed."

Also, in the case of *Citizens Investment Co.* v. *Armer,* 179 Ark. 376, 16 S. W. (2d) 15, the court recognized the rule announced in previous cases that where there is repugnancy between the granting and habendum clauses, the former will control the latter, but, applying the further rule that it is the court's duty to give all parts of a deed, if possible, such construction as to reconcile conflicting clauses so that they may stand together to effectuate the intention of the parties, held that there was no repugnancy between the granting and habendum clauses for the reason that the limitation on the grant was contained in the granting clause itself.

Fender v. *Rogers,* 185 Ark. 191, 46 S. W. (2d) 804, recognizes the rule announced in *Carl Lee* v. *Ellsberry, supra,* citing that case with approval. It was there held, however, that there was no repugnancy between the granting and habendum clauses in the deed under consideration for the reason (quoting headnotes Nos. 4 and 5) that "where the granting clause in a deed does not define the estate conveyed, and the habendum clause, if it defines such estate, is determinative"; and "where the granting clause did not define the estate conveyed, and the *habendum* provided that the grantee should 'have and hold the property unto herself and unto her heirs and legal assigns forever,' the grantee received a fee simple."

In the recent case of *Gravette* v. *Veach,* 186 Ark. 544, 54 S. W. (2d) 704, the court found from the nature

of the transaction that the grantee held the naked legal title for the use of the public and that the provision that such use be administered through a certain agency was not such a repugnancy to the granting clause as to render the latter void, but cites with approval the case of *Carl Lee* v. *Ellsberry, supra.*

We have endeavored to examine all our cases dealing with the subject under consideration and have found none to impair or alter the rule first announced as applied in the cases of *Carl Lee* v. *Ellsberry; Levy* v. *McDonnell* and *Cole* v. *Collie, supra.* The terms of the deed in the case at bar are identical with those of the deeds under consideration in the cases, *supra.* It follows that the decree of the trial court is correct, and it is, therefore, affirmed.

SMITH and MCHANEY, JJ., dissent.

SMITH, J. (dissenting). There is one fact in this case about which there is no room for doubt, reasonable or otherwise, and that is that the majority opinion has defeated the obvious and plainly expressed intention of the parties to this deed. The grantor reserved a one-half interest in all oil, gas and mineral rights. That reservation has been ignored, and the majority hold that a right expressly reserved was in fact conveyed. A new contract has been made for the parties, and this has been done by disregarding the unambiguous language which was employed and giving it a construction which the parties did not intend. The grantee purchased the land and a half interest only in the oil, gas and mineral rights, yet he is given the entire oil, gas and mineral rights. He has been given valuable rights which he did not buy and which the deed was not intended to convey. Such a result should not be reached unless required by positive law, and the majority opinion does not furnish that justification. The implications of the opinion will be so far reaching in the timber and mineral portions of the state that I am constrained to register my protest and dissent.

There is no question about the right of a landowner to convey timber or mineral rights apart from the land,

or to convey the land and reserve these rights. The practice is so common that the General Assembly found it necessary to make provision for the separate assessment of these interests for purposes of taxation. By the act of April 7, 1905, provision was made for the separate assessment of timber rights. Section 9855, Crawford & Moses' Digest. By the earlier act of March 1, 1897, provision was made for the separate assessment of mineral rights. Section 9856, Crawford & Moses' Digest. The grantor, therefore, had the right to convey or to reserve all or any portion of the mineral rights. His plainly expressed intention to exercise that right should not be denied him unless some positive law requires that this be done, and I very respectfully, but very earnestly, insist that there is no necessity.

The case of *Carl Lee* v. *Ellsberry,* 82 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, 118 Am. St. Rep. 60, is chiefly relied upon by the majority. I think there has been a misapprehension of the holding in that case. There, as the opinion recites, an unconditional conveyance of the fee had been made, after which it was attempted to convey to the same grantee a conditional life estate. In distinguishing this opinion in the case of *Fletcher* v. *Lyon,* 93 Ark. 5, 123 S. W. 801, Chief Justice McCulloch said: "There the deed conveyed an estate of inheritance in lands. Words of grant were used which were sufficient, in the absence of qualifying words, to convey an estate in fee simple, and the *habendum* contained a proviso attempting to limit the estate to one only for life. This court held that the limitation contained in the *habendum* was repugnant to the granting clause, and was void."

In other words, two separate and inconsistent estates had been there conveyed to the same grantee. There was an irreconcilable repugnancy, and the question presented and there decided was which of these two estates was in fact conveyed. The rule of construction, that a deed is construed most strongly against the grantor could have been applied as of controlling effect.

It was said in the case of *Whetstone* v. *Hunt,* 78 Ark. 230, 93 S. W. 979, 8 Ann. Cas. 443, that "While it is a rule of law that, if there is a clear repugnance between the granting and *habendum* clauses in a deed, the latter must give way, upon the theory that the deed should be construed most strongly against the grantor, yet it is only where these clauses are irreconcilably repugnant that such a disposition of the question is required to be made." An extensive annotation of this Whetstone case appears in 8 Ann. Cases at page 445, and the annotator makes the comment that "When the court has exhausted every means of determining the actual intent of the parties, resort to the arbitrary and technical rules of construction becomes necessary. Thus, where the *habendum* is clearly repugnant to the premises, the *habendum* must give way to the premises. The court will declare the *habendum* to be void and will put into effect the technical intent as expressed in the premises."

There is no occasion here to resort to technical rules of construction to ascertain the intent of the parties to this deed, for there is no repugnancy here if we may read the deed in its entirety in determining the intention of the parties. There is a widespread misapprehension that we may look only to the granting clause of a deed to determine the estate or interest conveyed. This is not the law. In distinguishing the case of *Fletcher* v. *Lyon, supra,* from the Carl Lee case, *supra,* Chief Justice McCulloch said: "The rule announced in *Carl Lee* v. *Ellsberry, supra,* does not apply, as the whole of the premises of the deed must be considered together so as to give effect to it as a whole. Moreover, reservations, conditions or limitations not repugnant to the grant may appear in any part of a deed and be equally effectual. 1 Jones on Real Property in Conveyancing, § 624; Martindale on Conveyancing, § 121."

In the case of *Fletcher* v. *Lyon, supra,* the deed construed recited that "The grantors 'do hereby grant, bargain, sell and convey unto the said Thomas R. Lyon, and unto his heirs and assigns forever, the following lands

lying in the county of Woodruff and state of Arkansas, to-wit: (Here lands are described), containing 372 acres.' " The opinion, also, recites that the grantors in the deed reserved "the right to use for grazing or farm purposes the surface of so much of said premises as the said grantee shall not desire to use in connection with any lumber manufacturing, lumbering or logging operations which he may wish to conduct over or upon said premises, or any part thereof." It was said by Chief Justice McCulloch that to properly construe a deed it should be read in its entirety, and when so read the reservation of the beneficial interest above set out was valid and had not been conveyed away in the apparent grant of a fee-simple title appearing in the granting clause.

The effect of a conflict between the granting and *habendum* clauses as to the estate conveyed is the subject of an extensive annotation to the case of *Hammond* v. *Hammond,* 84 A. L. R. 1050, and many of our cases are there cited. The effect of the note is that the rule requiring the rejection of clauses repugnant to and inconsistent with the granting clause is one of construction only, to be employed only where the repugnancy cannot be reconciled. But all the courts do not employ it even then. The annotator says: "The modern and now widely accepted rule, the strongholds of which appear to have been Kentucky, North Carolina, and California, has for its cardinal principle the proposition that, if the intention of the parties is apparent from an examination of a deed 'from its four corners' without regard to its technical and formal divisions, it will be given effect though, in doing so, technical rules of construction will be violated. And by these courts it is held that the rule that an *habendum* creating an estate contradictory or repugnant to that given in the granting clause must be rejected is not a rule of property, but is merely a rule of construction, which will be resorted to only where the court cannot determine which of the clauses was intended to be controlling." Many cases from numerous states are cited in support of this statement, but it may again be said that there is no repugnancy in this deed requir-

ing the aid of technical rules of construction to ascertain the intent of the parties to this deed.

It would unduly extend this dissenting opinion to review our own numerous cases on the subject. The case of *Stokes* v. *State,* 121 Ark. 95, 180 S. W. 492, Ann. Cas. 1917D, 657, reviews a number of them, and quotes with approval from 8 R. C. L., §§ 98, 100 and 101, of the chapter on Deeds, the true rule to be applied. See especially that portion of the quotation beginning where the quotation therefrom in the majority opinion concludes. I shall not again quote the statement of the law there appearing, but will be content to rest the question on a quotation from one of our latest cases on the subject. This is the case of *Gravette* v. *Veach,* 186 Ark. 544, 54 S. W. (2d) 704. There a warranty deed had been executed to the town of Gravette. The deed contained the following reservation: "The above-described property is to be used for public park purposes and is to be under the control of the ladies of Civic Improvement Club of Gravette." The chancellor held the reservation valid, and in affirming that decree we said: "The appellant challenges the correctness of this decree, and invokes the well-settled rule that, where a grant is made in a deed of the title in fee, a subsequent clause limiting the absolute title, being in irreconcilable conflict with the title conveyed by the granting clause, is void. *Carl Lee* v. *Ellsberry,* 82 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, 118 Am. St. Rep. 60; *Levy* v. *McDonnell,* 92 Ark. 324, 122 S. W. 1002, 135 Am. St. Rep. 183; *Veasey* v. *Veasey,* 110 Ark. 389, 162 S. W. 45. The appellant contends that the granting clause conveys to the grantee the fee simple title, and that under the rule, *supra,* the clause quoted is void. It must be conceded that the rule contended for is the one established by our decisions, but the rule is not one of positive law, but rather one of construction to be applied where there is a clear repugnance between the nature of the estate granted and subsequent clauses in the deed, either in the *habendum* clause or elsewhere; for, in such cases, the courts are of necessity compelled to choose between the conflicting

clauses, and it is then that the arbitrary rule is invoked. In cases where the intention of the parties may be ascertained from a consideration of the entire instrument and the several clauses may be reconciled, the rule contended for must yield to that cardinal rule of construction that the intention of the parties as drawn from the entire instrument must govern." The result there announced was reached because when the deed was considered in its entirety, technical rules of construction to the contrary notwithstanding, it was apparent what the parties intended and that intent was given effect. It is not necessary to impair the authority of the Carl Lee case, *supra*, to give effect to the intention of the parties to the deed here under consideration, for the reason that in the Carl Lee case there was an irreconcilable repugnancy between the estate conveyed in the granting clause and that as limited in the *habendum* clause. A grantor could not convey both a fee simple estate and a conditional life estate. It was necessary, therefore, to determine which estate had been conveyed; and it was held that the granting clause conveying the larger estate could not be limited by the *habendum* clause reducing that estate. But here there is no reason at all why the grantor might not convey the land to one person and the mineral rights to another; or to reserve a portion of those rights as he did do, in language too plain and unambiguous to admit of a doubt of any kind.

The authorities there cited fully sustain the conclusion reached and the declaration of law there announced.

I, therefore, dissent, and am authorized to say that Mr. Justice McHaney concurs in the view that the reservation of an interest in the oil, gas and mineral rights is valid and should be upheld.

COCA-COLA BOTTLING COMPANY *v.* MORRISON.

4-4682

Opinion delivered June 14, 1937.

Audrey Strait and *W. P. Strait,* for appellant.

Ed Gordon and *McDaniel, McCray & Crow,* for appellee.

SMITH, J. Appellee recovered a judgment against appellant for $1,000, to compensate an illness and incidental physical suffering alleged to have been caused by swallowing a spider found in a bottle of Coca-Cola bottled by appellant.

There is some conflict as to whether the Coca-Cola in question was bottled by appellant or by another bottler doing business in Hot Springs; but without reciting the testimony it may be said that it was sufficient to sustain the finding that it was appellant who had bottled it and sold the bottle to the retailer from whom appellee purchased it.

Appellee testified that he bought a bottle of Coca-Cola, and that as he drank a portion of its contents he realized that he had swallowed something besides the drink. He became sick at his stomach, and sent for a Dr. Burks, his father-in-law, who administered an emetic, from the effects of which he vomited into a pan, and a partly decomposed spider was found in the pan. This occurred about two hours after drinking the Coca-

Cola. Dr. Burks expressed the opinion that the presence of the spider in appellee's stomach had occasioned appellee's nausea and his subsequent illness, which became so severe that appellee was removed to a hospital, where he remained for attention and treatment for six or seven days. Appellee testified that he had not even yet fully recovered from his illness, and had lost much time from his work on account thereof. Dr. Burks admitted on his cross-examination that if a poisonous substance is taken into the stomach it will not become effective until after it has been dissolved by the digestive organs. The spider here alleged to have been swallowed had not been digested, for although somewhat decomposed its identity was recognized after it had been vomited. There is a question whether the spider was swallowed at all, as appellee testified that it remained in his throat until the emetic had been administered.

It was denied by appellant that there was any spider in the bottle, and, if so, that its presence there was due to any lack of care on appellant's part. The testimony shows the very highest degree of care in connection with bottling the drink; but the testimony is sufficient also to show that there was a spider in the bottle.

Many of these cases have been before this court and the law governing has been previously declared. Among other cases were the three cases decided January 11, 1937. In one of these, that of *Coca-Cola Bottling Co.* v. *Massey,* 193 Ark. 423, 100 S. W. (2d) 681, we quoted from the case of *Coca-Cola Bottling Co.* v. *McBride,* 180 Ark. 193, 20 S. W. (2d) 862, as follows: " 'The *prima facie* case of negligence arising from proof that a bottle of Coca-Cola contained poisonous matter was not overcome by proof that the most modern machinery was used in cleansing and filling bottles, and that defendant's plan and system was to exercise every precaution in doing so, and to inspect every bottle.' " It was there further said: "By this it was meant that such testimony was not conclusive as a matter of law, but that the presumption of negligence arising from proof of the presence of the deleterious matter was not overcome by showing the care

usually employed to prevent its presence and to discover if it were in a bottle. In other words, the case presented, under the conditions stated, is for the consideration and determination of the jury whether, as a matter of fact, there was extraneous matter in the bottle when sold to the consumer, and, if so, whether it was there when it left the plant of the bottler and its presence had not been discovered through lack of care in bottling the drink and the inspection of the bottle containing it."

The testimony of appellee made a question of fact which has been passed upon and concluded by the verdict of the jury, as to whether a spider was found in the bottle, and, if so, whether the presumption of negligence arising from that fact has been overcome.

It is insisted that the verdict is excessive; and we have concluded that it is. In this Massey case, *supra,* where the plaintiff swallowed particles of glass, a judgment for $4,000 was reduced to $1,000. In another of these cases above referred to, *Coca-Cola Bottling Co.* v. *Raymond,* 193 Ark. 419, 100 S. W. (2d) 963, a judgment for $5,000 in favor of the plaintiff who had swallowed particles of glass, was reduced to $1,000. In the third one of those cases, *Coca-Cola Bottling Co.* v. *Eudy,* 193 Ark. 436, 100 S. W. (2d) 683, a judgment for $1,250 in favor of the plaintiff who had swallowed a spider was reduced to $300.

Dr. M. M. Blakeley, called as a witness for appellee, testified that he saw and examined appellee at his home before appellee was taken to the hospital, and found him sick at the stomach, gagging and vomiting, and that he thought at the time that appellee's sickness had been caused by swallowing a spider, but in answer to the question, "Is he still suffering from this trouble?", Dr. Blakeley answered: "I have not talked with him professionally. I have not examined him in the last few days, but he complains of having these spells of diarrhea. I do not know how often he has them. He has some pain in his right abdomen. I thought it was chronic appendicitis." No physician expressed the opinion that swallowing a spider would cause appendicitis, either acute or chronic.

Dr. H. E. Mobley testified in behalf of appellant that he had appellee under examination for two days and subjected him to X-ray and other tests, and that in his opinion appellee has chronic appendicitis. Dr. Mobley and the State Chemist both testified that if one swallowed a dead spider without knowing it, that no harmful effects would follow, but that if he knew it "the mental effect, the repulsion, the psychological effect" would make him sick. They were of the opinion that only through the bite or sting of a spider or other poisonous bug or insect could the poison get into the tissues and into the blood stream.

However this may be, we have concluded, upon the authority of the cases above cited and other cases to the same effect, that a judgment in excess of $300 would be excessive, and the judgment will, therefore, be modified and reduced to that amount.

HUMPHREYS and MEHAFFY, JJ., dissent from modification.

THE CUE BALL COMPANY *v.* EAST ARKANSAS LUMBER COMPANY.

4-4690

Opinion delivered June 14, 1937.

O. D. Longstreth, J. A. Watkins and *F. W. A. Eiermann,* for appellant.

S. Hubert Mayes, for appellee.

SMITH, J. Appellee sued appellant in August, 1932, on an account. An affidavit, in proper form, was made for an attachment, upon which a writ of attachment was levied upon certain personal property belonging to appellant. Before the final trial of the cause an officer of

appellee, a corporation, sold the personal property for the sum of $300.

Numerous motions were filed and orders made, which we find it unnecessary to set out in this opinion, as the cause was finally submitted on a stipulation signed by the parties. We extract from it the following relevant and controlling recitals. Appellant was at that time indebted to appellee in the sum of $43.85, and it was agreed that judgment therefor might be entered in appellee's favor. This balance was arrived at by crediting on the debt the $300 proceeds of the sale of the personal property.

In this stipulation it was agreed that "* * * The only issues now to be tried in this case are: First: Was the attachment lawful and can it be sustained? Second: The legal measure of damages sustained by the Cue Ball Company, a corporation, on account of the taking and disposing of the property under the attachment in event the original attachment should not be sustained, agreed to be the value of the property so taken at the time of taking." There had been previously filed in the case a motion to sustain the attachment "For the reason that no controverting affidavit denying the statement of the affidavit upon which the attachment was issued has been filed by the defendant."

The court rendered judgment for $43.85, for the reason that the parties had stipulated that this should be done. The court sustained the attachment because no controverting affidavit was filed nor did the answer which was verified controvert the alleged grounds for attachment. The latter action was taken pursuant to the provisions of § 568, of Crawford & Moses' Digest, which reads as follows: "If judgment is rendered in favor of the plaintiff, and no affidavit or answer, verified by oath, by the defendant filed, denying the statements of the affidavit upon which the attachment was issued, or motion made to discharge it, the court shall sustain the attachment." *Weibel* v. *Beakley,* 90 Ark. 454, 119 S. W. 657; *Ford* v. *Wilson,* 172 Ark. 335, 288 S. W. 712.

The judgment is, therefore, correct, and must be affirmed. It is so ordered.

BLUFORD *v.* PARSONS.

4-4697

Opinion delivered June 21, 1937.

Thomas W. Raines, for appellants.

Galbraith Gould, for appellee.

SMITH, J. Appellee brought suit in ejectment to recover possession of an eighty-acre tract of land, which suit was, by consent, transferred to the chancery court. Appellee claimed title through a deed from the State Land Commissioner dated December 16, 1935. The deed was based upon a forfeiture to the state for the nonpayment of the taxes due thereon for the year 1931.

The cause was submitted and heard upon an agreed statement of facts, which was copied into the decree. It recites that appellants were put in possession of the land under a parol gift from their ancestor in 1922, and had since remained in the exclusive and adverse possession of it; and that they had made improvements on same "during said occupancy." These improvements were described and had cost $105. It was stipulated that they "had paid no taxes of any kind during said occupancy." It was, also, stipulated that the lands had forfeited to the state for the nonpayment of the 1931 taxes and had been purchased by and conveyed to appellee by the State Land Commissioner. No other testimony appears in the record.

It was alleged in the answer—but no testimony was offered to support the allegation—that the sale was void for the reason that the sale of the land had not been

advertised for the time required by law. It was further alleged in the answer that proceedings had been commenced pursuant to the provisions of act 119 of the Acts of 1935, page 318, to confirm this and other forfeitures, but that appellee had purchased before the rendition of the confirmation decree. It is, therefore, insisted that the ejectment suit was prematurely begun.

If this last allegation were sustained by testimony it would be unimportant and would afford no defense to the action. This act 119 does provide for quieting title to lands forfeited to the state for nonpayment of taxes; but it was not intended to make tax sales void which had not been confirmed. Its purpose was to confirm and quiet such sales. The sale upon which appellee's deed is based may have been valid without the benefit of the confirmation decree, and in the absence of any showing that the sale was invalid it will be presumed to be good and valid. Appellee does not rely upon the confirmation decree, but does rely upon his deed. It was said in the case of *Board of Conference Claimants* v. *Phillips,* 187 Ark. 1113, 1119, 63 S. W. (2d) 988, that "* * * If there were no irregularities or informalities in the conduct of the (tax) sale, or in the proceedings relating to the levy of the tax, the title to the lands would vest in the state, and there would be no necessity for a decree confirming the same."

Appellants argue that they had title by adverse possession. That fact is admitted in the stipulation, but is unimportant for the reason that it is, also, stipulated that they did not pay the taxes for which the lands were sold and upon which sale the deed was based. Ownership of a title, however perfect, does not relieve the owner from the obligation to pay his taxes, nor relieve him from the consequences incident to his failure to do so.

The decree which awarded possession to appellee is correct, and is, therefore, affirmed.

THE GUS BLASS COMPANY *v.* THARP.

4-4704

Opinion delivered June 21, 1937.

Isgrig & Robinson, for appellant.

Brickhouse & Brickhouse, for appellee.

HUMPHREYS, J. Appellee sued appellant in the circuit court of Pulaski county, Second division, for damages on account of personal injuries received to his back in falling down an elevator shaft in its department store on Fourth and Main streets, about ten o'clock on the morning of November 10, 1935, Sunday, where he was employed as a porter, in directing him to take one of its salesmen on elevator No. 1 from the first to the seventh floor, through a doorway in the cage which should have been securely locked if the floor of the elevator was not on a level with the first floor of the building; whereas, through its negligence the lock on said door was broken so that he could open the door and step into the open shaft or well in which the elevator proper moved up and down. An answer was filed to the complaint by appellant denying the material allegations therein and interposing the further defenses of contributory negligence, assumption of the risk and a settlement and written release from appellee.

The cause was submitted upon the issues joined, the evidence introduced by the parties and instructions of the court resulting in a verdict and consequent judgment against appellant, in the sum of $500, from which is this appeal.

When the evidence was concluded appellant requested an instructed verdict in its favor which was refused by the court over appellant's objection and exception.

There were two written releases introduced in the evidence, the first being signed by appellee on the ninth day of December, 1935; and the second one being signed by him on the thirteenth day of March, 1936.

The first release was procured by J. F. Morris, store manager of appellant. Appellee attempted to avoid the first release by claiming it was represented to him that it was a receipt for small amounts appellant had paid to him after he was injured up to the time he signed the instrument and that at the time he signed the instrument he was wrongly advised by the physicians appellant had employed to attend him that his injury was slight and that he would soon recover and be able to work again.

The second release was procured by George Mallory and Mr. Texley, one of Mallory's employees. Appellant carried a liability insurance policy with Mallory's insurance company and he was informed by appellant that appellee was not satisfied with the amount he had received on the execution of the first release and was questioning the legality thereof and that it wanted him to investigate and adjust the matter with appellee. Mallory requested Mr. Texley to investigate the case and after having done so he brought the appellee to the office of Mallory where a settlement was reached and the second release signed, witnessed and acknowledged. The second release is as follows:

"Whereas, the Undersigned, on or about the tenth day of November, 1935, sustained injuries about my limbs, body and head by reason of falling down the elevator shaft from the first floor to basement in the store of Gus Blass Company, and

"Whereas, I claimed and alleged that the said fall was caused by negligence of Gus Blass Company, which negligence they specifically denied, but nevertheless offered to pay me the sum of Forty Dollars ($40) and

pay certain medical expense that they had incurred on my behalf, which settlement I accepted and executed a release to said Gus Blass Company on the ninth day of December, 1935; and

"Whereas, at the time that I made said settlement and signed said release, the only doctors that had treated or examined me were doctors furnished by the said Gus Blass Company, and not of my own choice, and I had relied upon their report to me as to the severity and extent of my injuries and my condition at that time, which report I now allege were incorrect, and

"Whereas, since the time that I executed said release I have continued to endure pain and suffering and at times have been disabled and have personally employed and consulted with other doctors of my own choosing and

"Whereas, the said Gus Blass Company while still denying that when I was employed by them I suffered any injuries or disability by reason of any negligence upon their part, but desiring to make a full, complete and final settlement with me of any and all claims that I now have or may hereafter have against them on account of the said accident and injuries, have offered to pay to me the sum of Ninety Dollars ($90) and I have agreed to accept same,

"Now, therefore, I, Earnest Tharp, in consideration of the payment made to me on this date by Gus Blass Company of the sum of Ninety Dollars do hereby release and discharge and by these presents do for myself, my heirs, executors, administrators, or assigns, and by these presents do for myself, my heirs, executors, administrators or assigns, release and forever discharge the said Gus Blass Company and all other persons, firms, or corporations, liable from all claims, demands, damages, actions, or causes of action, on account of injuries resulting or to result from said accident to myself which occurred on or about the 10th day of November, 1935.

"In executing this release I do so solely upon my own knowledge of my injuries, disabilities and suffering and not on account of any statements or representations made to me by said Gus Blass Company or by their agents or representatives.

"In Witness Whereof, I have hereunto set my hand this 13th day of March, 1936.

"(Signed) Earnest Tharp."

"STATE OF ARKANSAS
"COUNTY OF PULASKI, SS.

"Before me, a Notary Public, within and for the county and State aforesaid appeared Earnest Tharp this 13th day of March, 1936, signed the aforegoing instrument of writing and stated on oath that he had executed the same for the purposes and considerations therein mentioned and set forth.

"(Signed) W. J. Campbell,
Notary Public.

"My Com. expires 7-7-1938."

Appellee sought to avoid the second release on practically the same grounds that he had the first one. He did not testify, however, that either Mr. Texley or Mr. Mallory made any misrepresentations to him to induce him to sign same. In fact, he testified that Mr. Texley asked him if he was willing to sign the release and he told him that he was, and that Mr. Mallory said nothing to him. He signed the second release about four months after he was injured and after he had employed physicians of his own choosing and after he had advised with them as to the extent of his injury.

The physicians employed by appellant were unable to discover any serious or permanent injury to appellee even with the use of X-ray pictures. They had several X-ray pictures made in an effort to discover his injury, if any, but failed to find that anything of consequence was the matter with him. Some of them as well as several lay witnesses concluded that appellee was malingering.

He admitted that he could write and that he could read, but said he could not read very well. He did not

sign the second release until he had had ample opportunity to ascertain the extent of his injury. He did not sign it under duress of any kind or while under the influence of opiates or through deception as to the extent of his injury. He was in full possession of all his faculties when he signed it. The release was not only witnessed, but was acknowledged by a notary public. A contract of this kind executed as this was cannot be treated as a scrap of paper and ignored by the law. The trial court should have given full force and effect to it by instructing a verdict for appellant under the undisputed facts in the case. The instant case is controlled by declarations of law announced and applied in the cases of *Cherokee Const. Co.* v. *Prairie Creek Coal Mining Co.*, 102 Ark. 428, 144 S. W. 927; *Kansas City Southern Ry. Co.* v. *Armstrong,* 115 Ark. 123, 171 S. W. 123; *Magnolia Petroleum Co.* v. *McFall,* 178 Ark. 596, 12 S. W. (2d) 15; *Texas Company* v. *Williams,* 178 Ark. 1110, 13 S. W. (2d) 309.

The judgment is reversed, and the cause dismissed.

HODGES *v.* TAFT.

4-4705

Opinion delivered June 21, 1937.

Ferguson & Madole, for appellants.
Wilson & Wilson, for appellee.

MEHAFFY, J. This action was begun by the appellee as administratrix of the estate of Charles E. Russell, deceased, praying judgment on certain promissory notes and mortgage given to secure their payment. The following is a copy of the principal note:

"On the first day of April, 1937, for value received we promise to pay to the order of the Inter-State Mortgage Trust Company the principal sum of Twelve Hundred and No/100 Dollars, with interest thereon from date hereof at the rate of six per cent. per annum, until maturity, payable semi-annually according to the tenor of twenty interest coupons hereto attached, each for the sum of Thirty-six and No/100 Dollars bearing even date hereof both principal and interest coupons payable at the office of the Inter-State Mortgage Trust Company in Greenfield, Massachusetts, and if default be made in the principal or any of the said interest coupons or any part of the same as they severally mature, then both principal and interest shall become due and payable and the holder of this note may proceed to collect and enforce the same by law.

"Dated at Booneville, State of Arkansas, this 29th day of March, 1927."

At the same time the principal note was given, interest coupons were given, all of which are alike, and the following is a copy of one of them:

"$36 Arkansas, March 29, 1927.

"On the first day of October, 1929, for value received, we promise to pay to the Inter-State Mortgage Trust Company, or bearer, thirty-six and No/100 Dollars at the office of said company in Greenfield, Massachusetts, the same being the interest on the principal note of $1,200 of even date herewith. This note bears interest after maturity at the rate of 10 per cent. per annum."

At the same time the notes were executed, a mortgage was executed to secure the payment of said notes. The mortgage was assigned and became the property of the appellee.

Appellants filed answer admitting the execution of the notes and mortgage, but deny that the notes and mortgage were purchased by Charles E. Russell, and deny that subsequent to the purchase of said mortgage, bond and coupons, that the Inter-State Mortgage Trust Company was adjudged bankrupt, and deny that Russell became the legal holder of the bond, coupons and mortgage, and deny generally each and every material allegation of the complaint, which is not specifically admitted. They allege that the cause of action is barred by the statute of limitations.

The principal note contains the following statement: "and if default be made in the principal or any of said interest coupons or any part of the same as they severally mature, then both principal and interest shall become due and payable and the holder of this note may proceed to collect and enforce the same by law."

The mortgage contains the following acceleration clause:

"Now if default shall be made in the payment of any note secured hereby, or if any installment or interest thereon, when due; or in the payment of any charges, taxes or assessments levied upon said property; * * * or if breach should be made in any other of the covenants, agreements, terms or conditions herein contained; then the whole sum intended to be secured hereby shall immediately, at the option of the holder of the notes secured hereby, become due and payable without notice, and the holder hereof may proceed to foreclose this mortgage by suit * * *."

Appellants say: "The question presented by this appeal is presented by the pleadings in the case and is a question whether or not the Statute of Limitations has run on the note herein sued upon at the time the suit was instituted."

It is contended by the appellants that what they call the absolute acceleration clause in the note, is controlling and that without any action on the part of the appellants, the obligations became due and payable

when default was made in the payment of one of the interest coupons. It is contended that the note is the principal instrument, and that the mortgage is a mere incident thereto, and that as there is a conflict between the terms of the note and the terms of the mortgage, that the terms of the note should prevail.

Under our statute if the debt for which the mortgage was given is barred, this is a defense and the mortgage cannot be foreclosed after the debt which it is given to secure is barred.

Appellants contend, however, that the acceleration clause in the note is controlling, and they cite *Johnson* v. *Guaranty Bank & Trust Company,* 177 Ark. 770, 9 S. W. (2d) 3. The court said in that case:

"It is claimed that the failure to pay the purchase money note and the accrued interest on January 1, 1927, was due to the fault of the mortgagee, and an effort was made to place the blame upon its officers, who represented it in the transaction, but in this the chancery court was justified in finding that the defendants had failed."

In that case it appears that the acceleration clause was in the mortgage alone, and not in the notes, and it was barred unless there was some fault on the part of the mortgagee, and the court found that there was none.

Appellants next call attention to 17 R. C. L. 771, and quote a part of paragraph 139. That paragraph also contains the following: "But where notes are given for a debt, all of which is to become due at the option of the payee, in case of default in payments of interest, such option applies to the notes, and the notes are not due on default of payment of interest so as to set the statute of limitations running, unless the payee exercises his option to accelerate their maturity.

Appellants, also, call attention to the same volume of R. C. L. at page 793. That section, however, says that according to some authorities, where the mortgage contains an acceleration clause, that the right to recover accrues when default is made, but that other cases hold to the contrary.

Appellants, however, admit that there is conflict in the authorities. A number of authorities are cited by appellants, which we do not think it necessary to discuss.

In the instant case the note, coupons and mortgage were all executed at the same time and each a part of the same transaction, and, therefore, must be construed together.

"If two or more writings are executed at the same time, between the same parties and concerning the same subject-matter, they may be construed together as part of the same contract, at least in the absence of evidence to the contrary * * * a note and the mortgage by which such note is secured." Page on Contracts, vol. 4, page 3538; *Kendall* v. *Selby,* 66 Nebr. 60, 103 Am. St. Rep. 697, 92 N. W. 178; *Consterdine* v. *Moore,* 65 Nebr. 291, 96 N. W. 1021, 101 Am. St. Rep. 620.

The acceleration clause in the note was for the benefit of the payee and while he could, he was not required to take advantage of it, and when the note and mortgage are construed together it seems clear to us that it was optional with the mortgagee, and that the failure to make payments did not, of itself, start the statute of limitations to running, especially when the mortgage contained a clause which was clearly optional.

We think when the note and mortgage are construed together, that the acceleration clauses were made for the benefit of the mortgagee, and were optional, and the statute of limitations did not begin to run merely on default of payment of an interest coupon. These notes and mortgage were given for borrowed money, it is admitted that the debt has not been paid, and the only reason given by appellants is that the cause of action is barred by the acceleration clause in the notes. As we have already said, when this clause in the note is construed with the acceleration clause in the mortgage, the right to accelerate was optional with the mortgagee. Any one for whose benefit a provision in a contract is made, may waive it, and it is, therefore, optional whether he will enforce it.

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

SMITH *v.* STATE.

Crim. 4030.

Opinion delivered May 31, 1937.

J. Loyd Shouse, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Asistant, for appellee.

MEHAFFY, J. The appellant, O. O. Smith, was indicted and tried in the Boone circuit court for murder in the first degree, and was convicted of involuntary manslaughter, and his punishment fixed at one year in the penitentiary. The appellant owned and operated the Ozark Hotel at Harrison, Arkansas, and the deceased, Kirby Clifton, was a farmer living at Western Grove, Newton county, Arkansas. Appellant and de-

ceased had been friends for many years, and deceased usually stopped at appellant's hotel when in Harrison.

On February 19, 1936, the day before his death, Clifton came to appellant's hotel and secured a room for the night. He was assigned a room by appellant. Next morning he left the hotel and was not seen again by the appellant until late that afternoon. He was drinking, and spent part of the day with Jeff Sanders, and about four o'clock in the afternoon Sanders took him to the Ozark Hotel. Sanders, appellant and deceased went to deceased's room in the hotel, and discussed plans for opening a real estate office in Western Grove. Deceased had a bottle of alcohol and all three of them drank from it.

The testimony of Blaine McDougal showed that he was at the appellant's hotel the night the deceased was shot and killed; that he got there about 11:20 and appellant and deceased were the only ones in the lobby; that deceased was sitting in front of the stove asleep, and appellant was behind the stove playing solitaire; that deceased had all of his clothes on, overshoes and overcoat, and was bareheaded; appellant told witness to go upstairs and take room No. 2 which was about ten or twelve feet back from the head of the stairs; that he got ready for bed, smoked a cigarette, and not long afterwards heard an argument start in the lobby; that he had not been asleep. He heard appellant tell deceased to get on out, but did not hear what deceased said. Appellant told deceased to get out, and then said: "You have been here and not been out anything." Deceased said: "If I owe you anything I will pay you." It was not over a half minute until the shot was fired. There was only one shot. Witness lay there a little while and heard a peculiar noise like one in a death struggle and went down. The chair on which deceased had been sitting was sitting in the same place, but was turned over to the right, and deceased's right arm was lying under him. He fell and had a death grip on the chair. The chair went over with him. There was a knife lying in front of him which looked like it had been used to cut

tobacco. Deceased did not use tobacco, and was right-handed. Witness came to the hotel about 11:20, and the first time he noticed the clock after he went down to the lobby it was 11:45. Appellant said he and deceased had been drinking together, and appellant looked like he had been drinking.

Dr. Gladden testified that he was called to the Ozark Hotel the night of the killing. Deceased was on his right side, and sitting in a chair which was turned over. Deceased had a grip with one hand on the chair, and was just about one foot out of the chair. His right hand was gripping the chair. Deceased was right-handed. Deceased was shot through the heart, ranging down in the back about an inch. Death was instantaneous. In witness' opinion if a man has something in his hand and was shot through the heart, he would stay gripped to it. If a man was sitting in a chair and another man shot him standing up, the bullet would come out lower behind.

Lavona Thompson testified that appellant was pretty drunk at supper.

Bud Holland, city marshal, testified that he got to the lobby of the hotel the night of the killing shortly after the shooting; that deceased had been sitting in a chair, and the chair was turned over, and his right hand was under the chair, gripping the chair, and his left hand was over his face.

Deceased's father testified that the deceased did not chew tobacco and was right-handed.

Deceased's son testified that his father was right-handed, and that the knife found by his father's body was a strange knife, one that he had never seen before.

There is some conflict in the testimony. The evidence showed that there were two knives found in deceased's pocket; both of them shut. No one knows where the knife found on the floor came from, or to whom it belonged.

Appellant insists first that there is no substantial evidence to support the verdict of the jury. We do not agree with appellant in this contention. Appellant him-

self testified that the deceased came toward him with a knife and threatened him, and that he ran downstairs and deceased followed him, and when appellant got downstairs to his room he stepped in and got the gun, and thought the deceased was going to kill him, and he shot and killed deceased.

The undisputed facts, however, show that deceased was shot in the heart, and the bullet ranged down, coming out at the back. If the jury believed the evidence of McDougal and Gladden, they were not only justified in convicting appellant, but the evidence of the state witnesses would sustain a conviction for a higher grade of homicide.

The rule is well settled that the evidence adduced at a trial will, on appeal, be viewed in the light most favorable to the appellee and if there is any substantial evidence to support the verdict of a jury, it will be sustained." *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. (2d) 50.

In the trial of cases the facts are to be determined by the jury and not by the court. The jury is the judge of the credibility of the witnesses and the weight to be given to their testimony. Therefore, in testing the legal sufficiency of the evidence to support the verdict, it must be viewed in the light most favorable to the state. *Turnage* v. *State,* 182 Ark. 74, 30 S. W. (2d) 865; *Link* v. *State,* 191 Ark. 304, 86 S. W. (2d) 15; *Clayton* v. *State,* 191 Ark. 1070, 89 S. W. (2d) 732.

It is next contended by the appellant that the court erred in giving instruction No. 2 requested by the state. That instruction is as follows:

"No one in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, is justified in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid

the danger and avert the necessity of killing. The danger must apparently be imminent, irremediable and actual, and he must exhaust all the means within his power, consistent with his safety, to protect himself, and the killing must be necessary to avoid the danger, if, however, the assault is so fierce as to make it apparently, as dangerous for him to retreat as to stand, it is not his duty to retreat, but he may stand his ground, and, if necessary to save his own life, or to prevent a great bodily injury, slay his assailant."

The specific objections appellant makes to this instruction are that it is argumentative, second that it is conflicting within itself, third that it is in conflict with other instructions given.

We think the instruction given is correct. It is not argumentative, it is not conflicting within itself, and it is not in conflict with any other instruction. Moreover, numerous instructions were given at the request of the appellant, which fully instructed the jury as to the law in the case, and there was no error in giving instruction No. 2.

The appellant next urges a reversal because of alleged improper conduct of the jury. Appellant says that the jury was directed by the court to be held together in one body, and that they should not communicate with outside persons, and remain in charge of the sheriff until their final report and discharge by the court. It is alleged that the jury was permitted to separate, mingle with outside persons, sleeping in different houses, free from the charge of the sheriff. The appellant, however, says, "We doubt, under law, and under the record here, whether this was prejudicial."

The evidence showed that the sheriff kept the jury in the City View Tourist cabins, near the city limits. The jury occupied three different cabins, all near each other, and had breakfast at Aker's cafe, in town.

Section 3190 of Crawford & Moses' Digest is as follows: "After the cause is submitted to the jury they must be kept together in charge of the sheriff, in the room provided for them, except during meals and

periods for sleep, unless they may be permitted to separate by order of the court. Suitable food and lodging must be provided by the sheriff and the expense paid by the county."

It clearly appears from this section that the jurors are not to be kept together during meals or periods for sleep. There was no error in permitting them to occupy separate cabins. Moreover, the evidence conclusively shows that the jury did not communicate with outside persons, and that nothing occurred to influence them in any way.

But it is urged that one of the jurors was permitted to approach the court and ask some questions about the law, and appellant urges that this was in violation of § 3192 of Crawford & Moses' Digest, which provides:

"After the jury retires for deliberations, if there is a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must require the official to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, counsel of the parties."

The sheriff, Ernest Rogers, testified that one of the jurors, Frank Andrews, requested him to let him leave the remaining eleven and let him come into the court room and see the court, and the sheriff permitted him to do this. This was after they had come back from the tourist camp and were at the court house. The sheriff permitted him to separate from the other eleven and go into the court room. The court was not busy, but was on the bench. He saw the juror talking to the judge, but he does not know what was said. After the conversation the court permitted the juror to return to the jury room. When the sheriff brought the juror into the court room Mr. Walker was in the prosecuting attorney's office and came into the court room before Mr. Andrews, the juror, returned to the jury room. Mr. Walker is a partner in the firm of Shouse & Walker, and while the testimony shows that he did not actively participate in the trial, yet it is admitted that he sat at

the counsel table with the other attorneys for appellant, assisted in selecting the jury, and the court and prosecuting attorney evidently regarded him as one of appellant's attorneys. He saw the juror in the court room, made some remark about it, and asked what it was about. He did not request that the entire jury be brought in, and the conversation repeated in their presence. This request was not made at any time by appellant's attorneys. The testimony of all the jurors shows that nothing occurred at any time after they were elected as jurors to influence them in any way. There was no communication between them or any one of them and outside persons. There is in fact no claim made by the appellant that anything was done or said at any time to influence their verdict. It is only contended that the sheriff, permitting one juror to separate from the others and go into the court room, violated the statute, and for this reason it is urged that the judgment should be reversed.

Appellant cites and relies on *Pearson* v. *State,* 119 Ark. 152, 178 S. W. 914, and *Kinnemer* v. *State,* 66 Ark. 206, 49 S. W. 815. It is true that the statute was enacted to protect the defendant on trial and the trial court should be extremely cautious not to permit anything to be done to prejudice the defendant. If the jurors are permitted to separate and one of them communicates with the court and the court gives any instruction, the presumption would be that it would be prejudicial. However, this court has stated that this error may be waived either by the defendant or his attorney.

In the case of *Scruggs* v. *State,* 131 Ark. 320, 198 S. W. 694, this question was discussed at great length. In that case the court instructed the jury in the absence of the defendant. They came into the court room after they had deliberated for some time, and requested the court to re-read the instructions. The court then read all the instructions that it had previously given to the jury, but did not give any additional instructions. The defendant was not in the court room, but his attorney was present. The attorney did not request the presence

of the defendant and did not object to the instructions being re-read to the jury in his absence. He did, however, save his exceptions, making both general and special objections on the ground that the instructions were wrong in certain respects. The court then said, in discussing the case of *Kinnemer* v. *State,* 66 Ark. 206, 49 S. W. 815:

"In that case the court re-read the instructions exactly as first given to the jury. The defendant was not present when this was done and the record does not show that even his counsel was present. The court held that the re-reading of the instructions was tantamount to instructing the jury originally and that it was error to do so in the absence of the defendant. It is true the court said that even had the record showed affirmatively the presence of defendant's counsel that his counsel could not have waived his presence while the jury was being instructed. This language was not necessary to the decision of that case and the decision must be considered with reference to the facts of that particular case. Hence that case can not be taken as an authority that the presence of the defendant can not be waived by his counsel. There are authorities to the effect that the presence of the defendant at his trial can not be waived by his counsel, but we need not consider these cases for this court has taken the contrary view. It is well settled in this state that the defendant has a right to be present during the whole of his trial when any substantive step is taken, but in the case of *Davidson* v. *State,* 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436, it was held that when the record shows that counsel acted for the accused in waiving his right to be present at the rendition of the verdict, it will be presumed, in the absence of a showing to the contrary, that they had authority from the accused to waive that right. The right to be present at every stage of the trial is a personal right limited to criminal prosecutions and is not a jurisdictional limitation upon the authority of the court because it secures simply a personal right of the defendant and in no manner affects the jurisdiction of

the court. It may be waived by the defendant himself." *Scruggs* v. *State, supra.*

This court has uniformly held that it is not necessary for the accused to show that he was actually prejudiced by the ruling of the court in his absence. However, we recently said:

"But we have, also, uniformly held that a cause will not be reversed where a ruling is made by the trial court in the absence of the defendant that could not by any possibility result in his prejudice." The court, also, said, quoting from *Mabry* v. *State,* 50 Ark. 492, 8 S. W. 823: "We do not depart from the rule that the probability of prejudice by an order made in the absence of the defendant prosecuted for a felony, is all that need be shown to reverse a judgment of conviction, but adhere to its corollary, that we will not reverse for that cause when it is plain the defendant has lost no advantage by his absence." *Whittaker* v. *State,* 173 Ark. 1172, 294 S. W. 397.

It is plain from the record in this case that appellant was not in any way prejudiced, and the judgment is, therefore, affirmed.

SHAW *v.* STATE.

Crim. 4032.

Opinion delivered June 7, 1937.

Joe W. McCoy, for appellants.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

BUTLER, J. The appellants were charged and convicted as accessories before the fact to the crime of arson. Punishment was fixed at one year in the state penitentiary.

On appeal, appellants contend that the evidence showed no substantial corroboration of the testimony of the accomplice.

One, John Dorris, was arrested charged with having set fire to and the burning of a certain house. He admitted his guilt and testified that he had been hired to burn the house by the appellant, Gid Shaw; that he procured one, Clyde Holford, to assist him. Holford testified that he assisted in the burning of the house and that previous to the burning he had seen Dorris and Gid Shaw in conference and that the appellant, Charlie Shaw, was with them. Both Dorris and Holford testified that they were taken in a car driven by Charlie Shaw to a point near the place where the house was situated and that Gid Shaw was riding on the front seat with Charlie

Shaw. The two had gone to an appointed place and were picked up by the automobile which had in it some gasoline and oil in containers in "tow" sacks. Dorris and Holford further testified that the car was stopped near the house which was to be burned and they got out taking with them the sacks containing the oil and gas and carried them to a sweet gum tree; that this was during the night; that they remained under the tree until the neighborhood became quiet and then carried the oil to the house and used it in igniting the building; that when they took the sacks out of the car appellants drove away to a predetermined point where Dorris and Holford met them after the fire and were carried away.

The corroborating testimony was that of one, Freeman Scott, who stated that he lived near the house which was burned; that a short time before the fire he saw and recognized the appellants driving in a car past where he was standing; that they stopped a short distance away and two men who were sitting on the back seat got out of the car, and removed from it some sacks and carried them to a sweet gum tree where they stopped; that the car was then driven away.

This testimony is criticized by the appellants because of its unreliability. Attention is called to the fact that it was around ten o'clock at night when the witness, Scott, saw the automobile which was moving at the time, and that it was unreasonable to believe that he could have recognized the occupants of the front seat under those circumstances. It is sufficient to say that this was purely a question for the jury. They believed the testimony of Scott, and there is nothing in the evidence to show that it was physically impossible for the witness to have recognized the appellants as he said he did. The testimony of Scott, independent of that of the accomplices, tended to connect the appellants with the commission of the crime, although it might not have been sufficient of itself to convict them. This satisfies the rule. The sufficiency of the corroborating evidence was a question for the jury and, together with the testimony of the accomplices, it is clearly sufficient to sup-

port the verdict. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Mullins* v. *State,* 193 Ark. 648, 102 S. W. (2d) 82.

Dorris testified that he was to be paid $5 for burning the house and, in addition, that appellant, Gid Shaw, was to put some of Dorris' livestock on the railroad track for the purpose of having them killed by the trains so that he (Dorris) could collect for them. Objection was made to this testimony, and it is now argued that the same was prejudicial as tending to show a conspiracy to commit another and independent crime. This testimony was directly connected with the crime charged and there was no error committed by its admission. Furthermore, it appears that the trial court refused to allow the prosecuting attorney to go into detail as to this phase of the case.

It appears that the trial court instructed the jury on its own motion as to the law of the case. There was no motion for a severance, and the complaint is made that the court erred in neglecting to instruct the jury that even though they might believe one of the appellants guilty, they should acquit the other unless, as to him also, the evidence was sufficient to show his guilt beyond a reasonable doubt. A sufficient answer to this contention is that it was appellants' duty to request such an instruction if desired. Not having done so, they cannot complain on appeal. *Martin* v. *State,* 189 Ark. 408, 72 S. W. (2d) 539; *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. (2d) 50.

It is finally insisted that the trial court erred in overruling the separate motion of the appellant, Charlie Shaw, in arrest of judgment. This motion was based upon an affidavit signed by the members of the trial jury and was to the effect that had they known they had the right to find Gid Shaw guilty and at the same time to find Charlie Shaw not guilty, they would have acquitted the latter. The court did not err in denying this motion. A public offense was stated in the indictment, and it is only in cases where such an offense is not stated that the motion will lie. It cannot be used to raise ques-

tions as to the sufficiency of the evidence, its only province being to question the sufficiency of the indictment or at most only such errors as appear on the face of the record. Section 3224, Crawford & Moses' Digest; *State* v. *Bledsoe*, 47 Ark. 233, 1 S. W. 149; *McCoy* v. *State*, 46 Ark. 141.

Finding no error, the judgment of the trial court, is, therefore, affirmed.

BLAKELEY *v.* STATE.

Crim. 4034.

Opinion delivered June 7, 1937.

Scipio A. Jones, for appellant.

Jack Holt, Attorney General, and *John P. Streepey*, Assistant, for appellee.

SMITH, J. Appellant was fined $50 in the municipal court of the city of Little Rock for operating an insurance business without legal authorization so to do. He prosecuted an appeal to the circuit court, where, upon his trial, the jury returned a verdict of guilty under the direction of the presiding judge. Appellant admits that he has received no authority from the Insurance Department to

operate an insurance business. His defense is that he did not engage in or operate a business of that nature.

Appellant, also, insists that no proper information was filed against him in the municipal court. His appeal from the judgment of that court and the trial of his appeal in the circuit court renders this unimportant. In the very recent case of *Simpson and Elliott* v. *State,* 193 Ark. 623, 101 S. W. (2d) 795, it was said: "These questions are all disposed of by the opinion in the case of *Mayfield* v. *State,* 160 Ark. 477, 254 S. W. 841, where it was said: 'We do not stop to inquire whether there was any error in the procedure before the justice or not, as the cause was appealed to the circuit court, where there was a trial *de novo.* The original affidavit and warrant had brought appellant into court, and the justice, sitting as an examining court, found appellant was guilty of an offense and imposed a fine for its commission. This became the offense with the commission of which appellant was charged upon his appeal to the circuit court, and it was unimportant to inquire whether there had been irregularities leading to this situation, because the trial in the circuit court was *de novo.* (Citing cases.)' " *State ex rel.* v. *Ball, ante,* p. 132, 105 S. W. (2d) 863.

The information filed against appellant charged a violation of act 139 of the Acts of 1925, p. 405. Section 16 of this act provides that any person who violates any of its provisions shall be fined not less than fifty nor more than five hundred dollars. Appellant complains of the action of the presiding judge in directing the jury to return a verdict of guilty. In the recent case of *Collins* v. *State,* 183 Ark. 425, 36 S. W. (2d) 75, it was said: "In misdemeanor cases, where the punishment is by fine only, the circuit judge would have the power to direct a verdict of guilty where the facts were undisputed and where guilt from all the evidence was the only inference that could be drawn. But where the punishment may be imprisonment or where the law provides that it may be fine or imprisonment, the trial judge has no power to direct a verdict."

Act 139, *supra,* does not provide for punishment by imprisonment, and the "circuit judge would have the

power to direct a verdict of guilty where the facts were undisputed and where guilt from all the evidence was the only inference that could be drawn." Was such the case here? Act 139 is entitled: "An Act to Define Assessment Life, Health and Accident Associations or Companies, Industrial Insurance Companies, to Provide How Same May Be Organized and Transact Business in This State, for Proper Regulation of Same, and for Other Purposes." Its numerous sections effectuate the purposes declared in its title.

Appellant admits the establishment of an organization, which he named the "Union Aid Society." He admitted, also, that he issued a certificate of membership, signed by himself as president, to persons whose applications for membership were approved. This certificate contains, as a part thereof, a copy of the by-laws of the organization, which declared the purpose of the organization as follows: "Purpose. To unite reputable men and women for the purpose of engaging in any activity for the mutual benefit of its members, and for the purpose of giving aid to themselves and their dependents and to promote organization and cooperation; to improve working conditions, hours, pay, etc., to promote closer relationship between its members, to assist them in the improvements of their civic, social, educational, and economical conditions, and to provide a fund out of which members who are in good standing may receive aid and financial relief in case of distress."

A section of the by-laws relating to membership reads as follows: "Membership. In order to become a member of this society, the applicant must be of good moral character and be in good health and from 1 year to 80 years of age, and may apply for membership by signing the application and paying the membership fee and registration fee respectively."

In regard to the issuance of certificates of membership the by-laws provide: "Certificate. When an applicant is accepted by this society and the membership and registration fees are paid, the society will issue to such an applicant a copy of the by-laws. But no contributions shall arise thereon to the society, nor any benefit be due

the applicant until the acceptance of such application and its delivery to and acceptance by the applicant while alive and in good health free from diseases."

The by-laws, also, provide for the election of a board of directors, who shall select a president, "who may act as secretary to the board of directors, but is not a member of the board, and shall hold office during good behavior and efficient service."

The president is given charge of the general business affairs of the society, and is authorized to "sign all membership certificates and checks, * * * and have general charge of all agents." The directors "shall receive all requests for aid, determine the amount of benefits, pass on all applications for membership for the society and organize and supervise all other special activities sponsored by the society."

Upon the question of fees and dues the by-laws provide: "Section 1.—The standard plan for one membership is as follows: The life membership fee is $2.50, the registration fee 50 cents, total $3 to be paid when application is made for membership. Thereafter beginning the first day of the month next following the date of the membership, the standard contribution is 50 cents per month and $1 in January, April, July and October. Two memberships may be carried as well as halves, fifths, tenths, etc., if the member desires."

Other provisions relate to notices of distress and requests for aid.

Appellant admitted that he had issued these certificates, and had made collections under their provisions. This makes it such an organization as act 139 was intended to regulate.

In Bacon's Life and Accident Insurance, (4th Ed.) vol. 1, § 50, it is said: "It follows from the foregoing adjudications, that all benefit societies, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations whenever, in consideration of periodical contributions, they engage to pay the member, or his designated beneficiary, a benefit upon the happening of a specified contingency."

The "Union Aid Society" is such an organization, and its social, civic and fraternal features do not divest it of that character, and its operation without the required authorization is a violation of the law, and the trial court did not err in so instructing the jury.

Judgment affirmed.

SCOUGALE *v.* PAGE.

4-4729

Opinion delivered June 14, 1937.

Sam Robinson, for appellants.

Charles T. Coleman, for intervener.

Jack Holt, Attorney General, *T. H. Humphreys, Jr.,* Assistant, and *Walter L. Pope,* for appellees.

WOOTEN, Sp. J. By act No. 11, of the General Assembly of Arkansas, approved February 4, 1927, the state declared its policy to take over, construct, repair, maintain and control all the public roads in Arkansas which comprised the system of state highways, as defined by the act.

At that time, many of the roads in the various counties, (mostly gravel roads) had been constructed, by the formation of improvement districts, under what was known as the Harrelson Act. (Act No. 5, Extra Session of 1923.) In order to raise revenue with which to pay for the construction, annual assessments were levied against the lands to be benefited, or, theoretically supposed to be benefited. Bonds, which became liens against the lands, necessarily had to be issued to provide the money with which to pay for the construction. At the time of the enactment of act No. 11 of 1927, the burden upon the lands had become heavy, and the Legislature, realizing that it was not just for lands along the highways to bear such an unequal load, agreed to make annual appropriations to the counties to aid in the payment of bonds and to maintain the highways. At the same time, certain sums were to be spent annually for the construction and maintenance of new roads, and to meet such needs, the state highway commission was authorized to borrow the necessary money, and to issue notes therefor to be known as state highway notes. Act No. 11 of 1927 required the state treasurer to set aside out of the first revenues collected from taxes on gasoline, motor oil and automobile licenses, a sum sufficient to pay the annual interest on state highway notes due during the year, which revenues were pledged by the state for that purpose. Proceeds from the sale of state highway notes were to be deposited to the credit of the state highway fund.

The well-known historical events which occurred subsequently are stated correctly and concisely in intervener's brief as follows:

"In 1933, the state defaulted in the payment of the current interest due on the highway bonds. The state was so financially distressed that it not only could not pay the interest on its highway obligations, but it was unable to meet some of the ordinary expenses of government. It was without funds to meet the expense of the legislative session; the penitentiary had accumulated an enormous debt; contractors' claims for construction of highways exceeded a million dollars; the charitable institutions were suffering for lack of funds; and the treasurer was unable to cash the warrants for the salaries of state officers. The highway bonds were selling on the open market at 30 cents on the dollar. The state of Pennsylvania had filed a suit in the Supreme Court of the United States against the state of Arkansas to collect highway bonds owned by it.

"In this situation, the governor appointed a committee to negotiate a refunding of the highway obligations. The holders of these obligations appointed a bondholders' committee to treat with the committee representing the state. The two committees met in Little Rock, and the negotiations covered a period of more than two months.

"The two committees realized that it would be useless to adopt a refunding program which the state would be financially unable to carry out. In view of the depleted revenues and enormous debts of the state, the bondholders' committee made concessions that were more than generous.

"The contract negotiated between the two committees, embodying the concessions made by the bondholders, was evidenced by a bill which they drafted in collaboration, which was passed by the legislature in 1934, and became act No. 11, approved February 12, 1934."

Section 2 of that act created an account to be known as the state highway fund. It, also, provided that the first charge on the state highway fund should be the cost of

maintaining the state highway system and the operation and maintenance of state toll bridges; for that purpose the state treasurer was required to transfer from the state highway fund to the state maintenance fund twenty-five per cent. of the total amount credited to the state highway fund during any fiscal year, such credit to be not less than $166,666 monthly, and to transfer not more than $100,000 during each fiscal year for the operation and maintenance of toll bridges; and to transfer during the fiscal year ending June 30, 1935, the sum of $60,000 to the general revenue fund, and to further transfer to that fund during each fiscal year thereafter the sum of $4,800; also, to transfer from the state highway fund to the auditorial fund the sum of $11,500.

Section 2 of act No. 11 of 1934, 2d Ex. Sess., after providing for the transfer of the foregoing amounts from the state highway fund for the purposes specified provides as follows:

"All highway revenue credited to said state highway fund in excess of the transfers and appropriations above provided for, shall next be applied in payment of interest upon the bonds and other obligations authorized to be issued or paid under the provisions of this act. * * * Any balance remaining after providing for the semi-annual payments next to accrue, shall be credited to and paid by the treasurer of state into the following special accounts hereby created in the state highway fund for the purpose set forth below:

"(a) To a special account, to be known as the state highway refunding bond redemption account, in the years 1934 and 1935, 25 per cent.; in the year 1936, 50 per cent.; and annually thereafter 63.3 per cent., pledged for the payment or redemption of the principal of state highway refunding bonds, series A and B; state toll bridge refunding bonds, series A and B; and DeValls Bluff bridge refunding bonds in the manner hereinafter provided."

The section further provides that the remainder of such balance shall be credited to (b) a special account to be known as the road district refunding bond redemption account; (c) a special account to be known as the

funding notes redemption account; and (d) a special account to be known as refunding certificates of redemption account.

The same section then provides:

"Said special accounts provided for in subdivisions (a), (b), (c) and (d) of this section are hereby declared to be trust funds held in the state highway fund, pledged exclusively to the payment or redemption of the principal and interest of the respective obligations described in such accounts, and shall be applied solely as provided in this act.

"The transfer or appropriation of any money from the state highway fund, or from the state highway revenues, or of any funds arising from motor vehicle licenses, fees or taxes, or from taxes on gasoline, to or for any purpose other than as specified in this act, and expenses of collection, shall be deemed to be an immediate default on the part of the state with respect to the obligations authorized to be issued hereunder."

Section 3, act No. 11 of 1934, authorizes the issuance of state highway refunding bonds, series A, in the total sum not to exceed the amount of outstanding highway bonds and notes of the state theretofore issued under previous acts. For the payment of the bonds, with interest full faith and credit of the state and all of its resources were pledged.

Section 4 of that act authorizes the issuance of state toll bridge refunding bonds, series A, in a sum not to exceed the amount of such toll bridge bonds theretofore issued. Likewise, the full faith and credit of the state and all of its resources were pledged for the payment of those bonds.

Section 5 of that act provided for the exchange of old bonds for new bonds. The old bonds were to be deposited with and held by the treasurer of state in trust, uncancelled, as collateral security for the refunding bond for which it was issued. Upon default in the payment of either interest or principal, if such default should continue until two interest coupons attached to the bonds were past due and unpaid, the holders of such bonds would have the right to a return of the old bonds

or notes upon the surrender to and cancellation by the state treasurer of the refunding bonds.

Section 5 also contained the following: "No limitation of action shall begin to run against any state highway bond or note or state toll bridge bond deposited with the treasurer of state in pursuance of this act until a default shall occur in the payment of the principal or interest of the refunding bond issued in exchange therefor."

Section 6 provided for the issuance of road district refunding bonds, series A, in like manner as the issuance of the other two classes of bonds mentioned in § 5, as well as for the deposit of old bonds with the state treasurer, and the return of same upon default in payment of principal or interest on the refunding bonds. The same provision waiving limitation of action against the bond, or the lien of such bond, or of any assessments of benefits against lands of an improvement district, until a default should occur, was contained in that section.

Sections 11 and 12 provided for the issuance of refunding certificates of indebtedness to municipal and street improvement districts which had improved streets through cities and towns, which streets were a continuation of state highways.

Under § 22, the gasoline tax was raised from 6 cents to 6½ cents per gallon.

Under other sections various other forms of taxes against motor vehicle fuels, inspections, etc., were provided for.

Section 23 divided the net tax derived from motor vehicle fuel 92.3 per cent. as state highway revenue, and 7.7 per cent. as county highway improvement revenue, the funds to be segregated and used for those respective purposes.

Section 31 provided for the collection of motor vehicle fees.

Section 34 directed that the revenue from registration of motor vehicles should be credited to the state highway fund.

Section 36 required that funds arising from the operation of toll bridges should be credited to the state highway fund.

Under act No. 82, approved March 7, 1933, before the passage of act No. 11 of 1934, 2d Ex. Sess., there had been created what was known as the bond refunding fund. When act 11 of 1934, 2d Ex. Sess., was adopted there was a balance of $2,122,330.86 in the bond refunding fund.

Section 39 of act 11 of 1934, 2d Ex. Sess., provided that such balance in the bond refunding fund should be used for the following purposes:

Expenses of special session of the legislature which convened January 2, 1934—$36,000;

An amount equal to the unexpended balance of the appropriation made for the expenses of the audit commission by act 11, of September 2, 1933;

To the charities fund—$250,000;

For payment of maintenance and construction warrants and vouchers issued by the highway commission and unpaid on February 1, 1933—$620,861.70;

For payment of warrants and vouchers issued by highway commission for administration expenses unpaid on February 1, 1933—$44,231.41;

Expenses of the refunding board, $250,000, or so much thereof as might be necessary;

The remainder, to be used for the pro rata payment of construction warrants and vouchers unpaid on February 1, 1933, and certain short term notes and bonds issued under various acts of the legislature—$1,000,000.

Section 39 directed that if any balance should remain in the bond refunding fund after providing for the above allocations, such balance, together with all moneys deposited in the bond refunding fund since December 31, 1933, should be transferred to the state highway fund.

Section 44 reads: "In consideration of the concessions made by the creditors of the state as to amounts to be received, or in the interest rates or dates of payment of their respective obligations, by the acceptance of refunding obligations issued under the provisions of this act in exchange for their existing obligations, this act shall constitute a contract between the state and

such creditors, including the affected improvement districts, and the terms of such contract or contracts shall never be impaired by any subsequent legislation."

By § 48, the state expressly covenanted that so long as any of the obligations authorized by act 11 of 1934 were outstanding, it would not permit the repeal or amendment of § 23 or 24 (as amended by act 11 of 1934) so as to reduce, in any manner, the revenue therein provided for.

Under § 49, appropriations were made for various expenses for the refunding. The last paragraph of that section reads: "Should any part of the appropriation contained herein for any particular purpose be found unnecessary for the purpose mentioned, and not for any other, the board may, at its discretion, cause a transfer to be made from one item to the other."

Section 51 authorizes the refunding board to reduce the taxes on gasoline for any one year one-half to one cent per gallon if the revenue for the preceding year should exceed $10,000,000.

The General Assembly of Arkansas at its, 1937, session, adopted acts Nos. 130, 151 and 278, as a program for the refunding of the state's outstanding highway, toll bridge and road bonds.

The preamble to act No. 278, approved March 19, 1937, stated that "before the present highway obligations are paid off, under existing maturity tables, refunding would be inevitable in order to avoid default, resulting at that time in much confusion and great expense to the state, and that if the refunding acts adopted at the current session were carried to a successful conclusion, many millions of dollars would be saved to the state."

Section 6 of act No. 130 of 1937, provides, among other things, as follows: "The percentages of the state highway fund set aside and pledged for the payment of bonds under § 2, of the aforesaid act No. 11, shall be and remain as therein set forth, subject only to a reduction from time to time in proportion as the bonds secured thereby are exchanged or redeemed out of the proceeds of the general refunding bonds herein authorized to be issued, and the treasurer of state is hereby authorized to

make such reduction upon certification of the governor fixing the amount thereof."

Under § 1 of act No. 151 of 1937, a board of finances was created, composed of the governor, the state comptroller, one member of the highway commission, to be chosen by the governor, the president of the Arkansas Bankers Association and one member from each of the seven congressional districts of Arkansas, to be selected by the governor by and with the approval of the senate, (a total of eleven members).

Section 1 of act No. 278 of 1937 reads: "For the purpose of carrying out the provisions of acts Nos. 130 and 151 of the Fifty-first General Assembly of the state of Arkansas, and the provisions of this act, all proceeds of the sale of general refunding bonds shall be deposited in the state treasury to the credit of the general refunding bond redemption account and there is hereby appropriated out of any moneys which may be so deposited the sum of one hundred and fifty million ($150,000,000) dollars, or so much thereof as may be necessary, to effectively, efficiently, and speedily refund or refinance the obligations provided for in act No. 11 of the Second Extraordinary Session of the Forty-ninth General Assembly of the state of Arkansas, approved February 12, 1934."

Section 3 of act No. 278 of 1937 is as follows: "For the purpose of paying necessary expenses in connection with operations, the state comptroller is directed and authorized to cause a transfer to be made to the general refunding bond redemption account of any balance to the credit of the bond refunding fund, and allocated under the provisions of §§ 39 and 50 of act No. 11 of the Second Extraordinary Session of the Forty-ninth General Assembly, approved February 12, 1934, and of such additional sums as may be necessary from the appropriation made in § 1 hereof. Provided that under no circumstances shall the par value of funds received from the sale of general refunding bonds be used for the expenses of such refunding."

Appellant, Scougale, filed his complaint in the Pulaski chancery court against the treasurer, the audi-

tor and the comptroller of the state of Arkansas, wherein he alleged that he had brought suit in his own behalf and on behalf of all other taxpayers of the state. He further alleged that the comptroller, acting under authority of § 3 of act No. 278 of 1937, had directed the state treasurer and state auditor to transfer upon their records $100,000 from the bond refunding fund to the general refunding bond redemption account for the use and expenses incident to issuing general refunding bonds under authority of the three acts of 1937 General Assembly; that there were more than $300,000 in the bond refunding fund at the time act No. 278 took effect; that under § 39 of act 11 of 1934, any balance remaining in the bond refunding fund, after paying expenses incident to the refunding provided for in act 11 of 1934, and other obligations mentioned in that section, was required to be transferred to the state highway fund; that all of the provisions of act 11 of 1934, by § 44 of that act, made an irrevocable contract between the state, the road improvement districts affected and those holding refunding bonds issued under the said act No. 11; that by § 2 of act No. 11, the transfer from or an appropriation of state highway revenues to or for any purpose other than as specified in said act No. 11, should be deemed to be an immediate default on the part of the state with respect to the obligations authorized to be issued under that act; that the board created under act No. 11 is still engaged in refunding bonds authorized under act No. 11 and that there were more than two million which had not been tendered for refunding; that if § 3 of act 278 of 1937 was enforced, the refunding board created by act 11 of 1934 would have no funds with which to carry on its work and complete the refunding contemplated by that act; that § 3 of act No. 278 of 1937, in so far as it provides for a transfer is void, because those funds were pledged and could not be used for any other purpose than those provided for in act No. 11 of 1934, and such transfer would impair the obligations of the contract by reason of § 10, Art. 1, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States and § 17, Art. 2, of the Constitution of

Arkansas; also that such transfer would create a default on the part of the state and until the bondholders should surrender same and receive their original bonds; that such transfer would leave the Refunding Board without funds with which to carry on its work.

The complaint also alleged that § 3 of act 278 of 1937, was void upon the ground that the attempted appropriation did not distinctly state the various purposes of the appropriation, the maximum amount to be expended in dollars and cents and that the appropriation was not itemized, as required by § 29, Art. 5, of the Constitution of Arkansas.

The petition also alleges that § 1, act 278 of 1937 is void on the ground that the appropriation mentioned therein is not specific, the purposes not stated and the use to be made of the funds not definitely fixed, and the appropriation not itemized as required by § 29, Art. 5, of the Constitution of Arkansas.

It was also alleged that many employees would be necessary to carry out the provisions of the new acts; that the number of such employees and their salaries could be fixed by the Governor, subject to the approval of the Board of Finances, which would be an unwarranted unlawful delegation of power, in violation of § 4, Art. 16, of the Constitution of Arkansas.

The petition prayed that the defendants be restrained from transferring any funds from the Bond Refunding Fund to the General Refunding Bond Redemption Account, from issuing, approving or paying, under act 278 of 1937 any vouchers or warrants.

Appellant, See, filed his intervention in the cause, setting up that he owned real estate in one of the road improvement districts known as the Arkansas-Missouri Highway District, the bonds of which were a lien against his real estate; that if the terms of act 11 were enforced, intervener's real estate would be relieved of the taxes against his lands; he adopted all of the allegations in Scougale's complaint, except those in paragraph 1 thereof. He also prayed for the same relief asked in plaintiff's complaint.

Appellant, Burr, an owner of bonds issued under authority of act 11 of 1934, filed an intervention.

After reviewing pertinent sections of the various acts passed relating to the refunding of bonds, he alleged that there was now in the Refunding Bond Fund the sum of $382,783.46, which sum should be transferred to the State Highway Fund under the terms of act 11 of 1934.

He further alleged that in the negotiations of the contract between the state and holders of the highway bonds issued under act 11 of 1927, the bondholders agreed, in view of a deficiency of revenues for the payment of certain items of indebtedness which the state owed, and for a certain stated purpose, such as the expenses of a special session of the legislature, the payment of expenses incurred by the Highway Commission, a contribution of $250,000 to the charities fund and other items, that the permission to divert such revenues was a concession made by the bondholders in the negotiations of the contract evidenced by act 11 of 1934; that after the items had been paid, the balance of $382,783.46 in the Bond Refunding Fund, was pledged to the payment of obligations issued under that act.

The intervention sets out in detail the debits against the fund, as well as the allocations mentioned in §§ 39 and 50 of act 11 of 1934.

He alleged that the passage of acts Nos. 130, 151 and 278 of 1937 was in violation of the contract mentioned.

After referring to and quoting many sections of various acts, intervener alleged that the State Comptroller had directed the Treasurer and Auditor to transfer $100,000 in the Bond Refunding Fund to the General Refunding Bond Redemption Account, provided for in Act 130 of 1937, for the expenses incident to the refunding program contemplated by the latter act; that such officers were without legal authority to divert such revenue from the State Highway Fund because it was pledged to the payment of the obligations of the state.

He also alleged that act 11 of 1934 provided that the excess highway revenue in any year over debt service requirements should be used in purchasing outstanding

bonds at competitive offerings, known as the "distressed bond" provision; that the acts of such officers unless restrained would impair the operation of the "distressed bond" provision of act 11 of 1934, to the injury of the bondholders, without authority of law, and in violation of the contract.

Intervener alleges that the various diversions of the funds would impair the obligations of the contract between the state and the bondholders, in violation of § 10, Art. 1, of the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, § 17, art. 2, of the Constitution of Arkansas and § 11, art. 16, of the Constitution of Arkansas.

He prayed that acts Nos. 130, 151 and 278 be declared unconstitutional; that the State Treasurer be enjoined from transferring any funds from the Bond Refunding Fund to the General Refunding Bond Redemption Account, or from paying any warrants drawn pursuant to acts 130 and 278; from transferring from the Bond Refunding Fund of the State Highway Fund any amount on account of the difference in the rate of interest to be borne by the bond issue under act No. 130 and that rate of interest borne by obligations issued under act No. 11 of 1934; that the Treasurer be enjoined from transferring any of the highway revenues from the State Highway Fund to the General Refunding Bond Redemption Account on account of the redemption or call in payment of obligations issued under act No. 11 of 1934, with the proceeds of bonds issued under act No. 130 of 1937; that he be enjoined from diverting any funds from the State Highway Fund to the payment of interest on General Refunding Bonds issued under act No. 130.

To the complaint and the interventions the defendants demurred upon the grounds that the court was without jurisdiction and that neither the complaint nor the interventions stated a cause of action.

The court sustained the demurrer and dismissed the complaint and interventions.

Appellees contend that this action, although instituted against individual state officers, is in reality a suit against the state of Arkansas, and, therefore, was pro-

hibited under § 20, Art. 5, of the Constitution of Arkansas, which says that "the state of Arkansas shall never be made a defendant in any of her courts."

We do not deem it necessary to pass upon that contention in considering and disposing of the appeal.

One of the grounds which appellants rely upon for a reversal of the decree is that the adoption of § 3, act No. 278, of 1937, (quoted above) by the General Assembly of Arkansas was an unwarranted exercise of legislative power in that it is an attempt on the part of the state to impair the obligation of the contract entered into between the state and owners of refunding bonds issued under the terms of act No. 11 of 1934. If it be true that the legislative act complained of did impair that obligation, then it would be of no effect and void under § 10, Art. 1, of the Constitution of the United States, the Fourteenth Amendment thereof, as well as § 17, Art. 2, of the Constitution of Arkansas.

"Impair" means to make worse; to diminish in quality value, excellence, or strength; to deteriorate. *Swineburne* v. *Mills,* 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932; *Gladney* v. *Sydnor,* 172 Mo. 318, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517.

In *Lapsley* v. *Brashears,* 14 Ky. (4 Litt.) 47, it was stated that the word "impairing" in the Federal Constitution, prohibiting the passage by the states of any laws impairing the obligations of contracts, does not mean destroy; consequently, every state law which weakens the obligations of contracts previously made, or renders them less operative, is a violation of the provisions against the impairment of the obligations of contracts.

Whatever enactment abrogates or lessens the means of the enforcement of a contract impairs its obligations. *State* v. *Jumel,* 107 U. S. 711, 27 L. Ed. 448, 2 Sup. Ct. 128; *Holland* v. *Dickerson,* 41 Iowa 367.

If, therefore, the terms of act No. 11 of 1934 have not been substantially changed by the passage of acts Nos. 130, 151 and 278 of 1937, or any part thereof, by weakening the obligation of the contract embodied in act No. 11 of 1934, rendering the contract less operative, or a les-

sening of the means of enforcement of some right conferred on the bondholders by the, 1934, act, then there has been no impairment of the obligation assumed by the state under that act.

Appellants have not pointed to any provision in either of the refunding acts adopted by the General Assembly of 1937 which would indicate that any right possessed by the bondholders under act 11 of 1934 has been taken away from them. Under the new acts, the revenues arising from taxation of motor fuel, motor oil, inspections, bridge tolls, and car licenses have not been diminished, but are to be collected and distributed to the proper respective funds as required under the, 1934, act. With the advent of better times than existed in 1934, and the natural growth of the population of the state, necessitating a greater use of motor vehicles, oil and fuel it is safe to assume that the increase in the collection of revenues from those sources will materially strengthen the funds which are pledged to the payment of the bonds.

Sections 5 and 6, act No. 11 of 1934, remain unchanged. Those sections permitted the holders of the original notes and bonds to deposit the old bonds with the State Treasurer, who was required to hold them in trust until the refunded bonds were paid in full. It was, also, provided in those sections that no limitation of action should run against the original notes and bonds until a default should occur in the principal or interest on any of the refunding bonds taken in exchange therefor. Every remedy possessed under the original bonds, such as the enforcement of liens and assessments against the lands lying in the road districts, is still held by the owners of the original obligations. By the new refunding laws the full faith and credit of the state and its resources has been repledged.

The specific complaint lodged by appellants is directed against § 3, act 278 of 1937, hereinbefore quoted.

It is admitted by all parties that when act No. 278 of 1937 was approved there was a balance of $382,783.46 to the credit of the Bond Refunding Fund. Appellants insist that the transfer of such balance to the General Re-

funding Bond Redemption Account (set up under the 1937 laws) was an impairment of the obligation of the contract assumed by act No. 11 of 1934, for the reason that such balance was pledged under the, 1934, act toward the payment of the state's bonds.

To ascertain whether there is merit in such a claim, it is necessary to examine the circumstances which surrounded the enactment of the, 1934, act.

All parties agree, and the act itself reveals, that the adoption of the refunding program under act No. 11 of 1934 was the outgrowth of negotiations between committees representing the state and the bondholders. At that time, and before emerging from the depression, it was generally understood that some new plan for the refunding of the bonds would have to be evolved. The state's finances were at a low ebb, as the revenues had dropped to a considerable degree. Estimates were made of probable revenues during the biennial period, and that the revenues might be augmented, the tax of gasoline was raised one-half of one cent per gallon. The amount necessary to pay annual interest on the bonds and maturities during the succeeding years was agreed upon, and the percentages in the division of the revenues to be applied to the respective classes of bonds were fixed. The state was hard pressed to meet other obligations and expenses of the refunding program; taxes from motor fuel, oil, bridge tolls, and car licenses was the largest single source of revenue the state possessed. In those circumstances, the bondholders said in effect, "If you will adopt the program we have outlined, which we believe will amply protect our bonds, we will relinquish any claim over the sum of $2,975,215.75, the money now in the Bond Refunding Fund, and you can exercise complete control over that sum." Accordingly, it was agreed by §§ 39 and 50, act No. 11, of 1934, that the state might divert to its own use from the Bond Refunding Fund $36,000 for the expense of the, 1934, Legislature; also an amount equal to the unexpended balance of the appropriation theretofore made for the expenses of the Audit Commission; to the Charities Fund, $250,000; for payment of Highway Commission construction warrants and notes, $620,861.70; for past

administration expenses of Highway Commission, $44,-231.41; for expenses of the Refunding Board, $250,000; contractors' claims, $1,000,000.

The bondholders were willing, in consideration of the adoption of the proposed refunding program, that the state might become the sole owner of the $2,975,215.75, and that they would look to the future revenue for payment of interest and maturities.

But, say appellants, after payment of the various items mentioned above, the balance was required to be transferred to the State Highway Fund under the concluding provision in § 39, act 11 of 1934, which reads: "Should any balance remain in the Bond Refunding Fund after providing for the above allocations, such balance, together with all moneys deposited in the Bond Refunding Fund since December 31, 1933, shall by the Treasurer of the State be transferred to the State Highway Fund."

When the allocations were agreed to, so far as the bondholders or any one else could foresee, every dollar in the Bond Refunding Fund might necessarily have to be utilized, and there might be no balance whatever. That being true, the bondholders' status would not be changed or injured, whether a balance remained or not, especially when by comparing the balance of $382,783.46 to the outstanding obligations of approximately $150,000,000, it will be seen that only one-tenth of two and one-half cents on each dollar would be available for payment on the obligations. We are led to the conclusion that the provisions regarding the transfer of any balance remaining in that fund was not inserted with the view of adding an additional substantial sum to the State Highway Fund for use in the payment of bonds, but that it was embodied in the act as a guide for bookkeeping, as any balance ultimately would have to be transferred to some other fund.

The bondholders had signified a willingness to relinquish possession over the whole fund and had agreed to its control by the state. It, therefore, could make no difference to them whether all or only a part of the sum appropriated was to be used. They had agreed to be satisfied with the revenues provided for in the law as the

source from which funds would arise with which to pay the bonds.

If the representatives of the state, by their diligence in compromising some of the claims against the Highway Department, saved some of the appropriation, we do not comprehend why any bondholder should object to the use of the balance in helping defray the expenses of a new program intended to further safeguard the security and payment of the bonds, especially when the amount of such balance would be insignificant and when the state's use of the balance would not reduce the security of bonds.

By the passage of the three acts of 1937, the state was not undertaking to repudiate its contract, or to breach any of the terms of the contract, but, on the other hand, to strengthen that contract, and to create a plan whereby the interest installments and maturities might be met.

It is a different situation than the one which arose in the case of *Hubbell* v. *Leonard,* 6 Fed. Supp. 145, (U. S. Dist. Court, E. D. of Ark.) cited by appellants. There the Legislature of 1933 undertook to so amend and repeal existing laws as to take money from the State Highway Fund and divert it to the various counties in the state for the purpose of aiding in the construction of "county roads." The court said: "There can be no doubt that the effect of the various acts of the 1933 General Assembly was to impair the obligation of these contracts. With commendable frankness this was admitted on oral argument." Our reference to that case must not be understood to imply that we agree with the ruling of the court upon the question of whether or not that suit was one against the state of Arkansas.

In our judgment, § 3, act No. 278 of 1937, which authorizes the transfer of the balance in the Bond Refunding Fund to the General Refunding Bond Redemption Account did not impair the obligation of the contract between the bondholders and the state.

We do not attach serious weight to the argument that there will be a discrimination in payment of bonds issued under the, 1934, act and those refunded under the new

acts, as $150,000,000 is appropriated under § 1, act No. 278, to be used for refinancing purposes. If intervener, bondholder, does not see fit to refund his bonds, we fail to see wherein he will suffer injury from the operation of the new laws.

The argument is advanced that the new acts will interfere with the "distressed bond" feature of act No. 11 of 1934, which appellants say operates to stabilize the market and maintain a higher market value for the bonds; that such an interference with or disturbance of that section, whereby the bonds will bring a lower price in the open market will be an impairment of the obligation of the contract. We do not concede that the "distressed bond" clause will be disturbed by the new law. However, it was embodied for the benefit of the state primarily.

Although the value of state bonds, like other bonds, may rise and fall on the open market, that would have no bearing on the question of the impairment of the state's obligation, as there was no undertaking on the part of the state to guarantee any particular market price for the bonds.

A further objection is interposed by appellants to the legality of § 3, act No. 278 of 1937, on the ground that the section attempts to appropriate moneys in a manner which violates two constitutional provisions of this state.

Section 29, art. 5, of the Constitution of Arkansas reads: "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 of which may be drawn shall be specified in dollars and cents; and no appropriations shall be for a longer period than two years."

It is insisted that the proposed appropriation does not conform to the constitutional provision because it is not specific, nor is the amount thereof stated. No objection is made that there was a failure to state the purpose in the section.

The case of *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41, is decisive of the proposition, as the court in that case had before it the same constitutional question

regarding an appropriation act. The court said: "An appropriation need not be made by any set words. It is the setting apart from the public revenues a certain sum of money for a specific object in such manner that the executive officers of government are authorized to use that money, and no more, for that object, and no other. *Clayton* v. *Berry,* 27 Ark. 129; *Jobe* v. *Caldwell,* 93 Ark. 503, 125 S. W. 423; *Dickinson* v. *Clibourn,* 125 Ark. 101, 187 S. W. 909; *Comer* v. *Blackwood,* 176 Ark. 139, 2 S. W. (2d) 44. * * * The appropriation (under consideration) is specific as to the purpose for which it is to be used. It is specific as to the time of payment, and as to the fund out of which it shall be paid. This was sufficient to constitute a valid appropriation."

When the act under attack in that case was adopted, it was not known just what claims were to be paid, but under the act they were to be ascertained by the Highway Commission at a future time. That made the appropriation too indefinite and uncertain, according to its challengers.

The purpose of the appropriation in § 3, act No. 278 of 1937, was the payment of the expenses to be incurred in the refunding operations; the appropriation was specific in that it was to be transferred from the Bond Refunding Fund, and such additional funds as might be necessary from the appropriation made in § 1.

When the bill, which later became an act, was first prepared, the author, realizing there would be a fluctuation of the balance in the Bond Refunding Fund at that time and at the time of approval of the act, (several weeks later) of course, could not name an exact amount. At the time this suit was instituted, the amount was known. Because the amount could not be ascertained at the time the bill was prepared, and for fear the balance might not prove sufficient for the expenses, it was deemed prudent to provide that any additional amount might come out of the larger appropriation contained in § 1 of the act.

Dickinson v. *Clibourn,* 125 Ark. 101, 187 S. W. 909, cited by appellants as sustaining their position that the

appropriation was not specific, covered a different state of facts. The act referred to in that case undertook to appropriate from the Game Protective Fund the expenses of the Game and Fish Commission and its employees, and for enforcing the game and fish laws. The court said the appropriation was not specific "when the amount that would probably be raised from the operation of the law was entirely contingent and altogether unknown."

Neither is the case of *Arkansas Game & Fish Commission* v. *Page, Treasurer,* 192 Ark. 732, 94 S. W. (2d), 107, in point. The court in that case held that § 2, act No. 194 of 1935, did not distinctly state the purpose of the attempted transfer of money from the Game Protective Fund, and was so uncertain and indefinite as to make it violative of the constitutional provision authorizing appropriations. A reading of the offending section shows that it failed to state where the sum sought to be transferred was to be placed, nor for what purpose.

Appellants urge that because the appropriation is not itemized and the number of employees and their salaries are to be fixed by the Governor and the Board of Finance, it violates § 4, Art. 16, Arkansas Constitution, which reads: "The General Assembly shall fix the salaries and fees of all officers in the state, and no greater salary or fee than that fixed by law shall be paid to any officer, employee, or other person, or at any rate other than par value; and the number and salaries of the clerks and employees of different departments of the state shall be fixed by law." In support thereof, *Pulaski Co.* v. *Caple,* 191 Ark. 340, 86 S. W. (2d) 4, is cited. The court in that case held that a deputy county clerk belonged to one of the departments of state enumerated in § 4, Art. 16, Arkansas Constitution, which required the General Assembly to fix his salary. An employee of the Refunding Board does not fall in that category. The distinction is pointed out in *Farrell* v. *Oliver,* 146 Ark. 599, 226 S. W. 529, where an appropriation for the maintenance of two of the state industrial schools, embraced in the general appropriation bill, was challenged, as violative of § 30, Art. 5, Arkansas Constitution, which provides: "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.'' Those seeking to uphold the appropriation maintained that the schools were a part of the executive branch of the state. The court did not think so. It was there said: ''The control of such institutions is administrative and falls within the executive powers of government, but the control and maintenance is not a part of the expenses of the executive department of the state as defined by the Constitution.''

While, undoubtedly, the Legislature had the power to fix salaries of those engaged in the work connected with the refunding program, its failure to do so in making an appropriation to pay for such expenses should not, and in our judgment does not, render the appropriation illegal.

We hold that the action of the chancery court in sustaining the demurrer to the complaint and the interventions was correct, and the decree is, accordingly, affirmed.

GRIFFIN SMITH, C. J., BUTLER and BAKER, JJ., dissent.

MCHANEY, J., disqualified and not participating.

GRIFFIN SMITH, C. J. (dissenting). The majority opinion sets out in detail the history of this litigation. It quotes from act No. 11 of 1934, and copies the salient parts of acts 130, 151 and 278, of 1937.

If full effect is given to act 278, rights heretofore created in certain creditors of the state will be impaired in that funds pledged to an account in which these creditors have an interest will be diverted to other purposes.

As set out in the majority opinion, the state's credit was at low ebb when the Forty-ninth General Assembly convened in January, 1933. Default in payment had occurred, and further default threatened. Act 167, approved March 28, 1933, was ineffective as an emergency measure because bondholders declined to refund under its provisions. The state of Pennsylvania filed suit against Arkansas in the United States Supreme Court, in which judgment against the state was asked. A suit by holders of highway bonds was brought in the

United States district court at Little Rock, as a result of which the State Treasurer was temporarily restrained from disbursing highway funds under act 167 and acts making appropriations in pursuance of the program therein provided for. A three-judge court sitting in Little Rock made the temporary order permanent. See *Hubble* v. *Leonard,* 6 Fed. Sup. 145. By consent, this permanent order was modified to permit payment of current expenses for highway maintenance.

With the state upon the one hand threatening to carry its fight to the supreme court of the United States, and with the bondholders on the other hand in control of a favorable decision which did not give them access to the state treasury or afford immediate means of realizing upon their advantage, conferences were entered into which resulted in promulgation of act 11, approved February 4, 1934.

Importance of the negotiations leading to enactment of this legislation should not be minimized. The result may be classified as a stupendous financial transaction—the state's greatest single venture in consolidating obligations. Refunding involved approximately one hundred and fifty million dollars in principal alone. Creditors then holding the state's bonds were asked to, and did, meet with representatives of the commonwealth and promises were given and assurance received affecting securities held by investors in virtually all of the forty-eight states. Savings accumulated through long years of economy; trust funds held by institutions for widows and orphans; bonds purchased by insurance companies with money pledged to the payment of death benefits—these and other interests were included in a program sanctioned by the state.

In meeting the issues squarely, bondholders made substantial concessions, particularly in refunding road improvement district obligations. These concessions, however, in view of prevailing economic conditions, were no more than the state had a right to ask, and the attitude of the state was not that of a supplicant begging to have its debts forgiven. On the contrary, it was admitted that during the easy period, so appropriately re-

ferred to as the "Fool's Paradise," promises had been too freely given, and the state's resources were not sufficient to discharge its debts in the order of their creation and in harmony with their terms. The state asked for time—a breathing spell—an opportunity to rearrange and reclassify its fiscal functions: in other words, a day of grace. The bondholders, both wisely and generously, acquiesced in the request—not as a matter of charity, but, rather, as an incident to changed conditions and business evolution.

We told our creditors, in all seriousness, and in all good faith, that the commitments made around the conference tables and later enacted into solemn law would remain inviolate—a monument to the fidelity of a people then striving to maintain the state's independence and its credit.

Section 44 of act 11 of 1934 makes that refunding measure a contract between the state and its creditors, and the solemn pledge is there given that the terms of the contract shall not be impaired by subsequent legislation.

One of the pledges made in that law was that any balance remaining in the bond refunding fund, after certain privileged payments had been made, would be transferred to the state highway fund created by § 2 of the act. With respect to this balance § 39 provides that "It shall, together with all moneys deposited in the bond refunding fund since December 31, 1933, be transferred by the treasurer of state to the state highway fund." The balance now identified as being in the bond refunding fund is $382,783.46. Although the promised transfer has not been made, equity, regarding that as done which ought to have been done, will treat this balance as standing to the credit of the highway fund.

By § 2 of act 11 of 1934 the first charge upon the state highway fund is maintenance of the state highway system to the extent of 25 per cent. of highway revenue. The section then provided for certain transfers to be made from the state highway fund. Remainder of the highway revenue in excess of the maintenance fund and transfer items was next to be applied to the payment of

interest upon the obligations authorized to be issued. Any remaining balance was to be credited to several special accounts, specifically set out in said section, for use by the state in purchasing highway obligations tendered under the terms of act 11 of 1934. It was further enacted that the special accounts "are hereby declared to be trust funds held in the state highway fund pledged exclusively to the payment or redemption of the principal and interest of the respective obligations described in such accounts and shall be applied solely as provided in this act."

It is first claimed that if effect is given to § 4 of act 130 and to § 3 of act 278, both of 1937, rights created and given under the provisions of act 11 of 1934 will be destroyed in violation of § 10 of article 1 of the federal constitution, and § 17, Art. 2, of the State Constitution. This contention should be sustained.

Act 130 of 1937, after providing for issuance of general refunding bonds, directs the treasurer of state, from and after the date of the sale or exchange of any general refunding bonds, and during each year while said bonds remain outstanding and unpaid, "to credit and pay to the special account hereby created in the state highway fund to be known as the general refunding bond redemption account and to charge against the state highway fund an amount equal to the annual savings and interest effected by the issuance of general refunding bonds thereunder, and likewise to credit and pay to the aforesaid general refunding bond redemption account and to charge against the particular redemption account from which those certain bonds refunded would otherwise be payable according to the provisions of aforesaid act 11 which created such account the portion of the total amount of the revenues pledged by said act 11 to the payment of principal of those certain bonds refunded."

Section 3 of act 278 of 1937 contains the following direction: "For the purpose of paying expenses in connection with refunding operations the state comptroller is directed and authorized to cause a transfer to be made to the general refunding bond redemption account of any balance to the credit of the bond refunding fund and

allocated under the provisions of §§ 39 and 50 of said act 11 aforesaid, and of such additional sums as may be necessary from the appropriation made in § 1 hereof." Section 1 of act 278 of 1937 provides that "All proceeds of the sale of general refunding bonds shall be deposited in the state treasury to the credit of the general refunding bond redemption account and there is hereby appropriated out of any moneys which may be so deposited the sum of $150,000,000 or so much as may be necessary to effectively, efficiently and speedily refund or refinance the obligations provided for." This section refers to and identifies acts 130 and 151 of 1937 and undertakes to tie the three enactments together.

The majority opinion disregards the fact that by § 4 of act 130 an amount equal to the difference in the interest rate of the new bonds and the refunded bonds, and a part of the sinking fund created by § 2 of act 11 of 1937, will be transferred from the highway fund to the general refunding bond redemption account.

If any money is transferred (as provided for in § 4 of act 130 of 1937) before all of the obligations issued under act 11 of 1934 are redeemed or retired, the holder of bonds will be deprived of substantial rights in violation of § 10, article 1, of the federal constitution and § 17 of article 2 of the State Constitution.

Section 3 of act 278 of 1937 authorizes and directs the transfer to the general refunding bond redemption account of any balance to the credit of the bond refunding fund as allocated under the provisions of §§ 39 and 50 of act 11 of 1934. The amount standing to the credit of the bond refunding fund has been pledged in trust to the payment of the bonds issued under act 11 of 1934. The transfer and use of this balance for any purpose other than as specified in act 11 is an impairment of the contract between the state and the holders of outstanding bonds.

The majority opinion holds, in effect, that even though this balance may be a trust fund pledged to the state's creditors, the state's culpability is slight because the ratio of $382,783.46 to $150,000,000 shows a diminishing degree of importance.

The philosophy of appropriation seems to be that if Peter must part with his worldly possessions to prepare a place for Paul, it may be presumed that Peter's lamentations will not be heard at a great distance when he grasps the explanation that the amount taken in comparison with the remainder is not sufficient to render him a bankrupt.

The supreme court of the United States in the case of *Bank of Minden* v. *Clement,* 256 U. S. 126, 65 L. ed. 857, speaking of the degree or extent of impairment of contract, said: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligations—dispensing with any part of its force." (See also cases cited in the opinion.)

The General Assembly does not possess the constitutional power to take any part of the trust funds created and dedicated by § 2 of act 11 of 1934, or to take $382,783.46 from a fund dedicated to the state's creditors in trust. If such conduct is to be approved because economies may be effected, then it would seem that salvation is being purchased at too great a price: the result is that honorable dealings are being sacrificed at the whim of expediency.

But, it is argued that there is no violation of either the state or federal constitutions because the term "impair" means "to make worse, to diminish in quality, value, excellence or strength, or to deteriorate." Therefore, say proponents of abrogation, the arbitrary taking of nearly $400,000, contrary to the provisions of an expressed trust, does not impair the obligations because it is the intent, immediate or remote, of those charged with administrative duties, to strengthen the security of bondholders, to improve the quality of their holdings, to increase existing values, and to endow with attributes of excellency in contradistinction of impairment.

This argument would have more merit if those with whom we entered into contractual relationship were parties to the change. In the absence of acquiescence it

may be suggested that the state is abandoning its status as trustee of highway funds for a trusteeship of the conscience and business judgment of bondholders who thought at least that act 11 of 1934 was not susceptible of the strange construction to which it is now being subjected that an advantage of the hour may be attained.

It is next contended by appellants that the appropriation of funds attempted by § 3 of act 278 of 1937 violates § 29, Art. 5, of the state constitution. This contention should also be sustained. This section of the Constitution reads as follows: "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 appropriation shall be for a longer period than two years."

The appropriation made by § 3 of act 278 of 1937 does not specify in dollars and cents the maximum amount that may be used for the purpose of paying expenses of refunding. The majority opinion says: "When the bill, which later became an act, was first prepared, the author, realizing there would be a fluctuation of the balance in the bond refunding fund at that time, and at the time of the approval of the act (several weeks later), of course, could not name the exact amount."

The language clearly indicates that the legislature did not fix in dollars and cents the maximum amount that might be used for expenses of refunding; yet, notwithstanding that fact, and in opposition to § 29, Art. 5, of the Constitution, the stamp of approval has been put upon the appropriation.

The case of *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41, is cited in the majority opinion. A study of the Grable case discloses that instead of being an authority supporting the results in the instant case, it is authority to the contrary.

The Grable case recognizes the force and effect of § 29, article 5, of the Constitution. The court held that the maximum amount that might be expended under the

act attacked in the Grable case and under act 18 of 1937 was specifically fixed at $7,500,000.

In the case at bar the legislature has authorized an expenditure (1) for the purpose of purchase and redemption of bonds issued under act 11 of 1934, and (2) for the payment of expenses of refunding under act 130 of 1937. That expenditure is the definite sum of $150,000,000 plus an unknown and indefinite amount to be transferred from the bond refunding fund. There is a provision that no part of the $150,000,000 shall be used for expenses until after the indefinite and unknown amount is exhausted. The sum of a known and unknown amount is unknown.

The appropriation made by § 3 of act 278 of 1937 does not comply with § 29, article 5, of the Constitution.

It is conceded that $150,000,000 appropriated by § 1 of act 278 of 1937 is legally appropriated. If this were the only appropriation contained in acts 130, 151 and 278 of 1937, and if there had been a provision that expenses of refunding should be paid from this appropriation under the rule announced in the Grable case, the appropriation would be constitutional, but the appropriation made by § 3 of act 278 of 1937 operates upon a balance in the bond refunding fund and this balance was not definitely fixed by the legislature.

Appellants next contend that even though the appropriation made by act 278 of 1937 is valid, no part thereof can be disbursed for salaries, fees or commissions to those assisting in the refunding program. This contention should also be sustained.

Section 4 of article 16 of the Constitution reads as follows: "The General Assembly shall fix the salaries and fees of all officers of the state and no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person, or at any rate other than at par value, and the number and salaries of the clerks and employees of different departments of the state shall be fixed by law."

In *Nixon* v. *Allen,* 150 Ark. 244, pages 257-258, 234 S. W. 45, this court said: "The power to fix the salaries and fees of all officers in the state and the number of

their clerks and employees and their salaries is a function which, within the limitation of the Constitution, is lodged in the supreme law-making power of the state—the legislature. The General Assembly cannot delegate this legislative power to any individual officer or board." The court, in *Pulaski County* v. *Caple,* 191 Ark. 340, 86 S. W. (2d) 4, reaffirmed the rule announced in the Nixon case.

The majority opinion, however, says that an employee of the refunding board is not within the restrictions found in § 4, article 16, of the Constitution. The reference is to those departments into which the powers of the government of the state are divided by § 1, article 4, of the Constitution, where it is provided that all the powers of the government of the state of Arkansas are divided into legislative, executive and judicial departments.

If the bonds to be issued are to be obligations of the state of Arkansas, their issuance must be exercised by some governmental power, and this power must be exercised by someone employed in one of the three departments of state. Issuance of bonds will be an administrative function and such duties will necessarily fall within the executive powers of the government. See *Farrell* v. *Oliver,* 146 Ark. 599, 604, 226 S. W. 529.

If it be admitted, for the sake of argument, that an employee of the board of finance is not an entity in one of the departments of state, even then such employee could not be paid a salary in excess of that fixed by the legislature, because § 4, article 16, of the Constitution prohibits the payment of any greater salary or fee "*to any officer, employee or other person*" than that fixed by law. Those engaged in refunding, if arbitrarily excluded from a departmental classification, would at least attain the dignity of "*employees or other persons.*" Since the legislature has not fixed the salaries or fees of those who will be engaged in refunding, no funds can be legally paid from the appropriations made by acts 130, 151 and 278 of 1937 for salaries, commissions, fees, or personal services even though the appropriations were valid. If a construction to the contrary is adopted, then an im-

portant safeguard against treasury-tapping has been removed.

It is the view of the writer of this opinion, concurred in by Mr. Justice BUTLER and Mr. Justice BAKER:

(1) That the balance of $382,783.46 standing to the credit of the bond refunding fund is properly a credit to the highway fund created by act 11 of 1934.

(2) That such balance is a trust fund and that its diversion to any purpose inconsistent with the trust would impair the obligation of the contract between the state and its creditors and such diversion is, therefore, prohibited by both the federal and state Constitutions.

(3) That the transfer of any moneys from any of the accounts created in the state highway fund by § 2 of act 11 of 1934 to the general bond refunding account as provided in § 4 of act 130 of 1937 would impair the obligation of the contract between the state and its creditors, and such transfer is, therefore, prohibited by both the federal and state Constitutions.

(4) That the relief prayed for by appellants and the methods provided for its procurement are not suits against the state, but on the contrary they are suits by taxpayers for the benefit of all taxpayers similarly affected, and to that extent are suits by the state and not against it.

(5) That the state has no interest in any unconstitutional enactment of the General Assembly, and such enactment should not be enforced by any officer or other agent of the state; therefore, injunction will lie to prevent an exercise of nonexistent authority.

(6) That act 278 of 1937 is not unconstitutional as to the appropriation of $150,000,000, nor is it unlawful for the state comptroller to transfer funds from the general refunding bond redemption account for use in any constitutional manner; provided, no part of the principal arising from the sale of bonds is transferred; and provided, further, that in no event can any part of the item of $382,783.46 be transferred or used except as authorized in §§ 39 and 50 of act 11 of 1934.

(7) That no part of the funds appropriated by any of the acts mentioned can be used for the purpose of

paying salaries, fees, or commissions to persons engaged in the furtherance of the refunding plan because such salaries, fees and commissions have not been fixed by the legislature as required by § 4 of article 16 of the Constitution.

TERRAL *v.* BROOKS.

4-4696

Opinion delivered June 21, 1937.

William J. Kirby, for appellant.
R. E. Wiley, for appellees.

GRIFFIN SMITH, C. J. Appellees, W. E. Brooks and Adeline E. Brooks, filed suit against the Southwestern Bell Telephone Company on March 12, 1936, praying for a temporary restraining order to prevent defendant from erecting a telephone pole in a driveway used by appellees as a part of the facilities of their residential property identified as plot No. 52 of Prospect Terrace Addition to the city of Little Rock. The temporary order was issued, and was later made permanent.

It is alleged in the complaint that plot 52 was purchased by appellees in 1925; that appellees immediately moved into the residence on plot 52, and that they had occupied the premises since 1925, with all appurtenances, openly, notoriously, and with the claim of title in fee simple thereto, adversely to all others.

It is further alleged that before and at the time appellees moved into the residence on said property, the driveway was laid out and was in use as the sole means of ingress and egress to the garage; that Edgewood road, which was the street opened and dedicated and on which appellees' property abutted, was paved, and a curbing separated the pavement from plot 52; that there was an opening about eight feet wide in the curbing, with rounded ends, through which the driveway opened into Edgewood road; that appellees had continuously, from 1925, used said driveway daily and at all times as a service entry to their premises, without interference, and that such use was with the claim of title through the whole length and width of the driveway; that the driveway in question consists of a strip of land between plots 51 and 52.

In its answer, the telephone company denied that appellees were owners of the real property used as a driveway, and alleged that appellees' acquisition of plot 52 was subject to certain restrictions and reservations; that the grantor from whom appellees took title reserved a strip of land between plots 51 and 52 for use of utilities, such easement being more particularly described in the original bill of assurance; that such reservation or limitation was of record in deed book 168 of the records of Pulaski county, as follows:

"The grantor herein, his successors and assigns, further reserve the right to lay or cause to be laid, gas, water, and sewer pipes and mains and conduits, and the right to place poles for carrying wires or any other purpose, on, under, through and across any and all of said addition noted on said plot or map as easements, paths, walks and cross-walks, and said grantor, his successors and assigns, or any person, corporation or utility so

authorized by him or them shall have free ingress and egress in, from and over said easements, walks, crosswalks and paths for the purpose of erecting, maintaining, or repairing such gas, water and sewer pipes or mains, conduits, wires and poles.''

On May 23, 1936, after the temporary injunction had been issued by the chancellor on March 12, Tom J. Terral filed an intervention, alleging that he was the owner of plot 51 described in appellees' complaint; that the strip of land between plots 51 and 52 was ten feet wide; that the bill of assurance contained the reservations mentioned in the telephone company's answer; that the easement was formed by taking five feet from plot 52, and five feet from plot 51, and that during the latter part of 1935 agents of appellees had offered intervener $200 for his five-foot strip. He prayed that the telephone company be required to remove its poles and lines from his lands, and ''that such easement be declared to be an easement according to its purposes, as shown by the bill of assurance referred to and that appellees be enjoined from further use of said easement as a driveway.''

There was no appeal by the telephone company.

The contention of intervener, appellant herein, is that any rights appellees might acquire through adverse possession would not begin to run until some act had been committed, or some fact had arisen, the effect of which would be to put appellant on notice that a hostile claim was being interposed; also, that recognition of the owner's title by one who occupies property will disprove adverse possession, if such recognition is made before the statutory period has run.

Appellant Terral testified that he owned plots 50 and 51 of Prospect addition; that Mr. Brizzolara of the Union National Bank called him on two occasions and offered to buy his five-foot strip of land for Mr. Brooks, and was willing to pay $200 therefor. He said that Brizzolara told him the reason Brooks wanted to buy was because he (Brooks) recognized that it belonged to appellant. Mr. Brooks' son also offered to buy the land ''so his mother and father would not be troubled as to whether they

owned it." Witness said he knew he could not sell the strip except subject to the easement for utilities; that Mr. Kahn, from whom he purchased plot 51, told him that if he put anything in this strip that would block the utilities, he did so at his own risk. He said that appellees had built a sun-porch on plot 52 contiguous to the easement and this had the effect of narrowing the space so that appellees ran against his (appellant's) shrubbery in getting cars in and out of the garage; that Mr. Kahn told him, before he bought plot 51, that the easement was for use of utilities and was not intended as a driveway.

On cross-examination appellant Terral testified that the first offer of Brizzolara as agent for Brooks was made about two years ago, before any controversy over the land had arisen; that the trouble started when Mrs. Terral undertook to project a walk over the five-foot strip on plot 51, and was stopped by Mr. Brooks, who claimed it was a private driveway and directed her not to walk on that space. Witness said he first bought plot 50 some time after Brooks moved into the residence on plot 52, and about a year later witness bought plot 51. The telephone pole was on the corner before he (Terral) bought plot 51. He admitted that appellees had been using the driveway for about ten years.

W. E. Brooks testified that when he bought plot 52 the dwelling thereon had just been completed, but the garage had not been finished when appellees moved in; that in 1934 or 1935 a sunporch was added to the western end of the house; that the driveway was used in getting in and out of the garage, but was also used by the telephone company's trucks in hauling material in that vicinity. When appellees first moved in, the driveway was open from Edgewood through Sherwood to Crestwood, and was used as a passway for the public from the street car line. Gilbert Blass, who owned property a little south and west of plot 52, closed this pathway by building a wall across it at the alley back of plot 52. Witness had used the pathway as a driveway since that time, and before. The driveway as at present outlined is about eight feet wide and runs to the rear of the plot. There has never been a telephone pole in the driveway, the nearest

being about twenty feet south of Edgewood and 10 or 12 inches west of the west side of the driveway, on plot 51. No suggestion of placing a pole in the driveway had ever been made, and the only actual use by the telephone company was erection of two poles, neither of which was in the driveway. Witness said that Mr. McCall of the telephone company called and told him Mr. Terral didn't want the pole on his plot to remain there any longer, and the company intended to set it over the line on the driveway. Such action would completely deprive witness of the use of the driveway.

"Beyond question or doubt I understood we had the driveway and part of it was on plot 51 and part on plot 52, and it was already laid out and measured. We have never questioned our right to use it for a driveway as it was a part of the property which we purchased. No one has ever questioned our right to it until this question came up. We didn't ask any questions and no one raised any objections. We used it knowing that the dividing line between the two plots went right down the center of the driveway. The boundaries of the driveway were coincident with the cut in the curb running straight back between parallel lines to the rear property line, the width being about eight feet."

On cross-examination Brooks testified that at the time he bought the property he knew the utilities had the right to use this strip, but he did not know the exact dimensions of the easement until some time later, when he saw the bill of assurance. The driveway is not paved. The sunporch was built to within six or eight inches of the driveway. The plat on file in the circuit clerk's office shows a reservation of the easement, without specifications for a driveway, nor does appellees' deed call for a driveway. "I used this as a driveway supposing it was part of the property, although no one told me so." Witness also testified that he knew nothing of the purchase offer made by his son; that Brizzolara's offer was in the nature of a compromise, made after witness had used the driveway more than seven years; that appellees had never questioned Terral's right to all the ground west of the center line of the driveway, but only recognized the

title subject to use of the driveway which witness understood was for the joint use of those owning the adjacent properties. The telephone company laid a conduit under the driveway in 1930 or 1931, but did not interfere with use of the surface. Appellees made no objection to this work, as the conduit was placed west of the dividing line between the two lots.

V. P. Knott, engineer, testified that in his professional capacity he laid out the first section of Prospect Terrace which included plots 51 and 52; that he was familiar with the easement between the plots, and it was laid out for use of the utilities, and not for a driveway.

In order that adverse possession may ripen into ownership, possession for seven years must have been actual, open, notorious, continuous, hostile, exclusive, and it must be accompanied with an intent to hold against the true owner. *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002. Where a landowner, through mistake, takes possession of land of an adjacent owner, intending to claim only to the true boundary, the possession is not adverse. *Murdock* v. *Stillman,* 72 Ark. 498, 82 S. W. 834; *Goodwin* v. *Garabaldi,* 83 Ark. 74, 102 S. W. 706; *Couch* v. *Adams,* 111 Ark. 604, 164 S. W. 728. But it is different if a landowner, acting under a mistake as to the true boundary, takes possession of the land of another, believing it to be his own. There the intent is to retain possession under an honest belief in ownership, and there is an adverse purpose. *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444. One entering upon the possession of land under a deed of conveyance to him is presumed to occupy and to claim only the interest named in his conveyance. *Wilson* v. *Stortz,* 117 Ark. 418, 175 S. W. 45.

In *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830, it was held that a party claiming title after seven years of possession gained nothing, because claimant had not acted to bring to the defending party knowledge or notice of the adverse claim. It was also said that where entry upon land is permissive, the statute of limitations will not begin to run against the legal owner until an adverse holding is declared and until notice of the changed status has been brought to the owner.

In *Fulcher* v. *Dierks Lumber & Coal Co.*, 164 Ark. 261, 261 S. W. 645, this court said that the holding of land, begun by permission, would not ripen into an adverse or hostile right until notice of such adverse holding had been brought home to the owner, and occupancy had continued for the statutory period. In *DeMers* v. *Graupner,* 186 Ark. 214, 53 S. W. (2d) 8, it was said that "Evidence showing that an adjoining landowner mowed the grass on a small strip adjoining defendant's fence was not sufficient to establish adverse possession where there was nothing to bring home to defendant the knowledge that plaintiff was intending to divest defendant of title by adverse possession."

Decisions of this court are in harmony with the general rule laid down in Corpus Juris Secundum, Adverse Possession, Vol. 2, § 45, p. 559, which reads as follows: "Notorious possession contemplates possession that is so conspicuous that it is generally known and talked of by the public or the people in the neighborhood." On the question of notice, the textwriter says: "The true owner must have knowledge or notice that the possession is hostile; and this may and must consist either of actual knowledge or of constructive notice arising from the openness and notoriety of the possession. * * * Possession which is so open, visible, and notorious as to give the owner constructive notice of an adverse claim need not be manifested in any particular manner; but there must be such physical evidence thereof as reasonably to indicate to the owner, if he visits the premises and is a man of ordinary prudence, that a claim of ownership adverse to his is being asserted."

At page 627 it is said: "Admission or recognition of another's title precluding hostility of possession of claimant may be shown by claimant's offer to purchase another's interest."

At page 646 it is said: "Claim or use of an easement is consistent with, rather than hostile to, the title of another to the fee, and possession attributable to the easement will not be regarded as adverse to the fee title

of another unless and until there is notice of a hostile claim to the fee."

And, finally, there is this rule: "Where the original entry on another's land was amicable or permissive, possession, regardless of its duration, presumptively continues as it began, in the absence of an explicit disclaimer. The presumption is rebuttable by evidence of adverse holding with notice to the true owner." (p. 823)

Tested by these general rules, and by decisions of this court, we are of the opinion that the chancellor was in error when he decreed that the telephone company be forever enjoined from erecting any telephone poles on the driveway or from otherwise obstructing it, and that the intervention be dismissed for want of equity and that the intervener be forever enjoined from interfering with the continued and permanent use of the driveway by appellees.

Appellees had knowledge of reservations made with respect to the west five feet of plot 52, and they knew that certain rights were retained for utilities. They did not at the time of purchase know just what these limitations were, but W. E. Brooks testified that no one told him the driveway belonged to his property, and when he examined the bill of assurance he became acquainted with actual conditions.

Admittedly, a five-foot strip on the west end of plot 52, owned by appellees, and a five-foot strip on the east end of plot 51, owned by appellant-intervener, attached to the fees of the two plots, subject to the easement reserved for utilities. The telephone pole referred to by W. E. Brooks as being about 20 feet south of Edgewood and 10 or 12 inches west of the west side of the driveway on plot 51, might be on the five-foot strip of plot 51 reserved for utilities, or it might be on intervener's land west of that to which the easement attached, for Brooks testified that the driveway was about eight feet wide. The defined driveway did not, therefore, cover the entire width of the two reserved strips. Intervener Terral testified that he notified the telephone company to remove the pole from his property, "as I didn't think my prop-

erty should be used by the utilities when I had already dedicated five feet from my lot for that purpose." It is fairly inferable that Terral intended to say that the pole was on his property west of the reserved strip.

When appellees moved into their property, the driveway between plots 51 and 52 had been well marked and was used alike by appellees, the general public, and for utilities. Appellees, therefore, accepted the situation as they found it, and without questioning any one, or asserting any hostile or adverse rights, they began to make use of accommodations thus afforded. The evidence does not show when Gilbert Blass closed the passway. This may, or may not, have occurred within seven years, and there is only an inference that the obstruction was built more than seven years prior to the time the suit was filed.

There was nothing in the character of the use made of the driveway by appellees to put appellant-intervener on notice that appellees intended to appropriate the property to the exclusion of the owner of the fee, and to the exclusion of rights reserved in the bill of assurance. Reservations as to utilities were in the interest of the public, and no company or firm or person engaged in that class of business had any right paramount to that of any other company or firm or person similarly engaged. Acts of appellees in making use of the driveway, not being inconsistent with rights reserved for the utilities, could not have the effect of putting on notice those who might, at some future period, be called upon to supply utility accommodations essential to the general welfare, and as to such persons, firms, or corporations, the statute would not begin to run in favor of appellees until the service was required and there had been a refusal to permit entry.

Use of the driveway, as such, was not necessarily inconsistent with concurrent occupancy of the easement by the telephone company. Rights of the two had not been in conflict, and until 1934 or 1935 there had not been an intimation by appellees that they would object to a continuation of the kind of usage of the property which had been formerly made by the telephone company. On

the contrary, as late as 1930 or 1931 the telephone company laid its conduits under the driveway. Appellee W. E. Brooks undertook to explain this by saying that he did not object to this entry because construction was on or under the easement reserved from plot 51—the Terral property. This strip of land, however, is the sole subject of controversy, and it is the identical property appellees are now contending for, on the theory that they have held adversely for more than seven years.

The record reveals that the first hostile claim made by appellees occurred in 1934 or 1935, when the sunporch was built on land extending to within a few inches of the east side of appellees' five-foot strip. The natural effect of this construction was a declaration by appellees that in making use of the driveway they would occupy a part of intervener's easement, this being necessary to freedom of movement.

There is no proof on behalf of the telephone company that its occupancy of the land upon which the pole in question is situated has ripened into adverse possession. The telephone company's only contention is that it should not be deprived of rights granted under the bill of assurance, and to this we assent.

Reversed and remanded, with directions to enter an order denying the relief prayed for by appellees and to grant the prayer of appellant-intervener that reservations and conditions pertaining to the easement on, over, and under the five-foot strip of land on the east end of plot 51, as defined in the bill of assurance, be treated as continuing, and that appellees be enjoined from using same in any manner inconsistent with the rights of the owner of the fee under restrictions imposed by the bill of assurance.

INTERURBAN TRANSPORTATION COMPANY, INC. *v.* REEVES.

4-4695

Opinion delivered June 21, 1937.

E. W. Moorhead, for appellant.
E. W. Brockman, for appellee.

BUTLER, J. This action was begun in the court below to recover damages for personal injuries to appellee while a passenger on the bus of appellant company. There was a verdict in favor of the appellee in the sum of $2,500. Motion for a new trial was filed and overruled and a judgment entered for the amount named in the verdict, from which is this appeal.

The assignments of error argued are (1) that there was no negligence shown on the part of the defendant in the court below, (2) that there was error in excluding certain evidence and in giving instructions Nos. 3 and 7 requested by the appellee, plaintiff below, and (3) that the verdict is excessive.

The complaint in effect alleged that on the afternoon of December 30, 1935, appellee was a passenger on the bus of appellant company and, while in the exercise of due care for her own safety, was injured by the negligence of an employee of the appellant who let a heavy suitcase fall from the rack immediately above where she was sitting, striking her head and neck with such force as to cause serious and permanent injury to her. The answer denied the allegations of the complaint and pleaded as an affirmative defense contributory negligence on the part of appellee.

Although the evidence is in conflict, we think it tends to establish the following facts, which we summarize: appellee purchased a ticket at Pine Bluff for transportation by appellant's bus to the village of Yorktown in Lincoln county. At this particular time the traffic was heavy over appellant's bus line from Pine Bluff south and it was necessary to operate an extra bus. These busses left Pine Bluff going south on the afternoon of December 30, 1935, one following the other after a comparatively short interval. It is not clear which one was boarded by the appellee. A negro man, wearing a cap which indicated to the minds of the passengers that he was a porter, was on the bus in which appellee was riding. Appellee's seat was near the front of the bus and between stops the negro man would take his place by the driver. At Pine Bluff he assisted the passengers in boarding the bus, placed the baggage in proper place

in racks constructed above the passenger seats, and, at the different stops, he unloaded the baggage for such passengers as disembarked, continuing to do this as far south as Star City. Whether he remained on the bus until it reached the terminus of its destination is not shown. At one of the stops, while removing baggage from the rack directly above the seat occupied by appellee, he let a suit case fall which struck her on the neck and shoulder.

A witness, who was a passenger on the bus when the suit case fell upon appellee, testified that she had traveled on the same bus two weeks before and that on that occasion a negro man acted as porter—that is, he assisted the passengers on and off the bus when necessary, loaded and unloaded baggage—who, witness thought, was the same as the one who performed the duties of porter on the afternoon of appellee's injury. The proof further shows that on several occasions negroes were permitted to ride the bus free acting in the capacity of porter.

The two drivers, who operated the busses going south from Pine Bluff on the afternoon of December 30, 1935, testified that they had no recollection that appellee was a passenger on either bus; that there were no porters loading and unloading baggage or assisting passengers in boarding and alighting and that they were not informed and did not know of any one claiming to have been injured. They admitted that on certain occasions they would allow persons to ride in consideration of their services as porter.

There was evidence to the effect that the negroes who assisted in the loading and unloading of the busses of appellant company at Pine Bluff and Little Rock were not employees of that company, but of independent transportation companies whose stations were used by appellant.

Mr. T. C. Ward became the general manager of the appellant in February, 1936. The accident to appellee was reported about the 26th of that month and an investigation made regarding it. Testifying as to this in-

vestigation, Mr. Ward stated that his company did not employ porters and that if any such were employed it was without his permission; that he learned on definite inquiry that no porters had ridden on any of the busses prior to the preceding holidays.

No one of appellee's fellow-passengers on the afternoon of her injury testified that the negro man acting as porter was an employee of appellant company. They testified merely as to his actions and what they inferred from them. This testimony, together with that of the drivers to the effect that they had no porters on that occasion, is the basis for appellant's contention that appellee has failed to discharge the burden of proving that the negligence resulting in injury to her was the act of an employee of appellant. Appellant relies on the rule that public carriers are not insurers of the safety of passengers, *St. Louis I. M. & So. Ry. Co.* v. *Jackson,* 118 Ark. 391, 177 S. W. 33, L. R. A. 1915E, 668; *St. Louis I. M. & So. Ry. Co.* v. *Tukey,* 119 Ark. 28, 175 S. W. 403, L. R. A. 1915E, 320; 10 C. J. 900, and, therefore, before the appellant's liability can be established, it must be proved that the negligent act from which the injury flowed was that of one of its employees.

It is argued that the jury is not permitted to speculate upon this question and that a judgment will be reversed where the verdict is based upon such speculation. To sustain this contention, many of our own cases are cited, and it must be admitted that these sustain the rule that a verdict must not be based upon conjecture or speculation. This rule is well settled and a citation of the authorities relied upon by appellant is unnecessary. It is our opinion that the evidence on these points raises the questions above the realm of speculation and is sufficient to justify the inference that the relation between the negro man who acted as porter and the appellant was that of employer and employee, and that it was the negligence of the employee which caused appellee's injury, notwithstanding the testimony of the drivers. It is true, the general manager of appellant testified that the company used no porters on the bus

line in question, and that if drivers employed any such it was done in violation of the rules of the company and not with his permission. It will be noted, however, that, on December 30, 1935, this witness had no connection with appellant company; and his testimony, therefore, was hearsay in its nature insofar as it related to the rules of the company prior to his employment. He did not offer any written rule or, by competent testimony, show the date of the promulgation of the rule about which he testified.

Three witnesses testified that on previous occasions they had been permitted by the driver of the bus to act as porters, but each denied that he was acting as porter at the time appellee was said to have been injured.

It is well settled that facts may be established by circumstances which will at times prevail over direct proof. There was no competent testimony tending to show lack of authority of the drivers to permit persons to act as porters at times and to give such persons free rides for services rendered. The proved circumstances justify the reasonable inference that the supposed porter on the bus on which appellee was a passenger on the afternoon of her injury was a special employee of appellant company for whose negligence appellant is liable.

It seems to be the established rule that where a servant is engaged in the performance of his duties, the master will be liable, although the particular act complained of is unauthorized or even where such act is contrary to express direction. *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6; *Healy* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115; *Campbell Baking Co.* v. *Clark,* 175 Ark. 899, 1 S. W. (2d) 35; *Federal Compress & Warehouse Co.* v. *Jones,* 180 Ark. 476, 21 S. W. (2d) 852; *Rex Oil Corp.* v. *Crank,* 183 Ark. 819, 38 S. W. (2d) 1093. In *Federal Compress & Warehouse Co.* v. *Jones, supra,* the master was held liable where the injury complained of was occasioned by the failure of a third person employed by the servant to perform a duty with which he was charged. In that case the defendant sent its servant, Harris, to get sacks of cotton for trans-

portation to defendant's compress. To accomplish this, Harris used a truck which he stopped by the side of the building where the cotton was stored and which was to be dropped from the third story to the sidewalk. The person dropping the sacks from the window was unable to see pedestrians on the sidewalk below and was dropping the sacks in accordance with signals to be given by Harris. Harris allowed a boy, who wanted to ride across the river with him to get on the truck and give these signals while he (Harris) was loading the cotton which had been dropped. The boy failed to warn a particular pedestrian of the danger in passing along the sidewalk and failed to signal the one dropping the cotton not to do so at that time.

In that case it was a contention for reversal that the servant, Harris, violated his instructions as to the manner in which he was to obtain the cotton, and that the particular act of negligence on the part of the boy in failing to give warning was that of a third party not in defendant's employ and a mere volunteer. This court denied that contention in the following language: "Neither can appellant's further contention, that its employee allowed a third party, a volunteer, to give signals to the employee of Randolph Scott & Company when to drop cotton from the third-story window and to warn pedestrians passing by against the danger, relieve it from liability in this case. It was negligence on the part of appellant's employee to substitute another to give the signals and warn the public." See, also, *Tchula Co-operative Store* v. *Quattlebaum,* 176 Ark. 780, 4 S. W. (2d) 919.

If we are mistaken in our analysis of the evidence in the instant case and the just conclusion to be drawn therefrom with respect to the status of the negro man who was acting as porter, we nevertheless believe that appellant is liable on broader grounds. We recognize the validity of the general rule stated in 39 C. J., 1272, and relied upon by appellant, which is as follows: "Where there is neither express nor implied authority given a servant to employ another to perform or to

assist him in the performance of his work, or a subsequent ratification by his employer of such employment, the relation of master and servant between the employer and one so employed by his servant does not exist and he is not liable for the negligent acts of the latter under the doctrine of *respondeat superior.*" The author of that chapter, "Master & Servant," however, after noticing the rule, *supra,* further says: "While some decisions hold, apparently without qualification, that no liability attaches to the master on any ground by reason of acts of one employed by a servant where such employment was neither authorized nor ratified, the weight of authority holds that the fact that the master cannot be held liable under the doctrine of *respondeat superior* does not necessarily absolve him from liability on other grounds, although the decisions are not in accord as to the circumstances which will impose liability."

The reason for this rule, as gathered from the cases dealing with it, seems to be that where a servant, charged with the performance of certain duties, delegates these to a stranger, but to be performed in his presence, such servant is deemed to be cooperating with such stranger and his negligence in law is that of the servant.

There are some cases holding that under any circumstances the master is not liable for the negligent act of a stranger employed by a servant where the servant has no authority, express or implied, to employ assistants and where such employment has not been ratified by the master. Typical of these are *Great Atlantic & Pacific Tea Co.* v. *Compton,* 164 Miss. 553, 145 So. 105, and *Cooper* v. *Lowry,* 4 Ga. App. 120, 60 S. E. 1015.

The exception to the general rule, quoted, *supra,* from 39 C. J. 1272, chapter "Master & Servant," is stated in the case of *Geiss* v. *Twin City, etc.,* 120 Minn. 368, 139 N. W. 611, 45 L. R. A. (N. S.) 382, as follows: "When the master intrusts the performance of an act to a servant, he is liable for the negligence of one who, though not a servant of the master, in the presence of his servant and with his consent negligently does the act which was intrusted to the servant." This rule appears

to be supported by the decided weight of authority and to be sound and reasonable, for, in its final analysis, the liability to be fixed upon the master grows out of the negligence of the servant to whom must be imputed the act of the stranger employed by him where that act is one done in the furtherance of the master's business and within the line of duty of the servant who procures such assistance. Such is the effect of the following decisions: *Althorf* v. *Wolfe,* 22 N. Y. 355; *Campbell* v. *Tribble,* 75 Tex. 270, 12 S. W. 863; *Simons* v. *Monier,* 29 Barb. (N. Y.) 419; *Booth* v. *Meister,* 7 Car. & P. 66; *Weatherman* v. *Handy,* (Missouri) 198 S. W. 459; *City of Indianapolis* v. *Lee,* 76 Ind. App. 506, 132 N. E. 605, and cases therein cited.

In White on The Law of Personal Injuries on Railroads, vol. 1, § 210, after noting the general rule that where the master is sued for the negligent act of another person it must be established that such person was an employee of the master in order to establish the master's liability, continuing, the author says: "But this rule does not obtain as to passengers, in all its strictness, for if the company, by reasonable care, could prevent an injury to a passenger, by preventing or having corrected, the acts of third persons, such as other passengers, or persons not in its service, and it fails to do so, it will be held liable, in case of a resulting injury, based upon the obligation of its special contract to safely carry the passenger, or accord him reasonably safe surroundings and facilities."

The facts in the case at bar, found by the jury to exist and established by substantial evidence, call strongly for an application of the doctrine announced in the authorities, *supra.* The driver was in sole charge of the operation of the bus and the care of the passengers. It was a part of his duty to give assistance to such of them as might need it, to dispose of their baggage and remove and deliver it when passengers reached their points of destination. In performing these duties he was obligated to the highest degree of care for the safety of his passengers compatible with the reasonable movements of

the bus. With respect to these duties he was clothed with all the authority of the master and his acts in their discharge must be deemed those of the master.

The evidence adduced in behalf of the appellee is ample to raise and sustain the inference that the supposed porter was one in fact. If he was not acting as a porter under express authority given by the driver, he was acting as such in the driver's presence and with his apparent consent. It will be remembered that appellee sat near the front of the bus or driver's end. Before the driver was a mirror which gave him a view of the bus and its occupants. The porter rode in front immediately by the driver. He would leave this position when the time arrived for discharging passengers and, after having removed and given them their baggage, would resume his place by the driver's side and there remain until occasions demanded the discharge of his duties as porter. The driver, by his knowledge and acquiescence in the supposed porter's conduct which was in the performance of duties of the driver, must in law be deemed to be cooperating with the porter, and whether such cooperation was active or passive is of no moment as it was such as to make the porter's act his own. In other words, the porter was a mere instrumentality used by the driver to discharge his duties. Therefore, the negligent act of the porter was that of the driver for which the master is liable.

The next ground urged for reversal is that the trial court erred in excluding certain evidence. On cross-examination of appellee, counsel for appellant asked the following question: "Who suggested that you get a lawyer and make a claim against the bus company?" On objection being made, counsel contended that it was pertinent for the purpose of testing the extent of appellee's injury and whether or not the claim for such was the result of the suggestion of another. No prejudice is shown by reason of the action of the court in sustaining the objection. The expected answer was not suggested, nor in fact do we see where any answer that might have been made could have been relevant to the question of the extent of appellee's injury.

A certain witness was asked: "What trouble had she been having before this Christmas that you saw her on the bus?" Counsel for appellee objected on the ground that it was not proper cross-examination. The witness, however, answered: "Not anything that I know of—not that I know of; the only thing, she was just old." Following this, counsel asked: "What trouble had she been having prior to this time?" At that juncture, the trial court stated that an objection had been made because such question was not proper cross-examination and that he thought the objection proper. Counsel said: "I didn't hear the court rule on it," and the court replied, "No, sir; I didn't at that time. I thought it was all over." Counsel for appellant complain of this ruling on the ground that it is not known, and the jury did not know what witness' answer would have been, which the court prevented, as to what trouble the appellee had been having before the Christmas when witness saw her on the bus. The last question, not allowed to be answered by the court, was but a repetition of the question which the witness did answer and we can see where no prejudice could have resulted from this ruling.

It is next contended that the trial court erred in giving instruction No. 3 which in effect told the jury that if it found from the weight of the evidence that a man performing the duties usually that of a porter or helper negligently removed a suitcase from the rack over the seat occupied by appellee, the jury had a right to presume that he performed such service with the consent of appellant company; also, that it was error to give instruction No. 7, requested by the appellee, by which the jury was instructed that if it should believe from a preponderance of the evidence that one, who, in a general way, assisted passengers on and off the bus, taking baggage therefrom with the knowledge and consent of the driver, was an employee of the appellant company which would be responsible for his negligent acts.

In view of the principles announced by the authorities cited, *supra,* which we approve, it cannot be said that these instructions requested and given were in-

herently erroneous. The specific objection to instruction No. 3 was that "the bus driver had no authority to employ a porter." From what has already been said, it necessarily follows that the specific objection was without merit. The court gave a number of instructions at the instance of both parties which we think fairly presented the law of the case to the jury.

It is finally insisted that the instruction given on the measure of damages was erroneous in that the trial court should not have submitted to the jury, for its consideration in determining the damages to be awarded, the permanency of appellee's injury, her disability arising therefrom and her future pain and suffering. This contention is based upon the unique theory that such elements of damage are improper because there was no evidence in the record as to appellee's life expectancy which was necessarily very short, and which it is said was not in excess of one and a half years. We think it proper to notice the objection to this instruction in considering the question as to whether or not the verdict is excessive. Appellant seriously contends that the evidence establishes only trivial injuries; but, to this, we cannot agree. It is undisputed that appellee, at the time of her injury, was ninety years of age, but of remarkable strength and vitality. Just before she was injured she was able to, and did, wait upon herself, perform her household duties unaided and milk her cow. She was healthy, strong and vigorous and it is reasonable to believe that she would have passed the remaining period of her life in comparative independence. Her physical strength was undoubtedly the result of a temperate and innocent life, and she had the right to pass the remainder of it in comfort and ease. By her injury this reasonable expectation has been destroyed, and the evidence clearly shows that she has suffered, and will continue to suffer, great physical pain and her ability to care for herself and to do the work she had been in the habit of doing, no longer exists. The proof is undisputed that the vertebrae of her neck has been seriously injured. Slivers, or bits, of bone were broken from it and she can no

longer rotate her head freely and without pain. The extent of the injury did not develop immediately, but it is undisputed that within a short time following the accident appellee's pain became so severe as to make the services of a physician imperative. She went to Pine Bluff where she was confined for several weeks suffering acute pain, so much so that the frequent use of morphine was necessary. The evidence is, also, undisputed that she still suffers great pain, and that she now requires the assistance of others in performing those duties necessary for the care of her person. It is undisputed that she will never recover and will pass the remainder of her life in an almost helpless condition and discomfort. We think the jury had the right to consider the permanency of appellee's injury, her present and future disability and the future pain she may endure, however short her life may be. We have frequently sustained verdicts for pain and suffering much in excess of the award made to the appellee, and, in our opinion, such verdict is not excessive.

Finding no reversible error, the judgment of the trial court is affirmed.

DEANER *v.* GWALTNEY.

4-4698

Opinion delivered June 21, 1937.

Frank C. Douglas, for appellants.

Shane & Fendler, for appellees.

SMITH, J. Giles Thomas was the owner, at the time of his death in 1916, of the northwest quarter of section 15, township 13 north, range 10 east, in Mississippi county. He was survived by his widow and three adult children. In a partition proceeding, the land was divided into three equal parts, but all subject to the dower and homestead rights of the widow, who died in 1928. The west third was assigned to Lucy Deaner, a daughter, now deceased, whose children and surviving heirs brought six separate suits to cancel sales of the land for the nonpayment of drainage taxes. The suits were in the nature of a bill of review, and, also, under the stat-

ute permitting suits to set aside judicial sales within five years from the date thereof.

The land lies within Drainage District No. 9 and in Subdistrict No. 3 of District No. 9, and it appears that neither of the parties to this suit nor their ancestor had ever paid any of the drainage taxes assessed against the land. There had been altogether six sales in one or the other of the drainage districts under decrees foreclosing the lien of the improvement districts for the nonpayment of the assessed benefits. The court held that four of the sales under these decrees were void, but that two were valid. The sales held good were rendered pursuant to decrees in cases Nos. 1198 and 1199, and will be referred to herein by those numbers.

Case 1198 was a suit by Subdistrict No. 3 to enforce payment of the delinquent, 1927, taxes. The suit was begun March 10, 1928, decree was rendered May 26, 1928, and the land was sold to the drainage district by the commissioner named in the decree August 25, 1928. In the complaint, notice of pendency of suit, decree of sale, notice of sale, report and decree of confirmation, the name of the supposed owner was given as "Giles Thomas Estate."

Case 1199 was brought by Drainage District No. 9 on the same date as Case 1198, and the dates of its progress are identical with that case. In case 1199 the name of the supposed owner is given as Giles Thomas, and the sale in that case was to the plaintiff drainage district.

It appears that although these sales were made in 1928 they were not confirmed until February 18, 1935. During this interval repeated efforts were made by the commissioners of the drainage district to induce appellants and other delinquent landowners to redeem their lands. This delay in confirming the report of sale does not affect its validity. The cases remained upon the court docket, and no property owner was misled or prejudiced by this delay. The contrary is true, the delay was a matter of indulgence to the landowners. It is a matter of common knowledge that this was the period of the

depression, when land values had almost disappeared. During this interval negotiations were conducted for refinancing the indebtedness of the drainage districts, which, when finally consummated, excused and remitted the payment of the taxes for the years 1932 and 1933.

After the approval and confirmation of the reports of sales of the land to the drainage districts, appellee, Gwaltney, obtained deeds from the districts on February 11, 1935. The lands had forfeited to the State for the nonpayment of the general taxes and, on February 22, 1935, appellee obtained a redemption deed from the State Land Commissioner.

Numerous attacks are made upon the decrees pursuant to which the lands were sold. One is that the list of lands sold for drainage taxes by the commissioners was not prepared and certified by the chancery clerk to the county clerk in conformity with the provisions of act 445 of the Acts of 1923, p. 395. This act was repealed by act 60 of the Acts of 1929, vol. 1, p. 134. As has been said, the sales were not confirmed until 1935, and the act of 1923 had been repealed by the act of 1929.

It was stipulated that the county court clerk did not attach his warrant to collect taxes to the tax book, which contained the drainage as well as the general taxes, and did not deliver the tax book to the collector by the first Monday in January, and did not keep the list of lands sold posted in his office for one year after the sale. Based upon this stipulation the argument is made that the decrees of foreclosure were unauthorized. If it be conceded—which we do not decide—that the provisions of the statutes imposing these requirements apply to delinquent drainage taxes as well as to delinquent general taxes, it may be said that these omissions were mere errors which, so far as this case is concerned, were cured by act 142 of the Acts of 1935, although that act was repealed by act 264 of the Acts of 1937, inasmuch as this case was pending when the repealing act was passed. *Carle* v. *Gehl,* 193 Ark. 1061, 104 S. W. (2d) 445.

It is insisted that the drainage districts having foreclosed and sold the land for delinquencies prior to 1927

had no right to foreclose for the delinquencies of that or any subsequent year. It will be remembered that these prior foreclosures were declared void, and if there could be no subsequent foreclosure the drainage districts could neither enforce the tax lien nor acquire title to the land. Here the owners refused to redeem from the prior foreclosures and failed also to pay current assessments. Certainly they could not defeat the collection of the taxes due on the land in this manner.

It is conceded that the description of the land in the cases where the sales were upheld is good, but it is argued that the sales were bad because the notice of the pendency of the suits was not dated. The statute does not require that it should be. Both suits were instituted March 10, 1928, and while the notice of the suits is not dated they are otherwise in good form and are signed by the clerk, and the decrees were not rendered until May 26, 1928, during which interval there was ample time to give the notice required by § 3631, Crawford & Moses' Digest, as appears to have been done. This section contains a form for the notice to be given, but does not require that the notice be dated.

Apparently the point chiefly relied upon for the reversal of the decree is the failure of the notice of the suits to correctly allege the ownership of the land. It appears that the other two-thirds of the land were also delinquent, and were advertised in the names of the two sons to whom they had been respectively assigned in the partition proceeding. In the suits against the west third, the land here involved, it was advertised, in one suit, in the name of Giles Thomas, and in the other, the name of the supposed owner was stated to be "Giles Thomas Estate."

The written opinion of the chancellor disposed of this contention properly, and we quote from it as follows:

"Lastly, it is contended that the sales are void because the name of the supposed owner in each of the proceedings is improperly stated. Giles Thomas owned the land at the time of his death in 1916. In one case

he is named as the supposed owner and in the other his estate is named. The decree of partition of his lands in 1922 expressly reserves the right of dower and homestead of his widow. Lizzie Thomas was living at the time the sales were made in 1928. It is not likely that it is contemplated that the officers of the district would be required under this statute to obtain an abstract to these lands before proceeding with a sale. Would the sale have been more effective, or the notice of the pendency of the suit have been more explicit if it had stated that the lands belonged to the heirs of Lucy Deaner? In *Simpson* v. *Reinman,* 146 Ark. 417, 227 S. W. 15, it appeared that the person named as supposed owner did not then nor had he ever owned the land. In the case at bar Giles Thomas was the owner of the land, and under the decree of the chancery court partitioning the land, the heirs received their right to the land subject to the dower and homestead right of Lizzie Thomas. Furthermore, there is no showing that there was any administration of the estate of Giles and until there was such, the land belonged to the estate of Giles and was subject to be sold to pay any indebtedness which he may have owed at the time of his death.

"In one of the proceedings it is described as belonging to the estate of Giles Thomas or Giles Thomas est. I am of opinion that this was sufficient even under the ruling in the Simpson case, to render the description of ownership in the notices valid."

It is argued that the sales were void for the reason that, at the time they were made, the title was in the St. Francis Levee District under a sale to the Levee District made on December 1, 1924, pursuant to a decree foreclosing the lien of the levee district for the nonpayment of the delinquent, 1923, levee taxes, and that appellants acquired this title by their deed from the levee district.

The drainage district and the levee district are separate districts, and have levied taxes based upon different benefits, which each may enforce without reference to the action of the other. *Tallman* v. *Board of Com-*

missioners Northern Road Imp. Dist. of Arkansas County, 185 Ark. 851, 49 S. W. (2d) 1039; *Oliver* v. *Gann,* 183 Ark. 959, 39 S. W. (2d) 521. But it is insisted that in view of a previous sale by another improvement district, a subsequent sale would be valid only after compliance with the provisions of § 3646, Crawford & Moses' Digest. But it was held otherwise in the case of *Oliver* v. *Gann, supra.* The second headnote in that case reads as follows: "Drains—Power to Sell Forfeited Land.—It was not necessary to resort to sale under Crawford & Moses' Digest, § 3646, before land was sold to the drainage district in payment of taxes due thereon since the land was necessarily sold subject to the lien of all assessments existing against them at the time of sale."

The deed to appellants from the levee district may be disposed of by saying that in legal effect it is a mere redemption from the sale for the delinquent levee taxes. At the time of that sale, appellants were in possession of the land, deriving the rents and profits therefrom. They were, therefore, under the legal obligation to pay these taxes, and cannot acquire title by a sale for the taxes which they should have paid. *Jacks* v. *Dyer,* 31 Ark. 334; *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116; *Roberts* v. *Miller,* 173 Ark. 38, 291 S. W. 814; *Security Mortgage Co.* v. *Harrison,* 176 Ark. 423, 3 S. W. (2d) 59; *First Nat. Bank* v. *New England Securities Co.,* 176 Ark. 1181, 6 S. W. (2d) 12; *Sharpp* v. *Stodghill,* 191 Ark. 500, 86 S. W. (2d) 934, 87 S. W. (2d) 577.

It is finally insisted that Fuller Amos, a grandson of Lucy Thomas, who was awarded the west third upon the partition of the land, is even now only twenty-two years old, and that he has, because of his minority at the time of the sale, the right to redeem therefrom. We must look to the statute under which the foreclosure proceedings were had for the answer to this contention, as a minor has no right of redemption except as given by statute. Section 24 of the Drainage Act, (act 279, Acts 1909), pursuant to which this proceeding was had, provides in part as follows: "* * * Any landowner shall have the right to redeem any and all lands sold at such

sale within five years thereafter; which shall run from the date when the lands were offered for sale and not from the date the sale is confirmed."

This right of redemption was given to all owners and was not limited to minors, nor were minors given any right of redemption peculiar to themselves. Minors and all others had the same period of redemption, which has been changed by later statutes, which we do not review, as none of them are applicable here, inasmuch as the suit in the instant case, whatever its nature and purpose may be, was not filed until August, 1936, and the sales attacked were made in 1928; and it is from this date, and not from the date of confirmation of the sale, from which the time for redemption is computed. Section 1179, Sloan's Improvement Districts in Arkansas, Vol. 2, p. 1028, and cases there cited.

Section 23 of the Drainage District Act, appearing as § 3631, Crawford & Moses' Digest, after providing when the decree of foreclosure may be rendered, contains a "saving to infants and to insane persons having no guardians or curators, the right they now have by law to appear and except to such proceedings within three years after their disabilities are removed." It is obvious that this is not a redemption statute, and the exceptions to the proceedings which the statute gives minors the right to make have been examined and found to be without merit.

Other questions are raised which we think it unnecessary to discuss.

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

DIAL *v.* HONEYCUTT.

4-4700

Opinion delivered June 21, 1937.

Thomas E. Toler, for appellant.

Oscar Barnett, for appellee.

McHaney, J. Appellee was the owner of 200 acres of cutover timber land in Hot Spring county, 120 acres in section 20 and 80 acres in section 18 T. 4 S, R 18 W. He had permitted this land to forfeit for the taxes of 1930 and same was sold to the state. Prior to February 8, 1936, appellee and appellant had some negotiations about the sale and purchase of the timber on this land, appellee says all the land, while appellant says the 120-acre tract. Appellant offered $150 for the timber on the larger tract. An examination of the tax records disclosed title in the state; so another conference was had between them, and it was agreed that appellant should buy from the state the 120 acres, according to his testimony, but redeem all the land, according to appellee. However, appellant came to Little Rock, and purchased the 120-acre tract from the state in his own name for $135 and received a deed therefor on February 6, 1936. Thereafter, on February 8, 1936, the parties entered into the following written agreement:

"We, the undersigned, agree that we will execute proper papers covering the sale and transfer of lands upon the terms and conditions as follows:

"It is agreed that Will Dial has purchased from the State of Arkansas, the following lands, to-wit:

"Northwest fourth of the northeast fourth and the north half of the northwest fourth, all of section twenty, township 4 south, range 18 west, containing 120 acres, more or less, situated in Hot Spring county, Arkansas.

"That the said Will Dial agrees to execute his quitclaim deed to the said lands to one B. L. Honeycutt, at his request, some time in the future when suitable to him, but will allow all merchantable timber from eight inches and up to be reserved to the said Will Dial, to be removed from the said lands within three years with the right to enter upon the said lands with such vehicles, trucks and etc., necessary for the removing the said timber.

"It is further agreed that when the above quitclaim deed is executed by the said Will Dial and his wife, the said B. L. Honeycutt will also execute and deliver his timber deed to Will Dial and Zeb Worley. These contracts to be executed will be for the purpose of perfecting the land timber deals referred to herein.

"Made and entered into on this 8th day of February, 1936.

"(Signed) Will Dial,
"B. L. Honeycutt.

"Witness: Tomas E. Toler, Sr."

On April 8, 1936, appellant and his wife executed and delivered in escrow a quitclaim deed to said 120-acre tract to appellee to be delivered to him when he executed and delivered a deed to the timber to appellant. Appellee refused to perform his part of the contract, but intervened in a suit by the state to quiet and confirm its title, brought February 21, 1936, made appellant a party by cross-complaint, and sought a cancellation of his deed from the state. Appellant answered setting up his contract with appellee, his purchase of the land from the state, and praying specific performance. He also made cross-appellant, T. A. Beason, a party, and sought and obtained a temporary restraining order against him from cutting and removing the timber from said 120-acre tract.

The state abandoned its suit to confirm, and its complaint was dismissed for want of equity. The court decreed that appellee is the lawful owner of all of said lands and canceled the deed of the State Land Commissioner to appellant; canceled the contract above set out

as also the quitclaim deed from appellant to appellee and dismissed the cross-complaint against Beason and that the latter should take nothing by his complaint for damages for the issuance of the temporary injunction. The case is here on appeal and cross-appeal by Beason.

We think the court erred in so holding. The preponderance of the evidence is with appellant. His own testimony is clear and unequivocal and he is supported by the signed, executed and delivered written contract and other evidence. The only reason the deal was not finally closed on February 8, 1936, was because of appellee's domestic affairs, and the matter was postponed for his accommodation, because of his divorce action. He did not want the title back in him at that time and he did not want to consult with his wife about signing the deed. The state's suit was brought to confirm its title after appellant had purchased 120 acres of the land from the state, not only with appellee's knowledge, but with his consent. He and appellant discussed the matter on February 6, the day appellant bought the land from the state. He knew or should have known that appellant could not redeem from the sale. His object was to get the title to the land out of the state and back in his name. As to the 120 acres, he would have accomplished this purpose by the course pursued had he carried out his part of the contract. He repudiated the contract, as he now says, because appellant did not buy or redeem the whole 200 acres. But appellee himself tendered the delinquent taxes on the 80-acre tract and was permitted to redeem. By performing his contract with appellant, he would have gotten title to the other 120 acres. He didn't do this, but sold the timber to others who employed Beason to cut it. Appellee must have known that his contract referred to 120 acres of land and not to 200 acres. It expressly provides that appellant has purchased from the state the NW NE and the N½ of the NW., etc., "containing 120 acres." He cannot be heard to say that he thought it covered the whole 200 acres.

Appellee, also, contends that the sale to the state was void, and that appellant acquired no title by his

purchase. The state's title may have been bad, but that has nothing to do with this contract. Both parties acted on the assumption that the state's title was good in the 120-acre tract, their purpose being for appellee to get the title to his land cleared; for appellant to get the timber in consideration of the price paid and expense incurred.

We think the court erred in not decreeing specific performance of the contract. The decree will be reversed, and the cause remanded with directions to this end. If, in the meantime, the timber has been cut and removed from the land, a judgment for $135 with interest from February 8, 1936, against appellee and a lien on the land itself should be decreed to secure the payment thereof, with costs to appellant.

This disposes of Beason's cross-appeal adversely to his contention, and the judgment is affirmed as to it.

TERRY *v.* OVERMAN, MAYOR.

4-4769

Opinion delivered June 28, 1937.

W. D. Hopson, for appellant.

Ed I. McKinley, Jr., House, Moses & Holmes and *H. B. Solmson, Jr.,* for appellees.

McHaney, J. Appellant, a citizen and taxpayer, brought this action against appellees, the mayor and the city clerk of the city of Little Rock, to enjoin them from issuing bonds in the sum of $25,000 to defray part of the cost of construction and equipment of an addition to the Little Rock public library building. He alleged that on the 26th day of January, 1937, an election was held, pursuant to an ordinance of the city council calling same, in which a majority of the qualified electors of the city of Little Rock voted to authorize the issuance of said bonds for said purpose; that the city, through the officers named, proposes to issue such bonds for said purpose; that the Federal Government through one of its agencies, has indicated the intention of defraying part of the cost of the construction and equipment of such addition to the said library building; that the bonds proposed to be issued are to be retired by the levy and collection of an additional tax upon property located in the city of Little Rock and that such action is proposed under amendment No. 13 to the Constitution of the state of Arkansas. He further alleged that while said amendment does authorize the issuance of bonds for the construction of a library, it does not authorize the issuance of bonds to construct an addition or improvement to the structure already in existence. He admitted that the present library building is inadequate to the needs of the city, but denies that any authority exists for the constructing or equipping of an addition to the present building.

To this complaint a demurrer was interposed and sustained by the court on the ground that the complaint does not state facts sufficient to constitute a cause of action. The appellant declined to plead further and his complaint was dismissed for want of equity.

Amendment No. 13 to our Constitution provides: "That cities of the first and second class may issue by

and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election as follows: '* * *; for the purchase of street cleaning apparatus, for the purchase of sites for, construction of, and equipment of city halls, auditoriums, prisons, libraries, hospitals, public abbatoirs, incinerators or garbage disposal plants; * * *; and for the purpose of purchasing, extending, improving, enlarging, building or construction of water works or light plants, and distributing systems therefor.' ''

Clearly the amendment authorizes the construction of, and equipment of, libraries. It is contended by appellant that this language limits the power to the construction and equipment of libraries, as an original proposition, and not to the construction and equipment of additions to libraries already in existence, and it is suggested that because the latter part of the amendment provides for the extending, improving and enlarging of water works or light plants and distributing systems therefor, but does not so provide for city halls, auditoriums, prisons, libraries, etc., it should follow that the amendment does not authorize a city to issue its bonds for improvements or additions to municipal projects where the amendment is silent in regard to such purpose. We cannot agree with appellant in these contentions. Coming in the same category with libraries, as used in the amendment, are city halls, auditoriums, prisons, hospitals, incinerators and garbage disposal plants. Can it be seriously contended that if the city had a city hall already, which it had outgrown, but could be utilized by building an addition to it, that the city would have to abandon that building and construct a new one in order to comply with the amendment? We think this would be a strained and unreasonable construction to place on it. The purpose of construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people in adopting it, and to this end it should receive a reasonable construction. *Snodgrass* v.

Pocahontas, 189 Ark. 819, 75 S. W. (2d) 223; *Downen* v. *McLaughlin,* 189 Ark. 827, 75 S. W. (2d) 227.

Webster defines the word library as, "An apartment, a series of apartments, or a building devoted to a collection of books, manuscripts, etc., kept for use but not for sale; as a college library; also, an institution for the custody or administration of such a collection; as a public library; the Library of Congress." Under this definition a library may be a building of one room or it may be a building of many rooms, and we think it is reasonable to say that an addition to a library already in existence might consist of one or more rooms and might be called a library of itself, or a new library added to the old.

In *Freeman* v. *Jones,* 189 Ark. 815, 75 S. W. (2d) 226, we held that under act 132 of 1933, authorizing cities and towns to construct and maintain sewage collection systems and treatment plants, and to issue bonds in payment thereof, that the city of Searcy might issue bonds for additional sewer mains and disposal plants to connect with the plant and mains already built and owned by an improvement district where the bonds were payable solely from the revenue from the new improvements, and that the act was not violative of amendment No. 13, here under consideration. In *Downen* v. *McLaughlin,* 189 Ark. 827, 75 S. W. (2d) 227, we held that the city of Hot Springs might enlarge certain sewer mains in that city and make improvements to its sewer system by following the procedure outlined in amendment No. 13. We there said: "Here the city is constructing sewers, and it can make no difference that the sewers so constructed tie into sewers theretofore built by improvement districts." We so held in these cases under the language of the said amendment which reads: "for the construction of sewers and comfort stations." It does not provide specific authority for improvements to sewers or additions thereto.

The purpose of the amendment, as we understand it, was to authorize cities of the classes named, after an election duly called and held in which a majority of the

qualified electors of said municipality voting on the question, voted to make the improvements named in the amendment by the issuance of bonds and the payment of said bonds by tax on the property within the municipality. Here, the election has been held as the complaint alleges, and the majority of the voters in the election approved the very purpose sought to be enjoined.

The decree of the chancery court is correct, and must be affirmed.

HARRISON STAVE COMPANY *v.* ROCKHILL.

4-4708

Opinion delivered June 28, 1937.

S. W. Woods, for appellants.

Shouse & Walker, for appellees.

GRIFFIN SMITH, C. J. Appellant corporation was organized in March, 1934, by E. Rockhill, Howard F. Kingsley, and F. W. Evans, with an authorized capital stock of $10,000, one-half of which was paid in. The board of directors was composed of the incorporators, with Kingsley as president, Evans as vice-president, and Rockhill as secretary-treasurer.

Kingsley and Rockhill were actively connected with the company's business of manufacturing staves. Each was authorized to draw a salary of $200 per month. The venture was not successful, and about July 20, 1934, the plant was closed. Kingsley agreed in writing that his salary should cease after July 31, and Rockhill in like manner agreed to waive compensation after August 31.

Early in September the directors agreed upon a program of liquidation. In the meantime Kingsley and Evans had gone to Joplin, Missouri, and on September 12 Rockhill met them there in conference. Rockhill testified by deposition that at the Joplin meeting Kingsley advised against a resumption of operations, and said that Evans was in substantial accord with this view.

Shortly after returning to Harrison, Rockhill began operating the plant.

On December 8, 1934, Rockhill filed complaint in the chancery court, alleging that Evans and Kingsley were insolvent; that they were nonresidents of Arkansas; that they had determined the corporation should cease to do business and were threatening to remove assets of the company; that they had issued call for a meeting of stockholders to be held December 10 for the purpose of removing complainant (Rockhill) from the office of secretary and treasurer, and that unless restrained from carrying out these purposes, the business would be adversely affected. There was a prayer that a receiver be appointed. The complaint named the Har-

rison Stave Company, Inc., and F. W. Evans and H. F. Kingsley as defendants.

On December 13, 1934, answer was filed by the Stave Company, F. W. Evans and H. F. Kingsley. In passing on Rockhill's petition, the court found that a receiver should be appointed, and designated M. F. Franklin. Rockhill filed with the court a claim for $400, requesting that he be allowed one-half of his regular salary for September and October, and full salary for November, 1934. He stated that "Said services were of said reasonable value to the company and were necessary for the preservation and protection of the interests of said company." Mrs. Rockhill filed claim for $262.50, alleging that she was entitled to $35 per month from May 1 to December 1, 1934, as compensation for keeping books. A claim for $44.55 was filed by Estes Bros. Machine Shop.

On December 2, 1935, the court made findings as to the claims of Rockhill and his wife, saying: "The court is of the opinion that these claims are not now properly before the court, the court holding that the same should first be presented to the receiver and acted upon by the receiver to the end that the court may have the benefit of the receiver's investigation and advice upon the same. The court is therefore of the opinion that these claims should be dismissed without prejudice."

Thereafter, the claims were presented to the receiver, and disallowed, and were then filed with the chancery court clerk. On September 4, 1936, the receiver filed separate answers to the Rockhill claims, asking that the court reject them.

On December 28, 1936, the court handed down a vacation decree, directing the receiver to pay the Rockhill claims and the claim of Estes Bros. On December 31 the decree of the 28th was superseded, the clerk having been directed by letter to disregard the former decree and enter a substituted decree. In the decree dated December 31 it is recited that the claimants, Florence E. Rockhill, E. Rockhill, and Estes Bros., each objected to the order and decree of the court for the reason

that it did not properly state the record upon which the cause was submitted, "in that no answer or other pleading was filed by the defendants F. W. Evans, H. F. Kingsley, and Harrison Stave Company; that no depositions were taken and filed by any of said defendants on the cause herein; that the depositions of Florence E. Rockhill, E. Rockhill, and J. W. Johnson, taken on May 22, 1936, was the only evidence properly before the court; that by reason of the failure of said defendants Evans and Kingsley to plead herein they are strangers to the record and have no rights herein."

The defendants, Harrison Stave Company, and Kingsley and Evans, duly excepted to that part of the decree directing the receiver to pay the controverted items of $400, $262.50, and $44.55, and were granted this appeal.

Appellees contend that because the Harrison Stave Company and Kingsley and Evans did not file additional pleadings after the chancellor ruled that the Rockhill claims should be dismissed without prejudice, these parties cannot appeal from the decree denying the receiver's petition that the claims be disallowed.

In other words, it is the theory of appellees that if appellants were dissatisfied with the order of December 2, 1935, they should have appealed from such adverse ruling; or, in the alternative, when the claims were filed with the clerk, appellants should have answered; or, when the receiver filed answer, they should have intervened, or should have had themselves named as parties to the action.

Appellees, therefore, ask that the appeal be dismissed because, as a matter of law, appellants have no place in this record; or, secondly, if this motion is not sustained, that the judgments in favor of E. Rockhill, Mrs. Florence E. Rockhill, and Estes Bros. Machine Shop, be affirmed on their merits.

The original suit filed by E. Rockhill named the Harrison Stave Company, F. W. Evans and H. F. Kingsley, as defendants. In filing his claim E. Rockhill alleged that the indebtedness was that of the Harrison

Stave Company. Mrs. Florence Rockhill's claim was filed against the corporation, and not against Kingsley and Evans. The demand of Estes Bros. Machine Shop was also presented as a debt of the corporation.

The joint answer of the corporation and Kingsley and Evans, filed December 13, 1934, contains an allegation that F. W. Evans supplied $2,700 of the original capital; that $2,300 was borrowed, but that no part of the total capital of $5,000 paid in was furnished by Rockhill. It is shown elsewhere in the record that a second-hand mill was purchased for $2,250, and that, presumably, $2,750 of the money actually paid in for stock was available when operations began. These allegations are sustained by the proof.

It is true that the court, on December 2, 1935, dismissed the Rockhill claims with the explanation that they should be referred to the receiver for his recommendations. Thereafter, on September 4, 1936, the receiver filed an answer to the claim of E. Rockhill. It recites that the claim for $400 was rejected because the board of directors of the Harrison Stave Company "Closed down operations in July, 1934, for the reason that the corporation was losing money, and that in September said board of directors ordered that said plant be closed permanently and that the affairs of the company be liquidated, and that under said order the mill was dismantled, and the order was not rescinded." The releases executed by Kingsley and Rockhill are then mentioned. There is this further allegation: "Said Rockhill, in violation of law, the by-laws and constitution of said corporation, and in violation of the actions of the board of directors, attempted to resume operations and to charge said corporation for services during the time said mill and business were closed down. That the corporation had to its credit when the business was closed down permanently the sum of $325 and that said Rockhill dissipated such money illegally in trying to illegally resume business."

An answer by the receiver to the claim of Mrs. Rockhill, filed September 4, 1936, contained a denial that

she had rendered any services at the request of the board of directors.

Although the Harrison Stave Mill as a corporate entity, and Kingsley and Evans as individuals, did not appeal from the order of December 2, 1935, the receiver, acting in the interest of the corporation, and as an officer of the court, filed his answer, protesting against allowances.

The cause, by agreement, having been submitted at a regular term of the court, was retained by the chancellor until December 28, 1936. The chancellor then transmitted his decree to the clerk, allowing the Rockhill claims, and that of Estes Bros. Machine Shop. This decree shows indorsement of attorneys for appellees, and it likewise shows that the Harrison Stave Company *et al.*, are defendants. It is apparent that this decree was not brought to the attention of appellants before being filed, and this, inferentially, accounts for the fact that a second decree was entered on December 31—three days later.

The decree of December 28 is styled: "E. Rockhill, plaintiff, v. Harrison Stave Company *et al.*, defendants." The decree of December 31 is styled: "E. Rockhill, plaintiff, v. Harrison Stave Company, H. F. Kingsley, and F. W. Evans, defendants; Mrs. E. Rockhill, and Estes Bros., interveners."

Attorneys for appellees approved and indorsed the first decree, in which the Harrison Stave Company and others were named as defendants. They dissent from the second decree on the ground that no answer or other pleadings were filed by either Evans, Kingsley, or the corporation on issues raised subsequent to the chancellor's order of December 2, 1935, nor subsequent to or in connection with the answer of the receiver, filed September 4, 1936.

A complete answer to these objections is that appellees who now object to the decree of December 31 had indorsed the decree of December 28, in which the Harrison Stave Company *et al.*, were recognized as defendants. They are, therefore, estopped to deny their own

approving acts, or to complain because the results have supplied the adverse parties with a means of appeal.

The cause should be reversed on its merits. It is not denied by appellee Rockhill that he agreed to waive his salary after August 31. By express language the claim he has filed shows that it is for salary. An attempt is made to classify the demand as one for reasonable compensation for services which necessity required should be rendered in the interest of the corporation. Although Rockhill insists that the Joplin meeting, attended by himself, Kingsley, and Evans, was not a board meeting, the effect of what was done is not changed through failure of Rockhill to call it such. It is admitted that the three held all of the stock; that they were the corporation officers, and that they likewise comprised the full membership of the board of directors, and that they met for the purpose of discussing affairs of the company. Rockhill testified that "at that time I was holding out to continue operation of the mill. Mr. Kingsley was against it and Mr. Evans, I think, was more or less against it, too. The last thing I said was to tell them I was going to insist on the operation of the mill, and that was about all there was to it."

E. Rockhill's own testimony is conclusive of the proposition that two-thirds of the directors opposed a resumption of mill operations. In disregarding the wishes of his associates he acted arbitrarily, and equity will not, in these circumstances, permit a recovery.

The weight of evidence is against the claim interposed by Mrs. Florence E. Rockhill, and it should be denied.

It is admitted that E. Rockhill and a business associate named Johnson personally paid the claim of Estes Bros. Machine Shop, and took an assignment. Johnson is not a party to this action. The rule that equity will not permit one to recover as an incident to his own wrongdoings will preclude a recovery by Estes Bros. here for the benefit of E. Rockhill.

The decree is reversed, with directions that the receiver be directed to disallow the three claims.

DEPARTMENT OF PUBLIC UTILITIES *v.* ARKANSAS LOUISIANA GAS COMPANY.

4-4640

Opinion delivered June 28, 1937.

[redacted]

Thomas Fitzhugh, for appellants.

H. C. Walker, Jr., and *Moore, Gray, Burrow & Chowning,* for appellee.

P. A. Lasley, amicus curiae.

GRIFFIN SMITH, C. J. General Order No. 13 was issued by appellant on April 13, 1935. It directed public utility companies doing business within the state, as defined in § 1 of act 324 of 1935, to file with the Department of Public Utilities all schedules of rates in effect as of April 2, 1935. In response to this order, appellee, a Delaware corporation doing business in Arkansas, filed a partial schedule. From this report there was omitted the schedule of rates charged for certain classes of service. Included in the class of service for which no schedule was filed were about forty customers who purchased large quantities of gas for industrial purposes, and five classified as customers buying at wholesale and engaged in retail distribution to individual customers.

On November 4, 1935, the Department issued a citation, requiring the respondent-appellee to show cause why it should not file schedules applicable to the class of business not included in the former report, and for convenience these customers will be referred to as pipe line customers.

The response filed with the Department was an allegation that the sales in question constituted transactions in interstate commerce, and therefore the Department was without power to regulate. The cause was set for hearing. Evidence was introduced, witnesses were examined and cross-examined, and a brief was filed by the respondent. Thereupon, the Department made a finding of facts, as follows:

"The respondent owns natural gas acreage in Northern Louisiana and in the Clarksville field in Arkansas, and produces gas from the acreage in each state. The respondent owns and operates a pipe line extending from the Clarksville field to Little Rock, and by means of this line supplies six or seven of its own city distribution plants with gas produced in that field. In addition to supplying gas to its own distribution plants respondent sells gas from that field to Empire Southern Gas Company, Arkansas Western Gas Company, and the Little Rock Gas & Fuel Company. Each of these companies resells and distributes the gas so purchased to consumers through city distribution plants. All of the gas produced in the Clarksville field is transported, sold, distributed and consumed exclusively in Arkansas.

"During the hearing the respondent filed schedules showing charges for gas produced in the Clarksville field and sold and delivered to Empire Southern Gas Company and Arkansas Western Gas Company.

"The gas produced by respondent in Louisiana is, along with gas purchased in that state, turned into a pipe line system owned and operated by respondent and by means of rock pressure, or compressor stations, strategically located, forced under high pressure ranging from 150 to 200 pounds per square inch, to points of consumption or delivery for resale to consumers in the

states of Arkansas, Louisiana and Texas. The respondent owns and operates three pipe lines and leases and operates another, all of which are laid across the line between the states of Arkansas and Louisiana. These lines are identified as lines A, C, H and K. Line C was not used for transporting gas into Arkansas at the time of the hearing and had not been for some time prior thereto; therefore, no further reference will be made to Line C.

"Line A crosses the Arkansas-Louisiana line some eight or ten miles east of a point where the states of Arkansas, Louisiana, and Texas join. This line extends in a northeasterly direction from the state line crossing, to the southwestern corporate limits of the city of Little Rock. Line H is not owned, but is leased and operated, by the respondent and crosses the line between the states of Arkansas and Louisiana some fifteen or twenty miles east of Junction City, Arkansas, and extends in a northwesterly direction to what is designated as Crusader Station No. 1 in Union county, Arkansas. Line K crosses the line between the states of Arkansas and Louisiana a few miles east of where said state line is crossed by Line H and extends in a northwesterly direction to the Barton Compressor Station located a short distance north of the city of El Dorado, and continuing thence in a northwesterly direction to the city of Camden, Arkansas. By means of Line E, extending from the Trees Compressor Station located on Line A near Emmett, Arkansas, in a southeasterly direction to Barton Compressor Station, and by means of Line E-1 (in reality an extension of Line E), Lines A, H, and K are interconnected.

"Lines A, E, H, and K constitute the principal or primary transportation system of respondent in South Arkansas. Laterals or spurs have been built from these lines for the purpose of serving industries and city distribution plants along and, in some instances, far removed from the location of said transmission lines. All gas transported into Arkansas by respondent moves through one or more of said lines, or laterals, or spurs

thereto, in reaching a place of consumption. By means of said lines gas is transported and delivered to the gateway of more than fifty city distribution plants in Arkansas owned by the respondent, to approximately 318 rural customers along the lines, and to the pipe line customers.

"In addition to the lines hereinabove described, there are in what is called the El Dorado District, a vast number of lines, primarily constructed and now generally used, to distribute gas to oil wells and petroleum industries located in this area and not to transport gas beyond or through it.

"All of the gas transported by respondent from the state of Louisiana into the state of Arkansas is consumed in Arkansas, with the exception of a relatively small amount consumed by citizens in Texarkana, Texas, and Junction City, Louisiana, served through city distribution plants.

"The gas moves across the Arkansas-Louisiana states line through each of Lines A, H and K for the purpose of serving the respondent's customers in Arkansas. At times the principal portion of this demand is supplied through Line A; at other times through either, or both, Line H or K. When the principal supply of gas is brought into Arkansas through Line A a portion of it is diverted into Line E and carried to the El Dorado District, and when the principal supply is carried through either or both, Line H and K, a portion of the gas is diverted through Line E into Line A. The lines in Arkansas are filled at all times with gas under high pressure, in readiness to serve as needed. The movement, volume and pressure of the gas in the pipe line are directly governed by the use of appliances owned by consumers irrespective of whether said consumers are served directly through a tap off of a pipe line or some spur thereof, or through a city or town distribution plant.

"There are 415 customers in Arkansas served through taps on Lines A, E, H, or K, and their laterals or spurs, if we treat each city or town distribution plant

as a customer. These consist of 318 rural consumers, 54 of respondent's city distribution plants, and the pipe line customers consisting of 40 industrial consumers, 2 city distribution plants owned by corporations affiliated with the respondent and one independently owned city plant.

"Line A has 141 taps in Arkansas between the state line and Little Rock, Line H has 117 taps, Line K has 99 taps, and Line E has 23 taps. While it is true that not all of these taps were in use at the time of the hearing, they all have been used at some time or they would never have been made. At the time of the hearing approximately 100 of them were not in use or not assigned directly to consumers.

"In the operation of the system respondent employs what is known as a gas dispatcher who, by reason of experience and consultation of weather reports and other available data, is able to estimate with reasonable accuracy the demands for gas, of not only the system in Arkansas, but in Louisiana and Texas, and accordingly directs the movement of gas in or into the three states. At the time of dispatching the gas he, nor any one else, knows what the demand of any particular customer is, or will be, and he only undertakes to supply sufficient gas to meet the entire system demand.

"The gas supplied to each pipe line customer is supplied under a contract signed by respondent at its general office at Shreveport in the state of Louisiana. To an extent not disclosed by the record, each of these contracts provides for a minimum charge, or a charge for readiness to serve, without regard to the quantity of gas consumed. While these contracts may vary as to the charges for gas and in other immaterial respects, they all provide that the title to the gas passes to the customer at the outlet side of the meter installed upon his premises, and do not require the customer to take any specific quantity of gas within any given time. He is merely required to take gas in sufficient quantities to supply the individual requirements of his distribution plant or industrial plant, as the case may be. If any

customer's plant happens to be shut down and is not operating, no gas is delivered to him. These contracts further provide that domestic customers, hospitals, schools and such customers as involve the element of human comfort shall be given preference to respondent's gas supply. Each of the contracts also provides that it is subject to the orders, rules and regulations by duly constituted authorities having jurisdiction over either buyer or respondent. There is no actual sale or delivery of gas until such time as the consumer through his own appliances turns the gas to his own burner tips. No gas is sold or delivered to corporations owning and operating distribution plants until the consumers thereof, by means of their own appliances, turn gas to their burner tips. The respondent will serve any prospective pipe line customer who is financially able to pay for the service. The respondent bases its charges for gas delivered to the pipe line customers largely upon the cost of competitive fuels, irrespective of the cost of service. However, it attempts to secure such a price from each of said customers as will give it something more than the actual out-of-pocket expense of the service.

"The tap through which city distribution plants receive gas from the pipe line is known as the city gateway. At each tap through which distribution systems and rural and pipe line customers receive gas, there is installed a pressure regulator which reduces the pressure of the gas from that in the pipe line to 8 or 10 pounds for city distribution and some pipe line customers, and as low as 8 or 10 ounces for other pipe line and rural customers. Irrespective of the pressure at which gas is metered and delivered to the city gateway or consumers, it is billed at a base pressure of 8 ounces above a standard of 14.4 pounds atmospheric pressure. The many rural domestic customers served directly from the pipe line are served under schedules and at the rates prevailing for the same class of consumers served by the nearest city or town distribution plant, and ordinarily the city or town distribution plant employees read the

meters and make and collect the bills for the gas consumed by these rural customers.

"The Arkansas Power & Light Company, one of the pipe line customers, takes large quantities of gas used as a fuel under steam boilers in its electric generating plants in Little Rock and Pine Bluff. Gas at both points is delivered to the power company through a city distribution plant. At Pine Bluff the respondent owns and operates the distribution plant, while that at Little Rock is owned and operated by the Little Rock Gas & Fuel Company, an affiliate of respondent. The respondent charges the distribution plants with all gas passing through their gateway needed to supply their customers and the Arkansas Power & Light Company, and credits each plant with the gas delivered to the power company. The distributing company at Little Rock is paid 1c per MCF for all gas thus delivered to the power company at that point.

"Three of the pipe line customers are corporations separately engaged as public utilities in supplying natural gas by means of city distributing plants to the citizens of Little Rock, Hot Springs, and Camden. These companies are respectively, the Little Rock Gas & Fuel Company, the Consumers Gas Company, and the Camden Gas Company. Part of the gas sold to the Little Rock Gas & Fuel Company is produced in the Clarksville field in the state of Arkansas and transported and delivered exclusively in that state. All of the gas delivered to the Hot Springs and Camden companies is produced in and transported from the state of Louisiana.

"The remainder of the pipe line customers are consumers of gas in industrial plants of various character located in rural territory and are not served by any facilities used in distributing gas through local distribution plants.

"During the first eleven months of 1934 the respondent transported into Arkansas from Louisiana and sold and distributed 15,582,012,000 cubic feet of gas, of which 8,730,616,000 feet were sold to pipe line customers and 6,851,396,000 feet were delivered to respondent's dis-

tribution systems. It is the sale of this 8,730,616,000 cubic feet of gas which the respondent contends is not subject to regulation by the state of Arkansas because of the commerce clause of the Federal Constitution."

The findings of the department were followed by an order that a schedule of rates, inclusive of those charged customers whose service formed the basis of controversy, be filed; whereupon the respondent filed in the Pulaski circuit court a petition for review. The ruling of the department was reversed. This appeal is from the action of the circuit court in so ruling.

Appellee, in its brief, says that there is little, if any, dispute as to the physical facts, the only variance being as to inferences to be drawn from them. Appellee calls attention to the fact that the production properties and the pipe line system through which gas is transported from Louisiana and delivered into Arkansas were in 1928 acquired by Bethany Oil & Gas Company, a corporation organized under the laws of Delaware in 1920; that its charter gave it the right to produce, buy and acquire natural gas, and only under special contracts, to be entered into for that purpose, to sell such gas to such selected industries and public utilities as the corporation might from time to time elect, but not to itself become a public utility or engage in the business of supplying gas to the public generally. In 1928 the company filed its charter in Arkansas and secured permission to do business in this state. The corporate name was changed to Arkansas Louisiana Pipe Line Company. This company was never granted a franchise to function as a public utility, or to sell gas to the inhabitants of any city or district, and its main office was at Shreveport, Louisiana.

The system consisted of large transmission pipe lines and compressor stations which transported gas from the Louisiana and Texas fields into Arkansas, substantially as set out in appellant's finding of facts. Appellee says that such gas was transported by means of natural pressure from the Texas and Louisiana wells, supplemented by compressor stations, and that it was

discharged into the distribution systems of local distributing companies to which it was sold, and into the pipes of the industrial customers direct from the transmission lines of the pipe line company. The gas was not treated in any manner after it had crossed the state line. It is further claimed by appellee that all of the gas so transported was delivered either to local distributing companies engaged in the distribution of gas in cities and towns, or to large industrial customers along and near the transmission pipe line, and that the sales in such cases were by virtue of special contracts made with such selected industries and local distributing corporations; that the contracts varied in duration, terms and conditions, setting forth the price agreed upon and minimum requirements.

In support of its construction that the business in question constituted interstate commerce, appellee says that in each instance where such sales were made the buyer was responsible for the gas at the point of delivery and metering, adjacent to the transmission lines of the pipe line company. The price depended upon the terms of the special contract and varied with the circumstances of service and of attending competition, a major factor in making prices being availability and cost of other fuels, such as coal and oil.

The business was conducted in this manner until November 30, 1934, when the Arkansas-Louisiana Pipe Line Company was merged with Southern Cities Distributing Company, and the name of the merged corporations was changed to Arkansas-Louisiana Gas Company. Southern Cities Distributing Company owned a number of local distributing plants in towns and cities in Arkansas, and after the merger the Arkansas-Louisiana Gas Company was owner of both the production and pipe line properties of the former Arkansas-Louisiana Pipe Line Company, and of the distribution properties of the former Southern Cities Distributing Company.

The new corporation continued to engage in production and transmission of gas in the same manner

these activities had been handled prior to the merger, with the single exception, as claimed by appellee, that the transmission department was severed and became distinct from the production department.

On September 30, 1935, additional local distributing plants were acquired by appellee, and it now owns all of the severed distribution properties except those at Little Rock, Clarksville, Hot Springs and Camden.

In support of its position that the service involved in this appeal constitutes interstate commerce, appellee says: "Neither Arkansas-Louisiana Pipe Line Company nor Arkansas-Louisiana Gas Company ever undertook to serve from its transmission system all industries applying to it for service. It only served those industries within economic reach of its lines or which it could serve—it selected such customers. Some customers applied to it that it could not serve at all."

Appellee's witness Hamilton testified that there are eleven compressor stations along the pipe line system, the functions of which are to keep the gas in a constant and steady flow; that the gas never comes to rest in the line, but movements are constant until it is delivered to the customer's meters, or to the distributing plants: "From the time the gas is taken into the line in Louisiana at any given time or in any one day, it is in transit until delivered to the customer. The pipe line is merely the vehicle through which the gas is transmitted."

Appellant concedes the general rule laid down by the Supreme Court of the United States that the transportation of natural gas from one state into another is interstate commerce. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. ed. 716, 35 L. R. A. (N. S.) 1193. This rule has been followed by state and federal courts in many cases. It is contended, however, that the question here is not whether the transportation of gas constitutes interstate commerce, but do the sale, distribution and delivery in Arkansas of gas transported from Louisiana under the facts before us retain the essential characteristics of interstate commerce?

Appellant directs attention to language used by the late Chief Justice TAFT, and applies it to the circumstances we are now dealing with. In *Atlantic Coast Line Ry. Co.* v. *Standard Oil Co.,* 275 U. S. 257, 48 S. Ct. 107, 72 L. ed. 270, the Chief Justice said: "Determination of the character of commerce is a matter of weighing the whole group of facts in respect to it." In *Swift & Co.* v. *U. S.,* 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518, it was said: "Commerce among the states is not a technical legal conception, but a practical one drawn from the course of business." See, also, *Foster-Fountain Packing Co.* v. *Haydell,* 278 U. S. 1, 49 S. Ct. 1, 73 L. ed. 147; *Rearick* v. *Penn.,* 203 U. S. 507, 27 S. Ct. 159, 51 L. ed. 295.

It is insisted by appellant that the "original package theory" is applicable to facts of the instant case, and attention is directed to 7 Enc. U. S. Sup. Ct. Rep. 298, where the rule deducible from United States Supreme Court decisions is given, as follows: "The general rule is that as long as an article imported remains in the hands of the importer in the original and unbroken package in which it was imported, it is protected by the commerce clause of the Constitution from interference of state laws, and it is only when the original package has been sold by the importer or has been broken by him, or has otherwise become mixed with the common mass of property in the state, that it becomes subject to state legislation." See *F. May & Co.* v. *New Orleans,* 178 U. S. 496, 20 S. Ct. 976, 44 L. ed. 1165; *Commonwealth* v. *Paul,* 148 Pa. 559, 24 Atl. 78; *Kaster* v. *Flannelly,* 96 Kan. 372, 152 Pac. 22; P. U. R. 1916C, 810; *West Va. & Maryland Gas Co.* v. *Towers,* 134 Md. 137, 106 Atl. 265; P. U. R. 1919D, 332; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 51 S. Ct. 499, 75 L. ed. 1171.

In each of these cases the court held that the original package of gas transported from one state to another was broken when the commodity was turned into a city distribution plant. Appellee admits this construction, and does not contend that sales made by it to city distributing plants, as such, are protected as interstate commerce, but undertakes to distinguish this class of

commerce from the individual sales made from its pipe lines to selected customers.

Among decisions relied upon by appellee is *Pennsylvania Gas Co.* v. *Public Service Comm.*, 225 N. Y. 397, 122 N. E. 260. The opinion was written by Mr. Justice CORDOZO, then Associate Justice of the Court of Appeals of New York, now Associate Justice of the United States Supreme Court. Mr. Justice CORDOZO there said: "The rule of the 'original package' is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed, there is need of other tests." Again, in *Baldwin* v. *Seelig*, 294 U. S. 511, 55 S. Ct. 497, 79 L. ed. 1032, 101 A. L. R. 55, Mr. Justice CORDOZO said: "The test of the 'original package,' which came into our law with *Brown* v. *Maryland*, 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries * * *. There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents subdivided. * * * In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. *Pennsylvania Gas Co.* v. *Public Service Comm.*, 225 N. Y. 397, 403, 122 N. E. 260."

Finally, in summing up its case, appellee says: "Appellant contends that failure to earmark or segregate any of the gas produced in Louisiana, when placed in the pipe line system in that state for delivery to any particular customer in Arkansas, prevents such gas from moving in and being a part of interstate commerce. But gas from its very nature is incapable of being earmarked for any particular destination or customer. It is a *quasi*-fluid substance and no one molecule can be segregated from another. It is impossible to identify any particular quantity of gas in a pipe line. That the Supreme Court of the United States has recognized this fact is shown by numerous decisions. In many of them gas was trans-

ported from one state to another and in the latter delivered to a large number of local distributing corporations. In all of these cases it was, of course, obviously impossible to earmark the gas when placed in the pipe line for delivery to any particular one of the local companies to which it was to be delivered in the state of destination; nevertheless, in all of them the court held that the transaction constituted interstate commerce and was not subject to local regulation. In *Eureka Pipe Line Company* v. *Hallanan*, 257 U. S. 265, 42 S. Ct. 101, 66 L. ed. 227, all of the oil was produced in West Virginia and in that state placed in a pipe line extending into Ohio. The producers, however, reserved the right to divert quantities of oil from the pipe line while still in West Virginia and before it crossed the line into Ohio. Manifestly, it was impossible to earmark or segregate any quantity of oil when put in the pipe line in West Virginia and say it was to be delivered in Ohio. Yet the Supreme Court held that all of the oil delivered in Ohio was the subject of interstate commerce.

"In *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U. S. 83, 47 S. Ct. 294, 71 L. ed. 549, the greater part of the electricity produced in Rhode Island was diverted for use in that state before it passed into Massachusetts. It was impossible to earmark that part of the electricity which was to be transported in Massachusetts. But the court held that the transportation of that part which did reach Massachusetts was interstate commerce, not subject to local regulation. In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. ed. 239, none of the grain purchased in Kentucky for shipment into Tennessee could be earmarked as destined for any particular customer in the latter state. But again the court held that its purchase and transportation was interstate commerce, free from state interference.

"As heretofore remarked in discussing the original package doctrine, such considerations cannot apply to the interstate transportation and delivery of gas. From the very nature of the substance transported, the only

true test is that of continuity—that is to say, continuous movement from the time the gas is placed in the pipe line in the state of production until its delivery to the customer in the state of destination. The Supreme Court of the United States in *Missouri* v. *Kansas Gas Company,* 265 U. S. 298, 44 S. Ct. 544, 68 L. ed. 1027, said: 'The transportation, sale, and delivery, constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local, but national, admitting of and requiring uniformity of regulation.' "

From these comments in appellee's brief, it will be seen that there are two considerations upon which reliance is placed to impress with interstate characteristics the gas sold to its pipe line customers: (a) There must be continuous movement from the time the gas is placed in the pipe line in Louisiana until delivery to the customer in Arkansas; and (b) the transportation, sale, and delivery must constitute an unbroken chain from beginning to end—of such continuity as to amount to an established course of business.

The most recent decision of the Supreme Court of the United States bearing directly upon the subject is *Southern Natural Gas Corporation* v. *Alabama,* 301 U. S. 148, 57 S. Ct. 696, 81 L. ed. 695. The gas corporation owned and operated an interstate transmission line extending from the gas fields of Northern Louisiana to Atlanta, and Columbus, in Georgia. Gas purchased by the corporation in Louisiana and Mississippi was transported through its line into Alabama, where supplies were withdrawn from the interstate line and delivered to customers, there having been four such customers in Alabama. Three of these customers were doing an exclusive intrastate business in supplying public utilities. The fourth customer was the Tennessee Coal, Iron & Railway Company. This customer purchased gas for itself and affiliated companies for use as fuel, and was not a distributor of public utilities.

It was urged by the gas corporation that its business in Alabama was wholly interstate, and therefore a franchise tax levied by the state was a burden on interstate commerce if assessed against the corporation. In denying this contention, the court referred to and reaffirmed *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 51 S. Ct. 499, 75 L. ed. 1171, and said: "We observed in that case that 'when the gas passes from the distribution line into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies,' its volume is expanded, and it is divided into the smaller streams that enter the service lines connecting such mains with the pipes on the customer's premises. In that case, the Ohio company furnished gas to consumers in municipalities by means of distribution plants and that activity was held to be not interstate commerce, but a business of purely local concern within the jurisdiction of the state. The court quoted with approval the statement in *Missouri ex rel. Barrett* v. *Kansas Nat. Gas Co.,* 265 U. S. 298, 309, 68 L. ed. 1027, 1030, that 'The business of supplying on demand local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and, this is so, whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.'

"While the facts of the two cases are not the same, there is a clear analogy. * * * We perceive no essential distinction in law between the establishment of such a local activity to meet the needs of consumers in industrial plants, and the service to consumers in the municipalities, which was found in the East Ohio Gas Co. case, to constitute an intrastate business. As was said in that case: 'The treatment and division of the large compressed volume of gas is like the breaking of an original package, after a shipment in interstate commerce, in

order that its contents may be treated, prepared for sale, and sold at retail.' ''

We are of the opinion that gas sold to the pipe line customers, and that diverted through municipal plants in Little Rock and Pine Bluff for use of the Arkansas Power & Light Company, are not transactions in interstate commerce possessing the characteristics necessary to exempt the sales from state regulation.

The record shows that during the first eleven months of 1934, appellee transported into Arkansas from Louisiana and sold and distributed 15,582,012,000 cubic feet of gas, of which only 6,851,396,000 cubic feet were delivered to distribution systems and classified for state regulation. Of the total quantity transported, 8,730,616,000 cubic feet, or more than half shipped into the state, were diverted to a use arbitrarily classed as interstate.

Quantity would not be a criterion for classification if the transactions constituted sales of a commodity continuously in motion from the time it went into the line in Louisiana until delivered to the customer—that is, if the transportation, sale and delivery constituted an unbroken chain from beginning to end. But they do not. In so far as deliveries to the wholesale customers are concerned (excepting gas supplied to the Arkansas Power & Light Company), appellee, for all practical purposes, maintains a distributing system through which it supplies a service similar in effect to that supplied by a local utilities agency.

Gas in large quantities is turned into the transportation system in Louisiana. There are 1,000 miles of these mains in Arkansas. More than fifty per cent. of the gas supplied goes to customers served under individual contracts. An initial force of from 75 to 170 pounds per square inch must be exerted to set in motion and maintain the primary supply. This pressure cannot be exerted in a practical manner at the initial point of entry in Louisiana, and "booster" stations have been built along the route to keep the pressure constant, or high enough to meet delivery specifications. Requirements

of customers are estimated approximately twenty-four hours in advance, and a "dispatcher" is employed for the purpose of procuring information from hour to hour with respect to what the needs may be.

At all times there is a supply of gas in the thousand miles of mains. This reserve is estimated to be about fifty million cubic feet, or an amount sufficient to meet requirements for several hours. The mains are "tapped" for diversion purposes, and the pressure is reduced substantially and then "metered" to the customer.

It is true that no particular gas pumped into the lines in Louisiana can be labeled as the identical gas supplied to a designated customer, because the nature of the commodity precludes such identification. We might assume, as an illustration, that appellee's dispatcher, during a stated period of ten minutes, directs that gas be pumped into its line at the Louisiana point of entry under a constant pressure of 150 pounds, and it could be ascertained by mathematical calculations that a designated quantity of gas had been set in motion. The rules of physics and of common sense tell us that the quantity thus ascertained and started on its journey is not necessarily the same gas appellee will bill to a designated customer under a specific contract, nor is there any process known to science by which its identity can be known.

Such gas, and all gas pumped into the mains in Louisiana, becomes part of a supply stored along a thousand miles of mains. It is affected by heat and cold, and by climatic variations. Expansion and contraction are attributes of its density and function independently of appellee. An individual customer's "tap" line may be idle, or it may be active. A shut-down by the Arkansas Power & Light Company in Little Rock, a change from steam to hydro-electric service, would affect continuity of supply and demand. In these circumstances, transportation of gas theoretically "scheduled" to reach a point in Southern Arkansas one, two, three or four hours after entering the main, would be delayed indefinitely. According to acknowledged principles this

hypothetical supply first pumped into the mains in anticipation of continued demands in Little Rock might never reach its destination, but on the contrary would remain in the storage facilities to be gradually consumed along the line.

Decisions of state and federal courts are called to our attention, and they are urged as authority for a desired construction. Many of these decisions appear conflicting, and the reasoning in one does not support the conclusions of another. But through most of them runs the general principle promulgated by Chief Justice TAFT, whose theory it was that "Determination of the character of commerce is a matter of weighing the whole group of facts in respect to it. * * * Commerce among the states is not a technical legal conception, but a practical one drawn from the course of business."

The conception to be drawn from the course of appellee's business is that it has developed a practical system whereby, if let alone, more than half of its sales in Arkansas will escape regulation by the state, while at the same time the physical facilities of the state, its resources, its laws and its police protection, are invoked in furtherance of its needs.

The cause is reversed with directions that respondent-appellee's petition for review be overruled, and that General Order No. 13 of the Department of Public Utilities be complied with by appellee.

UNITED MUTUAL LIFE INSURANCE COMPANY OF INDIANAPOLIS *v.* STATE, EX REL. ATTORNEY GENERAL.

4-4712

Opinion delivered June 28, 1937.

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

Jack Holt, Attorney General, *Leffel Gentry,* Assistant, and *Paul X. Williams,* for appellee.

GRIFFIN SMITH, C. J. Appellant declined to pay a tax of 2½ per cent. on certain gross premium receipts from 1931 to 1935, inclusive, for which the chancery court gave judgment in the sum of $5,566.30, with a direction that interest on such amount at six per cent. per annum should be computed and collected from December 1, 1936, to date of payment.

The state's claim is based upon § 9968 of Crawford & Moses' Digest, as amended by act 235 of 1935. Act 235 requires every life insurance company doing business in Arkansas to file with the insurance commissioner, at the time of making its annual report, a statement of gross premium receipts, upon which a tax of 2½ per cent. is payable on or before March of each year.

Appellant's defense is that the laws of Arkansas exempt from the tax in question all fraternal beneficiary orders or societies, and such exemption may be claimed in answer to the state's suit, for the reason that the gross premium receipts which the State is undertaking to tax arose from payments made by members of appellant's predecessor, the Supreme Lodge Knights of Pythias, a fraternal beneficiary society. Appellant admits that it is an old line legal reserve insurance company. The question to be determined, therefore, as stated in substance in appellee's brief, is this: Is a legal reserve mutual insurance company liable for taxes on premiums collected from policyholders in this state on business acquired from a fraternal beneficiary company when the fraternal beneficiary company is itself exempt from the payment of such taxes?

The issues were presented to the trial court on an agreed statement of facts, the essential parts of which follow:

"Defendant's predecessor, The Supreme Lodge Knights of Pythias, was a fraternal benefit society, organized in 1868 by an act of Congress and incorporated in the District of Columbia. Some years subsequent thereto this Association began the writing of fraternal life insurance. Said Association carried on fraternal activities in a number of states, and a number of years ago was admitted by the insurance commissioner of the state of Arkansas to operate in this state as a fraternal benefit society, under and within the contemplation of the fraternal benefit society statutes of this state. Said Supreme Lodge Knights of Pythias did so operate as a fraternal benefit society in the state of Arkansas and was yearly licensed to do business as a fraternal benefit society within the contemplation of the fraternal benefit statutes within this state. Said Association has an active lodge society, representative form of government, ritualistic form of work, operated without profit, and carried on only fraternal activities as contemplated by the statutes of this state.

"It is further stipulated and agreed that the same fraternalistic activities that were carried on by the members of the Supreme Lodge Knights of Pythias prior to reorganization in 1930, have also been carried on subsequent to that time, and are being carried on at the present time by that organization, among the membership that existed prior to said reorganization date.

"In the year 1930, the Congress of the United States passed an act authorizing fraternal and benefit corporations theretofore created by special acts of Congress to divide and separate the insurance activities from the fraternal activities by an act of its supreme legislative body, subject to the approval of the Superintendent of Insurance of the District of Columbia. In accordance with the provisions of this act, on August 18, 1930, the Supreme Lodge Knights of Pythias did separate its insurance activities from its fraternal activities, and the

United Mutual Life Insurance Company was organized as an old line legal reserve insurance company, and it has continued as such until the present time.

"On or about the first of April, 1931, the United Mutual Life Insurance Company made application for and received a license from the state of Arkansas to carry on an old line mutual legal reserve business, and has continued to transact such business since that time. At the same time this defendant, United Mutual Life Insurance Company, was licensed to carry on an old line life insurance business in the state of Arkansas, the Insurance Commissioner and Attorney General of the state of Arkansas, after conference and consideration of the reorganization and conversion into an old line mutual legal reserve company, informed defendant, United Mutual Life Insurance Company, that the business written in this state subsequent to reorganization date would be taxable as old line insurance business, but that the business written by the Supreme Lodge Knights of Pythias, same having been written as fraternal business, would not be taxable under the statutes of the state of Arkansas.

"By an act of Congress of 1932 the United Mutual Life Insurance Company was authorized to reincorporate under the laws of any state so permitting, and in accordance with an act of Indiana of 1933 the United Mutual Life Insurance Company reincorporated in that state and since then has been known as the United Mutual Life Insurance Company of Indianapolis, Indiana, which corporation assumed all the liabilities of every kind and description existing against the United Mutual Life Insurance Company at the time of its reincorporation under the laws of the state of Indiana."

The stipulations bring appellant's predecessor into this record as a fraternal beneficiary society belonging to a group or class which may claim exemption from payment of gross premium taxes. If The Supreme Lodge Knights of Pythias had continued to transact its business here, exercising the fraternal or beneficiary characteristics pertaining to it at the time the certificates

were issued, admittedly the gross premiums would not be taxable. But, acting under authority of Congress, appellant's predecessor separated its insurance activities from its fraternal functions, and insurance activities were assumed by the United Mutual Insurance Company. In April, 1931, this corporation was authorized to do business in Arkansas as an old line company. In 1932 congress passed an act permitting reincorporation, and in 1933 appellant did reincorporate under the laws of Indiana.

From April, 1931, the United Mutual Life Insurance Company (and the same company as reorganized in 1933 under the laws of Indiana) have been doing business in Arkansas under permits issued by the insurance commissioner, in pursuance of an agreement made by such commissioner, and concurred in by the attorney general. This agreement was an opinion, expressed in writing, that taxes on gross premiums on policies of insurance written subsequent to 1930 would be taxable, but that premiums on certificates issued by The Supreme Lodge Knights of Pythias would be exempt—this on the theory that the fraternal, or lodge, or ritualistic features of the original contract, having once attached, were not altered by the fact that thereafter premium maturities would be payable to an old line company.

It is contended by appellant that the judgment should be reversed on authority of *Modern Woodmen of America* v. *State ex rel. Attorney General,* 193 Ark. 458, 103 S. W. (2d) 38. We do not think that decision is conclusive of the issues now before us. No contention was there made that the appellant had by any formal act of reorganization or reincorporation changed its characteristics from those of a fraternal beneficiary society to those of an old line insurance company. On the contrary, it was shown that for many years the appellant had operated under the guise of a fraternal agency through permits annually renewed by the insurance commissioner. It was also shown that a lodge system of government was being maintained and that fraternal activities were engaged in.

The state's argument was that these activities were negligible; that they were inconsequential in comparison with the extensive business done by the corporation, and that the fraternal or lodge formalities were maintained as a subterfuge, practiced to evade taxation, when the truth was that the appellant was engaged in writing insurance similar to that of old line companies. In short, the state insisted that, notwithstanding appellant's claimed attributes of fraternalism, and in spite of the fact that it was incorporated as a beneficiary society and had been admitted to do business as such in the state under laws enacted for the protection of societies and orders of the class to which appellant belonged, the legal aspect of such classification should be disregarded in favor of a common sense construction which the State claimed ought to be given. The opinion contains the following findings: "Here, not only were the articles of incorporation, the constitution and by-laws, and the several beneficiary certificates issued by appellant introduced in evidence, which reflect its status as a fraternal beneficiary society, conformably to the laws of this state, but testimony was introduced which, in our judgment, is conclusive of the fact that it is a fraternal beneficiary society within the meaning of our statutes, doing business as such under a certificate annually issued by the Insurance Commissioner."

It will be observed that the opinion carried an express finding that the corporation was doing a fraternal beneficiary insurance business, as distinguished from the kind of business done by insurance companies classified for taxation by our laws.

In the instant case it is admitted that appellant is an old line company of the class subject to taxation.

Determination of the rights of the parties, therefore, resolves itself into this proposition:

(a) Is there any law expressly providing that fraternal business assumed by a nonfraternal corporation is subject to taxation?

(b) If there is no express enactment, did the General Assembly, in directing taxation of a specific class

of business and exempting from taxation a different class, intend that characteristics of the activities engaged in should control.

(c) Did the lawmakers intend that the name applied to a corporation should fix its liability and exclude proof that some of its business originated from non-taxable sources?

Appellee does not point to any law expressly providing for the relief granted by the chancery court. Therefore, if the right to tax exists, it must be implied from legislative intent, or inferred from prior decisions of this court.

To this end appellees direct attention to *Central States Life Insurance Co.* v. *State*, 190 Ark. 605, 80 S. W. (2d) 628, where a judgment against the insurance company was affirmed. Appellant, a foreign corporation, entered into a reinsurance agreement with the Home Life Insurance Company, a domestic corporation. Under the laws of this state, domestic corporations are not required to pay the 2½ per cent. gross premium tax. In that respect they are comparable to fraternal beneficiary insurance companies. Under its reinsurance agreement, the Central States Company took over the business of the Home Company. It was urged that, inasmuch as the business assumed was not subject to taxation in the hands of the domestic corporation, it could not be taxed when taken over by appellant. The opinion in part says: "Our interpretation is that the status of appellant is fixed in the contract as that of a purchaser of all of the assets of the Home Life Insurance Company for a valuable consideration. * * * None of the conditions, modifications, exceptions or limitations appearing in the contract convert it from a contract of purchase and sale of the assets into an assignment. * * * Under this interpretation of the contract, the status of appellant is that of a foreign life insurance company doing business in Arkansas under a 'Reinsurance Agreement' with reference to the subject-matter, which made it responsible to the state of Arkansas for an occupation tax imposed by said act for the years 1931, 1932

and 1933." *Central States Life Insurance Company* v. *State,* 190 Ark. 605, 80 S. W. (2d) 628.

Appellee concludes, from the foregoing expressions, that the gross premium tax imposed upon foreign insurance companies is not a tax on the character of business done, but is an occupation tax or a tax imposed on the company for the privilege of doing business in the state, the amount to be determined by the gross receipts of the company from policyholders within the state.

Admitting the correctness of this construction, we are, nevertheless, of the opinion that the exemption provisions in favor of fraternal beneficiary societies were intended to inure to the individual members—that is, to certificate holders, as distinguished from the parent agency. On the other hand, the tax statute exempting domestic insurance was intended as a benefit to home corporations. Its purpose was to give encouragement to and thereby promote domestic development. Immunity of such corporation from the gross premium tax was not intended as an advantage to be claimed by the policyholders.

As mentioned *supra,* The Supreme Lodge Knights of Pythias was authorized by an act of Congress to separate its fraternal and its insurance activities. In reincorporating under the laws of Indiana, appellant is subject to the following Indiana statute: "In case such foreign insurance company shall have outstanding legal reserve insurance, and shall also have outstanding fraternal certificates of insurance issued by itself or predecessor, such corporation shall remain liable for the payment of such legal reserve policies and also shall remain liable for the payment of such fraternal certificates, in the same manner as before such reincorporation. * * * Such new corporation shall be clothed with all of the rights, powers, duties, responsibilities and liabilities of such fraternal certificates, and the same shall be and remain fraternal certificates, and shall be governed by all laws regulating fraternal insurance and such new corporation shall properly designate such fraternal insurance in its annual reports as fraternal insurance, and

such insurance shall be governed by the fraternal insurance laws of this state as if such new corporation were a fraternal association. Such fraternal laws, however, shall apply exclusively to such fraternal certificates, and upon the final payment of such certificates, such corporation shall have no rights, duties or responsibilities under such fraternal laws, the purpose being to authorize and permit any such company reincorporated under the provisions of this act faithfully to carry out all contracts of fraternal insurance which may be outstanding at the time of such reincorporation."

Cases are cited by appellant, sustaining or tending to sustain the point now being urged. *Central Railroad* v. *George*, 92 U. S. 665, 23 L. Ed. 757; *Jones* v. *Loaleen Mutual Ben. Assn.*, 337 Ill. 431, 169 N. E. 254; *York* v. *Cent. Illinois Relief Assn.*, 340 Ill. 595, 173 N. E. 80; *Cochrane, Insurance Commissioner of Colorado* v. *Bankers Life Company,* 30 Fed. (2d) 918; *Yeomen Mutual Life Ins. Co.* v. *Ray Murphy, Commissioner of Insurance of the State of Iowa* (inferior court, now on appeal); *Bankers Life Company* v. *Chorn, Insurance Superintendent,* 186 S. W. 681. These and other citations are mentioned in this opinion not because they are controlling, but merely because they are urged by appellant as sustaining the point of view contended for.

It is our opinion that the controversy is not one to be decided by what other courts have done in circumstances and in the light of facts varying materially from those here presented, the distinctions being so sharply drawn that a proper analysis would unnecessarily extend this opinion.

We have reached the conclusion that the tax ought not to be assessed for the following reasons:

(1) Because the State has declared its public policy to be that premiums paid on fraternal beneficiary insurance are not subject to the tax imposed on foreign corporations doing an old line insurance business.

(2) Because the business which it is now proposed to tax came from a nontaxable source. It was created by an agency which had a right to issue beneficiary cer-

tificates, and the premiums on these certificates could not, under our laws, be reached for taxation purposes while in the hands of appellant's predecessor, The Supreme Lodge Knights of Pythias.

(3) Because, when Congress authorized The Supreme Lodge Knights of Pythias to separate its business and to organize a division or separate agency charged with the duty of carrying out agreements with certificate-holders, appellant assumed the insurance obligation. That obligation was not impressed with the special tax it is now sought to impose.

(4) Because points urged by appellee to sustain the judgment were raised and decided contrary to appellee's contentions in *Modern Woodmen of America* v. *State,* 193 Ark. 458, 103 S. W. (2d) 38, in *The Maccabees* v. *State,* 103 S. W. (2d) 46, and in *Woman's Benefit Association* v. *State,* 103 S. W. (2d) 46. In the opinion in the Modern Woodmen case this expression appears: "Whether appellant may continue to operate as a fraternal beneficiary society in this state presents a question addressed to the General Assembly, and not to us."

We take judicial knowledge of the fact that when the opinion was published, the General Assembly was in session, and continued in session for several weeks. We also take judicial knowledge of the further fact that a bill seeking to correct the evil complained of was introduced in the General Assembly. The measure was not passed, and the policy of the state remained as it had been, exempting fraternal beneficiary societies from the tax in question.

(5) Because it would be gross discrimination to uphold the tax in the instant case, and to exempt from taxation those who were appellants in the former cases referred to *supra.*

The judgment is reversed, and the cause dismissed.

SHACKLEFORD *v.* SHACKLEFORD.

4-4703

Opinion delivered June 28, 1937.

John A. Hibbler, for appellants.

James G. Lanier and *Mann & Mann,* for appellee.

HUMPHREYS, J. Quintella Shackelford, the appellee in this case, was the wife of John Shackelford, who died intestate on the 25th day of August, 1935, leaving as his next of kin his wife, Quintella Shackelford, and his father, Henry Shackelford. John Shackelford and Quintella Shackelford had no children born to them. At the time of John Shackelford's death he owned, in addition to his homestead, three pieces of real estate in Forrest City, one of which was encumbered for $754 and some personal property consisting of a truck upon which he owed most of the purchase money, some cord wood on the yard, and a stock of goods of the value about $400 or $500 and something like $80 or $90 in cash which had been deposited in the bank.

The debts against the estate, including the balances which he owed upon the truck and one piece of real estate, amounted to about $2,183.

On September 16, 1935, Quintella Shackelford was appointed administratrix of the estate of John Shackelford, deceased, by the probate court of St. Francis county and she duly qualified as administratrix of the estate of her husband. She filed an inventory, but took no further steps due to the fact that Henry Shackelford, her father-in-law, executed a deed to her for his interest in the real and personal property he inherited from his son, John Shackelford. John Shackelford and Quintella Shackelford owned the homestead by what is known as an estate in entirety, so Henry Shackelford inherited no part of the homestead.

After receiving and recording the deed Quintella Shackelford treated the property as her own, continued to operate the store, the wood yard, and a filling station which is on one of the lots, in her own name and paid all the debts against the estate of her husband without requiring that the claims be probated. A short time after she received the deed from him, Henry Shackelford, who was residing with her in accordance with the terms of the deed made a visit to his children and grandchildren with the avowed intention of returning in a short time and living with her. When he did not return she went after him, at which time he told her she had been kind to him and had cared for him as she had agreed to, but that he had decided to live with his children and declined to return.

On December 10, 1935, Henry Shackelford brought this suit to set aside the deed on the alleged ground it had been procured through fraud and undue influence.

An answer was filed to the complaint by appellee denying the allegations in the complaint.

Depositions were then taken on the issue of whether the deed was procured through fraud and undue influence, but the evidence was not confined to that issue alone. It was extended so as to show the value of all the assets

owned by John Shackelford when he died and the value of them, the debts he owed, what appellee had done with the assets and whether she had included all the assets in the inventory she filed as executrix in the probate court, and whether the claims against the estate had been probated and allowed before she paid them.

Relative to the execution of the deed appellee testified that Henry Shackelford executed and delivered the deed to her without being influenced by her or any one in her behalf. She was not in the room when he executed the deed, having been told to leave the room by W. J. Lanier, who had drawn the deed.

J. G. Lanier testified that at the time Henry Shackelford executed the deed those present in the room were his father, W. J. Lanier, and Thomas Catling, E. T. Ferguson, Jr., G. M. Dooly and Charlie Stuart; that his father read every word of the deed to Henry Shackelford and explained it to him, then asked him if he wanted to sign it and when he said he did that he, witness, signed Henry Shackelford's name for him and Henry Shackelford made his mark; that Mr. Dooly then asked Henry Shackelford if he understood what the consideration in the deed was and being informed that he did, took his acknowledgment to the deed. The witnesses to Henry Shackelford's signature by mark and in fact all those present in the room at the time of the execution of the deed, except W. J. Lanier, who had died, testified that Henry Shackelford was in good health, of sound mind, heard the deed read and explained and understood that it was a deed and that it conveyed all his interest in his son's estate to appellee in consideration that she would wait upon, take care of him and give him a good home with her the rest of his life and bury him when he died. At the time of the execution of the deed Henry Shackelford had resided with appellee from the 18th day of September, 1935, until November 1, 1935, or about six weeks and necessarily knew what kind of treatment and what kind of home he was getting for his interest in the property he was conveying to appellee. He had been blind since 1921 and needed and required exceptional care.

Henry Shackelford testified, in substance, in his direct examination that he thought when he signed the instrument it was an application for a burial insurance policy. Henry Shackelford and appellee had talked about him taking out burial insurance. He said the conversation occurred before he signed the instrument and she testified that it was after he signed the deed. On cross-examination he admitted the instrument was read to him and that it said nothing about insurance. He, also, admitted that it was a deed he signed although he claimed the word "deed" was not mentioned. He said his mental faculties were fine and sound. He admitted that after signing the deed he talked to one of his sons-in-law and became dissatisfied and authorized the institution of this suit to set aside the deed. He, also, admitted that he left and went back to live with his children of his own accord and had refused to return to the home of appellee although she requested him to do so.

After the depositions were taken Henry Shackelford died and the cause was revived in the name of the other appellants who were his sons and daughters.

After hearing the evidence the chancery court made a finding that the deed was procured through undue influence, but that appellee had paid more to the creditors of the estate of John Shackelford, deceased, than the property involved was worth and subrogated appellee to the right of the creditors and divested appellants' interest by inheritance from their father out of them and invested all the property in appellee.

This latter finding was in effect an encroachment upon the jurisdiction of the probate court where the estate was being administered. It was within the exclusive jurisdiction of the probate court in the first instance to allow or disallow claims against the estate and not within the jurisdiction of the chancery court to indirectly allow unprobated claims against the estate and subrogate appellee, who had paid them, to the rights of the creditors of the estate.

The chancery court rendered a correct decree in divesting appellants' apparent interest by inheritance in

said property out of them and vesting same in appellee, but for another reason than that given by him. The correct reason is that Henry Shackelford conveyed all his interest in the estate, real and personal, of his son, John Shackelford, deceased, to appellee voluntarily and without undue influence and for a valuable consideration. The overwhelming evidence in the record is to that effect.

The decree is, therefore, affirmed.

COUCH *v.* STOUT.

4-4707

Opinion delivered June 28, 1937.

Cockrill, Armistead & Rector, for appellant.

John Sherrill and *Howard Cockrill,* for appellee.

SMITH, J. For accommodation appellant Couch indorsed W. C. Ribenack's $25,000 promissory note, dated February 7, 1931, bearing 4 per cent. interest, and payable three years after date, to appellee, William W. Stout's order. Ribenack had been employed by and had been president of the Stout Lumber Company. Ribenack was indebted to the lumber company, or to Mrs. Stout, the principal stockholder of the lumber company, as far back as the record before us extends, and was indebted to Mrs. Stout in 1928 in the sum of $82,460.79, and as secur-

ity therefor he deposited with Mrs. Stout 11,978 shares of stock in the lumber company as collateral. At the same time Ribenack was indebted to W. W. Stout, the son of Mrs. Stout, who later succeeded Ribenack as president of the lumber company, in the sum of $100,000, which indebtedness was secured by the same collateral. From and after 1928, Ribenack borrowed large sums of money from the lumber company, for which he, also, pledged the 11,978 shares of stock owned by him, subject, however, to the prior liens of Mrs. Stout and of W. W. Stout. Certain other stocks were also, pledged as collateral. By October 30, 1929, Ribenack was indebted to the lumber company in the sum of $515,000. This was in addition to the indebtedness due Mrs. Stout and W. W. Stout. By the beginning of 1931, Ribenack was in need of additional cash, and made application to W. W. Stout for an additional loan of $200,000, which Stout was unwilling to make on the collateral then held, but on February 7, 1931, a written contract was entered into between Ribenack, designated therein as party of the first part, and Stout, designated as party of the second part, in regard to additional advances made and to be made, from which we copy so much as is important in the decision of this appeal.

This contract recites that "First party desires to borrow from time to time sums of money aggregating two hundred thousand dollars ($200,000) from second party, or such part or so much thereof as second party may in his judgment from time to time elect to loan to first party; and

"Whereas, second party is willing at this time to make an initial loan to first party of fifty thousand dollars ($50,000), and may hereafter if he so elects in his uncontrolled discretion make further loans to first party upon certain terms and conditions,

"Now, therefore, it is agreed as follows:

"Said first party agrees:

"1. To forthwith make and deliver to second party his collateral note of even date herewith in the sum of fifty thousand dollars ($50,000), said note to be payable

to the order of second party, with due date and interest as set forth therein, said note being given to represent the loan of fifty thousand dollars ($50,000) made by second party concurrently with the delivery of said note, the receipt of which first party hereby acknowledges."

The second paragraph of the contract provided for an additional loan of $100,000, to be evidenced by four separate notes, each for the sum of $25,000, to be indorsed by a designated indorser. One of these was a note to be indorsed by appellant Couch. All four notes which were numbered 1, 2, 3 and 4, were dated February 7, 1931, were due in three years, and bore interest at 4 per cent. per annum, payable semi-annually.

The loan agreement further provides that:

"If further loans are made to first party by second party, entirely at the election of second party, it is agreed that said loans be applied towards the sums called for in said notes one (1), two (2), three (3), and four (4), and appropriate indorsement will be made to represent unearned interest from the date of said notes to the date of the advancement of the funds by second party. It is further understood that if second party at his election should advance the full further sum of one hundred thousand dollars ($100,000), representing the face value of said four notes, and thereafter elect to advance further sums, that said further loans shall be evidenced by notes payable to the order of second party, made and delivered by first party, and corresponding in form, interest rate, and due dates to the note evidencing the initial loan this day made by second party to first party.

"3. First party further agrees that all sums loaned to him by second party may at the election of second party be placed in a special account, standing in the name of second party and/or his nominee, in a bank selected by second party and applied by second party and F. W. Niemeyer in discharging such proper obligations of first party as the second party and/or second party and said F. W. Niemeyer deem advisable; and in the event any of said obligations of first party so paid are secured by collateral of said first party, second party and/or second

party and F. W. Niemeyer are hereby authorized to receipt for said collateral so released on the payment of said obligation in the name of first party and for his account, and to retain said collateral to secure the obligations of first party to second party whether then in existence or thereafter to accrue."

First party agreed to assign to second party life insurance policies aggregating $378,500, against which there were policy loans in the sum of $41,271.50, and the right was given second party to pay future premiums, which, if paid, were to be considered as additional loans made under the contract. Second party did not agree to pay future premiums.

The loan agreement further provides:

"Second party agrees as follows: 1. To give appropriate credits by indorsements at the time further loans, if any, are made of unearned interest on the four notes aggregating one hundred thousand dollars ($100,000), to be delivered to him pursuant to terms of paragraph two of this agreement.

"2. To make such further loans from time to time pursuant to terms of this agreement as in his uncontrolled discretion he may care to make.

"3. To return all excess collateral held to first party or his order, immediately upon the payment of the last outstanding obligations of first party arising because of this agreement and/or any notes or other obligations undertaken by first party pursuant to the terms hereof."

It thus appears that on February 7, 1931, a loan of $50,000 was made by Stout to Ribenack, with an agreement to loan $100,000 additional upon the security of the four notes above referred to. The required indorsements of these notes were obtained and the additional loans were made. Only one of these notes is involved in this litigation, presumably the others were paid. The note indorsed by Couch was an ordinary note, which made no reference to the loan agreement above referred to.

The note evidencing the $50,000 loan to Ribenack, made February 7, 1931, recites that: "To secure the

payment of this note and all other liabilities of the undersigned (Ribenack) to the holder hereof, howsoever created, arising or evidenced, or acquired by said holder, whether now or hereafter existing, and whether accrued or to become accrued, the undersigned has pledged, transferred and delivered to said W. W. Stout the following property, viz:". There follows a long list of stocks and property, including the 11,978 shares of Stout Lumber Company stock. The notes authorized a sale of the collateral either publicly or privately upon default made in payment.

The $25,000 note indorsed by Couch was not paid at maturity, and payment having been refused upon demand this suit was brought to enforce payment. The cause was transferred on motion of Couch to the chancery court, and from a decree awarding judgment for the face of the note and the interest thereon is this appeal.

Couch testified at the trial from which this appeal comes that he was induced to indorse the note by the representation then made to him by Ribenack that the note was abundantly and sufficiently secured by collateral held by Stout; but he admitted that he never discussed the matter with Stout and that Stout made no representations of any character, and in a letter to Stout admits his negligence in this respect. Couch knew that Stout was unwilling to make the loan on the collateral then held and was demanding indorsements as a condition upon which the $100,000 loan would be made. Couch indorsed the note to meet this condition, relying solely on Ribenack's representation to him that Stout held sufficient collateral belonging to Ribenack to fully secure Ribenack's entire indebtedness.

The date of Couch's indorsement is undetermined, but that it was not contemporaneous with the execution of the loan agreement above set out is certain. Couch first declined to indorse the note notwithstanding Ribenack's representation in regard to the sufficiency of the collateral, and only agreed to do so upon the condition that C. S. McCain, then residing in New York, would also indorse one of the $25,000 notes above referred to.

Ribenack stated to Couch that he would secure that indorsement as soon as he could go to New York and see McCain. In about a month, or possibly later, Ribenack exhibited to Couch a note indorsed by McCain, whereupon Couch indorsed the note here in suit.

There is but little conflict in the testimony, and no questions of veracity are involved. The transactions between Ribenack and Mr. and Mrs. Stout and with the Stout Lumber Company are set out in detail and cover many pages of the record, and this opinion would be extended to an indefinite length if they were recited. We find it only necessary to summarize them.

At the time of the loan agreement executed on February 7, 1931, the first lien on Ribenack's stock in the lumber company held by Mrs. Stout had not been discharged, and the second lien by Stout for $100,000 had not been paid, and there was an indebtedness due the lumber company of $515,000, for the payment of all of which Ribenack's stocks had been pledged. In December, 1931, the lumber company took over the prior indebtedness due Mrs. Stout, and also that due Mr. Stout, so that the lumber company held more than $615,000 of Ribenack's paper. This, Ribenack was unable to pay, so an agreement was reached whereby the collateral belonging to Ribenack was transferred to the lumber company at an agreed valuation of $423,287.

It is upon this sale at this price that Couch predicates his defense to the suit on the note which he indorsed. The argument is that the $50,000 note of February 7, 1931, which no one indorsed, contained the recital that the collateral was pledged "To secure the payment of this note and of any and all other liabilities of the undersigned to the holder hereof, howsoever created, arising or evidenced, or acquired by said holder, whether now or hereafter existing, and whether accrued or to become accrued, * * * and further to secure said note and liabilities the undersigned hereby pledges, assigns and transfers any and all other property of every kind and description now or hereafter and howsoever in the possession or control of the holder hereof; * * *."

Authority was given to sell the collateral either publicly or privately, and it was then provided that "after deducting all costs and expenses incurred at any time in the collection, protection, sale and delivery of said property and the liabilities secured thereby to the payment of this note and/or any or all of said liabilities, whether accrued or not, returning the residue to the undersigned on demand."

It is argued that under this agreement the collateral was pledged for the security of the entire indebtedness due by Ribenack and should have been applied ratably to its discharge; and, that if this is not so, that Stout should be held to account for the actual market value of the collateral, which had a face value greater than the entire indebtedness, and that the excess should be applied *pro tanto* to the credit of the note here sued on.

Disposing of the last stated contention first, it may be said that the testimony does not show that the collateral was sold and assigned by Ribenack for less than its actual value. Stout was examined at length upon this question, and there was no testimony contradicting his estimates of its value, which had been arrived at by an agreement between Stout and Ribenack fixing the value. They probably knew as much or more about these values than any one else. Ribenack was not called as a witness, and, according to the testimony offered, the collaterals were credited at their full value. When the credit had been applied there remained a balance due the lumber company of more than $237,000, and there was, therefore, no surplus to go to Stout for credit upon any other indebtedness.

There was no misapplication of this credit. The testimony touching these collaterals shows that they were under a prior pledge, first to Mrs. Stout, and second to Stout for $100,000, and third to the Stout Lumber Company for $515,000, then to Stout for $50,000, and then for the last loan of $100,000, of which the note here in suit was a part. As much as can be said of the recitals quoted from the $50,000 note and the loan agreement as to the disposition of the collateral there referred to is that the

four notes of $25,000 each should prorate with the $50,000 in the credit of the excess value of the collateral after the prior indebtedness which the same collateral secured had been paid; but there was no excess. We do not find it necessary to decide, however, whether these agreements entitled the four $25,000 notes to prorate with the $50,000 note, all bearing date February 7, 1931.

The record before us does not disclose any misrepresentation made to Couch by Stout. Stout made no representation of any character. It is no doubt true that Couch indorsed the note under a misapprehension of the facts, but Stout is not responsible for the misapprehension. Couch thought he was becoming a mere surety upon a note otherwise amply secured, but Stout had neither occasion nor opportunity to correct the misapprehension. "However, unless asked in regard to a matter, it is not the duty of the creditor or obligee voluntarily to seek the surety, and to disclose facts which are open equally to the knowledge of each party. It is the duty of the surety to protect himself, and to ascertain the risk he is incurring, and he cannot, by his neglect, throw the burden on the creditor or obligee to inform him as to matters which he could ascertain for himself without difficulty. Were the creditor required to dwell upon the risk the surety is running by entering into such a contract, it would be well nigh impossible to find anyone willing to become a surety." Child's Suretyship and Guaranty, § 54, page 65. Had Stout either misrepresented or concealed any relevant fact we would have a question not presented by this record.

This view of the testimony makes it unimportant to consider any of the other questions discussed in the briefs.

The decree is correct and is, therefore, affirmed.

BLUM *v.* FORD, COMMISSIONER OF REVENUES.

4-4758

Opinion delivered June 28, 1937.

Jay M. Rowland, for appellants.

J. Hugh Wharton, for appellee.

MEHAFFY, J. On May 1, 1937, D. L. Ford, commissioner of revenues, served an order on each of the appellants, which order stated that he had revoked their permits to sell beer in their respective places of business for the reason that they had sold liquor of greater alcoholic content than allowed by their permits, and otherwise violated the law, and violated their contract and oath by selling said liquor, and accepting bets on horse races, and ordered them to immediately stop the sale of beer in their places of business, and notified the wholesalers not to sell appellants any more beer.

On May 5, 1937, appellant, Louis Blum, filed a petition for injunction in the Pulaski Chancery Court alleging that the Commissioner of Revenues had attempted to revoke his permit by sending C. B. Lovell, Sr., to his place of business and tearing the permit from the wall and asked that the Commissioner of Revenues be restrained from interfering with his beer business, and from demanding the wholesalers to refrain from selling him beer, and served summons on said Commissioner of Revenues to appear in the Pulaski chancery court on May 6 for

hearing on a petition for a temporary restraining order, which order was granted by the court, and appellant was allowed to continue the beer business.

Thereafter, on May 17th, the other appellants, Southern Club and Ohio Club, adopted the pleadings of appellant, A. Louis Blum, and all denied that they had violated any oath or contract with the Commissioner of Revenues, or knowingly violated any law, and they intervened in said action as plaintiffs, and adopted all the pleadings and allegations of said plaintiff.

On the same day the appellants filed a motion to require the Commissioner of Revenues to make his allegations of law violation more specific, which motion was overruled. Appellants then filed demurrer, which was overruled, and response was filed to plaintiff's motion to make the charges more specific.

The appellee filed an answer denying all the material allegations in appellants' petition, and asked that the temporary restraining order be dissolved and that the cause be dismissed.

The application and license were introduced in evidence. E. B. Ford testified that he was an investigator for the State Revenue Department, and had held this position on January 22 and 23, 1937; is familiar with the place of business known as the Ohio Club, located at 336 Central Avenue, Hot Springs, Arkansas; visited this place on January 22, 1937; they were selling beer in the place, and had a bookmaking joint running in full blast and, also, gambling tables; they had a big board on the wall with horses listed on it, taking bets, announcing results of races, cashier was paying off, touts were touting; there was a dice game and slot machine; there were about 75 or 80 people there; does not know whether the Kentucky Club at 314 Central Avenue is the same establishment or not; visited this place on January 22, 1937, they were selling beer in the place, and witness saw a bookmaking joint and a big board on the side of the wall with horses listed on it and men taking bets and paying bets, and barkers on duty announcing results; on that day there were about thirty-five people present. Witness is

familiar with the place known as the Southern Club, located at 248 Central Avenue; visited this place on January 22, 1937; they were selling beer downstairs; did not notice any up in the club room saw more law violations there than he ever saw in any one place before; they consisted of bookmaking, a big board on the wall, horses posted on it, men taking and paying bets on horse races, barkers on duty, roulette table, dice table, poker table, some other machines that witness never saw before, and about 150 people present, women, young boys, men, colored and white. Witness again visited Kentucky Club at 314 Central Avenue on January 23, the following day; there were about the same violations in progress as there were the day before. Visited the Ohio Club on the 23rd and there were about the same violations as there were the day before; also visited the Southern Club and found the same violations as there were the day before; did not see any liquor stored or secreted around the premises; saw them taking bets and paying off with money; did not report this condition to any of the local officials of Hot Springs or Garland county; did not talk to any of the managers of these places; did not give any notice or warning that that condition was prohibited by the beer permit; does not know whether he saw Blum at the Kentucky Tap Room; at the Kentucky Tap Room the bookmaking was taking place back of the bar room; the board was up on the left side as you go in; the building faces Central Avenue; the bookmaking was in the back of the building; bar and drinking place in front; and there were swinging doors which witness thinks were open all the time; does not know who was operating the gambling business, and did not make any effort to find out; does not know that Blum knew anything about it; all witness knows is that it was in operation in the same building with the beer saloon and bar; did not see Mr. Young at the Ohio Club; that building faces Central Avenue; swinging doors separate the bookmaking place from the beer place; did not notify any one to stop making books; was not his business to do so; his duty was to report violations to the commissioner; does not know who

was operating the book in the Ohio Club; saw slot machines; dice games, a fifty cent game; saw boys eighteen and nineteen years playing the book; did not see any liquor over 5 per cent. secreted, sold or concealed about the premises; once or twice saw people drunk; was reporting conditions existing in Hot Springs; it was not his business to revoke beer permits; did not see any betting or gambling in the beer or bar room at the Southern Club; the gambling was upstairs and the stairs were open; no doors separated them; did not see any beer sold upstairs nor any liquor secreted or hid around the beer department; did not see any one drinking liquor; does not recall seeing Mr. Phillips at the Southern Club; the two downstairs places had swinging doors between them; witness has been at the clubs at ten in the morning, two in the afternoon, and four in the afternoon. Was at the Kentucky Club on January 22 at 4:30 and 4:45 p. m.; at the Ohio Club, 4:00 and 4:15; at the Southern Club, 5:20 and 5:45. Legislature was in session at the time witness made the investigation. At the Kentucky and Ohio clubs everything was on one floor; at the Southern, there were two entrances and the gambling was conducted upstairs.

Neil Shannon, Robert Faust, J. O. Blucker, officers, testified about the gambling in the three clubs named above. Emmett Jackson testified that he was city clerk in April, 1936; he had his record with him, and it showed that Louis Blum paid a fine of $100 for selling liquor by the drink in April, 1936. Bernard Altmeyer paid a fine of $100 for selling liquor on Sundays. These convictions, however, were before the permits which were revoked were issued.

Louis Blum testified at length. He stated that he operated the Kentucky Tap Room; that his bar tender sold liquor without permission and he fired him in 1936; that there was no betting in his place that he knew about, and no liquor stored in the beer department; that he never did have crap games running there or slot machines; that he usually gets there about nine o'clock and stays until one, two or three o'clock in the morning; there

was no gambling conducted on his premises, and no gambling going on there the 22nd and 23rd of January, this year; all they sell is beer and soft drinks; he said he never was convicted in municipal court of selling whiskey on Sunday, and did not pay the fine; loaned Mr. Gage the money to pay the fine; Gage was working for him and sold whiskey without his consent.

Tink Young testified that he operated the Ohio Club and had a permit to operate a beer bar; had never kept or secreted any liquor on the premises; he heard the testimony about betting on horse races and knows about that; the cigar store and bar are in the front room, probably forty feet deep; then there is a partition to the top of the ceiling with swinging doors; which cuts the two rooms in two; that he was part owner of the Ohio Cigar Store at 336 Central Avenue, and that he was the person who applied for permit No. 515 to sell beer at the Ohio Cigar Store; that the testimony about gambling was partly correct.

Jimmy Phillips testified that he was manager of the Southern Grill; also manager of the beer parlor; the license was issued to W. S. Jacobs and L. M. Kilgore; they had a party named Altmeyer accused of selling on Sunday, and they arrested witness for selling by the drink; this was in April, 1936; they went into the municipal court and asked for a continuance and Mr. Wiseman said he would revoke the license if they fought back so they went in and paid the fine; witness nor Mr. Jacobs nor Mr. Kilgore knew anything about it; they all are instructed to sell what the permit grants authority to sell; the book mentioned in the testimony is upstairs, not connected with the beer department; Mr. Jacobs had an interest in both of them, and witness managed the place; never allowed any one to violate the liquor laws; does not know anything about a two dollar bet on a horse race in April; that is out of his jurisdiction, upstairs, and witness very seldom goes upstairs, and does not know what goes on up there. Witness said they were located at 248-250-252 Central Avenue, and the Southern Club is upstairs, all in one building; sell beer in dining room, but

not upstairs; had a man employed by the name of Altmeyer and he paid $100 fine for selling whiskey.

The chancellor entered a decree confirming and sustaining the acts of the Commissioner of Revenues in revoking the beer permit of the three appellants; dissolved the temporary restraining order; dismissed the complaint for want of equity, and from this judgment comes this appeal.

Act No. 7, p. 19, of the Acts of 1933, 1st Ex. Sess., expressly provides that under the Constitution and laws of Arkansas the business of manufacturing, handling, receiving, distributing or selling the products named in the act to be a privilege. A portion of paragraph C of § 4 of the act provides that if a dealer has secured a permit for $10 or $15, when a larger amount should have been paid, he shall require the payment of the difference or cancel the permit. That paragraph, also, provides that the payment of the special tax shall be evidenced by a permit issued by the Commissioner of Revenues; it must be applied for by the taxpayer and issued by the commissioner on such forms and under such regulations as may be prescribed.

Section 6 of the act provides that the Commissioner of Revenues shall jointly, with the prosecuting attorney, sheriffs and other law enforcing officers, have supervision of the enforcement of this act, and shall be charged with the full administration thereof, and shall from time to time promulgate the necessary rules and regulations for the enforcement and administration of this act.

Section 13 of the act provides that before any permit shall be issued and delivered to any applicant therefor, such applicant shall make and subscribe to an oath, and, among other things, the oath shall state that he will not knowingly allow any other person to violate any statute while in or upon such premises, and that no manufacturer, distributor, wholesale dealer to whom or to which this act applies, shall have any interest directly or indirectly in the business, etc.

Section 17 provides for the punishment of persons convicted of violating any provisions of the act, and fur-

ther provides that such permit shall, from and after the date of conviction, be void.

A part of § 25 provides that when it shall appear to the city clerk, recorder, or to the county clerk that a retail dealer has secured a permit for $15 when a larger amount should have been paid, he shall require the payment of the difference or cancel the permit.

Act No. 108, p. 258, of the Acts of 1935, known as the Arkansas Alcoholic Control Act, provides for the enforcement of said act by the Commissioner of Revenues, and authorizes him to grant and revoke for cause permits issued under said act. That act excepts wines from its provisions, but does not except beer.

Section 13 of act 108 provides that any permit issued pursuant to the act may be revoked for cause, and must be revoked for the following causes, naming them.

It is the contention of the appellants that the Commissioner of Revenues has no authority to revoke beer permits under act No. 7 unless the permittee has been convicted of one of the violations set forth in said act, and that said conviction should take place during the time the permit revoked was in force.

This act charges the Commissioner of Revenues with the enforcement and administration of the act, and if he knows or discovers by investigation that the law is being violated by the persons having a permit, he not only has the authority, but it is his duty to revoke or cancel the permit. The law requires the applicant for a permit to take an oath that he will not violate the law. It appears from the record that none of these appellants took this oath, and that in itself would be sufficient reason to cancel their permits. It is true that the permits were issued by the former Commissioner of Revenues, but no matter by whom issued, the appellants were not relieved from taking the oath required by law. Selling beer is a privilege, and not a right, and the state has an absolute right to control it or to require the Commissioner of Revenue to administer the act and enforce it, and if necessary to accomplish these purposes, he may cancel or revoke a permit that has been issued.

Act 108 above referred to provides that the dealer may appeal to the chancery court, and that is what the appellants did in this case. It would be the duty of the chancery court to hear the evidence, and if there was not sufficient evidence to show a violation of the law, then the court would restrain the commissioner from canceling their permit. In this case, however, the great preponderance of the evidence showed violations of the law, which justified the commissioner of revenues in canceling their permits.

Appellants call attention to several cases, one of them In re Sarlo, 76 Ark. 336, 88 S. W. 953. In that case the court said: "The authorities are practically uniform in holding that a liquor license is a mere privilege, revocable at the will of the state. It is not a contract between the state and the licensee, and no property rights inhere in it. Constitutional limitations against impairing obligations, retroactive laws, etc., cannot be invoked in support of rights under it. It is not a vested right for any definite period; in fact, is not a vested right at all, but is a mere permission temporarily to do what otherwise would be a violation of the criminal laws. * * *

"The power of the state over liquor licenses is complete. It is part of the internal police of the state, in which the power of the state is sovereign. The state may repeal the statute authorizing the license; revoke, annul or modify the license; create conditions, limitations and regulations subsequent to its issue burdening its exercise; and may delegate these powers to agencies of the state, as municipal corporations, county courts, boards of excise commissioners, etc."

The general statement of the law is contained in 15 R. C. L. 285 as follows: "Generally, however, and from other viewpoints, especially from the standpoint of the right and power of revocation, a liquor license is regarded as anything but a property or contract right. It is consistently declared to be a mere personal and temporary permit or privilege to do what could not be lawfully done without it, and not property in any legal or constitutional sense; and its issuance is a matter, not of

right, but purely of legislative grace, and may be extended, limited or denied without violating any constitutional right. * * *

"One who accepts a license must be deemed to consent to all proper conditions and restrictions which have been or may be imposed by the Legislature in the interest of public morals and safety relative to the traffic or to the place in which he sells. In other words, the licensee takes subject to the reasonable exercise of the police power. The license is not a contract between the government and the licensee, and it creates no vested rights, any more than does the charter of a social club create rights beyond revocation for violation of the liquor laws; nor can any vested rights be created under a license by the acquisition and use of the instrumentalities necessary to the business.

The state has authority at any time to revoke a license to sell liquor because it is a mere privilege and in no sense a contract right. It is a privilege to do what could not be lawfully done without the permit, and the permit or license is a matter, not of right, but, as stated in R. C. L., "purely of legislative grace" and may be extended, limited or denied without violating any constitutional right.

We think the law, when properly construed, authorizes the Commissioner of Revenues, after he has made an investigation, which investigation shows a violation of the law, to cancel the permit. He cannot do this arbitrarily, but can only do it after an investigation that discovers violation of the law by the permittee. In all cases of revocation and cancellation of a permit, the dealer may appeal to the chancery court, and that court will determine whether there were sufficient grounds for the action of the commissioner.

There appears to be ample evidence in this case to authorize the Commissioner of Revenues to take the action he did, and the decree of the chancery court is affirmed.

ARKANSAS WESTERN GAS COMPANY *v.* BRAGG.

4-4711

Opinion delivered June 28, 1937.

[redacted]

Pearson & Pearson, for appellant.

George A. Hurst, Kelsy Norman, Henry Warten and *Alfred K. Lee,* for appellee.

McHANEY, J. On July 26, 1935, appellee was in the employ of appellant as a welder's helper, the welder being one John Dunson, and they were engaged in welding pipe in a pipe line appellant was laying near Springdale, in Washington county. Two metal tanks were used by them in their work, one containing oxygen and the other acetylene, and weighing about 230 and 165 pounds respectively. In the progress of the work, it became necessary to move these tanks, and this was done by loading them on a small truck. Carl Watson, who appears to have had general charge of the work, directed appellee to load the tanks on the back end of the truck which he placed in position near the tanks, which he did, but in loading the heavier tank as he thereafter claimed, he was severely injured by the strain which caused a left inguinal hernia. He brought this action

for damages in a large sum on March 20, 1936, and recovered a judgment, after verdict, in the sum of $3,000, from which is this appeal.

At the conclusion of the evidence for appellee and again at the conclusion of all the evidence in the case, appellant requested a directed verdict in its favor, which was refused over objections and exceptions, and this forms the basis for the principal ground of reversal on this appeal. We agree with appellant that the court erred in refusing these requests. There was no evidence of any negligence on the part of appellant and appellee assumed the risk of injury in loading the tanks without additional help, under the facts and circumstances of this case.

Only one ground of negligence relied upon by appellee was submitted to the jury, and that was that appellant failed to furnish him sufficient help in loading said tanks into the truck. The facts, stated most favorably to him are that Watson directed him to load the tanks into the truck which he (Watson) backed down the road to within five or ten feet of the tanks; that the tanks were from 75 to 300 feet from the truck, and that appellee either walked down to the tanks or rode on the back end of the truck; that the larger tank is about 3½ feet long by 18 inches in diameter, and the smaller 2½ feet by 10 inches; that he is 5 feet, 4 inches tall and weighs 130 pounds; that Watson told him to hurry; that the welder suggested to Watson in his hearing that he was not big enough to load them; that Watson replied, "No, if he can't load them, I will kick his rear for him"; that he walked down to where the tanks were, picked up the larger one, stepped on a piece of 2x4 and slipped, and hurt himself in the groin. He admitted that he did not consider the remark of Watson about kicking him of any consequence nor did he load them under any compulsion because of such remark as he and Watson were good friends. There was some dispute as to when the accident occurred, whether on Friday, the 26th of July, or Saturday, the 27th. In a statement made and signed by him on August 15, he said it was "on the last Friday in

July, 1935," and that he did not ask Watson to help him because he thought he could do it, having lifted them before. However, the date is immaterial, and is mentioned only to show the frailty of memory. The fact remains that, whether on Friday or Saturday, he attempted to and did load the tanks with his friend, Watson, present, without asking for help, and, actually declining it, according to Watson, and without making any complaint of any injury at the time. It is difficult to discover wherein appellant was negligent. Some suggestion is made that leaving the piece of 2x4 there was negligence. But appellee himself put it there, as he did other short pieces on which the ends of the gas pipe rested, all along the roadway where the pipe was being laid. He knew these pieces were there and they were as open and obvious to him as they were to Watson—a fact which he admits, but says he didn't look. In *Missouri Pac. Railroad Co.* v. *Dickinson,* 193 Ark. 1179, 100 S. W. (2d) 968, we said: "If the bump was there it was as observable to him as it was to the assistant foreman. No duty devolved on the appellants to send an inspector down to examine for bumps in the metal covering. They were as visible to the appellee as they would have been to an inspector. The rule is as stated in (certain cases named) that where the perils of the employment are known to the employer, but not known to the employee, the former is liable for injuries to the latter resulting from such employment, but that no liability is incurred when the latter's knowledge equals or exceeds that of the former. This rule is applicable here."

As to the negligence relied on—insufficient help—we think the recent case of *Luten Bridge Co.* v. *Cook,* 182 Ark. 578, 32 S. W. (2d) 438, is controlling here. We there said: "Liability on the part of the master, the bridge company, was predicated upon the proposition that appellee was directed to perform a service which was made dangerous by reason of not having been furnished sufficient help, and that the work could have been performed safely if sufficient help had been supplied. We have stated the testimony in the light most favor-

able to the appellee as we are required to do in testing its legal sufficiency, but when thus viewed it appears to us that appellee must be held, as a matter of law, to have assumed the risk of his injury. He did not act in an emergency. The case is not one where the form was about to fall and be damaged, or injure the appellee or one of his servants, unless he attempted to support it. To use his own expression, he 'surged' against the form with a force so great that he ruptured himself. No one could know better than he what force could be applied, and the danger of injuring himself if he overtaxed his strength was an obvious one, the risk of which he must be held to have assumed."

But appellee contends that, because appellant asked and was given certain instructions after the court had refused its request for a directed verdict, it waived its right to insist thereon, and is now estopped from so doing. Appellee falls into error in this argument and has misapplied the rule of inconsistent positions in the cases cited. We have never held that a defendant who asks a directed verdict in his favor, which is refused, is estopped to insist on it on appeal, merely because he thereafter asks, and is given instructions on the issues submitted to the jury. If he cannot prevent the wreck, he ought not to be estopped from salvaging as much of the loss as possible.

The trial court should have directed a verdict for appellant. The judgment will, therefore, be reversed, and the cause dismissed.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* SHARP.

4-4687

Opinion delivered June 28, 1937.

Gerland P. Patten, C. M. Erwin, Jr., and *Carmichael & Hendricks,* for appellants.

F. M. Pickens, H. U. Williamson and *W. R. Donham,* for appellee.

BUTLER, J. Appeal from a verdict and judgment awarding appellee the sum of $37,500 as damages for personal injuries alleged to have been sustained by reason of the negligence of appellants' employee while appellee was a passenger upon one of appellant's motor buses. The grounds for reversal, in the order presented in appellants' brief, are: (1) that the verdict and judgment are uncertain; (2) error in the admission of incompetent evidence; (3) no causal connection or relation is established between the alleged accident and the damage complained of; (4) lack of substantial evidence to support the verdict; and, (5) that the amount of damages awarded is excessive. It is clear that the third and fourth grounds are the principal ones upon which a reversal is sought, and these are so connected that they will be examined together.

In testing the sufficiency of the evidence to support a verdict the appellate court is controlled by general rules of universal application which have been recog-

nized by this court in a long line of decisions. Among these are the following: that juries are the sole judges of the credibility of the witnesses and the weight to be given their testimony; on appeal, in testing the sufficiency of the evidence, such evidence will be viewed in the light most favorable to the appellee and will be sustained where there is any substantial testimony to support it, although it may appear to the appellate court to be against the preponderance. *St. L. I. M., etc.* v. *White,* 48 Ark. 495, 4 S. W. 52; *Richardson* v. *Cohen,* 113 Ark. 598, 167 S. W. 83; *American Surety Co.* v. *Kinnear Mfg. Co.,* 185 Ark. 953, 30 S. W. (2d) 825; *So. Lbr. Co.* v. *Green,* 186 Ark. 209, 53 S. W. (2d) 229; *East Ark. Lbr. Co.* v. *Moss,* 186 Ark. 30, 52 S. W. (2d) 49; *American Co.* v. *Baker,* 187 Ark. 492, 60 S. W. (2d) 572. These rules are so well-settled that reference to them appears unnecessary, but are noticed because of the earnest argument of learned counsel for appellants that because of modern trends this court would be justified in disregarding them where it appears that the preponderance of the testimony is against the verdict or that the supporting testimony is improbable and unreasonable. The argument of counsel is not without merit and cases sometimes arise in which we might desire that the rules governing us were otherwise, but nevertheless we have no right to alter or amend them. This court, through its history, has consistently adhered to these rules although their application may have, at times, worked a flagrant injustice. Counsel say: "There is no excuse for the highest courts of the country following a blind and unreasonable precedent." In the first place, we think the precedent is founded upon fundamental law governing jury trials and, in the second place, the remedy lies with the lawmaking body and not with us; lastly, ample protection is given litigants by the power inherent in trial courts to set aside the verdict of the jury where the preponderance of the evidence is contrary to it. That trial courts fail to perform this duty and to exercise this power is no reason for a usurpation by the appellate court.

In the case of *Missouri & N. A. Ry. Co.* v. *Johnson,* 115 Ark. 448, 171 S. W. 478, the court, in its statement, said: "The appellee was employed by the appellant railroad company as a brakeman and was injured while engaged in switching a freight train * * * by stepping on an unblocked frog * * *. The great preponderance of the evidence appears to be that appellee was not injured in the manner testified by him, indeed, that he was not injured at the frog at all, and one of the grounds upon which we are asked to reverse this case is that the evidence shows that it was physically impossible for appellee to have been hurt in the manner testified to by him." In commenting upon the evidence above noted, the court said: "We will not reverse the judgment because of the insufficiency of the evidence, for, as we view this evidence, it is not physically impossible that appellee was injured as the result of stepping into an unblocked frog, although it is highly improbable that the injury was caused in that manner."

We test the evidence on behalf of the appellee by the rules stated. The verdict depends largely, almost entirely, upon the testimony of the appellee, alone, which is to the effect that on the afternoon of August 12, 1935, he boarded appellants' bus as a passenger to be transported from Newport to Russell, Arkansas. As he was in the act of leaving the bus upon reaching his point of destination, the driver opened the door and, before appellee could alight, the driver jerked the door shut striking him upon the head and knocked him backward over and against some other object inflicting injury. The only remark he made was, "You liked to have got me that time," and, without further comment, got off the bus and walked about three miles from Russell to the home of his son-in-law. At the time he received the injury he felt the force of the blow, and, as he expressed it, "It addled me," but he did not realize that he had any injury which would produce any serious consequences. He told his son-in-law of the incident, and the next morning went with his daughter and others in an automobile to Searcy. While there in the office of a physician with

another who required the attention of the physician, he made some complaint of unease and lay for a time upon a couch in the doctor's office, but did not consult him. That afternoon he returned to the home of his son-in-law, and the next morning went to Russell—a distance of three miles—on a wagon drawn by a team of mules and stood beside the driver on a wooden frame all the way. After reaching Russell he returned by bus to Newport. On the day following, August 14, he went to see Dr. Stephens, a regular practicing physician, for examination. To this doctor he detailed the occurrence of the evening of August 12, and, on examination, the physician found an injury on appellee's back from which it is claimed total and permanent injury has followed.

On the question of the incident testified to by appellee as having occurred as he was in the act of alighting from the bus, and its causal connection with his present condition, counsel for appellants call attention to the lack of corroboration of appellee's testimony. The corroboration is not altogether lacking, though slight. A certain witness testified that he was a passenger on the bus in question on the afternoon of August 12; that he saw appellee on it and noticed him as he was preparing to leave the bus, but that he was paying no particular attention; that when the bus stopped he was looking out of a window for another person whom he expected to see; that at this time he heard a commotion in the front of the bus, and, because of it, made some exclamation, but paid no further attention and did not see what occasioned it.

The proof seems to be ample that appellee was in fact a passenger on appellants' bus; that it reached Russell after nightfall, and that appellee was the only person who got off at that point. Counsel further contend that the preponderance of the testimony contradicts the appellee and demonstrates that there was no untoward incident as he got off the bus, and that he was not, in fact, injured by the closing of the bus door or in any other way. There were discrepancies in the testimony of some of these witnesses, and certain facts in con-

nection with the testimony of others from which the jury might well have concluded, as to some, that they were mistaken as to the time when they were on the bus and, as to some others, that the surrounding facts were such as to make it probable that they were not in a position to observe and know what actually occurred. At any rate, the jury and trial court had the benefit of the presence of the witnesses and saw their demeanor upon the witness stand and the jury has accepted the testimony of the appellee as true. It is argued by counsel for appellant that appellee's testimony should be disregarded because it was physically impossible for him to have been injured in the manner he described and, in this connection, both he and counsel for appellee described the manner in which the door was constructed and how it opened and closed, the one contending that, because of its manner of construction, it was physically impossible for the closing door to have struck appellee's head knocking him backward, while the other as seriously contends that appellee's injury, as testified to, happened in a manner both possible and probable. The argument of both go beyond the record. We are uninformed by the evidence as to these matters, and we cannot say that it was physically impossible for the injury to have been sustained in the manner appellee described. It might have been highly improbable that the injury occurred in that manner, but that improbability is no cause for reversal. As is said in *Missouri & N. A. R. Co.* v. *Johnson, supra,* "There is no evidence to show that it was physically impossible."

On the question of "no causal connection or relation between the alleged action and the damages, pain and suffering which appellee claims" attention is called to the following evidence. After appellee had alighted from the bus at Russell at a time when it was dark and raining, persons were standing near to whom he made no complaint of injury and, while taking shelter in a nearby filling station, he made no complaint and showed no evidence of having been injured, but engaged in casual conversation, principally about farming. From

there he walked three miles to the house of his son-in-law and, on the morning after, rode three miles to Russell standing upon a wagon without making any complaint or in any way evidencing physical discomfort, and it was not until the day following, August 14, that he went to a physician for examination. These circumstances were proper for the consideration of the jury both as to whether or not appellee was injured and, if so, the extent of such injury. But we cannot say that they are of such probative force as to justify the conclusions, first, that no injury had been sustained, as claimed by appellant, and second, that there was no causal connection between the accident and his subsequent condition. It is a matter of common knowledge that injuries which are apparently negligible from which no ill effects are immediately felt sometimes result in the most serious consequences; whereas, other injuries, apparently grave, prove, in fact, not to be of a serious nature and the injured person speedily and completely recovers.

The physician who first attended the appellee seems to be one of repute and long experience. He testified that when he first examined the appellee he found him apparently suffering and nervous to the extent that he couldn't stand up very long at a time. Upon his body, there was a discoloration at a certain point near the spine. In about a week, appellee was brought back and appeared to be no better, and in the next day or two witness was sent for to visit appellee at his home where he found him much worse. Witness made a thorough examination, found his vital organs functioning properly, and discovered no cause for his condition except the injury of which he saw the evidences at the time of the first examination. The evidence is undisputed that before, and up until, the time of alighting from the bus at Russell, appellee had been an active and vigorous man and free from disease.

Reverting to the errors complained of, we now notice the contention that the verdict and judgment are uncertain. In giving instruction as to the form of the verdict, the trial court told the jury that if it should

find for the plaintiff the verdict should be, "we, the jury, find for the plaintiff and assess his damages (naming the amount) whatever you believe from a preponderance of the evidence he is entitled to. If you find for defendants, the form of your verdict will be, 'we, the jury, find for the defendants,' * * *." The jury returned the following verdict: "We, the jury, find for the plaintiff and assess his damages at $37,500. (Signed) L. B. Simmons, Foreman." This verdict is incorporated in the judgment which concludes as follows: "It is, therefore, by the court considered, ordered and adjudged that the plaintiff do have and recover of and from the *defendant* herein, etc." Appellee calls attention to the failure of appellants to except to the form of the verdict and judgment and the failure to bring said objection forward in their motion for a new trial. It is certain from the record that, if there is any liability, both the defendants, the corporation and the driver of its bus, are responsible and the verdict was necessarily against both of them. The trial court correctly so instructed the jury. As the judgment must conform to the verdict (§ 6271, Crawford & Moses' Digest) it follows that the omission of the letter "s" from the word "defendant" must be treated as a clerical error, and there is no uncertainty in the judgment.

The contention that error was committed by the trial court in the admission of incompetent evidence is based upon questions propounded to a certain witness, a Mrs. Tate, on cross-examination. This witness, in her testimony in chief, had testified that she was on the bus when appellee, whom before that time she had never seen, alighted at Russell. She identified appellee, who was lying on a cot in the court room, as the same person she saw alight. She was uncertain as to the date, but fixed it on cross-examination as the day upon which she had cashed certain checks at a bank, and which was two or three days after her daughter had been to a physician, a Dr. Wilson, for treatment. The date was material. There is little, if any, dispute in the evidence relating to the date of appellee's alleged injury, and if the date

when witness rode the bus, when she thought she saw appellee alight, was a different day to that established, then witness is mistaken in her testimony. On rebuttal, the cashier of the bank was called whose testimony showed that no checks were cashed by Mrs. Tate on the 12th of August or on any other day just preceding or succeeding that date. Another witness, called in rebuttal, who had charge of the records in Dr. Wilson's office, testified that these records showed the last treatment of Mrs. Tate's daughter to have been on June 22.

The testimony of the rebuttal witnesses did not tend to dispute the testimony of Mrs. Tate regarding collateral matters, but was material as tending to show whether or not she was, in fact, on the bus at the time when appellee claims to have been injured. There was, therefore, no error in the admission of the rebuttal testimony.

The most serious question for our consideration is that relating to the amount of the verdict. We agree with the appellants that it is excessive and doubtless the result of passion and prejudice. It is not difficult to perceive the evidence which would engender, in the minds of such men as ordinarily compose a jury, a prejudice against the appellants on their contention that the appellee was not, at the time of the trial or previous thereto, suffering any pain, but that his condition was simulated, and this in the face of the undisputed physical fact that he (at the time of the trial) was a mere shadow of his former self and his hands had become deformed (ankylosed) by reason of having held them continuously under his head in an effort to lessen his suffering.

Dr. G. K. Stephens is the physician who made the first examination of appellee after his injury and who discovered the indications of injury near his spine. He testified that appellee grew progressively worse from the time of the first examination, so much so that a short time thereafter he suffered so intensely that opiates were required and it became necessary that he be taken to a sanitarium; that his condition had become no better. This doctor made exhaustive examinations of the appel-

lee, but found no disease of his vital organs, or anything else wrong except the injury to his spine. Witness stated further that appellee's speech is weak and disconnected; that he gives out when he tries to talk, trembles, is easily exhausted and is just a nervous wreck; that his reflexes are exaggerated and that he has suffered constant pain for thirteen months; that his hands are drawn and stiff and, in witness' opinion, he will continue to suffer as long as he lives.

This testimony was corroborated by neighbors of the appellee who saw him at times convulsed by reason of the intensity of his suffering, and by Dr. Justice, appellee's family physician for more than twenty years. This physician testified that he would frequently be called as much as three or four times a day, and at times would find the patient in convulsions. Witness attributed this condition to the injury and said: "Having stayed over him for thirteen or fourteen months, and his not having improved any more than he has, I shouldn't think he will ever be well again."

The testimony of those who had known appellee for a considerable period prior to August 12, was to the effect that he was a man of physical strength and vigor, a hard worker, and apparently healthy; that he was generally regarded as a man of excellent character and of more than ordinary ability as a farmer. The witnesses who saw him after his injury testified as to his change in physical appearance for the worse and his great suffering which they had observed.

The jury accepted the testimony of the foregoing witnesses as true and disregarded that of the specialists who testified that appellee was not suffering at all, but merely pretending. Accepting the testimony adduced by the appellee relating to the nature and extent and probable duration of his suffering, it justifies a large award for pain and suffering.

Appellee was entitled to recover damages for the loss of his earning power as well as for his pain and suffering. As to what his earning power was previous to his alleged injury we have but little evidence. Appellee was asked the following question by his counsel:

"How much did you earn per year before you got hurt?" He answered, "I don't know—some years I made as high as thirty or thirty-five bales of cotton and some years I didn't make so much." This was all appellee's testimony relating to that subject and the only other testimony we discover as to the amount of his earnings is that of a Mr. Causey who stated that he had known the appellee two or three years; that the first year of his acquaintance appellee made a crop on land rented from witness' father; that witness had rented land to the appellee for two years following that; that appellee was a good farmer and a hard working man and produced more crops per acre than others who had the same amount of land; that the land rented to appellee by witness was fertile producing an average of a bale of cotton per acre; that he would work between 25 and 27 acres in cotton and some additional in corn; that the first year he made a good crop, but the second year, on 25 acres to cotton, he made only a little over seven bales; that appellee owns his own team and farming equipment and is a renter and paid him (witness) one-fourth of the cotton made as rent for the land put to cotton; that appellee, from his portion of the crop when he made only seven bales, paid the witness in full for advances and there remained for his credit a balance for which he was given a check. Witness did not remember the amount of the check, but it was not as much as $300.

The evidence fails to show the expense incurred by appellee, independent of his own work, in producing and harvesting his crops. Therefore, it is more or less uncertain what he might have been reasonably expected to earn during his life expectancy which appears to have been slightly above 15 1/3 years as shown by mortuary tables.

It seems likely that appellee's condition will require the frequent visits of physicians. He has already incurred an indebtedness for such services in a considerable sum, owing one physician six or seven hundred dollars. Another physician who has been in attendance upon him must also have a considerable bill. The proper amount of damages is a question of much concern to us.

The courts have not laid down, and, as a matter of necessity, cannot fix a general rule for the awarding of damages for pain and suffering. The amount of damages must depend upon the circumstances of each particular case—that which would be excessive in one case would be wholly inadequate in another, and yet there must be a limit to the award for damages. It is our conclusion that in any event an award in any sum in excess of $25,000 would be excessive. If the appellee, within fifteen days, will enter a remittitur for $12,500, the judgment will be affirmed; otherwise, the judgment will be reversed and the cause remanded for a new trial.

SMITH, C. J., dissents.

YOUNG *v.* BARDE.

4-4680

Opinion delivered June 28, 1937.

J. W. Nance, for appellant.

J. Wesley Sampier and *Duty & Duty,* for appellees.

BUTLER, J. The appellees instituted this action to cancel a deed purported to have been executed by Nancy C. Hileman conveying to her daughter, Edith Hileman, and the appellant, Ed Young, the farm upon which she was living, and the personal property owned by her. It was alleged as grounds for cancellation that the deed was never delivered to the grantee, Edith Hileman, and

that she had no knowledge of its execution until after the death of the grantor; that in truth the deed was executed for the purpose of conveying the said property to Edith Hileman, and that it came into possession of the appellant who entered his name after that of Edith Hileman as one of the parties grantee, and that the alteration was in effect a forgery; that the deed as altered was wholly without consideration and void, the same not having been delivered by the grantor in her lifetime.

The appellant answered denying the allegations of the complaint, and the case went to trial upon the complaint and answer. Before the conclusion of the trial, appellees amended the complaint so as to allege the appellant fraudulently procured the insertion of his name in the deed as one of the parties grantee. Edith Hileman disclaimed any interest in the property under the alleged deed and, at the conclusion of all of the testimony, the trial court found as follows:

"That there was not a sufficient delivery of the deed dated January 10, 1933, during the lifetime of the grantor, and that the grantee, Edith Hileman, had no knowledge of the execution of such deed until after the death of the grantor, who was the mother of the said defendant, and that she now refuses to accept said gift.

"That the defendant, Ed Young, was and had been for 13 years in the home of the deceased, and was the only man in said home and was the confidential adviser of the deceased and her daughter, Edith Hileman, for a period of thirteen years prior to the death of the said Nancy C. Hileman. That the deceased was old, feeble and in ill health at the time of the execution of said deed and until her death, and that she had no advice or counsel about the transaction except that of the defendant, Ed Young; that the defendant, Ed Young, kept the execution of said deed a secret from his co-grantee, Edith Hileman, and from the other children, the plaintiffs in this case, all of whom were congenial and on intimate terms with their mother. That their mother had assured them that she was leaving the property to her daughter, Edith Hileman, which was agreeable to all of them. That

the circumstances of the execution of said deed and the control of the same thereafter, and the secrecy surrounding the transaction, and the condition of the deed itself, though not sufficient to warrant a finding that the name of Ed Young was added to said deed as a forgery, do amount to a constructive fraud.

"That the attempted gift of the personal property is void because no delivery was made of said property during the lifetime of the donor, and because the defendant, Ed Young, paid $50 January 1, 1935, and $20 April 10, 1935, after the execution of said deed, on a note he owed the donor, and which was supposed to have been given in the said deed to himself and Edith Hileman."

In accordance with the above findings a decree was entered canceling the deed from which this appeal has been prosecuted. It is contended (1) that the trial court erred in allowing the amendment to the complaint. In the abstract and brief furnished us by the appellant we fail to discover any objection interposed, at the time of the court's action, or that he pleaded surprise and asked for a continuance. The evidence relative to the alleged fraudulent conduct of appellant was pertinent to the allegation of forgery, and the amendment to the complaint did not constitute a new cause of action, but served to allege another and related reason for the cancellation of the deed. Under our code of pleadings, it is always permissible to allow amendments to conform to the proof where such amendment does not change the issues and especially where there is no motion for a continuance to meet the evidence upon which the amendment is based.

Since the trial court has found that the circumstances surrounding the execution of the deed and the subsequent conduct of appellant with relation thereto are not sufficient to establish a forgery, we deem it unnecessary to comment upon that phase of the evidence. Nor do we deem it necessary to set out the testimony relating to the issue raised by the amendment other than to say that the conclusion of the lower court is supported by a preponderance of the evidence.

(2) The evidence clearly establishes the most intimate and confidential relationship between appellant and Mrs. Nancy C. Hileman and her daughter, Edith Hileman. It is, also, undisputed that there was no consideration for the deed in money paid or services rendered. Therefore, the purported conveyance was, if anything, a mere gift, and, under settled rules, it was the duty of appellant to establish that the same was free and voluntary by convincing testimony. The general rule is that where special trust and confidence exists between the parties to a deed, the gift to the party holding the dominant position is *prima facie* void. In *Gillespie* v. *Holland,* 40 Ark. 28, 48 Am. Rep. 1, cited by appellees, the court announces the doctrine from which there has been no deviation, as follows: "It has been the well-established doctrine in equity that contracts, and most especially gifts, will be scrutinized with the most jealous care when made between parties who occupy such confidential relation as to make it the duty of the person benefited by the contract or bounty, to guard and protect the interests of the other and give such advice as would promote those interests. And this is not confined to cases where there is a legal control. * * * They are supposed to arise wherever there is a relation of dependence or confidence, especially that most unquestioning of all confidences which springs from affection on one side and a trust in a reciprocal affection on the other. The cases for the application of the doctrine can not be scheduled. They pervade all social and domestic life. The application may sometimes be harsh, and one might well wish that an exception could be made, but there is a higher policy which demands that it should be universal. The language of Lord Kingsdownein, *Smith* v. *Kay,* 7 H. of Lords Cases 750, has been considered striking. He says that relief in equity will always be afforded against transactions in which 'influence has been acquired and abused, in which confidence has been reposed and betrayed.' "

The facts as found by the trial court and established by a preponderance of the evidence calls for the application of the doctrine, *supra,* and justifies the decree which is, therefore, affirmed.

WASSON, BANK COMMISSIONER, *v.* GREIG.

4-4709

Opinion delivered June 28, 1937.

[redacted]

R. S. Wilson and *Elmer A. Riddle,* for appellants.

Partain & Agee, for appellees.

SMITH, J. Wasson, as bank commissioner, recovered judgment on January 30, 1934, against J. K. Greig for $2,623.86, and on May 27, 1935, brought this suit, under the authority of § 4874, Crawford & Moses' Digest, to set aside, as in fraud of creditors, an assignment by Greig to H. E. Smith, his brother-in-law, of a devise to Greig under the will of his uncle. The will was filed for probate January 23, 1935, and the assignment was executed the same day. It recited that it was made for the consideration of $3,000. On June 19, 1935, Eva Chitwood and Marjorie Chitwood, a minor, by her father as next friend, filed an intervention, setting up the fact that they had recovered judgment on July 7, 1935, for $500 against Greig, and they asked the same relief prayed in the original complaint.

On May 21, 1935, a *nulla bona* return was made upon an execution issued on the Wasson judgment. In addition to this evidence of insolvency Dell Miller, the cashier of the bank of which Greig had been a customer, testified that Greig had been in the commission business, and when that business was closed the bank had a statement of Greig's business, according to which Greig was practically broke, as the witness expressed it. Witness did not know of any acquisition of property by Greig except the bequest under his uncle's will, and no check was passed through the bank evidencing the payment of

money to Greig by Smith. Witness had no knowledge of Greig having been regularly or gainfully employed after the dissolution of Greig's business. Witness had talked with Greig before the rendition of the judgment in Wasson's favor, here sought to be enforced, and Greig had told him that he was unable to pay the debt, and had no money in sight with which to pay.

No testimony was offered by Greig to sustain and support the assignment to Smith. No showing was made as to the manner of payment of the $3,000, nor was any testimony offered to overcome the *prima facie* showing of insolvency.

The law of the subject is well settled, and many cases cited in the brief of appellant have quoted and approved the following statement of the law appearing in the case of *Wilks* v. *Vaughan,* 73 Ark. 174, 179, 83 S. W. 913: "It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and when they are voluntary, they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors."

It is true the assignment recites a consideration of $3,000; but no proof was offered that it was in fact paid. In the case of *Leonhard* v. *Flood,* 68 Ark. 162, 56 S. W. 781, Judge Riddick said: "It has been several times decided by this court that when the creditors of a vendor attack his conveyance as fraudulent, and introduce proof making out a *prima facie* case of fraud against the vendor, the burden of showing a consideration is on the vendee, and that in such a case the recital in the deed is regarded only as *res inter alios acta,* and not competent to prove a consideration as against the creditor of the vendor."

We conclude, therefore, that the court below was in error in dismissing the complaint and the intervention as being without equity, and that decree will be reversed and the assignment will be declared void as being in fraud

of creditors, and the court will adjudge the rights of the parties accordingly.

REID *v.* STATE.

Crim. 4038.

Opinion delivered June 28, 1937.

H. U. Williamson and *Fred M. Pickens,* for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Jackson county under § 2832 of Crawford & Moses' Digest for failure to pay over $22,682.02 of public funds, belonging to said county which he collected in his official capacity of collector of taxes during the year 1936 for taxes of 1935 which became due and payable during the year 1936. As a punishment for the crime he was adjudged to serve a term of five years in the state penitentiary, from which judgment of conviction he has duly prosecuted an appeal to this court.

His first assignment of error is that the indictment does not sufficiently charge the crime of receiving and failing to pay over public funds in his capacity of collector of taxes of said county under § 2832 of Crawford & Moses' Digest.

The indictment is couched in the exact language of the indictment returned against Gurley in the case of *Gurley* v. *State,* 164 Ark. 397, 262 S. W. 636. This court ruled in the Gurley case that the indictment was sufficient to charge the crime and was impervious to attack on demurrer.

Appellant, also, assigns as reversible error the insufficiency of the evidence to sustain the allegations of the indictment. The accounts and books of the collector were audited by two accountants from the state auditorial department of the state of Arkansas. In auditing his accounts he was charged with all the taxes he collected for the county amounting to $134,348.91 and credited with $111,666.89, the total amount paid over by him to the county treasurer and his successor in office, leaving a balance due the county of $22,682.02. When shown the audit he admitted that the auditors had made a fair audit and told them he knew he was about $30,000 short, but while he had not paid the county he had the money with which to pay the amount of the shortage shown by the audit. When he was checked out of office he lacked $22,682.02 of having enough with which to pay the county. The auditors testified that the audit was correct and it was introduced in evidence as a part of this record. Then, according to the undisputed evidence, he collected $22,682.02 more than he paid over. The record is silent as to what became of the money. The only reasonable inference is that in omitting or failing to pay it over to the county and in not having it when checked out, he had converted it to his own use. The audit reflected that in one instance he checked out of his collector's account on a counter check cash in the sum of $1,500. There can be no question that he got this amount for his own use out of taxes he had collected for the county. There is ample evidence in the record to sustain the charge in the indictment.

The judgment of conviction is affirmed.

BAY SPECIAL CONSOLIDATED SCHOOL DISTRICT NO. 21 *v.* HALL.

4-4773

Opinion delivered July 5, 1937.

[redacted]

Roy Penix, for appellants.
Wallace Townsend, for appellee.

McHaney, J. Appellee, a property owner, brought this action against appellant district and its board of directors to enjoin them from issuing $20,000 of 4½ per cent. bonds of the district to refund $15,000 of 6 per cent. bonds issued in 1928, and $5,000 of new bonds, $1,400 of which would be used to make repairs to, and purchase equipment for, the school building, and $3,600 of which was to replace money diverted from the general operating funds to the building fund in 1934, which caused a deficit of $3,600 in the amount of the operating funds. The facts are that the district has an indebtedness of $15,000 of 6 per cent. bonds issued in 1928. In 1934, with the help of the W. P. A., the district, at a cost to it of $5,838.37 for materials, built a school building. It gave its warrants for this amount and these warrants were paid out of the district's general funds for the operation and maintenance of its schools, with the result that it has a deficit in its general funds of approximately the cost to it of the building. When the district receives its tax funds annually, this deficit is temporarily wiped out, but in the operation of the school this deficit reappears and increases from month to month until along in mid-term it is practically the full amount of the cost to it of the building. The 1937 flood damaged the building and equipment and it is now necessary to repair and purchase additional equipment to the extent of $1,400 and the district desires to sell bonds in addition to the $15,000 of refunding bonds to pay the cost of the repairs and equipment and to put $3,600 in its operating fund to cover said deficit. Appellee filed a complaint alleging these facts and charging that the additional $5,000 in bonds, sought

to be issued, would be illegal and void and prayed that the district be enjoined from issuing same. Appellant answered, admitting the material allegations of the complaint, denying the illegality of the proposed issue and alleging that it now has outstanding warrants unpaid against its funds amounting to $3,600 and that the reason for the deficit was because of the diversion of its general funds to the building fund in the sum of $5,838.37, and that the purpose of the proposed issue of the new bonds is to replace the money belonging to the general operating funds and to make repairs and purchase equipment in the amount of $1,400. The complaint also alleged and the answer admitted that appellants were advertising an election to be held on May 29, 1937, for the purpose of voting on a bond issue and on a 7-mill continuing tax levy on the property in the district beginning with 1938 to pay the principal and interest on the proposed refunding bond issue of $15,000, and $5,000 additional bonds. It is conceded that the election was held and that the property owners unanimously voted for the bond issue of $20,000 and the continuing levy of 7 mills. The appellee interposed a demurrer to appellants' answer on the ground that it did not state a defense to the complaint. The court overruled the demurrer in part, holding that the $15,000 proposed refunding issue and a new issue of $1,400 for repairs and equipment were valid and within the power of the district. It sustained the demurrer as to $3,600 proposed issue to cover the deficit in the general operating funds and held valid and binding the result of the election voting a 7-mill continuing tax levy for the security of $16,400 in bonds although the property owners voted for said continuing levy for a $20,000 bond issue. From this decree there is an appeal and a cross-appeal.

Disposing of the cross-appeal first, cross-appellant contends that the bonds authorized to be issued by the decree of the court cannot be combined into one issue. He concedes that the district has power to issue refunding bonds to take up its outstanding bonds and it is conceded that it has power to issue new bonds for the purpose of making repairs and equipment in the sum of $1,400, but it is said it cannot combine the two issues into

one bond issue. We think the cross-appellant is wrong in this contention. Section 72 of act No. 169 of 1931, provides that refunding bonds shall state on their face that they are refunding bonds, and it would seem to be a simple matter to so designate them although at the same time the district might issue additional new bonds. That part of the proposed issue could be handled just as any other refunding bond issue and the fact that they would be a part of a larger issue would not, in our opinion, change their character as refunding bonds nor deprive them of the benefit of the continuing millage voted for their payment.

It is, also, contended by cross-appellant that the building fund voted on May 29, 1937, and the continuing levy therefor, are invalid because not responsive to the election. In other words, because the people voted for a $20,000 bond issue and a continuing levy of 7 mills, it is said that the district cannot now issue $16,400 in bonds with the continuing levy of 7 mills. Cross-appellant is wrong in this contention, and we think the principle announced in *Parsons* v. *Barnett*, 189 Ark. 1057, 76 S. W. (2d) 83, is controlling here. We there said: "It is further contended that the electors voted for a bond issue for $112,500, whereas the board finds it necessary to issue only $110,500 in refunding bonds. Since the amount to be issued is less than the amount authorized, certainly this is to the advantages of the district and does not prejudice its interest in any way." Here, the electors authorized the directors to issue $20,000 in bonds. By a proceeding in court, it has been determined that only a part of this amount would be legal, so the principle announced in that case rules this.

The principal question in the case is the one raised on direct appeal and that is the right of the district to sell bonds to replace the deficit in its general funds, from which it was diverted for building purposes. We think the court correctly held that the district may not do this, and that the point is ruled by the decision of this court in *Berry* v. *Sale*, 184 Ark. 655, 43 S. W. (2d) 225. We there said: "In the present case, the district might have issued bonds in the sum of $58,500, which represented the

outstanding indebtedness of the district at the time of the passage of the act; but the district did not choose to do so. It paid the sum of $11,093.89, and this had the effect of extinguishing that much of the outstanding indebtedness. Consequently, the district would only have power and authority under the act to issue bonds for the remaining indebtedness, which was outstanding as of March 25, 1931. If it had paid all of the indebtedness of the district out of the tax moneys due the district from the collection of tax money due the school district, it would not have had any authority to issue bonds at all. Having paid only a part of the outstanding indebtedness of the date of March 25, 1931, it has the power and authority to issue bonds in the principal sum of $58,500, lessened by the sum of $11,093.89, which has been paid since that date."

So, here, appellants could have issued bonds in the amount of $5,000 to defray the cost of the new building. They did not do so, but paid the cost of its building out of its general funds. That indebtedness has been paid. It is no longer a debt for material and supplies in the construction of the building. The indebtedness now existing is represented by warrants issued for teachers' salaries and other expenses of operating the school. There is nothing in the statute which prohibits the payment of such indebtedness from its general funds, and having done so, we are of the opinion that the debt is extinguished and bonds cannot now be issued under the guise of an indebtedness for building.

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

LION OIL REFINING COMPANY *v.* BOYD.

4-4716

Opinion delivered July 5, 1937.

John M. Shackleford and *Tom Kidd,* for appellant.

Alfred Featherston, for appellee.

GRIFFIN SMITH, C. J. Appellee was given judgment for $600 on a jury's verdict based upon findings that he stumbled and fell over an iron intake pipe in the sidewalk between J. L. Webb's filling station and gasoline pumps on the outer, or street, side of the Webb station at Delight, sustaining painful injuries to his back; that the intake pipe was owned by appellant; that it was 2½ inches in diameter and protruded 4½ inches from the sidewalk, and that maintenance of the pipe in the position and manner complained of was an act of negligence upon the part of appellant. It was shown that the accident occurred at night after lights at the filling station had been turned off, with the result that incidental illumination from an adjacent drug store and a distant street light was insufficient to reveal to appellee the presence of the obstruction.

Appellant's answer was in part as follows:

"Defendant denies that it is a corporation, doing business in the state of Arkansas, and maintaining a place of business at Murfreesboro, Pike county, operated by H. W. Tull as its agent; denies that it also main-

tains and controls two gasoline pumps, underground tanks, and pipes used as an intake and connecting pipes for same at the filling station operated by J. L. Webb on the south side of Antioch street in the town of Delight in Pike county, Arkansas.''

Although there is a denial by appellant that it maintained and controlled the intake pipe, there is no denial of ownership. Neither is there a denial that H. V. Tull is its agent in Pike county.

Appellant went to trial without questioning the sufficiency of service, and appellee called Tull as a witness. He testified that he was agent for the Lion Oil Refining Company and that the company owned the underground tank and intake pipes at the Webb Filling Station, having acquired them from the Standard Oil Company. His testimony in this respect was directed to his knowledge of ownership of the property, and the fact of his agency was merely incidental, or explanatory.

Appellant urges that the court erred in giving appellee's instructions Nos. 1 and 6, and in refusing appellant's instruction No. 6. It is also urged that an instructed verdict for the defendant should have been given.

Existence of the offending pipe near the center of the sidewalk is established. Ownership by appellant is not denied. The fact of ownership by appellant was testified to by H. V. Tull. Appellee's instruction No. 1 reads as follows:

''You are instructed that if you find from a preponderance of the evidence in this case that the defendant through its servants and agents maintained and kept an intake pipe to an underground gasoline tank, which intake pipe protruded through the sidewalk in front of the Webb filling station at Delight in such a manner as to cause a pedestrian using such sidewalk to stumble and fall over said protruding intake pipe, and be injured thereby; and you further find from a preponderance of the evidence that the presence and danger of this intake pipe was known to the defendant, or by the exercise of reasonable diligence upon its part could have been known to it, and that plaintiff in the exercise of

ordinary care for his own safety without carelessness on his part did trip over said intake pipe and fall and by such fall was injured, then it will be your duty to find for the plaintiff."

It is insisted that the instruction is erroneous because there was no evidence that appellant maintained the intake pipe, and that there was no evidence that the pipe was in fact in the sidewalk. On the question of location—that is, sufficiency of proof that the area used in front of the filling station and from which the pipe protruded formed a part of the sidewalk—we think the objection is not well taken. Plats filed as exhibits "A" and "B" to the testimony of O. A. Owen, a contractor at Delight, show the various locations, with measurements, and this testimony is not disputed.

J. L. Webb testified that he owned and operated the filling station in question, and that land conveyed in his deed extended to Antioch street, but that he did not own the tanks or intake pipes. "When I first went there, there was one tank, and now there are two. I have a cover that extends out over the concrete and it is made for a drive-in station. It was concreted in 1930 and since then there has been no change made. I could not tell you whether the Standard Company owns the pipe or tanks. I have been using Lion Oil Company products since May, 1936. This company has never made any changes around there." [The accident is alleged to have occurred July 25, 1936.]

The most difficult question of determination is whether, under the evidence, the jury was justified in finding that appellant maintained the intake pipe. Taking the testimony as a whole, it is shown that an area twenty feet wide and forty-eight feet in length in front of the garage was used as a "drive-in." On the street side in approximate alignment with the thoroughfare, there were two gasoline pumps, 8½ feet apart, and on the west and east sides of the pumps were piers, spaced twelve feet apart. Directly south of the west pier, at a distance of 2½ feet, an intake pipe had been set in the concrete, and three feet southwest of the east pier a second intake pipe likewise protruded from the concrete.

The latter was the pipe appellee stumbled over. The record does not clearly show whether all of the area between Antioch street and the sidewalk was concreted, but that is immaterial. It is satisfactorily established that the north eight-foot strip of the Webb station area was used as a sidewalk, and that the intake pipe was in that part used by pedestrians.

Although appellant's interest in the property related only to its utility in connection with storage and sale of its gasoline, and appellant did not, in the ordinary sense of the term, "maintain" the pipe by any process of repairing, or by original installation, it did use these owned facilities as a means to an end. The testimony shows that persons other than appellee, in walking on the sidewalk, had stumbled over the pipes. There is no proof that this had been brought to the attention of appellant during its brief period of ownership. However, ordinary experiences and casual observation should have suggested to appellant the possibility of danger to pedestrians, and this danger would, of course, be intensified at night, in the absence of sufficient light.

The objection offered to appellee's instruction No. 6 is that there was no testimony that the defendant exercised any control over the filling station or the intake pipes, and no testimony that appellee had been invited by appellant to use the sidewalk. The mere fact that the concreted area used by pedestrians was a sidewalk constitutes a continuing invitation to use it for that purpose, and he had this privilege as a matter of right. The question of appellant's control over the pipe has already been discussed.

Appellant requested instruction No. 6, as follows:

"You are instructed that the defendant, Lion Oil Refining Company, did not own or maintain or have control of the premises on which the pumps and fill pipes thereto were located, but that these premises were under the control of James L. Webb and if through any negligence on the part of the same James L. Webb the plaintiff was caused to fall and be injured as alleged,

then this defendant, Lion Oil Refining Company, could not be responsible for any negligence of James L. Webb and your verdict will be for the defendant."

By this instruction the court was asked to tell the jury that appellant would not be liable unless it owned or maintained or had control of the premises on which the pipe was located. The court was further asked to tell the jury, as a matter of fact, that the premises were under the control of J. L. Webb. There is evidence to show that the underground tanks and the pipes in question were owned by appellant, and that appellant had access to them, and that they were used in the regular course of appellant's business for the mutual convenience and profit of appellant and Webb. The instruction was properly refused.

In *Standard Oil Company of Louisiana* v. *Hodges,* we said:

"We know of no duty resting upon pedestrians traveling on sidewalks constructed for their use to keep a lookout for protruding pipes negligently maintained therein by others and especially for small pipes protruding only two and one-half inches above the walkway. Of course, if the obstruction had been large enough to attract the attention of any one passing along such a duty may have rested upon those using the walkway."

The same rule of law is applicable to the instant case. The only material difference is that the pipe over which the appellee stumbled in the Hodges case was smaller than that which occasioned appellee's injuries in the appeal now before us. In the Hodges case the accident occurred in daytime; here, appellee was using the sidewalk after dark.

The judgment is affirmed.

THE NATIONAL RESERVE LIFE INSURANCE COMPANY
v. COLE.

4-4710

Opinion delivered July 5, 1937.

Pryor & Pryor and *Stone, McClure, Webb, Johnson & Oman,* for appellant.

Partain & Agee, for appellee.

GRIFFIN SMITH, C. J. The question presented by this appeal is whether accidental death benefits of $2,000 provided for in a supplement attached to and forming part of policy No. 8387 on the life of Jack Mayfield Cole were intended to, or by reasonable construction did, merge with and become a part of the automatic extended insurance provision contained in the principal policy.

The principal policy is for $2,000. Premiums due May 21, 1934, were paid, extending the policy and supplement to May 21, 1935, but premiums due May 21,

1935, were not paid. The assured was injured August 25, 1935, by accidental means, and on September 4, 1935, died as a result of such injuries. Appellant admitted liability on the life policy for $2,000 with the explanation that when the premium due May 21, 1935, was not paid within sixty days, the policy automatically became extended life insurance for a period substantially beyond the assured's death. It was contended by appellant, however, that when the separate annual premium due on the supplemental policy defaulted, liability under the supplement, by its express terms, ceased, and such additional protection did not become a part of the extended contract.

The application reads: "I hereby apply to the National Reserve Life Insurance Company for a $2,000 plan ordinary life nonparticipating [policy] [with] double accident death benefit. Policy if written, unless otherwise provided for, shall bear the date of this application."

The consideration recited in the body of the principal policy was payment in advance of an annual premium of $29.56.

The supplement, in consideration of an additional annual premium of $5, contains the following provision: "If the beneficiary shall become entitled to indemnity on account of the death of the insured under the above policy, and if such death shall have resulted within ninety days thereafter from bodily injuries caused directly, independently and exclusively of all other causes by external, violent and purely accidental means * * * the company will pay the sum of $2,000, in addition to the payments provided for in said policy, provided said policy and this supplement are in force and all premiums are paid * * * *Expire.* This supplement shall automatically expire when the policy to which it is attached becomes paid-up or when premium payments are discontinued by the insured; or when the policy is maintained in force under disability supplement or when the insured becomes sixty years of age."

Paragraph three of the principal policy recites an agreement for loans, on certain conditions, to pay pre-

miums. Under "Benefits and Provisions" there are options of which the assured may take advantage after premiums have been paid for three full years.

Option (a) provides that, with respect to default after the third annual premium has been paid, then, upon written request of the assured, the company will grant paid-up life insurance of a reduced amount payable at the same time and under the same conditions as the policy would yield if kept in full force, with increasing loan or cash surrender values; or (b) "Upon due surrender of this policy by the insured or the owner, the cash surrender value will be paid in cash and the insurance terminated. The cash surrender value shall be equal to the reserve at the date of default for the face amount of this policy, computed according to the American Experience Table of Mortality with interest at the rate of 3½ per cent. per annum, less an amount having a maximum of one and one-half per centum of the sum insured at the end of the third policy year, and decreasing annually thereafter. Beginning at the end of the tenth policy year the cash surrender value shall be equal to the full reserve. Any indebtedness to the company on this policy existing at the time of the surrender shall be deducted from any such cash surrender value; or (c), if no other nonforfeiture benefits shall be elected by the insured within two months from the due date of the premium in default, the company will grant extended insurance reckoned from said date, without participation in the earnings and without the right to loans, for an amount equal to the face of this policy."

Option "c" is referred to in the policy as "Automatic Extended Insurance."

It is further provided that the extended insurance "will be such as the cash surrender value obtainable under paragraph (b), less any indebtedness due the company, will purchase when applied as a net single premium at the attained age of the insured on the mortality and interest basis as stated herein."

Table "A" on page two of the policy shows by specific enumeration the benefits on each one thousand dollars.

At the end of the eighth year (in the instant case May 21, 1935) the assured, having defaulted on his premiums, could have procured paid-up insurance for $304; or he could have borrowed $100; or he could have surrendered the policy and received $100 in full settlement. To exercise either of these options there was the requirement that an affirmative action be taken; the assured's preference must have been expressed in writing.

But—

As an additional privilege reserved to the assured, he had the right to remain quiescent. He had the privilege of silence. He selected a policy or contract under the terms of which the net accumulated reserve would be used as a single premium in the purchase of extended insurance. The amount of such insurance privilege varied from year to year, and its values were enhanced by the payment of premiums and the lapse of time.

As an essential or requisite to the determination of optional or automatic rights—as a basis from which these rights would be computed—the contracting parties stipulated that Table "A" should control, and this table provides what the policy values shall be for each one thousand dollars of insurance.

It now becomes necessary to determine whether the face of the policy is $2,000 or $4,000; or, admitting the face value to be $2,000, does the increased sum become a part of the general contract and draw to it the optional and automatic values, irrespective of provisions in the supplement that accidental death benefits automatically expire when the policy to which it is attached becomes paid up, or when premium payments are discontinued by the insured?

Appellee says: "The face of the policy, of course, is $2,000 if death results from ordinary causes, and is $4,000 if by accidental means. * * * It is clear that the cash and loan value was far more than ample to keep the whole policy in force, and further that by express terms of the policy, in default of any election by the insured as to an option, same would be extended for the full face amount for a period of almost seven years. * * *

By no stretch of the imagination could it be said that the additional payment for accidental death was not a part of the face of the policy issued upon the application." (Citing *Missouri State Life Ins. Co.* v. *Miller,* 163 Ark. 480, 260 S. W. 705; *Pfeiffer* v. *Missouri State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600; *Security Life Ins. Co.* v. *Matthews,* 178 Ark. 775, 12 S. W. (2d) 865; *Illinois Bankers Life Ins. Co.* v. *Wilken,* 187 Ark. 337, 59 S. W. (2d) 1046; and *Metropolitan Life Ins. Co.* v. *Stewart,* 188 Ark. 903, 68 S. W. (2d) 1017.)

It is our opinion that the face of the policy is $2,000. This limitation appears on the first page of the contract in this language: "If death occurs while this policy is in full force and effect, as provided herein, the amount payable as face amount shall be $2,000." The supplement refers to "the above policy" as No. 8387, and provides that if death be caused by accidental means, the company will pay the sum of $2,000 "in addition to the payments provided for in said policy." The application called for "An ordinary nonparticipating life policy" for $2,000, with double accident death benefit. The accident benefit feature required an additional annual premium of $5, and became nonoperative if such premium should not be paid within the period of grace. While the two papers will be read together, and in so far as possible will be construed together, effect must be given to the independent features of each, and there is not any language to justify a finding that the face of the policy is $4,000.

The policy provides, and the plan under which it is written clearly shows, that paid-up insurance, and extended insurance, may be *purchased.* In each instance the amount so purchased, or the term of extension, is limited to the cash surrender value. In the Table of Values a paid-up policy for $304, under the agreement of the parties, was equivalent to extended insurance for six years, 310 days. If the insured had lived after defaulting in premium payments, it could hardly be urged that his accumulated reserve would purchase paid-up insurance for $608, the amount convertible under a $4,000 policy. The supplemental contract negatives this

construction with a provision that it shall automatically expire "when the policy to which it is attached becomes paid-up."

In Cooley's Briefs on Insurance, vol. 4, pages 3818-19, it is said: "In computing the amount which is available for the purchase of extended insurance, the premiums paid are taken as the basis for determining the net value."

The "net value" of a policy is equal to the reserve, and means that part of the annual premium which, according to the American Experience Table of Mortality, must be set apart to meet the company's obligations to its insured.

Appellant, in treating appellee's insurance as extended, acted in obedience to the contract. The kind of insurance appellee would be entitled to if premiums were not paid was set out in the policy, and appellee retained the policy and at all times was charged with knowledge of its terms. The right reserved in his behalf was predetermined as a benefit to prevent forfeiture in the event he should fail, intentionally, by force of circumstances, or through oversight, to meet his premium obligations. All of appellee's accumulated reserve, less a $60.00 loan, was applied as a single premium to purchase extended insurance. The insurance so purchased *was paid-up* for the full period of the credit, and according to all contractual intendments the policy to which the supplement was attached became paid-up. No premiums were thereafter due, nor could such policy, at any time during its term, or at the expiration thereof, be converted into insurance of any other kind. The transaction, with respect to obligations other than payment at death, or cash surrender value, was at an end, and the assured had nothing more to do.

Appellee insists that the assured had a right to rely upon the plain provision of the policy, and says that "The company notified him of nothing to the contrary." The insurer is not required to give the insured notice to make an election upon his failure to pay a premium. Cooley's Briefs on Insurance, vol. 4, p. 3815.

It is true that the terms "extended insurance," and "paid-up insurance" are distinct, but each *is* paid up, as was the principal policy in the instant case.

In *New York Life Ins. Co.* v. *Moose,* 190 Ark. 161, 78 S. W. (2d) 64, where a life and disability policy provided that upon default in payment of the annual premium, the policy should be continued automatically as temporary insurance from the date of default for such term as the policy's cash surrender value, less any indebtedness thereon would purchase, unless within three months from default insured exercised one of two options, either to take paid-up insurance or the cash surrender value of the policy, it was held that, "on failure to exercise either of these options, the insured was automatically limited to temporary insurance for a term which the cash surrender value would purchase."

We hold, therefore, that the face of the policy was $2,000; that the double indemnity supplement, while a part of the primary contract, contained independent or severable provisions not in conflict with provisions of the principal contract, but operating while the supplemental premium was being paid; that the supplement's values ceased when the policy to which it was attached became paid-up, and that it was paid-up under the extended insurance agreement. The rights of appellee were limited to the face of the principal policy, and since this amount was paid, nothing is recoverable by the instant suit.

Reversed and dismissed.

STATE *v.* MASSEY.

Crim. 4036.

Opinion delivered July 5, 1937.

Jack Holt, Attorney General, *John P. Streepey,* Assistant, for appellant.

BUTLER, J. The appellee was indicted on two counts for burglary and grand larceny. The state relied for conviction upon the testimony of two accomplices who were present and participating in the crime. At the conclusion of the testimony it was the opinion of the trial judge that there was not sufficient corroborating testimony to meet the requirement of § 3181 of Crawford & Moses' Digest, and directed the jury to return a verdict of not guilty, which was done, and a judgment entered discharging the appellee. From this judgment the state has appealed under §§ 3410-11 of Crawford & Moses' Digest. The purpose of this statute is to present questions for this court's decision on the criminal law so that it may serve to secure the correct and uniform administration thereof.

In this case the error complained of did not relate so much to a question of law as one of fact, or a mixed question of law and fact. It does not appear to be of sufficient importance under the provisions of the statute as to require an opinion upon the correctness of the conclusion reached by the trial judge.

As is said in the case of *State* v. *Smith,* 94 Ark. 368, 126 S. W. 1057, "It is hardly probable that the testimony that is adduced in any two given cases will be so much alike that a decision upon the facts in one case would serve as an authority in the other. The testimony in cases containing similar charges is usually so different, and the inferences that may be drawn from the facts narrated are so varying, and the circumstances of each case are so peculiar to itself, that we do not think that an opin-

ion given by this court upon the evidence adduced in the trial of a charge would serve any useful purpose as an authority in a case founded only on a similar charge. We do not think, therefore, that it is important to the correct and uniform administration of the criminal law that the evidence adduced in this case should be set out in detail, together with the inferences that might legally be drawn therefrom, and our opinion given thereon as to whether or not it was sufficient to warrant a conviction of the crime charged against the defendant."

Again, in the case of *State* v. *Spear and Boyce,* 123 Ark. 449, 185 S. W. 788, the court said: "It is clear that appeals in felony cases are not allowed by the state except in cases where it is important to have the court correct errors which prevent the 'uniform administration of the criminal law.' Appeals are not allowed merely to demonstrate the fact that the trial court has erred. The question of the legal sufficiency of the evidence in a given case constitutes a question of law for the decision of the court, but it cannot become a precedent for application in another case because of the varying state of facts in different cases, and, therefore, the decision of that question, even though it be one of law, is not important in the 'uniform administration of the criminal law.' "

The authorities, *supra,* are controlling of the case at bar and, therefore, the question presented by this appeal is denied, and the judgment of the trial court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HARE.

4-4714

Opinion delivered July 5, 1937.

R. E. Wiley and *Henry Donham,* for appellants.

P. L. Smith and *J. H. Lookadoo,* for appellee.

McHaney, J. Appellee sued appellant and obtained judgment for $3,000 for personal injuries sustained by him when the blade of a road grader on which he was riding caught on a rail at a public crossing, at Antoine, in Pike county, Arkansas, which caused him to fall and to receive severe and painful injuries. He alleged negligence in maintaining a defective public crossing where the railroad crosses the public highway on Main street in Antoine, in that a hole had been dug or whipped out by the wheels of vehicles between the rails and that the left hind wheel of the grader, drawn by a tractor, dropped into such depression and that this caused the heel of the grader blade to catch on the second rail of the track, bringing the grader to an abrupt stop and throwing him to the ground.

It is first earnestly insisted by appellant, for a reversal of the judgment against it, that the court erred in refusing to direct a verdict in its favor. This challenges the sufficiency of the evidence to support the verdict. Viewed in the light most favorable to appellee, as we must do in determining this question, the evidence shows that he was foreman of a WPA job, doing some work on the public roads near Antoine; that, in connection with this work, his crew was using a road grading machine drawn by a tractor; that the tractor was in need of repair and it was necessary to take it to Antoine to order some parts; that, at the suggestion of the project engineer and the county judge, he was scraping or blading the road from the point where they were working near Delight into Antoine and back; that one Evans operated the tractor and one Phillips operated the grader; that the grader

was operated by manipulating the blade by the use of two wheels so as to raise or lower the blade in the process of smoothing the road; that appellee was standing on the grader with one foot on the left rear axle and another on the platform; that as they reached the railroad crossing in Antoine, said Evans stopped the machine, or nearly so, to give Phillips an opportunity to adjust the blade, so it would pass over the rails in safety; that Phillips did this, signaled Evans to proceed, which he did; that the blade which had been elevated to 1½ to 2 inches, and wheels passed over the first rail in safety, but because of a depression in the dirt or filling between the rails of the track, the left hind wheel of the grader dropped into a hole or rut which so lowered the heel of the blade as to cause it to catch on the second rail, giving it a sudden jerk or lateral motion, throwing appellee off to the ground. Appellee says he did not see the hole or rut, but felt the wheel drop into it, and he thought it was 4 or 5 inches deep. Phillips testified that he raised the grader blade high enough to pass over the rail, but the left hind wheel dropped down between the rails where a hole had whipped out and that the whipped-out place was 2½ or 3 inches deep which caused the left wheel to drop down, catching the heel of the blade. Another witness, Lamb, testified to the same condition and that the whipped out place was about 4 inches deep, and others said the crossing was in bad condition. This evidence is disputed by others, by contradictory statements given at the time by Evans and Phillips and by photographs taken within an hour or two after the accident. We think this evidence sufficient to take the question of negligence to the jury, as we cannot say there is no substantial evidence the crossing was in bad repair and the appellant knew it, or by the exercise of ordinary care could have known it. *St. L. & S. F. Ry. Co.* v. *Dyer,* 87 Ark. 531, 113 S. W. 49.

It is next argued that instructions Nos. 1 and 2, given at appellee's request, are erroneous. We have examined these instructions carefully, as also all the others given, and find that the instructions fully and fairly cover the law of the case. For instance, in the Dyer case, *supra,* this court said: "Railroads in constructing and main-

taining highway crossings are not required to anticipate and provide against extraordinary dangers, and are not required to provide facilities for the passing over of vehicles other than those in common use in the locality. Travelers along the highway when they encounter railroad crossings are entitled to facilities which are reasonably safe and convenient for vehicles in common use, but when they attempt to use crossings for other purposes they have no right to demand extraordinary facilities to meet the necessities of the special use. If a traveler attempts to cross with some kind of vehicle not in common use, he must take the crossing as he finds it constructed for use of ordinary vehicles."

The court instructed the jury in accordance with this statement of the law. Some contention is made that the machinery used in this case was not an ordinary vehicle in common use, and that appellee had no right to expect or demand extraordinary facilities to meet the necessities of the special use. The court properly left this question to the jury under instructions given at appellant's request, just as the court did in the Dyer case, *supra.*

Also, in *St. L., I. M. & S. Ry. Co.* v. *Smith,* 118 Ark. 72, 175 S. W. 415, the late Mr. Justice HART, speaking for the court, said: "The duty of the railroad company to repair and restore a highway is a continuing one, and commensurate with the increasing necessity of the public, and so, where the enlargement of a city or increased travel upon streets has rendered the crossing as originally restored inconvenient or dangerous, it is the duty of the company to adapt it to the public needs."

The court, at appellants' request, told the jury that the law requires it to exercise ordinary care to keep and maintain highway crossings over its tracks in reasonably safe condition for travel, and that it is not an insurer of the safety of persons using such crossing. Also, instructions were given, as heretofore stated, covering the rule in the Dyer case, and the question of contributory negligence of appellee was submitted. But, says appellant, no negligence was shown, except the negligence of Phillips in not raising the blade of the grader sufficiently high to

pass over the second rail. It may be that Phillips was negligent in this respect, but it is also true, as we have already shown, that the crossing was in bad repair, or, at least, a jury question was made regarding it, so that appellee was injured by the concurring negligence of both, and this justified the jury in finding against appellant, even though Phillips was, also, negligent.

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

GRIFFIN SMITH, C. J., dissents.

STATE, EX REL. ROBINSON, PROSECUTING ATTORNEY, *v.* JONES.

4-4768

Opinion delivered July 5, 1937.

Lewis M. Robinson, Scott & Goodier and *Neill Bohlinger,* for appellant.

R. M. Priddy and *Hays & Wait,* for appellee.

BUTLER, J. This action was begun by the filing of a complaint in the circuit court of Yell county signed by the prosecuting attorney and brought in the name of the state. W. H. McClure joined as a party plaintiff on the ground that he was a qualified elector of Dardanelle Spe-

cial School District and had a special interest in the cause of action set out in the complaint, the material allegations of which are summarized as follows: The defendant, Garrett Jones, (appellee here) at the time of the school election held in the district on March 20, 1937, was a director of said district. The election was for the purpose of electing two directors, one for a period of five years and another for a term of one year. Appellee was a candidate to succeed himself in the office of director and acted as a judge at said election, together with two other members of the board. Appellee and the other election officers conducted the election and certified the returns to the county judge of Yell county, as follows: "For school director—Garrett Jones 306 votes, W. H. McClure 300, Dr. E. J. Haster 289, Herman Green 287, * * *." Thereupon the appellee was certified as the school director for the five-year term and W. H. McClure for the one-year term.

The complaint recited certain constitutional and statutory provisions and alleged that under the same appellee was ineligible to hold the office of school director and McClure alleged that he, having received the greatest number of votes cast for any eligible candidate, is entitled to the office of school director for the five-year term. The prayer was that appellee be declared ineligible to hold the office of school director and that his present enjoyment of said office be declared to be a usurpation thereof and that he be ousted therefrom. The plaintiff, McClure, prayed in addition that he be declared to be the director for the five-year term. Appellee demurred to the complaint, first, because it did not state facts sufficient to entitle plaintiff to the relief sought and, second, that the complaint discloses a want of proper parties defendant. The court sustained the demurrer and dismissed the complaint. This appeal followed.

The questions involved in this appeal are: first, is McClure entitled to the relief prayed; second, is the prosecuting attorney authorized to bring the suit, and, third, is appellee a usurper within the meaning of our Constitution and statutory laws? We think McClure's interest and his right to the relief prayed is controlled

by the former decisions of this court to the effect that votes cast for an ineligible candidate will not entitle him who receives the next highest number of votes to the office sought. *Bohlinger* v. *Christian,* 189 Ark. 839, 75 S. W. (2d) 230, following the doctrine announced in the early case of *Swepston* v. *Barton,* 39 Ark. 549, and reaffirmed in *Storey* v. *Looney,* 165 Ark. 455, 265 S. W. 51, and *Collins* v. *McClendon,* 177 Ark. 44, 5 S. W. (2d) 734. As McClure did not receive the highest number of votes cast, he is not entitled to the relief for which he prayed.

It is contended that the prosecuting attorney had no authority to bring the action on the ground that the statute only authorized the institution of actions against persons who shall usurp county offices and that the office of school director is not a county office. We are of the opinion that, independent of this statute, the prosecuting attorney, as the representative of the state, is authorized to maintain actions in the nature of proceedings *quo warranto* to oust any and all persons from offices to which they are not eligible, or the right to hold which they may have forfeited. The substance of the remedy provided by the statutes, §§ 10326-10327 and 10329 of Crawford & Moses' Digest, remains the same as that at common law, and, since those statutes do not profess to declare the sole and exclusive remedy, the general rule is that the statutory remedy will be considered cumulative rather than exclusive of the remedies then existing. 51 C. J., chapter, *Quo Warranto,* § 18, sub-head, Statutory Remedy, p. 323. The fact that the statutory proceeding is in lieu of the ancient common-law writ does not abolish the remedies for which that writ was created. This was recognized in the case of *State* v. *Sams,* 81 Ark. 39, 98 S. W. 955, which was a proceeding brought by the state on relation of the attorney general in this court to oust one from the office of road overseer, and in which it was alleged that the present occupant of said office was a usurper. This court denied the petition and dismissed the same because it had no authority in cases of that kind to issue writs of *quo warranto* to prevent usurpation of the office of road overseer, but in that connection said: "As the law does not expressly vest jurisdiction to hear

and determine such an action in any other court, it falls within the general jurisdiction of the circuit court. The remedy for usurpation of office of road overseer is by an action in that court brought either by the state or the person entitled to the office." The case of *Whittaker* v. *Watson,* 68 Ark. 555, 60 S. W. 652, was one involving the right of an alleged usurper of the office of mayor of the city of Newport to hold said office. In that case the state and the claimant to the office were joined as parties plaintiff. The court held (quoting headnote No. 2): " 'Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the state or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise,' a joint action for the usurpation of an office may be maintained by the state and the party entitled to the office." Section 10326, Crawford & Moses' Digest. Therefore, whether or not the office of school director be a county office within the meaning of the usurpation statutes is immaterial, and the prosecuting attorney was the proper party to institute proceedings even though McClure was improperly joined. See *Whittaker* v. *Watson, supra.*

Appellee was not eligible to fill the office voted on at the election of March 20, 1937. Section 10, art. 3, of the Constitution, cited by the appellants, is as follows: "Nor shall any election officer be eligible to any civil office to be filled at an election at which he shall serve—save only to such subordinate municipal or local offices, below the grade of city or county officers, as shall be designated by general law." Appellee's qualification as school director and his holding of said office amounts to a usurpation of office within the meaning of the statute cited, *supra.* Unless and until the General Assembly shall designate by general law subordinate municipal or local offices below the grade of city or county offices the quoted provision of the Constitution applies to any and all civil offices without respect to rank or grade. The General Assembly has not, by a general law, named subordinate municipal or local offices as exempt from the constitutional pro-

visions. Therefore, the same applies to the office of school director as well as to all other civil offices.

There is no contention that the election was irregular or that the condidates were not credited with the votes to which they were entitled. This would make no difference. If the appellee was ineligible, the number of votes actually cast for him or others is of no moment. If we assume that the office of school director is not a county office and might be exempted from the constitutional provision quoted, act No. 30 of the Acts of 1935 manifests no intention of exempting the office of school director from the prohibition of that section. It merely provides that generally members of the board of school directors shall serve as judges of election or shall designate three judges to serve in their stead, but it does not provide that any of such shall serve as a judge at an election at which he is a candidate, or that, one of their number being a candidate, the board shall designate other persons to serve as judges. We think sound public policy requires a strict and literal compliance with the provision of § 10, art. 3, *supra,* and that there should be no exemption from its provision unless made so by the Legislature in clear and unmistakable terms.

Our conclusion, therefore, is that the learned trial court erred in sustaining the demurrer. The judgment is accordingly reversed, and the cause remanded with directions that a judgment of ouster be entered as prayed by the state on relation of the prosecuting attorney.

SMITH and MCHANEY, JJ., dissent.

PUCKETT *v.* STATE.

Crim. 4039.

Opinion delivered July 5, 1937.

Joe N. Wills, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Pulaski county, first division, for the crime of grand larceny, and as a punishment therefor was adjudged to serve a term of two years in the state penitentiary from which judgment he has duly prosecuted an appeal to this court.

The indictment contained two charges, the first count therein charging him with burglary, and the second count therein charging him with grand larceny.

Testimony was introduced by the state tending to show that he was guilty of both burglary and grand larceny. The court defined the offense of burglary in instruction number 6 and the offense of grand larceny in instruction number 7, which were given to the jury by him. Instruction number 7 is as follows:

"If you find that after he entered the house he did steal, take, and carry away personal property, as alleged in the indictment, of the greater value than twenty-five dollars, and you believe that beyond a reasonable doubt, then it would be your duty to convict him of grand larceny also."

The jury acquitted appellant on the charge of burglary and convicted him on the charge of grand larceny.

Appellant contends that under the instruction given by the court defining grand larceny an acquittal on the charge of burglary necessarily worked an acquittal

of the charge of grand larceny. We do not construe the instruction defining grand larceny as meaning that before appellant could be convicted of grand larceny the jury must find that he was guilty of burglary. The jury did not so interpret the instruction else when it acquitted appellant on the charge of burglary it would also have acquitted him on the charge of grand larceny. The law is that where one is charged with both burglary and grand larceny, the accused may be convicted of grand larceny and acquitted of burglary. Certainly the trial court did not intend by defining grand larceny as it did to tell the jury that its right to convict appellant on the charge of grand larceny depended on whether it convicted him of burglary.

The next assignment of error is that there is no substantial evidence in the record tending to show that appellant was present, aiding, abetting or ready and consenting to aid or abet in the crime of grand larceny as charged in the indictment. The indictment charged that A. C. Haley and appellant, in the county of Pulaski and the state of Arkansas, on the 22nd day of November, 1936, did unlawfully and feloniously steal, take and carry away certain property of Paul Seago of the value of $39.60, with the unlawful and felonious intent to deprive him of said property. Appellant argues that since he was indicted as a principal there must be substantial evidence showing that he was present and took part in the larceny. This is true, but his presence and participation in the larceny may be shown by circumstances. It was not necessary in order to convict him to show his presence and participation in the larceny by an eye witness. A. C. Haley, who was jointly indicted with appellant, and who was convicted of stealing the property described in the indictment from Paul Seago, testified that a short time before entering the Seago home and stealing his property, he had attempted to enter the home of Mr. Holt, and hearing some one in the house he left, going to the Seago home; that appellant was not with him on either occasion and that he did not see or meet appellant until after he had stolen the

property out of the Seago home; that he wrapped the stolen goods up in several bundles and was carrying them himself when he first met appellant about halfway between the overhead bridge on the Fort Smith branch and the main line of the Missouri Pacific; that appellant told him he was going to California and was going to the depot for that purpose; that he told appellant he would show him the way to the depot, if he would carry some of his bundles; that he did so, and after they had proceeded about a quarter of a mile they were arrested by a police officer.

Police officer Thompson testified that after visiting the Holt and Seago homes he, in company with an officer by the name of Hendricks, started to hunt for the offenders and saw two men carrying bundles crossing the paved road at Railroad avenue and Twenty-second street but did not arrest them because they did not correspond with the description of the men who had been seen attempting to enter the Holt home; that the men they had seen at the intersection of these streets were shortly afterwards arrested by a special officer in the Missouri Pacific yards who took them to the police station; that they were the same men he and Hendricks had seen at the intersection of Railroad avenue and Twenty-second street carrying bundles; that they sent for Paul Seago and his wife who identified the goods taken from the men as those stolen from their house.

Stacy Edwards, the special police officer, who arrested the men carrying the stolen goods in bundles in the Missouri Pacific yards, testified that he asked appellant where he got the goods and that appellant told him he lived at Conway and had just come into town and had brought the goods with him from Conway.

A number of witnesses introduced by the state testified that the men under arrest were the two men they had seen trying to break into the Holt home. These witnesses testified that the men went up on the porch and that the elder one cut the screen and then walked around the house, and as Mrs. Holt came out of the back door screaming both men ran away. They posi-

tively identified appellant as being with Haley at the Holt home, and officer Thompson positively identified appellant as being one of the men he and Hendricks had seen carrying the bundles at Twenty-second street and Railroad avenue.

The Holt home and the place where officer Thompson saw appellant and Haley carrying the bundles of goods was not very far from the Seago home, perhaps five or six blocks, and only a short time had elapsed from the attempted burglary at the Holt home until the Seago home was entered.

These circumstances and the claim of appellant that he had brought the goods from Conway were sufficient to warrant the jury in finding that appellant was present and participating in the asportation of the property from the Seago home.

Appellant also assigns as error the admission by the court of the testimony of C. L. Holloway, who testified that on the afternoon of the 22nd. of November he saw appellant with Haley at the Holt home and saw Haley cut the screen to one of the windows and saw them run away when Mrs. Holt came around the house hollering. It is argued that this attempted offense was not connected in any way with the crime for which appellant was being tried. This attempted crime occurred about fifteen minutes before the second offense at the Seago home. The Seago home was entered by cutting the screen and breaking the window in about the same manner that the entry was attempted to be made at the home of Mr. Holt. The distance between the two places was only about five blocks. Appellant and Haley were soon afterwards arrested in possession of the goods which had been taken out of the Seago home wrapped up in bundles. We think there was sufficient connection between the attempted crime at the Holt home and the crime charged to have been committed at the Seago home to admit the evidence of C. L. Holloway relative to the attempted burglary at the Holt home as a circumstance tending to show the guilt of appellant in the crime charged against him. This court stated in the case of

Larkin v. *State,* 131 Ark. 445, 199 S. W. 382, that, "The evidence of the commission of other crimes of a similar nature about the same time, however, tends to show the guilt of the defendant of the crime charged when it discloses a criminal intent, guilty knowledge, identifies the defendant, or is part of common scheme or plan embracing two or more crimes so related to each other that the proof of one tends to establish the other." See, also, the confirmation of this rule in the cases of *Cain* v. *State,* 149 Ark. 616, 233 S. W. 779; *Yelvington* v. *State,* 169 Ark. 359, 275 S. W. 701; *Wilson* v. *State,* 184 Ark. 119, 41 S. W. (2d) 764.

Appellant assigns as error a remark made by the court to witness Haley when he was testifying. It is argued that the remark made by the court was an intimation on the part of the court that the witness was perjuring himself. Appellant had denied that he stated to the officer who arrested him that he had brought the goods from Conway. Haley was asked whether appellant made this statement to the officer when the arrest was made. Haley answered:

"No, sir, I think they (meaning the officer) must have misunderstood him, he said he had just got out from that school down there."

The court then said to him:

"Now you don't know that do you, just tell the truth."

This remark was not made for the purpose of discrediting the witness nor was it an intimation that he was not telling the truth. In his answer, Haley stated that the officer misunderstood appellant and the court's remark was for the purpose of telling him that he must state the facts and not give an opinion as to the misunderstanding of the officer. In other words, his purpose clearly was to tell the witness that he must state facts, not to state his opinion as to the understanding of the officer. We do not think this remark, in any way, was prejudicial to the rights of appellant.

The last assignment of error by appellant is that the court erred in giving instruction number 4, which reads as follows:

"Any other offense of a similar nature committed by this defendant, if any has been proven beyond a reasonable doubt, may be proven as showing a common plan, scheme, or design, if it does so show."

Appellant argues that the effect of this instruction was to allow the jury to try him for other offenses of which he had been guilty instead of trying him for the offense of grand larceny with which he was charged. The evidence reflects that appellant had been charged and convicted of similar offenses. It is said that, in view of the evidence relative to the conviction of the other offenses, the instruction given should have stated that the jury could only consider the fact that he had been convicted of other offenses of similar nature as shedding light upon the character of the crimes he had committed, and that, without such a limitation in the instruction, it permitted the jury to convict him of the crime charged because he had been convicted of some other crimes of similar nature. Appellant made a general objection to instruction number 4, but did not point out any prejudice that might result to him on account of the phraseology of the instruction. We do not think the instruction was inherently erroneous, and had the appellant, by specific objection, called the court's attention to the purposes for which the evidence was introduced, and the only purposes for which such proof might be introduced, the court, no doubt, would have inserted the limitations suggested.

No error appearing, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HUFFMAN.

4-4713

Opinion delivered July 5, 1937.

R. E. Wiley and *Henry Donham,* for appellants.

Steve Carrigan, J. H. Lookadoo and *Tom W. Campbell,* for appellee.

MEHAFFY, J. Mrs. Ruth Huffman, administratrix of the estate of Albert H. Huffman, deceased, began this action against L. W. Baldwin and Guy A. Thompson, trustees, Missouri Pacific Railroad Company, debtor, and Harry Parker and Oliver Mosely, to recover damages for the injury and death of Albert H. Huffman.

She alleged in her complaint, in substance, that she was the duly appointed, qualified and acting administratrix of the estate of Albert H. Huffman, deceased, who was struck and killed in the town of Prescott, Arkansas, on December 20, 1933, by a passenger train owned

and operated at the time by the appellants, and which was in charge of and actually run and operated at the time by the appellant, Harry Parker, as engineer, and Oliver Mosely as fireman; that Huffman left surviving him as his sole and only heirs-at-law the appellee, Ruth Huffman, who was his wife, and their one son, now 20 years of age. The Missouri Pacific Railroad is a corporation and operates a line of railroad from St. Louis, Missouri, to Texarkana, Arkansas; that L. W. Baldwin and Guy A. Thompson were appointed trustees of the railroad company by the United States District Court in June, 1933; the appellant Harry Parker is a resident of Benton, Saline county, Arkansas, and Oliver Mosely is a resident of Gurdon, Clark county, Arkansas; that on December 20, 1933, the deceased, Albert H. Huffman, was driving in his automobile and proceeding to cross the tracks of appellants in the heart of the town of Prescott; that, as the said Huffman drove along Main street south to cross the railroad company's tracks, he approached said crossing and drove upon the tracks and one of appellants' freight trains was switching west of said crossing; that Huffman was watching said freight train switching in order to avoid being struck by it when he was crossing said track; appellants' passenger train, which was running late and was being operated by the appellants, the engine being driven by Harry Parker as engineer and Oliver Mosely as fireman, said train being run and operated without using ordinary care for the safety of Huffman and the public generally, was run into and through the town of Prescott at a high, excessive and dangerous rate of speed, and said train struck the automobile in which said Huffman was riding at the time, with such force as to throw the automobile from the crossing and throw it over and upon said Huffman so that he was injured and killed thereby; that the appellants failed to exercise ordinary care for the safety of Huffman and other persons who might have been crossing the tracks, in not keeping a lookout in order to discover the peril of those about to cross said railroad track, or crossing said tracks, in order to

avoid injuring Huffman or other persons, which could have been avoided by the exercise of reasonable care. The appellants failed to exercise ordinary care for the safety of persons at the crossing, and after they had discovered the position of peril, in failing to use reasonable care to avoid injuring the said Huffman; that said appellants did not exercise ordinary care by ringing the bell and sounding the whistle to warn said Albert H. Huffman of the approach of said train. By the use of care on the part of appellants, they could have avoided injuring Huffman. The railroad track is level and straight for about two miles east of the crossing. Said Huffman was at the time of his death a healthy and industrious young man, was engaged in useful and profitable labor, and was contributing to his wife and son, who were wholly dependent upon him, the sum of $1,200 per year. Said Huffman was 43 years of age at his death.

The appellants filed petition and bond for removal to the federal court, and the circuit court made an order removing the cause to the federal court. The federal court remanded the cause to the Clark county circuit court, from whence it was removed.

Appellants Parker and Mosely filed separate answer denying all the material allegations of the complaint and adopted the answer of the railroad company. The trustees, appellants, filed separate answer denying all the material allegations in the complaint, and alleging that the accident and injury was caused by the negligence of the deceased, Huffman.

Trial was had and the jury returned a verdict in favor of Oliver Mosely, but returned a verdict against Harry Parker and the trustees of the railroad company in the sum of $20,000. To reverse said judgment this appeal is prosecuted.

The substance of the evidence as set out by appellants in their abstract is as follows:

"Ruth Huffman, appellee, testified:

"I am the widow of Albert H. Huffman. He was killed by a Missouri Pacific train in the town of Pres-

cott on December 22, 1933. I have been appointed administratrix of his estate and am now acting as such.

"Mr. Huffman was 43 years old at the time he was killed and was in good health. He was a farmer and we lived on a farm. He had one child, a son, who was 19 years of age at the time of his death. The boy had finished school and was helping on the farm. His father supported him and put him through school. My husband supported me and kept up his home. He was just a regular farmer. He also made some money trading. I would say he made approximately $1,600 a year, which he used in farming and out of which he supported me. He required very little for himself. He was looking out for what he was always planning to do.

"I have lived at Prescott all my life, and I think my husband had lived there all of his life. He never lived in Clark county. This accident happened in the town of Prescott where my home is and which is the county seat of Nevada county. They have a court house there."

Harry Parker, the engineer, testified that on December 22, 1933, he was running the engine that struck and killed Albert Huffman.

Enoch Hale testified that he was a farmer, lived in the neighborhood of two miles of Prescott all his life; knew Albert Huffman; he was energetic and worked all the time; he was trustworthy; thinks he earned from $1,000 to $1,600 a year; after he paid his rent it would probably leave him $1,200 or $1,300 a year; his family consisted of his wife and one boy; he supported his family and educated his boy.

Lawrence Britt testified that he knew Albert Huffman, considered him a mighty good farmer; he was thrifty, a strong man, a good worker and energetic.

George Hunt testified that he knew Albert Huffman during his lifetime, worked with him four or five years, he was a good farmer and judged that his earnings would run from $1,000 to $2,000 a year. He treated his family nice and good as he could; he educated his boy and did as well as a man could do to take care of his family.

Ralph Owens testified and introduced a plat that he had made which showed the tracks and street and the situation. He testified that a man approaching the track on Main street could see a train 1,290 feet away for a distance of 70 feet before reaching the track; a train 600 feet from the crossing could be seen 150 feet from the track. There was no obstruction to prevent one's seeing it. There is a stop signal at the intersection of Main street and highway 67, also, a signal for the railroad track known as a tell-tell class; both signals are alike, and both of them work. A man on an engine can see a man coming up the track for the same distance as a man coming up to the track can see a train. There is no sidetrack across Main street and none across Walnut street.

Virgil James and his wife both testified that they crossed the tracks a block from where Huffman crossed about five minutes before Huffman was killed. There was a train south of the crossing switching around.

George Jones testified that he was driving along the street that parallels the road; was driving a truck about 25 or 30 miles an hour; the train that killed Huffman did not sound any whistle or ring any bell; it was running between 60 and 65 miles an hour; it stopped at the depot; did not examine the car much, but there was a dent about the back side of it; there was another train switching about the depot; he did not hear the crash and did not see the train stop at the station; the whistle on the train did not blow; if it had he would have heard it.

S. L. Jones, father of George Jones, testified to substantially the same things that George Jones did. He said that if the whistle had blown he would have heard it.

Loyd Lynch was with S. L. Jones and George Jones. He testified to substantially the same things that the Jones did.

A number of witnesses testified that the train was going very fast and that no signals were given. Some of them stated that the whistle blew about the time that it struck Huffman.

There is a conflict in the testimony as to the speed of the train, and also as to the signals. A number of wit-

nesses testified that there was a freight train switching south of the crossing and that the passenger was about an hour and a half late. The car was hit at the back end, showing that it had nearly crossed the track before the train struck it.

It was agreed that Huffman's expectancy was 26 years. Photographs were taken and introduced in evidence showing the situation.

H. D. Parker, the engineer, testified that he remembered the occasion of the train he was operating striking and killing Huffman; that he was sued in that case; he was running about an hour and a half late; he noticed Huffman's automobile approaching the track on the right side; he testified that Huffman was traveling at such a rate of speed he took it for granted that he was going to stop at the crossing; the automobile was going slowly; he said he thought the automobile was going to stop; he was keeping a lookout and knew this was a popular crossing; had his brakes on, but did not slow down, but went on and stopped at the station; when he saw Huffman he had the whistle open and the bell ringing; he said if he had shut off the steam and slackened the speed he did not know whether Huffman would have gotten over or not; he could stop the train within a train length at the speed he was going; if he had known in time that the man was going on ahead of him, he could have stopped before he reached the crossing; but he did not know that Huffman was not going to stop.

A number of witnesses were introduced by appellant and their evidence as to the speed of the train and the signals was in conflict with the evidence of appellee's witnesses.

Appellants first argue that the court erred in refusing to direct a verdict for appellants, and cite and quote from a great many cases which we do not discuss because the law is well settled in this jurisdiction, and unless the evidence shows that the appellants were guilty of negligence, there could be no recovery.

According to all of the evidence Huffman was driving slowly, at from 10 to 15 miles an hour, and just south of the crossing a freight train was switching, and this

freight train evidently sounded the signals. One witness testified that the passenger train was probably ten miles away when the signals were sounded. One of appellants' witnesses swore that when a train was late they always tried to make up time. The undisputed evidence shows that this train was about an hour and a half late.

Appellants urge that Huffman was guilty of negligence because he did not look to the north, the direction from which the passenger train came. As a matter of fact no one knows whether he looked north or not, but the situation south of the crossing where he was killed was created by the appellants, and if Huffman did what a man of ordinary prudence would have done under the circumstances, he was not guilty of negligence. Ordinarily, one approaching a railroad crossing must look and listen, but here was the situation created by the appellants that probably led Huffman to believe that the only danger was the danger from the freight train south of the crossing, and he was giving his attention particularly to this danger. He probably, also, knew that there was no train due from the north. This train that struck and killed him should have passed that place an hour and a half before.

It is true, appellants argue, that Huffman had gone to the depot with others, and they argue that he knew the train was late. He did go to the depot with Allen and others, and Allen got out of the car and bought him a ticket, but there is no evidence that Huffman got out of the car or that he knew anything about the time when the train would come; so that the only question was, whether he acted as a man of ordinary prudence would have acted under the circumstances. If he did, he was not guilty of negligence.

It has been said that due care does not mean constant, everlasting watchfulness, but it means such care only as a man of ordinary prudence would exercise under the circumstances.

Huffman was driving his car at a moderate rate of speed and his attention was necessarily attracted by the switching of the freight train. No train was due from the north. The train, according to the evidence, from

the north was traveling about 60 miles an hour, and numbers of witnesses say without sounding any warning at all. The appellants' evidence contradicts this, and they say that the train was traveling at its usual speed and that the signals were given, but the credibility of the witnesses and the weight to be given their testimony were questions for the jury, and they had a right to believe the evidence of appellee's witnesses, if they thought they were telling the truth, and we have no right to disturb their verdict, although we might think differently.

A number of witnesses, apparently uninterested, testified to the great speed of the train and the failure to give any warning of its approach. If, as testified to by some of appellee's witnesses, the train was running 55 or 60 miles an hour without giving any warning of its approach, the jury were justified in finding that the persons operating the train were guilty of negligence. It was going into the city of Prescott and going over one of the streets that was constantly traveled by the public; and if this is true, the jury were justified in finding that appellants were guilty of negligence.

In addition to this, however, the engineer saw Huffman in time to have avoided striking him at the speed the train was traveling. The engineer himself testifies that he could have stopped the train before he reached the crossing, but he thought Huffman would stop. He does not, however, testify to any fact that would indicate Huffman intended to stop. It is true, he says he was going slowly, but he was approaching the crossing and was close to it, and it is not pretended that his speed was reduced at all, so there was nothing to indicate that he intended to stop, and nothing to indicate that he knew about the approach of the train.

Appellants argue that the discovered peril doctrine is not involved. Without any regard to the lookout statute, if the engineer saw Huffman in time to avoid the injury, it was his duty to stop the train or reduce its speed, and the evidence shows that if he had reduced its speed very slightly Huffman could have crossed in safety. The engineer himself testifies that he could have stopped the

train before he reached the crossing after he saw Huffman.

The discovered peril doctrine may be involved without any regard to the lookout statute. This court quoted with approval the following from the Texas court: "By the doctrine of 'discovered peril' is meant that, where the danger of inflicting an injury is discovered by the person inflicting it in time to have prevented the injury by the exercise of proper care, he will be liable for injury proximately resulting from his own negligence, though the injury would not have occurred but for the previous negligence of the person injured." *Furst-Edwards & Co.* v. *St. Louis S. W. Ry. Co.,* 146 S. W. 1024, 1026.

We, also, said in *Missouri Pac. R. Co.* v. *Skipper,* 174 Ark. 1083, 298 S. W. 849: "The doctrine of discovered peril means, where one person discovers that another is in peril and negligently fails to use the means at his command to avoid the injury, when he could, by exercising reasonable care, have avoided the injury, he will be liable. To be sure, if one's peril were discovered, and thereafter the wrongdoer willfully and intentionally injured him, he would be liable. But there is no contention in this case that there was any willful or intentional injury, but the complaint alleges and the proof tends to show that, after the perilous position of deceased was discovered, the defendant's servants negligently and carelessly injured him."

The Virginia court has said: "The doctrine of discovered peril is a qualification of the rule that contributory negligence bars a recovery, and involves the principle that, though plaintiff was guilty of negligence in exposing himself to peril, he may recover where defendant, after knowing of the danger, could have avoided the injury by the exercise of ordinary care, but failed to do so." *Chesapeake & O. Ry. Co.* v. *Corbin's Admr.,* 110 Va. 700, 67 S. E. 179.

Appellants contend that the court erred in refusing to grant the petition for removal to the federal court at the conclusion of the testimony, and state: "The only ground upon which the state court had jurisdiction after

the filing of petition for removal was that there was a joint cause of action against the resident defendants and the nonresident defendants."

In this case there was a joint cause of action against all of the appellants. If the engineer's testimony is to be believed, all the appellants are guilty of negligence, and jointly liable.

It is next contended that the court erred in refusing to give appellants' instruction No. 11. That instruction told the jury that a person must look and listen for approaching trains, and that he must do this at a time and at a place where he can see and hear a train if one is coming, and he must continue to look and listen until he gets across the track, and if he fails to do this he is guilty of negligence. It then told them that if they found from the evidence that deceased was negligent in failing to look and listen at a proper place and time and continue to look and listen as set forth in the instruction, and that if his negligence in this respect was equal to or greater than that of the employees, if any, then he could not recover. The court properly refused to give this instruction. It is the duty of everyone to exercise care, such care as a person of ordinary prudence would have exercised under the circumstances. Whether one is guilty of negligence or not must be determined by a consideration of his conduct and all the circumstances surrounding his actions.

It is next contended that the court erred in refusing to give instructions Nos. 8 and 13. This instruction, number 8, is erroneous for the same reason that number 11 is, and in addition to that, it says to the jury that the undisputed evidence shows that the deceased was negligent in these respects, and that his negligence contributed to his death. This instruction was erroneous and the court did not err in refusing to give it.

Instruction number 13 tells the jury that if the wigwag signal and crossing bell were operating, then it was the duty of deceased to stop his car, if necessary, when, as a matter of fact, the evidence showed that these signals were being sounded by the freight train at which he was looking.

The above instructions were erroneous because they ignored the issue of "discovered peril." If Huffman's peril was discovered by the engineer in time to have avoided the injury by the exercise of ordinary care, and he failed to exercise such care, appellants would be liable notwithstanding the negligence of Huffman.

Appellant objects to instruction No. 1 given at the request of appellee and also instruction No. 4. Objection is made to these instructions because appellants contend that the undisputed testimony disclosed that deceased was guilty of contributory negligence. The question of contributory negligence was for the jury, and not for the court; and, therefore, the court did not err in giving these instructions.

Courts are prohibited by the Constitution from instructing as to the facts, but must instruct as to the law, and the jury passes on the facts.

We think the instructions as a whole constituted a correct guide for the jury, and after a careful consideration of all the instructions, we have concluded that the court did not err in giving or refusing instructions.

We find no error, and the judgment is affirmed.

GRIFFIN SMITH, C. J., dissents.

Justices SMITH, MCHANEY and BAKER concur.

CITY OF FORT SMITH *v.* BONNER.

4-4719

Opinion delivered July 12, 1937.

Fadjo Cravens and *Jos. R. Brown*, for appellant.

Hardin & Barton and *Daily & Woods*, for appellees.

GRIFFIN SMITH, C. J. This appeal is from the action of the chancery court in denying the prayer of a petition by appellant, City of Fort Smith, that the defendant-appellee be enjoined from maintaining, in an addition to the city, a business designated "horse, mule and live stock barns and enclosures."

It is alleged that the defendant "accumulated in these barns and enclosures large numbers of stock, creating offensive and nauseating odors that taint the atmosphere for many blocks; that said stock attracts large swarms of flies and other insects that harass the neighborhood; that said animals annoy residents by braying and making other disturbing noises day and night; that auctions held at short regular intervals attract large numbers of buyers, who congregate at the barns, blocking streets with their parked trucks and other vehicles, and that the conduct of said auctions is loud and disturbing and lasts throughout the day and much of the night."

The answer was a denial of the essential parts of the complaint, coupled with an allegation that appellee acquired the property and had operated the business for eleven years; that he had spent large sums of money making improvements; that appellant had issued a permit, authorizing the business to be conducted, and was estopped to maintain the action.

The appellee, First National Bank, intervened, alleging that it had a mortgage on the property, and was therefore interested in the suit.

Appellees' brief contains the following statement of facts: "There is a suburban railroad which circles the city of Fort Smith, built many years ago for the express purpose of encouraging the building of industrial enterprises around the city and along this railroad. Many years ago a lumber yard was built on this suburban railroad at the site now occupied by the Bonner Yards and Barn. This enterprise was discontinued and the buildings remained unused for a number of years. Some twelve years ago, Joe Bonner bought the property, and procured a permit from the city to establish and maintain the same as a Live Stock Commission Barn. He was permitted by the city to build a side track from the main railroad line to the gates of his barn as a convenience and facility.

"He operated this barn unmolested, improving and enlarging the same from time to time until 1936, when this suit was started. As late as May 1, 1936, he was granted permission from the city to change and remodel his barns and to install scales for the weighing of the live stock. At that time he expended several hundred dollars on these improvements. Two or three years ago he made improvements amounting to about $3,500.

"When he took over the place and established his business there, there were but few residences to the east of him, but in the rush times of the late twenties, and up to about 1931 and 1932, a great many houses were built to the east of him. All of the complaining witnesses, except possibly one or two, moved into the community during the time this barn was in operation and flourishing. These complaining residents live to the east and southeast for the most part. Grand Avenue runs east and west and to the immediate south of these barns, that is, the barns are located approximately one block north of Grand, there being no buildings, except a few little business houses, between it and Grand. Immediately west of the barns is a creek or branch along the banks of which the suburban railroad runs. There are no buildings near the suburban and east of it for many blocks south-

ward, and none for several blocks northward except some negro shacks. On Grand Avenue west, there are some residences and some little business houses. Immediately in front of this barn there is a whole block vacant except for a house on the southeast corner of the block. To the east and southeast along Grand Avenue, several blocks from the Bonner barns, are the comparatively new additions of Clifton Court, East End Place, and Hawthorne Place."

Appellant's summary contains the following declaration:

"The barn is located in a developed residential section as shown by the record, and defendant Bonner, just before the suit was brought, told newspaper representatives he was building eighty new stock pens under cover, and would sell cattle and hogs during the summer season. He also informed the paper he was installing five new chutes and expected commission firm buyers from Joplin, Springfield and Kansas City. He contemplated 'big sales' of hogs, cattle, horses, mules, etc. He intended to get as much stock as he could to sell at his barn.

"All witnesses, including defendant Bonner, testified that in operating the business, several hundred head of stock were collected in the barn and adjacent pens."

R. B. Odom, a witness for appellant, testified that his home was about a block from the Bonner barn; that the barn is "a big old dilapidated, ramshackle building, a block long and half a block wide, with adjoining pens. In the pens are kept hogs, cows, horses and mules. East of the barn are homes, extending thirteen blocks to the county farm, and homes are north of the barn, extending about eight or ten blocks. There are several hundred homes in the neighborhood surrounding the barn. The barn is an eye-sore and odors emanating from it are very offensive, especially in summer. After a rain it is almost unbearable. The barn is a breeding place for rats, mice, flies and insects of all kinds that infest the homes. Jackasses bray, horses neigh, cows low, and much noise results from unloading stock at night. Several hundred

head of stock are concentrated at the barn during auctions. Stock is brought in every day to prepare for auction and horses and mules get out and run across yards. The barn has a dirt floor, covered with manure. Odors can be detected five or six blocks away in every direction; flies breeding in the barn are noticeable in unusual numbers the same distance. I cannot use my sleeping porch because of barn odors."

Sixteen other witnesses for appellant testified, and the testimony of others was offered under an agreement that it would be treated as given, and as conforming to that already heard. On rebuttal appellant offered other witnesses.

Defendant-appellee Bonner's denial or contradiction of testimony given by appellant's witnesses was sustained by twenty-four witnesses, who testified that they lived in the immediate neighborhood of the barn; that it was maintained in an orderly and sanitary manner; that the odors complained of by appellant's witnesses came from the sewer, and not from the barn; that the barn had the usual stable odors, but that such odors were not noticeable at any great distance from the premises, etc.

Dr. Stubbs, president of the Fort Smith District Board of Health, testified that, in his opinion, too much manure was allowed to accumulate at the barn; that it was a breeding place for flies; that it would be impossible to keep the barn sanitary; that offensive odors were bound to come from the place in summer; that flies from the barn were found in unusual numbers in the neighborhood, carrying bacteria that caused infection and disease, and that rats and mice bred in places like defendant's barn.

Witnesses for appellees testified to the contrary.

Appellant, in its reply brief, concedes that "defendant's horse, mule and stock business is not a nuisance *per se*." It is contended, however, that the evidence shows it is a nuisance, operated as it is in the present location, and appellant relies largely upon *Fort Smith* v. *Western Hide & Fur Company,* 153 Ark. 99, 239 S. W. 724, as authority for a reversal.

In that case the appellee was engaged in the business of buying and selling hides and furs, such business being operated in appellee's own building situated near the center of the business district of Fort Smith. The business had been operated for ten years. In an opinion written by Chief Justice McCulloch, this court said: "A careful consideration of the testimony leaves no escape from the conclusion that the place of business maintained by appellee was offensive to those who came into the neighborhood. There were bad odors which were easily detected, and which were sufficient to constantly annoy those who were engaged in business in the locality or who came there for any purpose. * * * The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population. Under these circumstances, private rights must yield to the public good, and a court of equity will afford relief, even where a thing originally harmless under certain circumstances, has become a nuisance under changed conditions. Appellee pleads a license from the city in bar of the right to abate the nuisance, but the fact that the city granted a license to operate a hide and fur business does not imply that it could be operated in a manner so as to constitute a public nuisance, or to bar the city from suppressing the nuisance. *Durfey* v. *Thalheimer,* 85 Ark. 544, 109 S. W. 519; *Wilder* v. *Little Rock,* 150 Ark. 439, 234 S. W. 479."

In *Durfey* v. *Thalheimer,* referred to *supra,* the court said: "It is the duty of everyone to so use his property as not to injure that of another; and it matters not how well constructed or conducted a livery stable may be, it is nevertheless a nuisance if it is so built or used as to destroy the comfort of persons owning and occupying adjoining premises, creating an annoyance which renders life uncomfortable; and it may be abated as a nuisance."

In *Clay County Ice Co.* v. *Littlefield,* 187 Ark. 911, 63 S. W. (2d) 530, it was held that operation of an ice plant in a residential district was an abatable nuisance where it materially injured property and annoyed residents, regardless of how well the plant was constructed and conducted.

These general principles are not denied by appellees. It is insisted, however, as shown by the record, that the testimony is in sharp conflict, and that a question of fact was presented for the chancellor's determination. It is further insisted that in dismissing the complaint, the court necessarily found that the weight of evidence was in favor of appellees.

If this had been a suit for damages, brought by affected parties, it is possible that special injuries might have been shown, but where half of the people residing in a district testify that certain conditions are objectionable, and the other half testify that the same conditions are not objectionable, this court will not hold that a chancellor was in error when he found that the thing complained of and its incidental operations did not constitute an abatable nuisance.

In *Jackson* v. *Columbia County,* 116 Ark. 386, 172 S. W. 1035, we said: "The burden of proving that the keeping of the stable deprived appellant of the comforts of home or rendered life in her home uncomfortable, rested upon her, and it was necessary to show it by a preponderance of the testimony. There was testimony introduced, supporting the allegations and contentions, but the majority of the court is of the opinion that the finding of the chancellor is not against the clear preponderance of the testimony."

In *Terrell* v. *Wright,* 87 Ark. 213, 112 S. W. 211, 19 L. R. A. (N. S.) 174, it was said: "According to our settled notions and habits, there are convenient places—one for the home, one for the factory; but, as often happens, the two must be so near each other as to cause some inconvenience. The law cannot take notice of such inconvenience, if slight or reasonable, all things considered, but applies the common-sense doctrine that the parties

must give and take, live and let live; for here extreme rights are not enforceable rights—at any rate, not by injunction.

"This defines the situation here. That this planing mill is highly objectionable to plaintiffs and their families is unquestionably true. But that its operation is of such a nature as to deprive a normal person, living where plaintiffs live, of the comforts of home, or render living in such homes a positive discomfort, is not established by a preponderance of the testimony, and this is required before a lawful and useful business can be destroyed by a perpetual injunction."

The record in the instant case shows that inconvenience, annoyance, and objectionable conditions attend operation of appellee's stable, but we are not willing to say, in view of all the testimony, that the chancellor's findings are contrary to the weight of evidence, which he resolved in favor of appellees.

Affirmed.

GRAVES *v.* CARLIN.

4-4721

Opinion delivered July 12, 1937.

R. D. Smith and *W. G. Dinning*, for appellants.

Peter A. Deisch and *John C. Sheffield*, for appellees.

BUTLER, J. N. T. Guthrie, in his life-time, was the owner of several tracts of land situated in Phillips and Monroe counties. He and his wife, Lula B. Guthrie, resided on the tract of land lying in Phillips county, consisting of about 244 acres. He died on September 12, 1932. On October 5 of that year a deed was filed for record and duly recorded on the records for deeds for Phillips county. This deed purported to have been executed by N. T. Guthrie and Lula B. Guthrie, his wife, to De La Graves, Dorris May Graves and Gloria Gertrude Graves, bearing date of July 10, 1929, and conveying the lands above referred to. This action was instituted in the Phillips chancery court by Hester Guthrie Carlin, Julius B. Guthrie and Oscar B. Guthrie, naming the grantees in the afore-mentioned deed as defendants. The complaint alleged that the said deed was not executed by N. T. Guthrie and not delivered to the defendants during the lifetime of the grantor, and prayed that the deed be canceled and plaintiffs have possession of the property, they being the children and sole heirs-at-law of N. T. Guthrie.

The answer denied the allegations of the complaint and the case was submitted upon the complaint and answer, certain stipulations of counsel and the evidence adduced. The trial court found that N. T. Guthrie died intestate leaving surviving his widow, Mrs. Lula B. Guthrie, and the plaintiffs as the only surviving heirs-at-law; that on October 5, 1932, there was placed of record on the official deed records of Phillips county, Arkansas, a purported deed conveying to the defendants certain lands (describing them) and that said purported deed was not executed and delivered by N. T. Guthrie during his life-time and no valid conveyance of the property described had been made to defendants. The trial court

accordingly decreed that the title to the lands in question be vested in the plaintiffs subject to the dower and homestead rights of the widow and that the deed be canceled. From that decree this appeal has been prosecuted.

In support of their contention, plaintiffs caused to be taken the depositions of Mrs. Hester Carlin and her husband, Watkins L. Carlin, and Mrs. Effie Guthrie. At the time of the taking of these depositions objection was made as to the competency of the witness, Watkins L. Carlin, and to certain of the testimony of Mrs. Carlin and Mrs. Effie Guthrie. Before the hearing, these exceptions and objections were filed, but there appears to have been no formal order of the trial court made in this regard. The material parts of the testimony of these witnesses was practically to the same effect relating to statements and admissions made by Mrs. Lula B. Guthrie and of Bryan Graves, her son and father of the defendants, on the day of the death of N. T. Guthrie and on subsequent dates. The objection to the testimony of all the witnesses was that the same was hearsay and not made in the presence of defendants, and, in addition, that Watkins L. Carlin was the husband of one of the plaintiffs and, therefore, under the statute an incompetent witness.

The undisputed facts, briefly stated, are as follows: Mrs. Lula B. Guthrie was the second wife of N. T. Guthrie. At the time of their marriage she was a widow with a son, Bryan Graves. There was no issue from her second marriage. N. T. Guthrie had been previously married and the plaintiffs are his children by his first marriage and his sole surviving descendants. At the time of the marriage of N. T. Guthrie and Mrs. Lula B. Graves, Bryan Graves seems to have been a minor. He lived in the Guthrie home until he became grown and was married. After his marriage, he and his wife resided with the Guthries except at a time when Mrs. Graves was ill and away for her health. The defendants (appellants), are the children of Bryan Graves by this marriage and from their early infancy, resided in

the home of their step-grandfather and were reared by him with affection and indulgence. At the time of the execution of the purported deed the oldest of these children was about twelve years of age and the plaintiffs had approached middle life and presumably had not resided with their father since their majorities or marriages. The evidence tends to show that Mr. Guthrie had reared his children carefully and while they only visited him at infrequent intervals, there is no indication that the natural state of affection did not exist between him and them.

From the date of the purported deed Mr. Guthrie continued to occupy and use the lands in question, as he had previously, until the day of his death. During this time the lands were assessed and taxes paid as formerly.

The circumstances surrounding the death of N. T. Guthrie are somewhat peculiar. He was killed by his step-son, Bryan Graves, on the 12th of September, 1932, apparently early in the day. On learning of the tragedy, Mrs. Carlin, who lived in Memphis, went immediately to the Guthrie home, and also perhaps her two brothers, although the evidence is not clear as to this. They manifested no vindictive feelings and, in relating what occurred, Mrs. Carlin testified in effect that her step-mother was greatly agitated apparently on her son's account as he seemed to have been dependent, more or less, upon Mr. Guthrie. Mrs. Carlin said that Mrs. Guthrie exclaimed, "Oh, Hester, this is awful—it leaves my poor son penniless. Won't you please have mercy and help my poor boy? He has nothing to take care of his children on." In answer to a question regarding what disposition, if any, Mr. Guthrie had made of his estate, Mrs. Guthrie stated that nothing had been done by him. Two days later, in answer to direct questions in the presence of Bryan Graves, she again made the same statement, and was assured by Mrs. Carlin that Bryan Graves would be allowed to share equally with the heirs.

Mrs. Effie Guthrie, a sister-in-law of N. T. Guthrie, corroborated the testimony of Mrs. Carlin, stating that

she was present and heard the conversation between Mrs. Carlin and Mrs. Guthrie and that Bryan Graves was present.

Mrs. Lula B. Guthrie was the only witness who testified on behalf of the appellants. She testified as to the devotion exhibited by her husband to his step-grandchildren and introduced a letter written by him to the wife of Bryan Graves, who was at that time an invalid and away from home for her health. This letter expressed great affection for Mrs. Graves and concern for her condition and gave the assurance that she need not worry about her children; that he would care for and educate them and that he intended that they should have all of his estate. This letter was dated, Marvell, Arkansas, February 22, 1927. With respect to the execution of the purported deed, witness testified that she remembered the year of its execution which was 1929, before Mr. Molitor, a justice of the peace and notary public of the county; that after its execution and acknowledgment the deed was not placed of record during the lifetime of her husband, and in answer to question by counsel for appellants, "Will you state why," she answered, "Because he wanted to use the property, so that he could handle the property during his lifetime, and he gave me the deed and asked me to keep it as long as he lived, then to put it on record; in case of my death first he agreed that he would have it placed of record." Witness further stated, "As we had agreed, as he had asked me to do, I had kept the deed in my possession until he died, and I sent it here by my son and had him to put it on record." On cross-examination, witness stated: "He told me to put the deed away and keep it, and in case of his death before mine for me to have the deed placed of record; that if my death occurred before his, he would place the deed of record. Whichever one died first, the surviving one should place the deed of record, don't you understand now?" Witness testified that her son, Bryan Graves, died October 3, 1933; that he was living with her at the time she gave him the deed and that he lived with her the last year of

his life; that she did not know what became of the deed after she gave the same to him; that she had searched his papers, but had been unable to find it; that her oldest grand-child was about seventeen at the time of the giving of her testimony.

It is essential to the validity of a deed conveying real property that there be a delivery, actual or constructive, to the grantee, and whether a deed has been delivered is a mixed question of law and fact dependent largely upon the intention of the parties thereto. *Lacotts* v. *Quertermous*, 84 Ark. 610, 107 S. W. 167; *Russell* v. *May,* 77 Ark. 89, 90 S. W. 617. In order to constitute an effective delivery there must appear from the circumstances an intention on the part of the grantor to surrender control and dominion over the deed. This court, in *Harding* v. *Russell,* 175 Ark. 30, 298 S. W. 481, quoted the following rule with approval: "Each case must stand on its own peculiar facts. It (the delivery) may be actual or constructive, by word or act, to the grantee directly or to another for him, and a delivery may sometimes be made without the grantee (grantor) parting with the custody of the instrument. It is sufficient if, after the grantor has signed, sealed and acknowledged the deed, he make some disposition of it from which it clearly appears that he intended that the instrument should take effect as a conveyance and pass title."

The general rule is nowhere better stated than in the early case of *Miller* v. *Physick,* 24 Ark. 244, as fallows: "A deed to be operative must be delivered. The act of signing and sealing gives no effect without delivery. The delivery is a substantive, specific and independent act, which may be inferred from words alone, from acts alone, or from both together, and though there is no particular form in which to make it, enough must be done to show that the instrument was thereby considered to have passed beyond the legal control of the maker, or his power to revoke it."

If it be conceded that the testimony objected to by the appellants is incompetent, we must presume that the chancellor was not influenced by it, but considered

only the competent testimony. *Prall* v. *Richards,* 97 Ark. 135, 133 S. W. 595. The testimony of Mrs. Lula B. Guthrie, upon which appellants' case must depend, is not sufficient to establish a valid delivery under the rule cited, for it is clear that there was no intention on the part of the grantor to surrender control over the deed. We think, however, that the testimony of Mrs. Carlin and of Mrs. Effie Guthrie is competent if for no other purpose than to impeach the testimony of Mrs. Lula B. Guthrie. It is significant that Mrs. Lula B. Guthrie did not deny the testimony of Mrs. Carlin and Mrs. Effie Guthrie and their testimony tends strongly to establish the fact that Mrs. Lula Guthrie was not in possession of the deed at the time of her husband's death or at any time prior thereto and the question as to whether or not it was ever executed is unimportant.

The evidence on the whole case appears to support the decree of the trial court, and it is, therefore, affirmed.

BROWN *v.* THE ARKANSAS CENTENNIAL COMMISSION.

4-4796

Opinion delivered July 12, 1937.

D. D. Panich, for appellant.

Jack Holt, Attorney General, *T. Haddon Humphreys, Jr.*, Assistant, *House, Moses & Holmes* and *H. B. Solmson, Jr.*, for appellees.

McHaney, J. Appellant, a citizen and taxpayer, brought this action against the appellees to enjoin them from issuing approximately $300,000 in bonds, under the authority of act 180 of the Acts of 1935, for the purpose of obtaining funds to purchase, construct and equip recreational areas, such areas "to consist of tourists' information bureaus, lodging houses for tourists, concessions, swimming pools, and like recreational facilities," and to be located at Mena, Arkadelphia and various other towns and places in this state. Said bonds are to be sold to an agency of the Federal Government, and a grant of funds from such agency is also contemplated. It is proposed to lease the concessions and other facilities of said recreational centers and from the income thus obtained retire the bonds issued. In addition to the above matters, the complaint charged that said act 180 of 1935 is unconstitutional and void, but, if not so, then it was repealed by act 170 of 1937. To this complaint a demurrer was interposed by appellees and sustained by the court, and, upon appellant's declination to further plead, it was dismissed as being without equity.

Both points are presented on this appeal. It is first insisted that act 170 of 1937 repeals act 180 of 1935. It is conceded that there is no express repeal, but it is insisted that the prior act is repealed by the later by implication. No principle of statutory construction is better settled in this state than that the repeal of statutes by implication is not favored. In the recent case of *McDonald* v. *Wasson*, 188 Ark. 782, 67 S. W. (2d) 722, we quoted the following from 59 C. J. 905: "The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication

if they can avoid doing so consistently or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication, nor will they adopt an interpretation leading to an adjudication of repeal by implication unless it is inevitable, and a very clear and definite reason therefor can be assigned. Furthermore, the courts will not adjudge a statute to have been repealed by implication unless a legislative intention to repeal or supersede the statute plainly and clearly appears. The implication must be clear, necessary and irresistible." 59 C. J. 905 *et seq.* See, also, *Louisiana Oil Ref. Co.* v. *Rainwater,* 183 Ark. 482, 37 S. W. (2d) 96; *Boone County Board of Ed. v. Taylor,* 185 Ark. 869, 50 S. W. (2d) 241; *Consolidated Indemnity & Ins. Co.* v. *Fischer Lime & Cement Co.,* 187 Ark. 131, 58 S. W. (2d) 928; *Curlin* v. *Watson,* 187 Ark. 685, 61 S. W. (2d) 701; *Rightsell* v. *Carpenter,* 188 Ark. 21, 64 S. W. (2d) 101. All of these cases hold that in order for a later statute to repeal a former by implication there must be such an irreconcilable conflict between the two that they cannot stand together. With these principles in mind, we have carefully examined the two statutes and do not find any conflict in them. The later act creates the Arkansas State Park Commission and defines its power and duties, while the former act creates the Arkansas Centennial Commission and defines its powers and duties. The two have many wholly unrelated powers and duties. We think it unnecessary to set out the two acts and compare them, for to do so would greatly extend this opinion to no purpose. While there are some points of similarity in the two acts, it cannot be said that they are in such irreconcilable conflict they cannot stand together.

It is next contended that said act 180 is unconstitutional in that it is in conflict with § 1 of Art. 16 of our Constitution which provides that the state shall never lend its credit for any purpose whatever. Section 7 (b) of said act 180 of 1935, reads in part as follows: "All bonds and other evidences of indebtedness issued under this act shall have the quality of negotiable paper, and

shall not be invalid for any irregularity or defect in the proceedings for the issue and sale thereof, and shall be incontestable in the hands of *bona fide* purchasers or holders for value. But under no circumstances shall any bond, note, or other evidence of indebtedness issued under this act, or any other indebtedness created by the Commission, be held or construed as an obligation of the State of Arkansas, nor shall the State under any theory or upon any grounds be liable or responsible therefor. Said bonds and other evidences of indebtedness shall be solely and exclusively the obligations of the Commission in its corporate and representative capacity, and shall be secured by and payable only from such property, securities and revenues as shall be mortgaged or pledged as security for the payment thereof by the Commission."

It is plainly manifest from this language that the bonds to be issued are not obligations of the State, but "shall be solely and exclusively the obligations of the Commission in its corporate and representative capacity." This language is too plain to be misunderstood and is not open to construction. So the State is not lending its credit and it is not issuing any interest-bearing treasury warrants or scrip, and the provisions of said section of the Constitution are not invaded. *State Military Note Board* v. *Casey,* 185 Ark. 271, 47 S. W. (2d) 23. Even where the State issued its own bonds to borrow money for its own uses and purposes we held there was no violation of this provision of the Constitution. *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9; *Connor* v. *Blackwood,* 176 Ark. 139, 2 S. W. (2d) 44; *Tapley* v. *Futrell,* 187 Ark. 844, 62 S. W. (2d) 32; *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. (2d) 182.

The decree of the court dismissing appellant's complaint for want of equity is correct and must be affirmed. It is so ordered.

STANLEY *v.* STATE.

Criminal 4044

Opinion delivered July 12, 1937.

Linwood L. Brickhouse, for appellant.

Jack Holt, Attorney General, and *John P. Streepey*, Assistant, for appellee.

McHANEY, J. This action was instituted by the State through her prosecuting attorney for the seizure of a certain gambling device in the form of an electric baseball marble slot machine operated in a barber shop in the city of Little Rock. A search warrant was issued and the machine seized. Appellant intervened claiming to be the owner, and that it was operated for the purpose of amusement and not for gambling. He prayed that it be returned to him.

The facts are stipulated, as follows: "That S. L. Stanley, is the owner of a coin-operated novelty baseball game entitled 'Home Run.' That said game is played by placing a five-cent coin in a slot, which permits the pushing of a plunger, thereby releasing five steel balls for play in said machine. By pushing a lever on the lower right-hand side of the machine, one ball is placed in position in front of a plunger. The player draws a plunger back and when he releases same, it strikes the steel ball which goes out upon the baseball diamond or field of the game, in which are set twelve posts with coil springs, within each of which is an electric contact wire. These posts are called bumper springs. At the rear of the playing field is an electric score board upon which all bases, runs and 'outs' are indicated. Upon each play, a light on the score board designates the result earned thereby. In the event the steel ball

strikes one of the bumper springs in such fashion as to cause the ball to be directed to a base-hit compartment, the player is in position to score one or more runs. Three of the bumper springs, which are guarded, give the player an extra run if contacted by the steel ball. Players may earn no runs or scores if the steel balls contact points designated as 'out.' The player making the greatest number of runs wins the game.

"The attached sheet and advertisement furnished by the manufacturer of the game is a replica of the machine and is accurate as to its description and operation. No prize or premium of any kind is offered to the player by the intervener, his agents, employees or his operators for obtaining any designated result upon the machine. The game may be played for the entertainment of the player without the offer of a prize or reward for any particular result obtained in its operation. However, it is susceptible to use as a gambling device in the same manner as any other similar marble machine. That the novelty appeal of 'Home Run' is different from other marble machine games, but its operation is fundamentally the same as others.

"In order to make the operation of the machines profitable as a device for entertainment, they are left in one location for approximately three weeks, at which time they are removed to other locations, and in their places other machines of different design are substituted. The machines are thus rotated until all of those owned by the operator have lost their appeal, at which time they are removed from the particular city in which they are operated.

"That in order to meet the demand for new types of games, the manufacturers are putting on the market an average of two new or varied types of marble machines each week.

"The intervener, as owner and operator of the said game known as 'Home Run,' has installed same in the barber shop of the Rector Building at Third and Spring streets in Little Rock, and same was by invitation and permission of the intervener, operated by various cus-

tomers of said barber shop, including Dr. S. G. Boyce, Mr. Weathersby, Mr. Breashers, Mr. Pechoski, and Mr. McDougal. Each of those persons and others operated said machine by depositing five cents in the slot thereof."

We think this case is ruled by *Steed* v. *State,* 189 Ark. 389. 72 S. W. (2d) 542, where it was held that a marble machine is a gambling device *per se.* We there said: "Appellant contends that the marble slot machines owned by him and seized in these actions are not gambling devices inhibited by § 2630 of Crawford & Moses' Digest, and that the order for their destruction should be reversed. The description of these slot machines make them gambling devices *per se* under the construction placed upon said § 2630 in the case of *Howell* v. *State,* 184 Ark. 109, 40 S. W. (2d) 782, and cases cited therein. We might add that they are gambling devices *per se* because the only reasonable and profitable use to which they may be put is use in a game of chance."

Here, we are asked to modify that holding which we decline to do. The stipulation that, "it is susceptible to use as a gambling device in the same manner as any other similar marble machine" brings it within the Steed case which we reaffirm.

The judgment is accordingly affirmed.

STATE USE ASHLEY COUNTY *v.* RILEY.

4-4720

Opinion delivered July 12, 1937.

Y. W. Etheridge, for appellant.

Compere & Compere, for appellees.

MEHAFFY, J. This action was originally begun by the State of Arkansas for the use and benefit of Ashley county against John C. Riley, sheriff and collector, and the sureties on his bond. The plaintiff below prayed that the settlement of August 10, 1931, made by Riley be reviewed for fraud in the procurement thereof, and that it have judgment for the sum of $5,243.78.

John C. Riley filed answer denying the allegations of the complaint. On August 6, 1935, an amendment was filed to the original complaint in which it was stated that Riley had collected and appropriated to his own use $1,586.08 in excess of the $5,000 allowed by the constitution.

Y. W. Etheridge intervened as a taxpayer, adopted the original complaint, and, also, alleged in an amendment substantially the same allegations made in the amendment to the original complaint, asking judgment of $1,586.08. The suit brought by the State for the use of Ashley county was dismissed by the plaintiff, but Etheridge, having been made a party, the action proceeded in his name.

There were numerous motions and the court finally ruled that Etheridge must proceed on his amendment, which asked judgment for the excess of $5,000, or $1,586.08; that this amendment to the complaint was inconsistent with the original complaint, and took the place of the original complaint.

Both parties appealed. Under the amendment, seeking to recover money received by the sheriff in ex-

cess of the constitutional allowance of $5,000, the plaintiff would be entitled to recover all the money that the officer received in excess of $5,000 whether it was contained in the suit to set aside the settlement or the amendment. In other words, the officer was entitled to receive not exceeding $5,000, under the Constitution, whether he was operating under the salary law or under the fee system. This order of the court did not determine the action finally and was not appealable. *Harrod* v. *St. L. I. M. & S. Ry. Co.*, 98 Ark. 596, 136 S. W. 974; *Brown* v. *Norvell*, 88 Ark. 590, 115 S. W. 372.

To entitle a party to appeal there must have been a final decree rendered in the case. *Foley* v. *Whittaker, Executor*, 26 Ark. 96.

This court has said: "The unnecessary splitting of causes by courts of chancery creates confusion and difficulty in practice and is condemned." *Davie* v. *Davie*, 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170.

The allowance or refusal of a motion to amend pleadings is a matter within the discretion of the presiding judge, and no appeal lies. *State ex rel. Goodwin* v. *Caraleigh Phosphate & Fertilizer Works*; 123 N. C. 162, 31 S. E. 373; *Eastman* v. *Dunn*, 75 Atl. Rep. 697.

In Standard Encyclopedia of Procedure, vol. 2, page 162, it is said:

"The courts have frequently defined a final judgment. Mr. Chief Justice WAITE, speaking for the Supreme Court of the United States, *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. ed. 73, said: 'The rule is well settled and of long standing that a judgment or decree to be final must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.' "

"In equity, as at law, there must be a final decree before an appeal will lie." Standard Cyclopedia, vol. 2, page 163.

The learned chancellor was in error in holding that the decree was final, and the judgment is reversed and

the cause remanded with directions to proceed with the trial of the cause.

GRIFFIN SMITH, C. J., disqualified and not participating.

PATTERSON *v.* STATE.

Crim. 4043

Opinion delivered July 12, 1937.

D. W. Bryan, for appellant.

Jack Holt, Attorney General, and *John P. Streepey*, Assistant, for appellee.

HUMPHREYS, J. Information was filed against appellant in the name of the State of Arkansas by the prosecuting attorney of the Fifteenth Judicial District of Arkansas, before a justice of the peace, for drawing a check on the First National Bank of Fort Smith for $7.50, which check was dishonored because appellant had no money in said bank subject to check. The information was preferred under act 304 of the Acts of 1929 amending act 258 of the General Assembly of 1913.

This court held in the case of *Smith* v. *State*, 147 Ark. 49, 226 S. W. 531, that it was not an offense to give a post-dated check. The amended act makes it an offense to draw a check upon a bank, with intent to defraud, in which the drawer has no money or credit if the maker knows at the time that he does not have sufficient funds in or credit with the bank for the payment of the check, provided he does not make the check good

within ten days after notice of the dishonor of the check.

Appellant was convicted by the Justice of the Peace and on appeal to the circuit court was again convicted and fined $10, from which is this appeal.

Appellant first assigns as error the failure of the trial court to instruct the jury to acquit him because he says the evidence shows that the check was dated December 1, and that he drew and delivered it on November 30, or that it shows that it was a post-dated check. Even if the check was post-dated, as the law now stands, he would be guilty of the crime charged if he executed and delivered the check for the purpose of defrauding the drawee or payee and failed to make it good within ten days after being notified that it had been dishonored.

Appellant has failed to abstract the evidence in the case and it may be that the evidence reflects that appellant drew and delivered the check with the purpose of defrauding the payee.

Again, appellant assigns as error the failure of the court to instruct a verdict of acquittal because the evidence fails to reflect that he gave the check to defraud the payee. As stated above, appellant has failed to abstract the evidence, so, without exploring the record of the evidence, we are unable to say that the evidence is insufficient to sustain the judgment.

Rule ten of the court is as follows:

"In misdemeanor cases the appellant shall file with the clerk when the case is subject to call for submission under the statute an abstract or abridgment of the transcript as in civil cases."

The Attorney General has called our attention to this rule and it is one that must be rigidly enforced in order for the court to keep up with the docket and prevent delays that would result in great prejudice to many litigants.

The judgment must be affirmed and it is accordingly done.

MISSOURI PACIFIC RAILROAD COMPANY *v.* FOREMAN.

4-4718

Opinion delivered July 12, 1937.

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

Farmer Tackett and *Tom W. Campbell*, for appellee.

SMITH, J. Appellee's intestate was killed at a crossing by one of appellant's passenger trains. The usual questions arising in such cases are present in this case, and are discussed in the briefs of opposing counsel. We find no error in the record except in the particulars hereinafter stated.

There was a sharp conflict in the testimony as to whether the whistle was blown or the bell rung as the train approached the crossing, and in discussing the character of the crossing Mr. Tackett, of counsel for appellee, in his argument before the jury, said: "I have been over that crossing many times, and lots of you men have, and it is a death trap, and there is not another one like it in the State." Upon objection being made to the argument the court said: "Mr. Tackett, you

will have to confine your argument to the testimony." Further along in his argument counsel said: "If the jury returns a verdict in favor of the plaintiff there will not be a meal missed by an official of the Missouri Pacific Railroad Company." Upon objection being made to the argument counsel said: "I will withdraw any remarks I have made if they were not permissible." Counsel for defendant said: "I will ask the court to charge the jury to disregard it." Whereupon the court said: "I think that is a legal deduction in the first place; in the next place I will charge the jury they will consider the testimony." Exceptions were duly saved in both instances.

We think the argument in each instance was erroneous and prejudicial, and that the ruling of the court did not operate to remove the prejudice.

In the first instance the statement of counsel was an affirmative and very emphatic declaration of a fact upon one of the controverted issues in the case based upon his personal knowledge. It was in the nature of testimony, and the court did not direct the jury that it could not be so considered; on the contrary, the ruling was that counsel would have to confine his argument to the testimony. But the jury was not told that counsel's statement was not testimony, as should have been done.

The second statement of counsel was not withdrawn, nor was the jury told that it was improper. Counsel did propose to withdraw the remarks, but upon the condition only that they "were not permissible," but the court did not so hold; on the contrary, the argument was apparently approved by the court. Such is the effect of the ruling that "I think that is a legal deduction in the first place," and that holding was not qualified by saying "I will charge the jury they will consider the testimony." If, in fact, this was a "legal deduction," as the court stated it to be, it was not improper for the jury to consider it. The fair—if not the necessary—"deduction" is that a judgment in the plaintiff's favor in the case on trial, in comparison with the total operating costs of the railroad, would be so in-

considerable that "there will not be a meal missed by an official of the Missouri Pacific Railroad Company." The ability of the railroad company to respond in damages and to pay the judgment was not a proper matter for the jury to consider. The only questions which should have been submitted to and decided by the jury were (a) that of the liability of the railroad company for intestate's death, and (b) if liable, the proper compensation to be awarded; and these questions—both of them—should have been decided without reference to appellant's ability to pay, there being no claim for punitive damages. Many of our cases are cited in the briefs upon the questions (a) whether or not an argument was improper and erroneous, and (b) if so, whether the prejudice thereof had been or could be removed. We do not review these cases in this opinion, but applying the principles which all of them have announced, we state our conclusion to be that both arguments were erroneous, and, if this be true, the prejudice thereof was not removed by the rulings of the court.

In the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hairston,* 125 Ark. 314, 188 S. W. 838, we quoted with approval from the chapter on "Argument of Counsel" in 2 R. C. L. 425, the following statement of the law: " 'It is the unquestionable privilege of counsel to indulge in all fair argument in favor of the contention of his client. But he is outside of his duty and his right when he appeals to prejudice irrelevant in the case. Properly, prejudice has no more sanction at the bar than on the bench. An advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, *dehors* the very case he has to try. The fullest freedom of speech within the duty of his profession should be accorded to counsel, but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices ir-

relevant to the case and outside of the proof. * * * Where the admonition of the court does not prove sufficient to prevent improper and dangerous appeals to the prejudices of jurors, it becomes necessary rigidly to enforce the general rule that requires a reversal whenever the error is raised by a proper exception.' ''

Here, proper exceptions were saved, and for the errors indicated the judgment will be reversed and the cause remanded for a new trial.

HUMPHREYS and MEHAFFY, JJ., dissent.

ROPER *v.* GREENE & LAWRENCE DRAINAGE DISTRICT.

4-4715

Opinion delivered July 12, 1937.

H. R. Partlow, H. C. Rhine and *L. V. Rhine,* for appellants.

Wm. F. Kirsch and *Maurice Cathey,* for appellee.

HUMPHREYS, J. This suit was filed in the chancery court of Greene county on the 16th day of May, 1936, by appellant against appellees, the main purpose of which was to subject the taxes collected by the board of directors of said drainage district after August 1, 1930, directly or under foreclosure proceedings against property-owners in said district, amounting to about $23,000, to the payment of four bonds in the sum of $2,000 and interest owned by her, *pro rata,* with the unpaid bonds owned by all other bondholders.

The complaint is very long and it and the exhibits thereto are set out in full in appellant's abstract, but

for the purposes of this opinion it is only necessary to set out the substance of the material parts thereof relating to the fund in question.

The complaint alleged that the four bonds made the basis of the suit matured on August 1, 1930, and that although demand for payment was frequently made within the five year period of limitations, she refrained from bringing suit on account of promises made to her that the taxes would be collected and her bonds paid.

The complaint also alleged that the drainage district was created under special act No. 318 of the General Assembly of Arkansas for 1911, which authorized the issuance of bonds based upon benefit assessments against the real estate in said district with which to make the improvement, and that the bonds sued upon were a part of the bonds issued; that the board of directors were authorized under said act to pledge or mortgage the assessments against said lands to secure the payment of said bonds, and that pursuant to such authority the board of directors did pledge or mortgage all assessments to secure the payment of the bonds.

The complaint, also, alleged that after appellant's bonds became due, and before the five-year period of limitations ran against them, and particularly in 1934, the board of directors collected assessments which had been specifically assigned under the pledge for the benefit of all bondholders; that said assessments or tax money was paid and collected for the express purpose of paying delinquent bonds and interest; and that this tax money is being held by the board in trust for all of the bondholders.

The complaint, also, alleged that pursuant to the acts creating this district and the amendments thereto and the conditions and requirements of said pledge, the board of directors of the drainage district collected taxes after August 1, 1930, and that said board on the date of February 2, 1934, filed foreclosure proceedings as provided in said pledge given by said drainage district to secure the bonds; that said proceedings foreclosed the lien of the assessments levied for 1930, 1931, and 1933;

that a decree was granted in said suit April 19, 1934, and the report of sale filed November 1, 1934; that after appellant's bonds became due and payable, said board collected, as a result of the foreclosure proceedings under the terms of the pledge given to secure the bonds, $....., and the said drainage district purchased several tracts of land; that in addition to the money and property obtained by reason of said foreclosure proceedings, the treasurer of Greene county has paid over to the treasurer of said district $18,343.52, which amount represented tax money paid by the county collector on assessments levied by said board for retirement of said bonds including the bonds of appellant; that the treasurer of Lawrence county paid $5,000 to the treasurer of said district, which amount represents taxes collected on the lands embraced in said district located in Lawrence county; that under the provisions of the act creating said district and the amendments thereto and the provisions contained in the pledge all of said money so collected by appellee, board of directors, constitutes a trust fund for the specific purpose of paying the bonds, and that it was paid to the directors of the district, who are trustees charged with the specific duty to preserve said fund and *pro rate* it among all holders of defaulted bonds; and that such monies and the properties purchased in the foreclosure proceedings were held in trust for the bondholders.

The complaint further states that these funds were collected before the statutory bar attached to the bonds sued upon and that the board of directors and their depositaries are in possession of the trust fund; and that said board has and is refusing to pay said money to the beneficiaries of said trust after repeated demands have been made on the said board.

The prayer of the complaint is that appellees be required to pay over this trust fund to the bondholders, *pro rata;* and, further, that appellant have judgment against the district for the amount due upon her bonds with six per cent. per annum interest from August 1, 1930, until paid.

A demurrer was filed to this complaint and sustained and the complaint dismissed on the theory that the bonds sued upon matured more than five years before the institution of this suit, and from the decree sustaining the demurrer and dismissing the complaint appellant has duly appealed to this court.

The complaint shows on its face that appellant is not entitled to a judgment against the district on account of the statutory bar having attached, but the complaint also alleges another and different cause of action. It alleges that the fund in the hands or under the control of the directors was collected as taxes upon assessments against the lands for the express purpose of paying the bonds as they matured and that they are holding it in trust for appellant and the other bondholders. After reading the complaint and the exhibits, we think the fund is the result of an express trust and were collected before the statutory bar attached to the bonds. As to these funds the relationship of creditor and debtor does not exist. The landowners paid it in for the express purpose of retiring the bonded indebtedness. The law creating the district provided that this tax money should be set aside and assigned specifically to the bondholders. The directors had collected and were holding it for the bondholders with specific directions to pro rate it among the bondholders.

The fund being a trust fund and the directions being specific as to how it should be paid to the bondholders by the directors, a fiduciary relationship existed and it was clearly a fund, as long as it was in the hands of the directors or under their control, the payment of which could not be defeated by the statute of limitations. The general rule is that the statute of limitations cannot be interposed to defeat an express trust. We deem this question so well settled that it is unnecessary to cite the large number of cases so holding.

On account of the error indicated, the decree is reversed with directions to overrule the demurrer as to the portions of the complaint seeking to impound and pro rate the trust fund and for further proceedings in accordance with law.

STEELE *v.* STATE.

Crim. 4037

Opinion delivered July 12, 1937.

M. L. Reinberger and *Chrisp & Nixon*, for appellant.

Jack Holt, Attorney General, and *John P. Streepey*, Assistant, for appellee.

SMITH, J. Appellant was tried under an indictment charging him with the crime of murder in the first degree, alleged to have been committed by shooting and killing Victor G. Nordstrom. He was convicted of voluntary manslaughter and given a sentence of five years in the penitentiary, and has appealed.

Appellant owned and operated a restaurant in the city of North Little Rock, which remained open both day and night. Jack Mann was employed there, and became drunk and boisterous on the night of December 13, 1936. He had some powder, referred to as itching powder, portions of which he poured on appellant and on patrons of the cafe then present. Appellant's wife discharged Mann because of his conduct and paid him off, and Mann was ordered to leave the cafe, which he declined to do. Appellant appears also to have been under the influence of intoxicants, though probably not to the same extent as was Mann.

There was testimony to the effect that Mann began cursing Woody Adkins in the cafe, and appellant interfered to protect Adkins. Appellant shot Mann, and the same shot killed Nordstrom, a bystander.

The theory upon which the case was defended is reflected in two instructions requested by appellant, both of which were refused by the court, and the question presented on this appeal is whether these instructions, or either of them, should have been given. They read as follows:

"No. 1. You are instructed that the defendant, as owner of the Post Office Cafe, had a right to repel any felonious attack on his guests, or employees, and if you believe from the testimony in this case that Jack Mann was about to make a felonious attack on Woody Adkins, who was a guest of the defendant, and that the defendant made an effort to repel the same and in so doing had to take the life then you are instructed to acquit the defendant.

"No. 2. You are instructed that if you believe from the testimony that the defendant was attacked in his own place of business by Jack Mann and that Jack Mann was going to shipwreck the place, you are instructed that the defendant did not have to retreat, but that he had a right to kill his assailant if this is apparently necessary to save his own life. You are further instructed that the defendant does not have to leave his own premises to escape his assailant."

It may first be said that the court gave numerous and correct instructions defining the law of self-defense, that is, the right of appellant to defend himself against the assault about to be committed upon him by Mann; but these instructions do not go to the point raised in instructions 1 and 2, set out above. Was it error to refuse them?

So much of instruction No. 1 as declares the law to be that appellant, as owner of the cafe, had a right to repel any felonious attack on any of his guests or employees is a correct declaration of the law. The law is so stated in the chapter on Excusable or Justifiable

Homicide in volume 1 of Michie on Homicide. But the instruction does not properly define the conditions under which this right may be exercised. It did not state that the defendant could use no more or greater force than was reasonably necessary for the purpose of protecting his patrons, and that in using this force he should be free from fault or carelessness. He could not kill the assailant of his patron merely because the patron had been assaulted, nor could he, acting without fault or carelessness, use more force than was reasonably necessary to protect his patron from the assault.

Instruction No. 2 is open to the same objection. The hypothesis of this instruction has no logical relation to its conclusion. It states that if Mann was going to shipwreck the place appellant had the right to kill him if this was apparently necessary to save his own life, and concludes with a correct declaration of law to the effect that appellant was not required to leave his own premises to escape his assailant. There is an apparent implication that one has the same right to kill to protect his property from shipwreck that he has to protect his own life; at least, the instruction is not clear upon that question. One does not have the same right in the first instance which he has in the latter. The law of the subject was reviewed by Justice Battle with characteristic thoroughness in the case of *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900, to which reference is made for a full discussion of the question.

In the case just cited two neighboring farmers had quarreled over a gap in a fence through which the stock of one entered upon the fields of the other. There was testimony to the effect that the deceased, who was killed by Carpenter, refused to permit Carpenter to repair the fence, and cursed Carpenter and drove him away. Upon his trial Carpenter testified that he killed his neighbor in resisting a forcible trespass. The opinion in the case quotes §§ 1670, 1671, 1672 and 1676, S. & H. Digest, which now appear as §§ 2369, 2370, 2371 and 2375, Crawford & Moses' Digest. These sections define "Justifiable and Excusable Homicide." The first sec-

tion cited reads as follows: "No. 2369. Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony."

Judge BATTLE said these sections of the digest were declaratory of the common law. Construing these statutes Judge BATTLE said: "The circumstances (of the killing) must be such as to impress the mind of the slayer, without fault or carelessness on his part, with the reasonable belief that the necessity for killing to prevent the felony was immediate and impending, and the danger imminent." It will be observed that instruction No. 1 omits these qualifications.

Upon the question of one's right to defend his property Judge BATTLE said: "But the right to defend property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, to the extent of slaying the aggressor, does not include the right to defend it, to the same extent, where there is no intention to commit a felony. A man may use force to defend his real or personal property in his actual possession against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. But, in the absence of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor for the purpose of preventing a trespass; and if he should do so, he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress. Ordinarily, the killing allowed in the defense of property is solely for the prevention of a felony."

It will be observed that instruction No. 2 was not predicated upon the right of one to kill to prevent the commission of a felony, and insofar as it declares a

man's right to kill his assailant, if this is apparently necessary to save his own life, it may be said that the instructions of the court upon the right to kill in necessary self-defense was fully and correctly declared.

We conclude, therefore, that neither instruction No. 1 nor instruction No. 2 was a correct declaration, and there was, therefore, no error in refusing them. The law is well settled that a party must ask an instruction correct in its entirety, and that it is not error to refuse an instruction which may contain a correct statement of the law if, when read as a whole, it does not correctly declare the law. *Western Union Telegraph Co.* v. *Ford,* 77 Ark. 531, 92 S. W. 528; *Bates* v. *Ford,* 110 Ark. 567, 162 S. W. 1097; *Gunter* v. *Williams,* 137 Ark. 530, 210 S. W. 136.

No error appears and the judgment must, therefore, be affirmed. It is so ordered.

BARRENTINE AND IVES *v.* STATE.

Crim. 4048

Opinion delivered September 27, 1937.

Gus Fulk and *Milton McLees,* for appellants.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

McHaney, J. Appellants were convicted of attempted bribery of a police officer in the municipal court of the city of Little Rock. On appeal to the circuit court, they were again convicted, fined $100 and sentenced to 30 days in jail, on the theory that the charge was a misdemeanor under the common law. The only question to be decided on this appeal, as stated by counsel for appellants, is: "Whether or not the common law offense of attempting to bribe a public officer has been abrogated by statutory law of the state of Arkansas."

Appellants contend that, since at common law both bribery and attempt to bribe were misdemeanors, no distinction being made in the grade of the offense, our statute, § 2569, Crawford & Moses' Digest, takes up the whole subject anew, covering both the giving and offering to give a bribe, makes the offense a felony, and must be held to be in derogation of the common law. If so it is urged, no offense was charged against them, as there was no indictment or information under the statute. Said section provides: "If any persons shall * * * promise or offer to give * * * any money * * * to any member of the General Assembly * * * or to any officer of the state, or person holding any place of profit or trust, under any law of the state * * * with intent," etc. We think a careful reading of this statute shows that it was not intended to repeal the common law offense, but merely supplementary or cumulative thereto, and that the prosecutor might proceed under either assuming, of course, that a police officer is a "person holding any place of profit or trust, under any law of the state."

It has long been the rule in this state that "A statute will not be taken in derogation of the common law unless the act itself shows such to have been the intention and object of the legislature." *Gray* v. *Nations,* 1 Ark. 557; *State* v. *Pierson,* 44 Ark. 265; *Wilks* v. *Slaughter,* 49 Ark. 235, 4 S. W. 766; *Powell* v. *State,* 133 Ark. 477, 203 S. W. 25; *State* v. *One Ford Automobile,* 151 Ark. 29, 235 S. W. 378. A careful reading of the act fails

to convince that such was the intention and object of the Legislature.

We must, therefore, conclude that appellants were, lawfully charged and convicted, and the judgment must be affirmed. It is so ordered.

PENTON *v.* STATE.

Crim. 4040

Opinion delivered September 27, 1937.

George F. Edwardes, Jr., and *J. D. Cook, Jr.,* for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

GRIFFIN SMITH, C. J. The prosecuting attorney filed information in Miller circuit court, alleging that Foster Penton and Price Stephens "wilfully, feloniously and with malice aforethought, and after premeditation and with deliberation, did kill and murder Charley Block by striking and cutting the said Charley Block with an axe."

Appellant, on March 8, entered a plea of not guilty. He was granted a severance from Stephens. The jury returned a verdict of murder in the first degree and the court assessed the death penalty. On March 12 Stephens entered a plea of guilty to the crime of murder, and his punishment was fixed at life imprisonment in the penitentiary.

As grounds for reversal as to Penton it is urged (1) that improper remarks were made by the trial judge and prosecuting attorney; (2) that the court erred in refusing to instruct the jury that the defendant could not be convicted upon the uncorroborated testimony of witnesses who it was claimed were accomplices; (3) that the court refused to permit the defendant to exercise a challenge for cause upon a showing that one of the jurors had served upon a regular jury within one year; (4) that the court erred in admitting testimony by which the state sought to show that appellant and Stephens killed Block while engaged in the commission of robbery, whereas the information charged malice and premeditation; (5) that it was error to admit testimony of the sheriff and a deputy who told of appellant's confession; (6) that the court erred in commenting upon the weight of testimony; and (7) that Constitutional Amendment No. 22, authorizing prosecution by information filed by the prosecuting attorney in lieu of indictment by a grand jury, is invalid. Other errors are alleged, but

they are not of sufficient importance to require separate discussions.

(1) This assignment is predicated upon a question directed by the prosecuting attorney who asked a witness: "Did he (appellant) work for you at the time this murder happened?" In response to an objection the court remarked: "That's what it is." Attorneys for the defendant moved that a mistrial be declared, and were overruled. Thereupon the court, addressing the jury, said: "Well, gentlemen, it is a question for the jury as to whether or not it is murder."

Appellant's defense was not that he was justified in killing Block, but that he had no connection with the transaction, and was innocent. Therefore, use of the word "murder" by the trial judge could not prejudice appellant's cause. *Vasser* v. *State,* 75 Ark. 373, 87 S. W. 635.

(2) A complete answer to this objection is that neither of the witnesses who are alleged to have been accomplices testified to the guilt of appellant. The deceased's body was found in the river near Garland City. Tony Price testified: "I work for the Gas Company, and was going to look after the company's motor boats and skiffs. Upon reaching Block's house I said something, and there was no reply. Upon looking in the door I saw blood. I followed a trail of blood to the river bank and found a sweater I thought I recognized, but did not bother it. I bailed out the boats and then picked up Bill Barnum and told him what I had found and we went back and fished Charlie out of the river. This happened about the middle of December. When we got the body out of the river it looked badly cut and badly battered with some instrument. I could not say what time of day it was, but I go to work between 7:30 and 8:30. I do not remember whether I saw Charlie Block the day before, or not—I just don't remember."

It is contended that because the witness, after noticing the sweater and after having seen blood in the cabin and along the trail, went on bailing out his boat, and made no further investigation until he met Bill Bar-

num, an inference of guilt arises, and Price should be classed as an accomplice. But even if it should be admitted that the circumstances were sufficient to create a suspicion, it must be remembered that Price did not give any testimony connecting appellant with the crime, nor did he refer to appellant in any manner.

Price Stephens testified that he lived in Garland City and worked for Jesse Smith. At this point appellant's attorneys objected that the witness had been jointly accused with appellant, and that any testimony he gave would be self-incriminating. The court remarked: "He has not been asked any incriminating questions yet." Stephens was then asked whether he and appellant stood jointly charged with the robbery of Charlie Block, and he replied that he had entered a plea of guilty to that charge. This testimony was also objected to. When asked whether he was at Charlie Block's house "the afternoon of the night that you and Foster (appellant) robbed him," the objections were renewed. The court then asked the witness if he objected to giving testimony "about it," and the answer was, "Yes, I mind." Stephens was excused.

It is contended that the testimony given by Stephens conveyed to the jury information that appellant and witness had been jointly held for the robbery of Block; that they had entered pleas of guilty, and that such testimony probably formed a basis for the final verdict.

It will be noted that Stephens did not testify against appellant other than to say that they had been jointly charged with having robbed Block. He did not say that appellant participated in the robbery, or that appellant was present when it was committed, nor did he in any manner connect appellant with the transaction. In view of other testimony affirmatively fixing appellant's guilt, it will not be presumed that the jury was influenced by the references to robbery, and appellant did not suffer prejudice by reason of the testimony. It follows that the court did not err in refusing the requested instruction.

(3) Section 36 of Initiated Act No. 3, adopted November 3, 1936, repeals act 135 of 1931, which provided that "no citizen shall be eligible to serve on either a grand or petit jury oftener than one regular term of the circuit court every two years." The trial court was therefore correct in refusing to allow appellant's requested peremptory challenge.

(4-5) No testimony, other than the confession, was admitted to show that Block was killed by appellant with robbery as the objective, but it is insisted that the confession should have been excluded as having been induced through promise of reward. Sheriff Tom Sewell testified as follows: "I went with Mr. Greer, Mr. Adcock and Bill Smith down to investigate the killing of Charlie Block. We went to Charlie Block's house; found it open and a big pool of blood on the floor; found where the blood left the house and went off down the bank of the river; followed it about 600 yards to where the body was thrown into the river. Myself, with my deputies, examined the trail from the house to the point where the body was found, and beside the trail of blood discovered the tracks of two men. One of the tracks had three bars across the bottom of the shoes, and that track made a plain impression in the sand.

"I arrested appellant down there—carried him down the river to where those tracks were in the sand bar where they drug this body, and made him make a track there beside it. The shoes that he had on made, I think, the same track and the same size. I cut a stick and measured the track and the shoes he had on.

"I asked appellant what he thought about the tracks and if he didn't think the tracks looked very much like his, and he said yes, but he didn't make the tracks. So we went on down a piece further and coming back I showed him another track and he said that that was his track, but he couldn't tell exactly when the track was made. He denied at that time knowing anything about the murder of Charlie Block, but said he had been at Charlie Block's house that afternoon. I asked him if the clothes he had on were the same ones he had on the

evening he was at Charlie Block's house, and he said they were. I was present when a certain pair of pants was exhibited to appellant. He admitted that they were the pants he had on the afternoon before, and tried to explain how some blood was on them. There was blood on them. I don't know of my own knowledge where the pants come from. He said he had a disease and that it come on them from that. He, with some other suspects, was brought by myself and deputies to the Miller county jail. Appellant made a statement to me since he has been in custody.

"We had been talking to appellant a couple of days at different times about this thing, and he contended all the time that he knew nothing about it. Will Greer and myself rode up to the jail one day and appellant called out of the window for Mr. Greer to come up there; that he wanted to talk to him. Greer went up and got him and brought him down and he told how he killed Charlie Block and who was with him. I didn't call him down there. He said Tony Price was the man that killed Charlie Block. I told him that we were going to go down and get Tony Price and that he had better not lie because that would just get him in more trouble. He called us back and said he might have lied on Tony Price. Then he told me that he and Price Stephens killed Charlie Block, drug him down there and put him in the water. He said he had been there shooting craps that afternoon before Block was killed that night, and he knew Block had some money; that they fixed it up between themselves to go there and rob Charlie Block and get his money. Price Stephens went in to buy a dime drink of whiskey, and while he was standing there with the dime on the table that appellant took an axe and hit Block in the head two licks. Price Stephens took the money out of his pocket and handed it to appellant and when Stephens said that Block might not be dead he went back and picked up the axe and hit him two or three times more. Then they took the body and dumped it in the river, down where it was found. They dragged the body down there by his feet. I found

a dime lying there on the table by a fruit jar in Charlie Block's house, and found an axe lying there. Appellant told me it was his axe. After this statement had been made to me, Price Stephens was arrested.

"While appellant was in jail he stuck a match up his penis and caused himself to bleed and called us up there and showed us. I called Dr. Dale to check up and then I found the match he had used with blood on it. It was after that appellant made the statement to me and Mr. Greer.

"After the body had been recovered out of the river and the undertaker had dressed it, I looked at it and it was Charlie Block's body. There were four cut places on the body."

We are of the opinion that the confession was properly admitted. There is no evidence that appellant was in any manner mistreated. It is true that the sheriff says he carried appellant down to the river where there were tracks in the sand near Block's body, "and made him make a track there beside it." Appellant, however, does not insist that force was employed, or that he was threatened. The word "made" as used by the sheriff does not necessarily imply compulsion, and was doubtless used in a sense synonymous with "directed." Emphasis is placed upon testimony given by Deputy Sheriff Will Greer who says he told appellant it would go well with him if he told the truth. This was merely the expression of an opinion, and the statement was not coupled with innuendo or subtleties calculated to deceive the prisoner. Appellant was only advised to tell the truth.

It is suggested by counsel for appellant that Block might have met his death by a fall, or in some manner within the realm of speculation. However, there was no proof suggestive of any means other than violence, and the discovery of blood in deceased's cabin and a trail of blood leading to the river, considered in connection with the nature of the wounds, are substantial circumstances tending to confirm appellant's confession. Here, as in *Owens* v. *State*, 120 Ark. 568, 179 S. W. 1014,

"the *corpus delicti* was established by abundant testimony, and the confession constituted evidence legally sufficient to support the verdict."

(6) It is next urged that the court commented upon the weight of testimony. The remarks to which exceptions were taken were with respect to trivial matters, and could not have influenced the jury in arriving at a verdict. From a purely technical or legalistic standpoint, some of these comments might be classified as improper, and support for holding that they constituted reversible error can be found in the older decisions, written at a time when great weight attached to purely technical construction. But the tendency of present-day decisions is to regard as immaterial those matters which cannot conceivably militate to the prejudice of a defendant, where such construction does not, in the circumstances of the case, run counter to the law, nor conflict with rules of reason.

Initiated Act No. 3, referred to *supra,* will have the effect of simplifying procedure. Section 23, amending § 3029 of Crawford & Moses' Digest, cures the error complained of by appellant that prejudice resulted when the trial court permitted information to reach the jury that robbery motivated the murder, whereas malice and premeditation were charged in the information. The form approved by this section is as follows: "The grand jury of Pulaski county, in the name and by the authority of the state of Arkansas, accuses John Doe of the crime of murder in the first degree, committed as follows: The said John Doe, on January 1, 1936, in Pulaski county, did murder Richard Roe, against the peace and dignity of the state of Arkansas."

(7) Constitutional Amendment No. 22 was adopted at the general election in November, 1936. Section 1 reads as follows: "That all offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information filed by the prosecuting attorney." The resolution of the House of Representatives, under authority of which the amendment was submitted, provides that "if

a majority voting thereon at such election adopt such amendment, the same shall become a part of the Constitution of Arkansas."

A constitutional amendment is self-executing "if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duties imposed may be enforced." *Jones* v. *Jarman*, 34 Ark. 323; *Griffin* v. *Rhoton*, 85 Ark. 89, 107 S. W. 380; *Arkansas Tax Commission* v. *Moore*, 103 Ark. 48, 145 S. W. 199; *Cummock* v. *Little Rock*, 168 Ark. 777, 271 S. W. 466; *Matheney* v. *Independence County*, 169 Ark. 925, 277 S. W. 22; *Wright* v. *Ward*, 170 Ark. 464, 280 S. W. 369; *Martin* v. *State ex rel. Saline County*, 171 Ark. 576, 286 S. W. 873.

Finally, it is insisted that the conviction and sentence of appellant are void, on the ground that they are repugnant to article 5 of the Constitution of the United States, which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." It is also urged that the procedure is violative of that clause of the Fourteenth Amendment of the Constitution of the United States, which reads as follows: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

In an opinion written by Chief Justice TAFT, *Gains* v. *Washington*, 277 U. S. 81, 48 S. Ct. 468, 72 L. ed. 793, the Supreme Court of the United States said: "Another question raised on behalf of the defendant concerns the filing of the information for murder by the prosecuting attorney. Prosecution by information instead of by indictment is provided for by the laws of Washington. This is not a violation of the Federal Constitution." And again, in the same opinion, appears this declaration of the law: "It has been well settled for years that the first ten amendments" to the Federal Constitution "apply only to the procedure and trial of causes in the federal courts and are not limitations upon those in state courts. *Spies* v.

Illinois, 123 U. S. 131, 166, 8 S. Ct. 22, 31 L. ed. 80, and cases cited."

In *Hurtado* v. *California,* 110 U. S. 516, 4 S. Ct. 111, 28 L. ed. 232, the due process clause of the Federal Constitution was invoked by the plaintiff in error, who had been convicted of the crime of murder, committed in the state of California. The California Constitution (Art. 1, § 8) contained the following provision: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by an indictment, with or without such examination and commitment, as may be prescribed by law."

In affirming the judgment of the Supreme Court of California, the Supreme Court of the United States, at page 534 of the opinion, said: "According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini,* the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state, which derives its authority

from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.''

The principle distinction between provisions of § 1 of Amendment 22 to the Constitution of Arkansas, and the provision of California's Constitution authorizing prosecutions under information, is that as a condition precedent to the validity of prosecutions on information in California, there must have been examination and commitment by a magistrate. Omission of this requirement from the Arkansas Amendment does not deprive the accused of the rights of due process guaranteed under the Constitution of the United States.

The judgment is affirmed.

DEATHERAGE *v.* STATE.

Crim. 4050

Opinion delivered September 27, 1937.

H. A. Northcutt and *Oscar E. Ellis,* for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

BUTLER, J. This proceeding was instituted by a charge of murder in the first degree contained in an information filed by the prosecuting attorney of the Baxter circuit court under authority of Amendment No. 22 to the Constitution of Arkansas and act No. 160 of the Acts of 1937 in aid thereof. At the trial the defense offered was that the appellant was an officer, acting at the time of the killing in a criminal case, and that he had one Cunningham in custody, who there and then assaulted and resisted him, and that while Cunningham was in the commission of such acts appellant shot and killed him in his necessary self-defense. Appellant was convicted of the crime of involuntary manslaughter.

The errors assigned and argued for reversal will be considered in the order presented by appellant's counsel in their brief.

The first assignment of error relates to the testimony of J. J. McCarthy who was a witness on behalf of the state. At the trial, articles of clothing, purported to have been worn by the deceased at the time he was killed, were introduced before the jury by the sheriff of Baxter county, who identified the same as clothing he had procured from the undertaker's establishment after it had been removed from the body. This clothing was sent by the sheriff through the mails to the Bureau of Investigation of the Department of Justice in Washington, D. C. After a time it was returned by the same means to the sheriff and by him introduced as the same clothing which he had transmitted to Washington. The

witness, McCarthy, testified that he was employed by the Federal Bureau of Investigation and that he received some clothing from the sheriff of Baxter county which he examined; that he found certain holes in the clothing. The witness qualified as a chemist and expert in firearms and stated that these holes were bullet holes and, from the condition of the clothing and some discolorations which he observed and examined, he concluded these were powder marks and that the holes were the points of entrance of the bullets. Objections were made to the introduction of this testimony and exceptions properly saved to its admission by the trial court. At the conclusion of the examination in chief, counsel for appellant moved to exclude the testimony from the consideration of the jury, which motion was overruled and the exceptions saved.

It is contended that this testimony was inadmissible (a) because there was no proper identification of the clothing as that taken from the body of the deceased, and (b) that it was not shown that the clothing was in the same condition when examined by McCarthy as it was when removed from the body. These specific objections were not made in the trial court, and when counsel was asked by the trial judge if the motion to strike was made for any special reason, none was given save the general objection that "it is incompetent and irrelevant." We deem it unnecessary to discuss the sufficiency of the identification, for if the testimony was erroneously admitted no prejudice resulted to the defendant, the reason being that it related to no issue in the case. The general effect of the testimony is that the slayer was in close proximity to the deceased at the time the fatal shots were fired. The appellant testified that the deceased, immediately before the firing, grasped him by the throat, backed him against a wall and he there and then fired the shots because of the assault and under the belief that he was in imminent peril of receiving great bodily harm or of losing his life, and that the shots were fired in necessary self-defense. The question, then, is why the shots were fired and whether this

act on the part of appellant was justified, and not at what distance the shots were fired or on what particular part of the body the wounds were inflicted, there being no dispute as to this. While the testimony of McCarthy may not have been competent, a point we find it unnecessary to decide, we agree with appellant that it was immaterial. We are unable to perceive how it could have helped the case of the state or harmed that of defendant. Accordingly, the case cannot be reversed because of this error. *French* v. *State,* 187 Ark. 782, 62 S. W. (2d) 976.

The second, third and fourth assignments of error are so related that they may be considered together. These are that the trial court erred in refusing to sustain appellant's instruction for a directed verdict, in overruling instruction No. 1 requested by the appellant, and that the evidence was insufficient to sustain the conviction. The undisputed evidence is to the effect that at a time when appellant was a peace officer, he arrested Cunningham while the latter was drunk and disorderly and placed him in the county jail. This appears to have occurred late in the evening or during the night. After Cunningham had been placed in jail, a fire broke out in the jail and the prisoners were brought out until it was extinguished. Then appellant returned Cunningham to the jail and, as he was putting another prisoner back, Cunningham came out again. The appellant again took Cunningham into the jail and while inside and beyond the sight of those on the outside, a commotion was heard by them. Appellant was heard to exclaim, "Quit, quit," and again, "He's choking me to death," and, immediately after the last exclamation, the shots were heard.

One witness testified as to having seen a part of the struggle between appellant and Cunningham and stated that he heard Cunningham say, "I'll burn the damn thing down," at the same time reaching out and grabbing appellant around the neck. After the shooting a shirt collar was found in the jail which was identified as that of the appellant who testified that it had been

torn from his shirt in the struggle. After the firing, appellant came out of the jail rubbing his throat, which, however, was found free from bruises, lacerations or other apparent injury when examined by a physician the next morning.

Instruction No. 1, requested by the appellant and refused by the court, was to the effect that if the jury found appellant was an officer and had arrested deceased and was committing him to jail or attempting to keep him there after his commitment and was assaulted by the deceased, appellant was justified in killing him. It is argued that it was error of the trial court to have refused this instruction and, further, that as the instruction is based upon undisputed facts, the evidence is not sufficient to sustain the conviction. This contention is based upon the language of § 2376 of Crawford & Moses' Digest which provides: "If an officer, in the execution of his office in a criminal case, having legal process, be resisted and assaulted, he shall be justified in killing the assailant." This section, however, must be considered and construed with the whole of chapter No. 44 of the Revised Statutes, relating to the law of homicide, of which it is a part. As part of this chapter, one of the grounds for justifiable homicide is defined as a killing in necessary self-defense. Crawford & Moses' Dig., § 2369. Also, it is declared, that a bare fear of the offenses to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing, but that they must be such as to excite the fears of a reasonable person and that the slayer really acted under their influence. *Id.*, § 2374. Again, the declaration is made that if the killing be in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter. *Id.*, § 2356.

One who slays another under the honest belief that his life or limb is in imminent peril and commits the act to prevent the apprehended danger is in the exercise of a lawful act. Merely because of this, however, he is not to go free unless he acted with due caution and circumspection, for if he did not he is guilty of manslaughter.

Ringer v. *State,* 74 Ark. 262, 85 S. W. 410; *Scott* v. *State,* 75 Ark. 142, 86 S. W. 1004; *Bruder* v. *State,* 110 Ark. 402, 161 S. W. 1067; *Smith* v. *State,* 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20.

"Although," as it has been said, "officers of the law are 'clothed with sanctity' and 'represent its majesty,' " their right in resisting an assault can rise no higher than that of one in the exercise of the right of self-defense, a right which existed before the promulgation of any law, one inherent to man in the nature of things. Therefore, the same rule applies to officers in resisting an assault and in exercising a lawful act under the circumstances; that is to say, before taking human life, they must at least act with due care and circumspection.

In the instant case, the officer was not assaulted by a felon or one charged with that offense, but by one who had been arrested and committed for misdemeanor, and, in resisting the assault made upon him, the officer could be justified only when it appeared reasonably necessary to him to kill in order to save his own life or to prevent infliction upon him of great bodily harm. The slaying must have been made in the honest belief that it was necessary and not with any other motive. This court, in the case of *Thomas* v. *Kinkead,* 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68, in speaking of a misdemeanant (quoting page 509), said: "In making the arrest or preventing the escape, the officer may exert such physical force as is necessary on the one hand to effect the arrest by overcoming the resistance he encounters, or, on the other, to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life or to prevent a like harm to himself." This doctrine has been followed in subsequent cases, among them being *Edgin* v. *Talley,* 169 Ark. 662, 276 S. W. 591, 42 A. L. R. 1194, and *Stevens* v. *Adams,* 181 Ark. 816, 27 S. W. (2d) 999.

Instruction No. 1 requested by the appellant was properly refused. Its effect, if given, would have been

to separate the section of law thought to be authority for its request from the remainder of the law dealing with homicide, and give to its provisions a literal interpretation which would justify an officer in slaying one under his arrest without regard to the slight degree of resistance and the feebleness of the assault.

Appellant admitted the killing and sought to justify his act under the plea of necessary self-defense. While he testified that the slaying was the result of an apprehension on his part that his life was in peril, no circumstances appear in the proof to corroborate him save the testimony of certain witnesses to the effect that he was heard to make certain exclamations, and the collar found upon the floor which appellant claimed was torn from his shirt during the struggle. No evidence appears as to the relative size and strength of the parties to the rencounter or marks of violence found upon the person of the appellant, although an examination of him was made by a physician within a few hours after the homicide. Unless it otherwise appears, it was the duty of the appellant to prove circumstances which would excuse or justify the killing, § 2342, Crawford & Moses' Digest; and the circumstances in proof are such that from them the jury might have reasonably found that, while the homicide might have otherwise been justifiable, proper restraint was not exercised by the appellant, or that he acted without due caution and circumspection in its commission.

It is next contended that the trial court was without jurisdiction because the information of the prosecuting attorney, though authorized by the Amendment to our Constitution and the act of the Legislature, *supra,* was in violation of Amendment No. 5 to the Constitution of the United States. In the case of *Penton* v. *State, ante,* p. 503, 109 S. W. (2d) 131, handed down this day, we have decided this contention adversely to the appellant, the reasons for which are set out in that case.

It is finally contended for reversal that the record fails to show that the jury was selected and sworn as required by law. The specific charges as to insufficiency of the record are (1) that the record does not show the names of the seven jurors from the regular panel who

were a part of the trial jury; (2) and (3) that it does not show the names of the special jurors who made up the remaining five, and (4) that the jury, as selected, is not shown by the record to have been sworn before examination as to their qualifications, nor to have been sworn to try the case.

The first, second and third objections are disposed of in the cases of *Spear* v. *State,* 184 Ark. 1047, 44 S. W. (2d) 663, and *French* v. *State, supra.* It does not appear what examination, if any, was made of the jury on their *voir dire,* or that any juror was challenged, or that appellant had exhausted his challenges before the jury was completed. Therefore, no prejudice is shown which would call for reversal. See cases cited, *supra.*

In the case of *French* v. *State, supra,* as in the case at bar, complaint was made because the record did not reveal the names of all the bystanders who were summoned to complete the jury. But there, as here, it did show the names of all the jurors accepted in the case. Section 6378 of Crawford & Moses' Digest was cited to sustain the contention made that the failure noted constituted error. That section, in part, provides: "The record shall contain the names of all bystanders." We there decided that this section was directory and, in the absence of any showing of prejudice, a failure to comply with it was an irregularity about which no complaint could be made.

The appellant is in error as to the fourth contention. The record affirmatively shows that the jurors were examined and accepted by both parties, that each of the twelve named in the record had been sworn, examined and found competent by both plaintiff and defendant, and that thereupon "said jury was by order of the court sworn and impaneled as the jury to try this cause."

No prejudicial error appearing, the judgment of the lower court is affirmed.

GILL *v.* STATE.

Crim. 4042

Opinion delivered September 27, 1937.

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

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted jointly with Walter Baxter and Marvin Kennedy by the grand jury of Jefferson county for willfully, unlawfully and feloniously taking and stealing and carrying away one cow and one bull, the property of Floyd Beedle, with the felonious intent to convert same to their own use, contrary to the statute in such cases made and provided.

They were tried in the circuit court of Jefferson county with the result that Walter Baxter and Marvin Kennedy were acquitted; and appellant was convicted and adjudged to serve a term of one year in the state penitentiary as a punishment for the crime.

Appellant has duly prosecuted an appeal to this court from the judgment of conviction.

In August, 1936, six head of cattle, three owned by R. I. Culifer, two by Floyd Beedle and one by W. L. Bailey, disappeared from the community where Culifer, Beedle and Bailey lived in Jefferson county, some six or seven miles from where appellant lived. The cattle had

been running on the range and on Saturday after they disappeared on Wednesday or Thursday the hides of six cattle were found by Culifer, Beedle and Bailey in the place of business of Jones & Denhardt in Stuttgart. Jones & Denhardt were hide buyers and bought the six hides from appellant on Friday and paid him for them. Appellant used the money he received for the hides in paying Marvin Kennedy for hauling six cattle from his farm to Stuttgart Friday morning where they were skinned during the afternoon and placed in the cold storage plant to be sold by J. H. Wilson who had skinned them for appellant.

Culifer, Beedle and Bailey each testified in the trial of the case that the hides they found at Jones & Denhardt's place of business had been removed from their six head of cattle, identifying them largely by the color of the hides, and the heads, feet, etc., they found and viewed at the slaughter house where the cattle had been skinned. They and the buyers of the hides were permitted to testify to what was said and done between themselves and the buyers when they viewed the hides on Saturday, over the objections and exceptions of appellant. What was said between them leading up to the identification and what was done was admitted in evidence by the trial court as substantive or original evidence tending to show guilt of appellant. The court allowed them to testify that the buyers being convinced that the hides were removed from cattle belonging to Culifer, Beedle and Bailey, turned the hides over to the claimants and after doing so bought the hides back from them. In arguing the effect of this evidence to the jury, the prosecuting attorney was permitted, over objection and exception of appellant, to say to the jury:

"The identification was so perfect (referring to purported identification made by Beedle, Bailey and Culifer of some hides on Saturday) that the men that bought those hides said, 'Yes, they are your hides, and we will pay you for them'."

This character of evidence is referred to in the law books as extrajudicial identification and, according to

the weight of authority, is not admissible even though the identifying witness or witnesses had been impeached by any method known for impeaching witnesses. *Burks* v. *State,* 78 Ark. 271, 93 S. W. 983, 8 Ann. Cas. 476. There is no authority whatever for admitting an extrajudicial identification as original evidence of guilt. This court said in the case of *Warren* v. *State,* 103 Ark. 165, 146 S. W. 477, Ann. Cas. 1914B, 698, that: "But nowhere, so far as we can ascertain, has it ever been held that a so-called extrajudicial identification is admissible as original evidence; and it was, therefore, in any view of the case, inadmissible for there was no attempt to impeach the witness by contradictory statements or otherwise. The testimony was introduced as original evidence, and it was clearly inadmissible, for it was not competent to corroborate the identifying witness by proof of former identification."

The trial court, therefore, erred in admitting the former identification of the witnesses Culifer, Beedle and Bailey.

It is, also, contended that the court committed reversible error in not admitting the record that was made or the receipt that was given for the cattle when they were placed in the cold storage plant. This receipt or record showed who put them in the cold storage plant and the weight of each head of cattle. The weights would have tended to show the size of the cattle and whether they were larger or smaller than the cattle claimed by Beedle, Culifer and Bailey. We think this evidence was admissible for these purposes as the identification of the cattle was the real issue in the case.

Other assignments of error appear in the record, but they relate to the correctness of some of the instructions which may not be requested or given by the court when the case is tried again.

On account of the errors indicated the judgment is reversed, and the cause is remanded for a new trial.

MOSS AND CLARK *v.* STATE.

Crim. 4051

Opinion delivered September 27, 1937.

[redacted]

George F. Edwardes, Jr., for appellants.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

BAKER, J. Although one of the principal contentions in this case urged by the appellants is that the evidence is not sufficient to sustain the conviction, we think it unnecessary to set forth with minute detail the evidence relied upon by the state. The defendants were charged with obtaining money under false pretenses and we have carefully examined all the testimony and have come to the conclusion that there was sufficient substantial evidence to warrant the submission of the case to a jury.

We agree that the evidence is not altogether satisfactory and that upon some points it is somewhat meager; but there are certain facts and circumstances testified about which, if believed, warrant a conclusion that the

conduct of the defendants was reprehensible in the highest degree. From the evidence, however, the following conclusions might well have been reached by the jury in the determination of the facts.

Gates Carlisle, Jr., went by bus from Finley, Oklahoma, to Texarkana. Shortly after he had reached the bus station, and while still standing near it, he was approached by Ray Moss, whom he had never seen before and who asked him how long he was going to stay over and if he were acquainted with the town. Moss also stated that he was having to wait for a bus and the two went for a walk. They were shortly thereafter approached by John Clark, who sought information from them about zoos, parks and places of entertainment, and who advised them he had been down in Louisiana selling some land for his sister and that he had gotten $1,200 more than she had expected and that he was going to pocket that. Clark proposed to Moss that they match money and upon Carlisle advising that he did not know the game Moss and Clark matched coins and a claim was made that Moss had won $100 from Clark. Carlisle was induced to match coins also. Clark made, at least, a pretense of counting out and paying over $100 to Moss. Carlisle said he observed that this money was counted out and delivered. It was then insisted that Carlisle also owed $100 to Moss and that he must pay over. Upon this insistence and under the belief that Moss had won his money, he delivered over $19, all he had except a few coins, less than a dollar in amount.

About this time a police officer approached, took the three into custody and started to the police station with them. Moss furtively handed back to Carlisle the amount that Carlisle had presumptively lost in the matching game with the remark, "You don't know anything about this." At the police station all of the parties were searched. Moss had only about $11, Carlisle had the $19, plus the fractional part of a dollar in coins, and Clark had less than a dollar. Moss claimed to have "hitch-hiked" from El Dorado to Texarkana. He and

Clark were claiming to be strangers to each other as they were to Carlisle.

Moss' wife telephoned the police station and made inquiry about him and it was discovered that they had gone to Texarkana in a car. Clark claimed to have gone to Texarkana with a traveling man from Pine Bluff, although he claimed his home was in Canada, at or near Montreal. Neither Clark nor Moss testified at the time of the trial and made no explanation of these inconsistencies in their statements made to the police officers, and as shown in the trial. The jury might well have concluded that Moss and Clark were operating in concert to obtain what money or valuables Carlisle possessed, and they succeeded in getting nearly all of his money, although it was returned after their arrest.

In the statement above, to the effect that neither Clark nor Moss testified in the case, we are not suggesting that that fact is any evidence or that it was so regarded by the jury. It is patent, however, that the defendants knew their conduct was under investigation and scrutiny and that the jury would interpret all the testimony offered during the trial and make reasonable inferences therefrom; that the contradictions and conduct were not consistent with uprightness and honesty.

There were other pertinent facts and statements unnecessary to set forth in detail, but the foregoing, we think, is sufficient to show that there was substantial evidence to sustain the verdict of the jury and such evidence and reasonable inferences therefrom warranted the conviction, particularly when such proof must be regarded and be reviewed by us in the light most favorable to the appellee. *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. (2d) 50; *Smith* v. *State, ante,* p. 264, 106 S. W. (2d) 1019; *Combs* v. *State,* 107 S. W. (2d) 525.

Numerous authorities cited support the foregoing cases.

The appellants object because of the fact that the court submitted to the jury the question of whether there was a conspiracy between the appellants or whether they were acting in concert in pursuance of the plan whereby

they had cheated, defrauded, or obtained wrongfully from the prosecuting witness, Carlisle, the $19 in money by making misrepresentations to him upon which he relied and which they knew to be false. The lack of testimony upon this matter is urged very strongly.

Of course, it is difficult in most instances to prove such conspiracies, the details and purposes of which are shrouded in secrecy. The courts have uniformly held that conspiracies, like many other facts, may be established by circumstances from which the conspiracy may be inferred. We know of no real exception to the rule.

"The testimony warranted the submission of the question of conspiracy, which need not be proved by positive testimony, but may be established by circumstances. *Chapline* v. *State*, 77 Ark. 444, 95 S. W. 477; *Butt* v. *State,* 81 Ark. 173, 98 S. W. 723, 118 Am. St. Rep. 42." *Sims* v. *State,* 131 Ark. 185, 198 S. W. 883; *Venable* v. *State,* 156 Ark. 564, 246 S. W. 860.

It is also suggested that the prosecuting witness Carlisle suffered no real loss, that his money was voluntarily returned. The testimony shows that he delivered his money to Moss, who put it in his pocket, and Carlisle testified further that it was not until after their arrest and they were approaching the police station that the money was secretly returned to him.

We have said: "One who obtains money by false pretenses is liable to punishment, although it may turn out that the prosecutor suffered no financial loss thereby." *Higgins* v. *State,* 141 Ark. 633, 217 S. W. 809.

Appellant Moss argues that his wife was called as a witness and required to testify in the case and that this was error as she could not be required to testify against her husband, Ray Moss. He argues also that he had insisted upon a severance and that the court had denied his motion and had required him and Clark to proceed to trial together and that since this ruling had been made it was then error to offer Mrs. Moss as a witness, although it was explained she was offered to testify solely against Clark.

According to our examination of this record, as it is presented here, a severance was not asked until after the jury was made and the opening statement had been made, or while the prosecuting attorney was making it. Of course, the request for a severance at that time came too late; but Mrs. Moss testified to no substantial fact whereby either of the appellants could have been prejudiced, unless it was her statement that she was the wife of Moss. It was necessary that that fact be determined by some evidence before it became apparent that her testimony might be improper. She expressed an unwillingness to testify and was promptly excused. There has been no suggestion whereby prejudice might have arisen or could in any manner be presumed by the testimony in regard to the one fact that the witness was the wife of one of the appellants.

A careful examination of this entire record discloses no error prejudicial to the rights of the appellants.

Affirmed.

TUCKER AND PEACOCK *v.* STATE.

Crim. 4045

Opinion delivered September 27, 1937.

James Merritt, for appellants.

Jack Holt, Attorney General, and *John P. Streepey*, Assistant, for appellee.

MEHAFFY, J. Appellants were convicted of grand larceny under a charge which alleged the ownership of the property said to have been stolen, in Bailey Jones.

The information filed by the prosecuting attorney is as follows:

"STATE OF ARKANSAS
Against
Vance Tucker, J. V. Tucker, Neal Peacock. } SS. INFORMATION

"I, Will J. Irvin, prosecuting attorney for Drew county of the Tenth Judicial Circuit of Arkansas, upon my oath of office, in the name and by the authority of the state of Arkansas, accuse Vance Tucker, J. V. Tucker and Neal Peacock of the crime of grand larceny committed as follows, to-wit: The said Vance Tucker, J. V. Tucker and Neal Peacock in the county of Drew, and state of Arkansas on or about the 15th day of December, A. D., 1936, did then and there take, steal and carry away twelve hogs, the property of Bailey Jones in Lincoln county and transported same to the home of Vance Tucker in Drew county, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Arkansas.

"WILL J. IRVIN,
Prosecuting Attorney.

"January 25, 1937."

The case was dismissed as to J. V. Tucker. The appellants, Vance Tucker and Neal Peacock, pleaded not guilty, and were tried and found guilty by the jury.

Appellants earnestly insist that the evidence does not show that Bailey Jones was the owner of the hogs and that the case should, therefore, be reversed.

Section 3018 of Crawford & Moses' Digest reads: "Where an offense involves the commission, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material."

There can be no doubt but that the information describes the offense with sufficient certainty to identify the act.

This court said in construing the above statute, (which is § 2233 of Kirby's Digest); "Now, in all of the cases on the point heretofore decided by this court the indictment charged ownership by individuals, and there was no other sufficient identification. In the present case, however, there is another description in stating the partnership name, and to that extent the proof conforms to the allegations of the indictment. The only variance is as to the name of one of the partners. If the statute (§ 2233 of Kirby's Digest) has any application at all to larceny and kindred cases, and if any effect at all is to be given to it in such cases, we must hold that it applies, and that, there being a sufficient identification of the property in stating the partnership name, the statute applies and renders the erroneous allegation as to one of the persons injured immaterial. It is true that ordinarily in cases of this kind the rules of criminal pleadings require that the names of partners be given, but, so far as identification of the property is concerned, it is described by naming the partnership and, by operation of the statute, an error as to the individual names of the partners is immaterial." *Porter* v. *State,* 123 Ark. 519, 185 S. W. 1090.

Where partners are the owners, neither the fact of the partnership nor the firm name, need be averred. If one of the parties has such a separate possession as gives him a special property, it may be alleged that the ownership is in him alone. Bishop's New Criminal Procedure, vol. 3, pages 1684, 1685.

The purpose of requiring the owner of the property to be named is for the protection of the defendant. But as our statute provides, where the offense is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the ownership of the property is not material.

Bailey Jones testified that these hogs belonged to him. His evidence was corroborated by other witnesses.

It is true that, on cross-examination, Jones testified that his uncle had given one of the hogs to Jones' mother, but he also testified that she turned it over to him, and that he bought all the feed for the hogs, paid for it himself, and it appears that he was the head of the family, although his father and mother lived with him, and other relatives, there being ten people in the house. Bailey Jones made all the arrangements for cultivating the land and to get supplies furnished him during the year, and paid for them himself. One of the hogs, it is said, belonged to his brother, who was about 18 years old. Neither his brother nor his mother appeared to have anything to do with managing the place, raising the stock, paying for the feed or for the supplies.

Appellants call attention to and rely on *Merritt* v. State, 73 Ark. 32, 83 S. W. 330. The court there said: "In this case the proof shows neither sole ownership of W. N. Marshall, nor such separate possession as to give special ownership, and was not sufficient to sustain the allegation of the indictment. The animal, being in the actual possession of neither of the owners, was in the constructive possession of both, and the names of both should have been alleged as owners."

In that case, however, the court does not quote or mention the statute above set out.

The later case of *Andrews* v. *State,* 100 Ark. 184, 139 S. W. 1134, does discuss the statute, and among other things says: " 'Assuming that this section is applicable to cases like this, an erroneous allegation as to the ownership of the goods stolen can only be cured by describing the alleged offense in other respects with such certainty as to identify the act. There was no such description of the offense in the indictment in this case, and hence this statute did not relieve the state of the necessity of proving that the goods stolen belonged to' the parties named in the indictment."

In the case at bar, however, the offense was described in other respects with such certainty as to identify the act. The information charges that in Drew county in the state of Arkansas, on or about the fifteenth

day of December, 1936, the appellants did then and there take, steal and carry away twelve hogs, the property of Bailey Jones in Lincoln county, and transported same to the home of Vance Tucker in Drew county.

The offense appears to be described in such a way that there can be no doubt about it.

In the case of *Porter* v. *State,* 123 Ark. 519, 185 S. W. 1090, the court said: "It is true that ordinarily in cases of this kind the rules of criminal pleadings require that the names of partners be given, but, so far as identification of the property is concerned, it is described by naming the partnership, and, by operation of the statute, an error as to the individual names of the partners is immaterial."

"If the averment of ownership is material and must be proved, a variance entitles defendant to an acquittal, except in those states where the statutes provide that an erroneous allegation as to the ownership of the property involved is not material as long as the property is sufficiently described in other respects to identify the offense." 12 Stand. Encyc. of Procedure, 394.

The information is sufficient if it can be understood therefrom that the act charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case. Section 3013, Crawford & Moses' Digest.

Section 3014 of Crawford & Moses' Digest is as follows: "No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."

Even if it were necessary to name the owner of the property, under § 3018 above quoted, still no substantial rights of the appellants are affected. The owner, however, even where it is necessary to prove ownership, need not have the legal title; but if he had exclusive possession and control of the property, it may be alleged that he is the owner.

Appellants requested the court to instruct the jury to return a verdict for them. This of course was not proper, if there was any substantial evidence to sustain a conviction.

It is urged that the court erred in refusing to give instruction No. 3 requested by the appellants. This instruction, however, was fully covered by instruction No. 3 given by the court, which reads as follows:

"You are instructed that before you would be justified in convicting either of the defendants, you must find from the evidence, beyond a reasonable doubt: First, that the property described in the indictment was in fact stolen; second, that said property belonged to Bailey Jones, or that Bailey Jones had the exclusive possession and control of the hogs as it is alleged in the indictment; third, that the defendants, or either of them, received it in their possession; fourth, that they received and took said property into their possession with the intent, at that particular moment, to steal it and deprive the true owner thereof, and if you find from the evidence that all or any one of the above essential elements have not been proven to your satisfaction, beyond a reasonable doubt, then it is your duty to acquit the defendants or either of them. And so the court tells you that if you find from the evidence in this case and beyond a reasonable doubt that either defendant in this case in this county and state within three years before the filing of this information in this court, feloniously and unlawfully stole, took, carried, rode or drove away the 12 hogs alleged in the indictment, and the same being the property of the prosecuting witness, Bailey Jones, or such property being in the exclusive possession and control of the said Bailey Jones and that there existed in the minds of the defendant or either of the defendants at the time of such taking, the felonious intent to deprive the true owner thereof, or if you further find that either of the defendants was present, aiding, abetting and assisting in the theft of the hogs as alleged in the indictment, if you find from the evidence in this case beyond a reasonable doubt that the defendants or either of defend-

ants committed the theft of the hogs as alleged in the indictment, then you will find the defendants, or either of the defendants guilty of the crime of grand larceny as charged in the indictment and assess their punishment or his punishment at not less than one year nor more than five years imprisonment in the state penitentiary."

There was no error in permitting R. H. Hamilton to be sworn as a special officer to accompany the jury to the court house lawn, and no objection was made to this by appellants. The court permitted the prosecuting attorney and the attorney for appellants and the appellants to go on the court house lawn, instructing them that no conversation was to take place except to point out the things about the ears of the hogs, about which witnesses had testified. The evidence is in conflict as to what was said when the hogs' ears were examined, and no request was made by the appellants to cross-examine, and no objection at the time made to the jury's examining the ears. These were questions for the jury.

Appellants complain because the judge was absent when the ears were examined. There was no evidence taken, in fact nothing done, but to permit the jury to examine the ears. Testimony had been introduced, and was not contradicted, to show that the hogs had been remarked after having been taken to Vance Tucker's, and there was also evidence that the old marks could be seen on some of the ears. There was nothing done by anyone, and nothing said, that would, in any way, prejudice the rights of the appellants. There was no objection to the jury's viewing the ears in the absence of the judge.

In testing the legal sufficiency of the evidence to support the verdict, it must be viewed in the light most favorable to the state. *Turnage* v. *State,* 182 Ark. 74, 30 S. W. (2d) 865; *Link* v. *State,* 191 Ark. 304, 86 S. W. (2d) 15; *Clayton* v. *State,* 191 Ark. 1070, 89 S. W. (2d) 732; *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. (2d) 50; *Combs* v. *State,* 107 S. W. (2d) 526; *Smith* v. *State, ante,* p. 264, 106 S. W. (2d) 1019.

There was substantial evidence to sustain the verdict, and there is no prejudicial error.

The judgment is affirmed.

LIGHTLE *v.* KIRBY.

4-4784

Opinion delivered September 27, 1937.

J. E. Lightle, Jr., for appellants.

Gregory & Taylor, for appellees.

SMITH, J. Street Improvement District No. 6 of the city of Searcy includes within its boundaries a portion of a street which is a part of the State Highway System, and on that account the improvement district received a contribution from the state of Arkansas under the provisions of act No. 11 of the Acts of the Special Session of 1934, p. 28.

Margaret Lightle owns lots in the improvement district abutting the state highway, and when the contribution to the improvement district was made she brought suit against the commissioners of the district, praying that they be required to devote the contribution to reducing the assessments of property in the district adjacent to the state highway. The commissioners of the district filed a demurrer to the complaint, which was overruled, and when they declined to plead further a decree was entered awarding the relief prayed. The date of this decree was May 31, 1935.

Thereafter, other owners of property in the district which does not abut on the state highway, who were

not parties to nor advised of the pendency of the Lightle suit, brought suit against the commissioners of the district, praying that the state's contribution to the district be applied to the reduction of the assessments of all the lots in the district proportionately. Miss Lightle intervened in this suit, and she and the commissioners of the improvement district pleaded the decree of May, 1935, in bar of this suit. The relief prayed was granted, and she and the commissioners of the district have appealed from this last decree, which, in effect, annuls the decree of May, 1935.

It is conceded that the decree of May, 1935, is erroneous, and that it was error to devote the state's contribution to the exclusive benefit of the lots abutting the state highway. In the recent case of *Jackson* v. *Foster,* 192 Ark. 712, 94 S. W. (2d) 113, which presented this exact question, it was held that the state's contribution should not be applied to the reduction of the taxes against the lands fronting on the state highway to the exclusion of lands that do not front on such highway, but should rather be applied to the proportionate reduction of the assessments of all the lands in the improvement district.

It is argued, however, that the decree of May, 1935, though erroneous, has become final, as no appeal was prosecuted from it within the time limited by law. The argument is that in this first suit, in which the commissioners were made defendants, they represented the district and all the property owners in it, and that the decree is *res adjudicata* of the right to grant the relief prayed in the second suit.

In support of this contention we are cited to cases like that of *Howard-Sevier Road Imp. Dist. No. 1* v. *Hunt,* 166 Ark. 62, 265 S. W. 517, where it was held that a decree in a suit by certain taxpayers, who had sued in their own right and on behalf of all other taxpayers, to have assessments in the improvement district declared invalid, is *res adjudicata* in another suit involving the same subject-matter, although the parties to the second suit were not named in the first. The opinion in

that case quoted § 1098, Crawford & Moses' Digest, which is to the effect that where the parties are numerous, and it is impossible to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all.

Other cases are to the effect that the commissioners represent the district in their official capacity, and sue and are sued in that manner, and that all property owners in the district are bound by such suits. In other words, in suits which affect the whole district, in matters common to the whole district, the commissioners stand for this community of interests, and the taxpayers for whom and in whose interest they act are bound by such representation. *Crain* v. *St. Francis Levee District,* 189 Ark. 721, 74 S. W. (2d) 970; *Barney* v. *Texarkana,* 185 Ark. 1123, 51 S. W. (2d) 509; *Stevens* v. *Shull,* 179 Ark. 766, 19 S. W. (2d) 1018, 64 A. L. R. 1258; *Tri-County Highway Imp. Dist.* v. *Vincennes Bridge Co.,* 170 Ark. 22, 278 S. W. 627.

The first—or the Lightle suit—was not a case of that character. It was not, in fact, a suit for the district or against the district, nor was it a suit in which all the property owners had a common interest. There was no community of interests. On the contrary, the interests of the parties were highly antagonistic. The controversy was between two groups of property owners, and the relief prayed and granted in the first decree was to the effect that one group of property owners should be favored and the other excluded. This was not a case in which one group of property owners could represent all, because their interests were antagonistic and irreconcilable.

At § 9 of the chapter on Parties in 20 R. C. L., p. 669, there is a discussion of the doctrine of "Virtual Representation," or the right of certain members of a class to sue for and bind all others of that class without making them parties to the litigation. It was there said: "As an exception to the rule that all persons having an interest in the subject-matter of an equity suit must be made parties, the doctrine of 'virtual repre-

sentation,' which originated at an early date, recognizes the right of a few persons to sue for themselves and all others similarly situated. Under this doctrine, the persons who are not joined by name as parties are in a sense before the court. They have been called *quasi* parties, and have even been said to be parties in substance and legal effect. In all cases to which the doctrine of representation applies, there must be joined as parties persons who fairly represent the interest or right involved so that it may be tried fairly and honestly. It is sufficient if the parties before the court enable it fairly and fully to adjudicate the question involved. The parties represented must have a common interest with those before the court, and consequently the parties before the court cannot act as representatives if their interests are antagonistic to those who would be represented."

Only one relief was prayed in the first case, and that relief was unauthorized by law, this being to the effect that certain property owners be deprived of a benefit to which they were entitled. This was a question in which the improvement district, as such, was not interested. The court below was correct, therefore, in holding that the property owner who had asked and obtained this relief had not bound her adversaries through the doctrine of "virtual representation."

The decree of the court, awarding relief pursuant to *Jackson* v. *Foster, supra,* is correct, and is, therefore, affirmed.

TYLER *v.* NIVEN.

4-4730

Opinion delivered October 4, 1937.

C. V. Holloway, for appellants.

Coleman & Gantt and *Viola Castleberry,* for appellees.

BUTLER, J. The material facts in this case are not in dispute. L. C. Strickland and wife were indebted to the appellees, the indebtedness being evidenced by five promissory notes in the sum of $574.96 each. To secure these notes, they executed a mortgage on sixty acres of land which was duly recorded. As between the parties, the debt was kept alive by partial payments beginning in January, 1927, and continuing each year down to, and including a payment made, January 28, 1933. During all of this time the appellees, who are merchants, were furnishing the Stricklands with necessary supplies with which to live and make their crops. In 1933 or the first part of 1934, Strickland informed the appellees that he had lost his stock, and, after some effort on his part to get more stock and his failure to do so, it was decided that he should surrender possession of the land, and that later he and his wife would come in and make a deed. He determined to take this action because his children had grown up and left him and he was unable to continue to farm the property. Appellees, thereupon, took possession of the property and rented it to the United States Government for the year 1934. The following year it was rented to a Mr. Tyler, the husband of appellant, Rowena Tyler. He entered into possession under his rental contract and farmed the lands during the year 1935, during which Strickland and his wife worked a part of the place as share-croppers for Tyler. Mrs. Rowena Tyler procured an abstract of the title, from which she

discovered the mortgage given by the Stricklands to the appellees; also, that there had been no payments indorsed on the record and that the mortgage apparently was barred by the statute of limitation. Strickland claimed the property still belonged to him and, after the abstract was examined, Mrs. Tyler bought the land from Strickland and his wife, who executed a deed to her on October 17, 1935. The Stricklands did not testify, but Mrs. Tyler testified and admitted that her husband had rented the lands from appellee for the year 1935 and was in possession of it as tenants at the time she made the purchase and secured the deed.

The appellees brought suit to foreclose under their deed of trust, or mortgage, in which suit the Stricklands and the appellant, Rowena Tyler, were made defendants. The Stricklands did not answer.

Mrs. Tyler answered, pleading as a defense the statute of limitations. Her defense is based on § 7408 of Crawford & Moses' Digest, which provides, in effect, that when payment is made on an existing indebtedness secured by mortgage or deed of trust, before the same is barred by the statute of limitation, such payment shall not extend the operation of the statute so as to affect the rights of third parties unless an indorsement or memorandum of such payment, with the date thereof, shall be placed on the margin of the record where the instrument is recorded, which indorsement shall be attested and dated by the clerk.

The plea is not available to Mrs. Tyler because she is not a third party within the meaning of the statute. It is thoroughly settled that a tenant cannot acquire title adverse to his landlord while the relation exists without first having surrendered possession of the property. This limitation extends not only to the tenant, but to his privies in blood or estate. Estoppel to dispute the title of a landlord, or acquire an interest adverse to him, extends to the wife of the tenant in possession. *Casey* v. *Johnson,* 193 Ark. 177, 98 S. W. (2d) 67; 35 C. J. 1235, 1237.

The appeal comes from a decree foreclosing appellees' mortgage. The decree is correct and is, therefore, affirmed.

WANN *v.* THE READING COMPANY.

4-4722

Opinion delivered October 4, 1937.

Quillin & Quillin, for appellant.

Minor Pipkin, for appellee.

BAKER, J. The Reading Company, a corporation, a common carrier, sued H. Wann, doing business as H. Wann Heading Company, for freights accruing upon some shipments of timber products which originated at Ozark, Arkansas, and which timber products were consigned to the Reading Cooperage Company at Reading, Pennsylvania. In this suit, a judgment was rendered for the Reading Company as the terminal carrier.

It makes no difference upon this appeal concerning the merits of that controversy. The appellant filed his motion for a new trial in that proceeding and ordered his bill of exceptions, which, under order of the court, was to be filed within ninety days. The bill of exceptions when completed, but before approval by the trial judge, was filed with the clerk of the court. The clerk proceeded to prepare a transcript, and at the end of the

ninety-day period, within which the bill of exceptions should have been filed, the transcript was delivered to counsel for the appellant. Counsel then discovered that the bill of exceptions had not been approved and signed by the judge of the court. It appears that they asked opposing counsel to approve the bill of exceptions. The trial judge did not live in Polk county. The bill of exceptions was never presented to him so far as the record discloses for his examination and approval. On account of these facts the appeal could not be perfected. The appellant, however, at once filed a motion attacking the entry of the judgment in the case as having been made on the 18th day of January, 1937. This motion set up the fact that the judgment entered by the clerk was not the judgment rendered by the court; that it did not embody the findings of fact and declarations of law of the trial judge who, upon motion of both parties plaintiff and defendant for a directed verdict, had withdrawn the submission of the case from the jury and decided it.

In this motion, it was urged that the judgment should contain all the findings of fact, the declarations of law, as announced by the court, and it also urged that the precedent for the judgment was not signed by the trial judge or approved by counsel, and it was declared that it was not written by the clerk or prepared by him. After the ninety days had expired, within which the bill of exceptions should be approved and signed, a motion was then filed praying for an extension of time within which the bill of exceptions might be approved, signed and filed. This motion contained an allegation that the judgment was rendered on the 22d day of October, 1936; that as entered it purported to have been rendered on the 21st day of October and that this difference of one day, or alleged wrongful dating, caused the expiration of the time within which the bill of exceptions might have been filed to expire prematurely by one day with a resulting loss of the appeal. Demurrers were interposed to both of these motions filed by the appellant. The demurrers were sustained, and, appellant refusing to plead further, his motions were dismissed, to which action of the court in dismissing these motions proper appeals are pre-

sented. Appellant urges with great fervor that the demurrers admitted the truth of the motions and that the court erred in dismissing them. The action of the trial court in that regard is the sole matter for consideration upon appeal.

Without further elaboration, let it be said that we agree with learned counsel that the facts well pleaded are admitted by the demurrers. Still this does not necessarily show that there was error, nor does it necessarily follow that the motions should have been granted. H. Wann, doing business as H. Wann Heading Company, and his counsel only, were interested in the matter of appealing from the judgment rendered below. The court or trial judge, after having overruled the motion for new trial and having fixed the period within which the bill of exceptions might be filed, had no other duty to perform in regard to the appeal until the bill of exceptions was presented to him for approval and signature. We think the law contemplates that, when the bill of exceptions is presented to the trial judge within the period he fixes therefor, he should have time to make examination of it. If he delays approval and signature, a different situation is presented from the one we have under consideration. This delay by the judge may warrant a corresponding delay in filing. *Springfield* v. *Fulk,* 96 Ark. 316, 131 S. W. 694.

Here, the trial judge was at fault in no manner whatever. He never had the opportunity of approving any bill of exceptions in this case.

It is true, the bill of exceptions may be approved by stipulation of counsel, but we know of no rule or established procedure requiring counsel to agree. Perhaps counsel should be wary about agreeing unless sufficient time is had within which the bill of exceptions may be examined before it is irrevocably approved. Section 1323, Crawford & Moses' Digest.

It is, also, apparent that prior to the time of the expiration of the ninety-day period no motion was filed with the trial judge asking for an extension of time. This motion was not filed until after the time had actually expired and the right of appeal had been lost.

If no demurrers had been filed, if no response had been made to appellant's motions, the court in the exercise of inherent discretion might well have denied both motions without doing any violence to appellant's rights.

We think it must be conceded by all persons that litigants are entitled to appeals as a matter of right only when they have, in due and proper time, proceeded according to law. They may waive substantial rights by neglect or delay.

We cannot agree with counsel that it was necessary to incorporate the court's findings of facts or declarations of law into the judgment. In fact and in practice, it is not often done. These findings and declarations are otherwise preserved.

This court, many years ago, held contrary to appellant's contentions in that respect. *Springfield Fire and Marine Insurance Co.* v. *Hamby,* 65 Ark. 14, 45 S. W. 472.

If that decision has been impaired by any later announcement, our attention has not been directed to it.

We do not know who prepared the precedent for the judgment found in the files of the case and entered, according to counsel's contention, about January 18. This precedent or draft may not be treated as a judgment.

Section 6233, Crawford & Moses' Digest, provides: "A judgment is the final determination of the rights of the parties in the action."

The evidence of that judgment is now the record of that draft or precedent. No real or substantial matter has been suggested as a reason impairing the judgment.

Affirmed.

SEIZ *v.* CITY OF HOT SPRINGS.

Crim. 4056

Opinion delivered October 4, 1937.

Jay M. Rowland, for appellant.

A. T. Davies, for appellee.

McHaney, J. Appellant is engaged in the advertising business, including billboards and other outdoor advertising, in the city of Hot Springs, a city of the first class. In May, 1936, he began the construction of two large signboards or poster panels on Malvern Avenue, and before their completion, he was arrested, charged with a violation of the building code and fire ordinances of the city and in failing to secure a permit therefor. He was convicted in the municipal court and fined $5. On appeal to the circuit court, he was again convicted and fined the same amount, and has appealed to this court.

The facts are principally stipulated as follows: that the signboards complained of are within the first fire zone of the city; that the ordinances require the outside walls of all buildings erected in the first fire zone to be constructed of stone, brick or iron wholly; that appellant made application to the building committee for a permit to erect the signboards in question, which was refused; that he thereafter proceeded to erect the signboards without a permit; and that they are constructed wholly of wood with a steel sheeting front. Ordinance 908 of the city, authorizes the building committee "to refuse to issue a permit for the building of any house or structure deemed to be unsafe, unsanitary, obnoxious or detrimental to the public welfare." Section 2 makes it an offense, punishable by a fine of not less than $5 nor more than $50, to erect "any house or structure * * * after the Building Committee has refused to issue a permit for the building of such house or structure."

For a reversal of the judgment against him, appellant says there is no ordinance of the city requiring him to obtain a permit to build a sign or billboard; and that a signboard does not come within the terms of the ordinance with reference to the first fire zone, providing that the outside walls of buildings constructed therein should be of stone, brick or iron. In other words, that that ordinance mentions only buildings, and that a signboard is not a building. Counsel for appellant concedes, however, that the whole question in the case is to be determined by the validity or effect of ordinance 908, mentioned above. That ordinance was passed pursuant to the authority contained in § 7754, Crawford & Moses' Digest, which provides: "They shall have the power to regulate the building of houses, and to provide that no house or structure shall be erected within the city limits except upon a permit to be issued by such officer or officers as the city council shall designate, and to provide that no permit shall be issued for the building of any house or structure deemed to be unsafe, unsanitary, obnoxious, or detrimental to the public welfare."

It is contended that the ordinance is invalid because it vests the building committee with too much discretion in the regulation of legitimate business. It is argued that, under it, the building committee can say appellant's signboards are unsafe, unsanitary, obnoxious or detrimental to the public welfare, while those of competitors are proper, although of the same construction and located on the same lot. We cannot agree. The ordinance is couched in the same general terms as those used in the statute, but this fact does not render it invalid. We find nothing in the language of the ordinance to support the contention that it tends to give a monopoly to appellant's competitors. If the building committee should act arbitrarily and without right in denying appellant a permit, where, under the same conditions, it had granted a permit to his competitor, a different case would be before us. It is not shown when the other signs referred to were erected and whether with or without a permit. See

Berkau v. *City of Little Rock,* 174 Ark. 1145, 298 S. W. 514.

We are, also, of the opinion that a signboard, such as is involved in this case, is a "structure" within the meaning of said ordinance, and that the passage thereof was within the powers granted to cities of the first class by the statute above quoted.

The judgment must be affirmed. It is so ordered.

STATE *v.* MAY.

Crim. 4052

Opinion delivered October 4, 1937.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellant.

Thomas W. Rowland, for appellee.

HUMPHREYS, J. The prosecuting attorney of the 7th judicial circuit of Arkansas charged, under oath, that appellee unlawfully operated in Hot Spring county, Arkansas, a pool room for hire in violation of Special Act No. 88 of the Acts of Arkansas of 1919 on the 12th day of May, 1937.

The act makes it a misdemeanor to operate a pool room for hire in said county within three miles of any school or church house finable in a sum not less than $50 nor more than $200.

On the trial of the cause in the circuit court appellee was acquitted from which judgment of acquittal the state has appealed to this court on the theory that the undisputed evidence showed that appellee was guilty as charged.

The record reflects, without dispute, that appellee owned and was operating a pool room in said county within three miles of schools and churches, but that prior to being charged with the offense he had sold his pool tables to a club, of which he became a member, for $700, $20 in cash and $20 per month until the purchase money should be paid; that appellee was selected as treasurer of the club and for his services in operating the pool room received $100 per month and in addition paid $40 per month to boys who racked the balls, etc., and other expenses such as rent of the room, utility bills, new equipment, etc. The revenue received by appellee consisted of membership fees of $1 per member and 50c per month for dues for each member. Anyone could get a membership who did not drink whiskey or beer. Appellee collected all the fees and dues and handled all the money he received. The windows and door were covered with Bon Ami. No one was required to knock to get in the room.

We think the sale of the pool equipment by appellee to himself and others for a small cash payment, and the continued management and control of the pool room at a fixed salary, his employment of boys to help operate the room, the collection of all membership fees and monthly dues, and the payment by him of all expenses incident to the operation of the pool room was a mere device, artifice and subterfuge to avoid the penalty of the act prohibiting the operation of the pool room for hire.

A pool room run for hire in the form of membership fees and monthly dues and which is open to the public upon the payment of membership fees is just as vicious in its tendencies and as injurious to public peace and good morals, as if run for so much per game. Its tendencies, such as leading to idleness, gambling and

other vices are just the same whether operated for so much per game or for dues and fees.

In view of our conclusion it follows that the trial court erred in not instructing the jury to find appellee guilty of operating a pool room for hire contrary to said act, and on account of the error the judgment is reversed, and the cause is remanded for a new trial.

SMITH and BAKER, JJ., dissent.

REFRIGERATION DISCOUNT CORPORATION *v.* HASKEW.

4-4726

Opinion delivered October 4, 1937.

I. J. Friedman and *George W. Dodd,* for appellant.

Arnett & Shaw, for appellees.

MCHANEY, J. Appellant is a finance corporation engaged in buying notes and contracts given by purchasers in connection with the sale of refrigerators, and is the holder or assignee in due course of the contract involved in this action, which grew out of the sale of a Kelvinator refrigerator by appellee, T. A. Richey, doing business in Paris, Arkansas, as Pete's Auto Supply, to appellee, C. L. Haskew. The contract of purchase is in writing

and was dated April 8, 1935. The refrigerator was installed shortly thereafter and $25 of the purchase price was paid in cash and the balance of the purchase price was to be paid in monthly installments of $9.98 each until fully paid, title being retained in the seller until the full amount of the contract price was paid. Appellee Haskew says that he paid eight additional payments, but that he was given credit for nine payments, which, including his cash payment of $25, made a total of $114.73. He refused to make other payments for the reason that the refrigerator, after about five months, refused to properly refrigerate food and, although an attempt was made to repair same, it was never repaired to his satisfaction so that it would properly refrigerate.

Appellant brought this action in the justice court in replevin, to recover the possession of the refrigerator of the actual value of $119.77, which is the balance due thereon. Appellee Haskew defended in the justice court on the ground that the refrigerator was not suitable for his purpose and prayed judgment against appellant for the amount of the monthly payments he had made. Trial resulted in a judgment in his favor. An appeal was prosecuted to the circuit court where, on a trial *de novo,* judgment was rendered for appellee in the sum of $89.73, and the court provided in the judgment that on the payment of said sum by appellant, the refrigerator should be returned to it. From that judgment is this appeal.

The contract above mentioned between Richey as seller and Haskew as purchaser provides that in case of default by the purchaser in making the payments, the seller or his assigns may collect the amount due or take possession of the Kelvinator, and that all payments made by the purchaser shall be deemed to have been made for the use of the Kelvinator and as liquidated damages for his default. It, also, provides that all payments by the purchaser are to be made at the office of appellant in Detroit, Michigan, and "the purchaser acknowledges that the seller is not an agent of said corporation to receive payment of the monies payable hereunder or for any other purpose whatsoever and that all payments

are to be made to said corporation and that no payments not so made will be credited unless and until received by said corporation." Another clause is as follows: "It is understood and agreed that this instrument and the seller's interest therein may be offered by the seller for discount to Refrigeration Discount Corporation of Detroit, Michigan. To induce said corporation to accept such assignments, the purchaser hereby agrees and represents to such corporation that such assignments shall be free of any and all defenses which the purchaser may or might have against the seller. All payments by the purchaser are to be made at the office of the Refrigeration Discount Corporation, Detroit, Michigan. The purchaser acknowledges that the seller is not an agent of said corporation to receive payment of the monies hereunder or for any other purpose whatsoever."

In the absence of a statute to the contrary, we think the parties had the right to make this contract herein and to use the language above quoted. Mr. Haskew knew that the instrument had been assigned to appellant. He agreed in advance that it might be done. He made payments to appellant after its assignment to the extent of nine of them. He had the right to agree and did agree in advance that the assignment should "be free of any and all defenses which the purchaser may or might have against the seller." He did so agree and he is now attempting to assert a defense, which is one against the seller, to the suit of appellant, contrary to the express provisions of his contract. He may not do this. There is no contention that Mr. Haskew is under any disability to make a contract of this character. He is a grown man, a teacher in the public schools of Paris, Arkansas. Courts are not permitted to make contracts for persons *sui juris,* but only construe such as they have made.

Counsel for appellee contends that there is an implied warranty, under the circumstances of this case, that the goods are suitable for the uses intended. We agree that such is the fact under the cases cited by counsel and many other cases. But the warranty, whether

express or implied, is one by the manufacturer or the seller, and it is not one imposed upon the purchaser or assignee of the contract here involved as the parties agreed expressly to the contrary.

The court should have directed a verdict in appellant's favor for the possession of the refrigerator as requested by it. For the error in refusing to do so, the judgment will be reversed, and judgment will be entered here in appellant's favor for the possession of same, and for all of the costs of this proceeding, if the balance due is not paid within ten days after this judgment becomes final.

MEHAFFY, J., dissents.

HILL *v.* TEAGUE.

4-4725

Opinion delivered October 4, 1937.

Clark & Clark, for appellant.

Madison K. Moran, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Faulkner county rendered on January 4, 1937, vacating a default judgment of the court rendered on the 27th day of November, 1936, in favor of

appellant against appellee in an ejectment suit. The ejectment suit was filed on October 20, 1936, and a summons was issued thereon and served upon appellee in Lonoke county on the 21st day of October, 1936, notifying him to appear and answer the complaint within twenty days as provided by statute. He failed to answer or otherwise plead to the complaint and on November 27, 1936, appellant took a default judgment against him.

After final adjournment of the July term, 1936, and on the first day of the January, 1937, term, appellee appeared and filed an unverified motion to set aside the default judgment on the ground that he did not know there would be an adjourned term of court on November 27, 1936, and for that reason prayed that the default judgment be set aside and that he be permitted to file an answer in the ejectment suit.

The court summarily vacated the default judgment and gave appellee thirty days in which to file an answer in the ejectment suit, because it found that appellee lived in an adjoining county and did not know there would be an adjourned term of court on November 27, 1936.

The fact that appellant did not notify appellee that there would be an adjourned term of court on November 27, 1937, did not constitute fraud practiced by appellant upon appellee. It is true, the motion to vacate the judgment filed by appellee alleged fraud and claimed that a failure to notify him of an adjourned term constituted the fraud. No duty rested upon appellant to do more than serve a summons upon appellee to file an answer or plead to the complaint in twenty days. It was appellee's duty to answer and look after his case. Judgments will not be set aside after final adjournment of court on account of the negligence or lack of diligence by a defendant. *Trumbull* v. *Harris,* 114 Ark. 493, 170 S. W. 222; *Kohn* v. *Smith,* 122 Ark. 74, 182 S. W. 533.

The trial court had no jurisdiction after the default judgment had been rendered and after the final adjournment of the July term of said court to set aside the

judgment except on grounds specified in §§ 6290 to 6292 of Crawford & Moses' Digest. None of the grounds contained in said sections were set up in a motion to vacate the default judgment. *Old American Insurance Company* v. *Perry,* 167 Ark. 198, 266 S. W. 943. It was not even alleged in the motion to vacate the default judgment that appellee had a meritorious defense to the ejectment suit, and it was necessary to allege and make *prima facie* proof of the truth of such a defense before the judgment should have been set aside even if statutory grounds thereon had been set up in the motion. *Holman* v. *Lowrance,* 102 Ark. 252, 144 S. W. 190.

The court erred in vacating the judgment on the motion filed; therefore, the judgment vacating the default judgment is reversed, and the cause is remanded with directions to overrule and dismiss the motion filed at the January term, 1937, of said court, and reinstate the judgment by default.

ZIMMERMAN *v.* FRANKLIN COUNTY SAVINGS BANK & TRUST COMPANY.

4-4734

Opinion delivered October 4, 1937.

W. A. Leach and *Joseph Morrison,* for appellant.

Ingram & Moher, for appellee.

SMITH, J. On May 18, 1920, George A. Zimmerman and Nettie C., his wife, executed the mortgage here

sought to be foreclosed, to secure their principal note for $8,000. The property conveyed was their homestead. George A. Zimmerman died intestate September 21, 1929, and his wife November 13, 1929. They were survived by two sons, Ralph and G. R. Zimmerman, who were their only heirs-at-law.

On April 15, 1927, the land was sold pursuant to a decree of the chancery court to the Northern Road Improvement District for the nonpayment of the road improvement taxes due thereon for the year 1925, and on July 27, 1929, the improvement district assigned the certificate of purchase given it by the commissioner making the sale to Iva Zimmerman, who is the wife of Ralph Zimmerman. On August 21, 1929, the commissioner conveyed the land to Iva Zimmerman, and this deed was duly approved by the court on October 7, 1929.

A complaint was filed May 18, 1933, to foreclose the mortgage. Iva Zimmerman filed a separate answer, and she and Ralph, her husband, filed an answer and cross-complaint, alleging the title to be in Iva by virtue of the commissioner's deed above-mentioned, and prayed the dismissal of the foreclosure proceeding.

The court found "* * * that the said Iva Zimmerman acquired no title to said land under said commissioner's deed; that said acquisition was nothing more than a redemption; and that the same is void and should be canceled, and that said cross-complaint should be dismissed." Upon this finding the foreclosure of the mortgage was decreed, and this appeal is from that decree.

It appears that George A. Zimmerman and his wife were advanced in years and in bad health for some years prior to their death, and that their son Ralph and Iva, his wife, lived on the land and kept house for George A. Zimmerman. Ralph and his wife had lived on the land since 1928. Iva Zimmerman testified, in effect, that her father-in-law did not have funds to effect a redemption, and that it was agreed that the land would be lost if not redeemed, and that she, therefore, paid her own money, which she had inherited from her father, to acquire the certificate of purchase from the improvement district;

that she did not intend to defraud anyone, but did not want to see the land lost for taxes and she had, therefore, bought the certificate of purchase with her own money for her own benefit.

We think, under these circumstances, the court correctly held that "said acquisition was nothing more than a redemption." The law is very definitely settled that persons in possession of land, enjoying the rents and profits thereof, cannot acquire title thereto by permitting it to sell for taxes and buying at the sale therefor. This is true because it is their duty to keep the taxes down. *Fitzgerald* v. *Spain*, 30 Ark. 95; *Guynn* v. *McCauley*, 32 Ark. 97; *Hunt* v. *Gaines*, 33 Ark. 267; *Sanders* v. *Ellis*, 42 Ark. 215; *Rodman* v. *Sanders*, 44 Ark. 504; *Drake* v. *Sherburne*, 57 Ark. 563, 22 S. W. 430; *Ross* v. *Frick Co.*, 73 Ark. 45, 83 S. W. 343; *Wade* v. *Goza*, 99 Ark. 543, 139 S. W. 639; *Galloway* v. *Battaglia*, 133 Ark. 441, 202 S. W. 836; *Roberts* v. *Miller*, 173 Ark. 38, 291 S. W. 814; *Adams* v. *Sims*, 177 Ark. 652, 9 S. W. (2d) 329; *Williams* v. *Maners*, 179 Ark. 110, 14 S. W. (2d) 1104. See, also, Jones on Arkansas Titles, § 1299.

Now, Iva Zimmerman was not in possession as owner, nor was it shown that she received directly any of the rents and profits from the land. But she was living as a member of the family of her father-in-law, who did claim title and who enjoyed the rents and profits therefrom, and she, therefore, had this indirect interest in and benefit from the land.

In the early case of *Hunt* v. *Gaines*, *supra*, it was held (to quote the headnote) that "A purchase of lands at tax sale by one who is receiving the rents and profits, and ought to keep down the taxes, can never strengthen his title."

In the earlier case of *Fitzgerald* v. *Spain*, *supra*, it was held that "* * * a vendee in possession under a title bond in the enjoyment of rents and profits, or having power to enjoy them, is so far bound to pay taxes, as to preclude him from acquiring title, directly or indirectly, from or under a sale for taxes which accrued while he was so under obligation to pay, and those who

claim under such vendee, as in this case, as dowager, heirs-at-law and homestead occupants enjoying, and having the legal right to enjoy the rents and profits, are in no better plight, and cannot take advantage of their own wrong in letting the property sell for taxes, to acquire a title thereby."

This principle controls the decision in the cases above cited. In one of the latest of these, that of *Adams* v. *Sims,* it was held that, where the mortgagor permitted the mortgaged premises to be forfeited for nonpayment of a road improvement assessment, and subsequently bought them from the road district in his wife's name, and with her means, the transaction would be treated as a redemption by him.

It would contravene the policy of the law which controls the decision of the cases above cited to permit Mrs. Iva Zimmerman, whose husband inherited a half interest in the land subject to the mortgage before the confirmation of her deed, to defeat the mortgage debt in this manner, inasmuch as she was living on the land with her father-in-law as his housekeeper when the lands were sold for the nonpayment of the improvement taxes.

The decree is correct, and is, therefore, affirmed.

THE SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* SAMS.

4-4732

Opinion delivered October 4, 1937.

Donham & Fulk, Pat Mehaffy and *Milton McLees,* for appellant.

Clark & Clark, for appellee.

GRIFFIN SMITH, C. J. On a jury's finding that appellee was totally disabled within the meaning of insurance policies which he carried in appellant company, judgment for $1,250 was rendered. As grounds for reversal appellant urges two propositions: (1) That if appellee is disabled to any degree by reason of a dilated heart and arterio-sclerosis, such disability was contributed to by appellee's own intemperate use of alcoholic liquors; and (2) that appellee is not totally and permanently disabled within the provisions of the beneficiary certificates sued on.

There are ten assignments of error, but these two are the only ones argued in the brief.

Issuance of the policies is admitted. It is also admitted that appellee was in good standing at the time the disability is alleged to have begun. Two policies are involved, one for $1,000 and one for $1,500, each bearing date February 28, 1935. These certificates were delivered to appellee in lieu of other certificates surrendered by appellee, of older dates.

Section 4 of the certificates provides for total and permanent disability as follows: "After this certificate shall have been in force for twelve months, if satisfactory proof is furnished to the Association, prior to age

60 of the member, and while this certificate is in full force, that the member is totally and permanently physically disabled and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit, or from engaging in any occupation or employment of a gainful nature, and if such disability has then existed for not less than ninety days, the Association will pay to the member in cash one-half the face amount of this certificate, less any indebtedness to the Association, or the cash value if greater, in full settlement, on surrender of this certificate for cancellation. * * * The total and permanent physical disability benefit shall not apply if the disability of the member shall result from self-inflicted injury, while sane or insane. * * *''

It was alleged in the complaint that plaintiff had become totally and permanently disabled within the meaning of the certificate before reaching the age of 60, and that such disability had existed for more than ninety days at the time suit was filed. In an amendment it was alleged that disability was due to arterio-sclerosis and heart disease, and that such disability was not the result of any self-inflicted injury, etc.

The answer contains the following affirmative allegation: ''Defendant states that if plaintiff is disabled to any extent, he was disabled at the time of the issuance of the beneficiary certificate by the defendant, and said disability was caused or contributed to by his own intemperate acts.''

Dr. I. N. McCollum, for the plaintiff, testified that he had examined the plaintiff. ''At the time of the first examination he was suffering from a dilated heart and arterio-sclerosis. I never gave him any medicine, but I advised him what to do. Medicine wouldn't especially help. He has short breath, his heart is considerably dilated and enlarged, and he has high blood pressure, from 190 to 200. About 140 is the average for his age (57 years). The condition he is in would prevent him from carrying on his farming operations without serious injury to his health. He should not do any work requir-

ing the least exertion. Rest is the only thing that will do him any good. Moderate exercise is beneficial to a person in his health. I had not treated him prior to February. I do not know how long he has had this condition, or what caused it. The condition may be caused by the excessive use of alcohol, over-eating, and leading a fast life. If he has a history of using alcohol to excess I would say it would contribute to his heart condition. Any excessive use would contribute to the development of arterio-sclerosis and chronic heart trouble. Ordinarily I don't think this condition prevents him from carrying on his farm and gardening operations nor in the transaction of his business in Conway. He would be able to do that, but should be superficial about his exercise. He shouldn't overdo his work nor drink either—just lead a quiet, normal life. The condition would naturally shorten his life some. A man in his condition can't meet work that requires labor of any kind. I would think it harmful for him to get out, especially in the winter, to look after his interests. He came here today when he shouldn't be out. It's never been proved that alcohol caused arterio-sclerosis; that's just what medical authorities think. I don't think if a man took a drink it would cause his heart condition. Influenza could help cause the condition—it could contribute to it. A person recovered from a severe case of influenza and attempting to do hard labor would suffer a dilation of the heart."

Dr. R. G. Herring testified as follows: "I have known Sams for about 25 years, and live near him. I treated him for influenza sometime in January. He didn't improve rapidly, but came out all right. I don't think he will ever be as good a man physically as he was before this attack. I didn't examine his heart. Have heard of his drinking, but never did see him take a drink, and never saw him drunk in my life."

W. O. Scroggins, secretary of the local camp of Modern Woodmen of the World, who took appellee's application for membership, testified that appellee contracted influenza in January or February. "Since he

got up from that he has done very little work. I am a rural mail carrier, and he meets me at the mail box when I bring mail. He looks like a dead man to me. I have seen him on the porch, and he was unable to get out. I passed Sams' house on my route about once a day. I never saw him at work on his farm; he would just be out looking around. I don't know whether he did any plowing, bush-cutting, or whether he made a potato patch or worked a garden. If he did, I didn't see him. His store burned down about four years ago. He rented his farms out every year—rents part and farms part of them. He appeared to be in average health when I delivered the certificates to him two years ago. I know he isn't in good health now like he was then. Sams has taken a few drinks in my presence. I don't know the extent of his drinking. I haven't seen him working any this year, but before, I saw him do all kinds of work, and go fishing, too."

J. E. Freeman testified: "I have lived near Sams for about fifteen years and worked with him, helping on the farm. I have worked for him the last thirty days, and off and on several times this year. He can't hold out to do anything very long. At times he was helping haul hay, and while I was pitching it to him he would give out. Would haul a load of hay and the next day he would help me plow and would have to quit before night because he gave out. He has been in bed practically ever since. He has tried to help on the farm within the last thirty days, but he can't hold out. He worked pretty well all along last year and made the average crop in 1935. * * * I don't know about his coming to Conway to transact his business. I guess he does come down to sell and gin his cotton."

Other testimony to the same effect was offered by appellee. The testimony was, we think, sufficient to make out a *prima facie* case of liability.

On behalf of appellant, testimony was introduced showing that "last Saturday a week ago" appellee was on a bus, drinking. In conversation with business men, they hadn't noticed anything the matter with him. On

Monday prior to the date of trial, appellee helped load some cotton and went with the witness to Conway to have it ginned; appellee and witness took a few drinks, but "he could still walk. I kinda helped him in the truck to get him home; he wasn't down." Appellee was seen working about three weeks before the trial. He was plowing. On another occasion he had been seen sowing grain. No difference could be noted in his health. He had been seen picking a little cotton; was in a store "about three weeks ago in an intoxicated condition." Gets intoxicated about twice a month and stays that way for two or three days. Made a crop this year, "doing about everything on a farm that a farmer would do." In October appellee worked all day, plowing up terrace. During the past few years he has been drinking a lot.

The jury's verdict was necessarily predicated upon a finding of fact that appellee was totally and permanently disabled within the meaning of the certificate of insurance, and if there is any substantial evidence to sustain this finding, it cannot, on appeal, be disturbed.

It has frequently been held by this court that "Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labor so long as was reasonably necessary to effect a speedy cure." *Missouri State Life Insurance Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; Kerr on Insurance, §§ 385 and 386; *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029; *Ætna Life Insurance Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335; *Ætna Life Insurance Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Ætna Life Insurance Co.*

v. *Person,* 188 Ark. 864, 67 S. W. (2d) 1007; *Travelers Protective Association* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364.

In *Ætna Life Insurance Co.* v. *Martin,* 192 Ark. 860, 96 S. W. (2d) 327, there is this declaration of the law: "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." To the same effect is *Sun Life Assurance Co. of Canada* v. *Coker,* 187 Ark. 602, 61 S. W. (2d) 447. In this case the court said: "Generally, it is a question for the jury to determine whether the insured is disabled, the nature of the disability, when it commenced, and its duration, whether total and permanent or otherwise."

In the instant case Dr. McCollum testified that appellee was suffering from high blood pressure, heart trouble, and arterio-sclerosis. Although there are many forms of heart disease, and although this court will not hold as a matter of law that permanent and total disability inevitably follows where it is present, we do know that many forms of heart disease are serious, and that they impair the patient's usefulness, and limit physical activities. Nor is it sufficient for an insurer to show, when existence of the malady is once established, that the assured has periodically discharged some of the duties incident to his business or profession, when at the same time there is testimony that such activities were engaged in at great risk to the assured's physical well-being.

The evidence here tends to show that appellee drank frequently, and he had been seen in an intoxicated condition. It is shown that appellee's intemperate habits extended over a long period of time, and it is insisted by appellant that this is conclusive that appellee's disability was self-inflicted, or that dissipation contributed to his unfortunate physical status. The testimony on this point is not sufficient to establish the contention. It is common knowledge that alcoholic liquors have different effects on different people. While we may indulge

the presumption that injury attends excesses, we cannot presume that in a given case a specific result was bound to follow. There was no medical testimony offered to show that appellee's heart trouble was induced through or influenced by excessive drinking, although a strong suspicion may attach.

In view of the jury's verdict, and in the light of former decisions of this court, the case must be affirmed, and it is so ordered.

CORDER *v.* NORSWORTHY.

4-4724

Opinion delivered October 4, 1937.

G. W. Botts, for appellants.

George Pike, for appellee.

GRIFFIN SMITH, C. J. S. E. Corder and his wife, Willie Corder, have appealed from a finding of the chancery court for Arkansas county that the indebtedness of S. E. Corder to appellee was $559.43, for which judgment was rendered.

In 1926 or 1927, appellee entered into a verbal contract to sell 4.25 acres of land in the town of St. Charles. Mrs. Corder testified that she bought the property, agreeing with appellee that the principal price of $1,500, without interest, should be paid by permitting appellee to take the rents from certain rice lands she and her husband owned, it having been estimated that more than six years would be required to complete the payments. Her husband was not present when she made the agreement with appellee, but she went home and told of the transaction. The deal was consummated in December, 1926.

Mrs. Corder further testified that the rice land "was turned over to Mr. Norsworthy to rent and collect rents like it was his own." She says that no papers were executed; that appellee claimed to be too busy. "He told me to come back, and I went back different times, and he always made excuses and did not have the papers ready. I don't know why he did not fix the papers." Witness also claimed there was an agreement that Norsworthy might collect certain dry land rents [as distinguished from irrigated rice farming] and in consideration of this arrangement Norsworthy would waive interest charges. When the contract for purchase of the town property was closed, no other indebtedness was due Norsworthy. Witness testified that, at the time the town property was bought, she and her husband had a substantial balance coming to them from the 1926 rice crop, they having been told by Norsworthy that this credit was sufficient to take care of a $500 payment. It was admitted by witness that in 1932 she and her husband owed appellee a supply account which showed a balance of $43.16, the obligation having been secured by chattel mortgage. This amount was paid to appellee by a Mrs. Whitmore, who had collected it on a rental charge. Witness says she directed Mrs. Whitmore not to make this payment to appellee, but that the instruction was disregarded.

S. E. Corder testified that his wife purchased the town property; that appellee promised to take the rice land and rent it and apply the proceeds on the debt; that T. L. Crabtree farmed the rice land in 1926, and appellee agreed to take the 1926 crop as the first payment, stating that the crop would be worth $500; that no interest was to be charged, and appellee was to pay taxes until the deed was made. Witness stated that the town property was occupied the latter part of February, 1927. He also testified that he later checked the rice mill records to ascertain the value of the 1926 crop, and it amounted to $495. No cash was paid on the purchase price of the town property, the rice check having stood for such. Witness testified there were no settlements or

discussions between the parties "until I got after him in 1929. I figured we were about even and he gave me this statement in 1929; it was $900 something. It was the only statement I ever got. Rents collected by Norsworthy in 1932 were against my will." The witness confirmed Mrs. Corder's statement that Mrs. Whitmore was directed not to pay Norsworthy the item of $43.16 heretofore referred to.

The record shows that in the fall of 1927 appellee sold to G. B. Dean approximately one acre of the town property, receiving $50 therefor. In 1930 he sold an acre to C. L. Whitmore, the consideration being $150. Appellants testified that they did not know of these sales, and did not approve them. Appellee just as positively testified that in each instance Mr. Corder was consulted, and that he readily agreed to the transactions. Appellants contend that the value of the land sold to Dean was $150, and that the Whitmore tract was worth $300, and demand credit for the aggregate of $450.

The full amount appellants testified appellee had collected, or should have collected, was $3,021.99, as follows: 1926 rice rent, $495; 1927, 750 bushels of sweet potatoes, $750; 1927, Jim Barker dry land rent, $150; 1927, Crabtree rice rent, $217.13; 1928, Jim Barker dry land rent, $95; by error in gasoline charge, $21.70; 1929, rice rent, $43.16; 1928, rice rent, prevented from farming by Norsworthy, $150; 1929, rice rent, not farmed, prevented by Norsworthy, $150; 1931, rice rent, not farmed, prevented by Norsworthy, $150; 1933, rice rent, not farmed, prevented by Norsworthy, $150; 1934, rice rent, not farmed, prevented by Norsworthy, $150; one acre sold to Whitmore, $300; one acre sold to Dean, $150.

Appellee testified that he sold the town property to S. E. Corder, and not to Willie Corder; that on October 20, 1926, he credited S. E. Corder with $330 on the Crabtree rice; that on November 29 he received four bales of cotton from Corder amounting to $234.65; that Corder owed an account for supplies, and after extending these credits of $564.65 against the Corder account, a credit of $77.29 was due, and this was paid by check. From

1927 to 1933, the Corders were indebted to appellee on open account, in addition to the land transaction. Instead of receiving 750 bushels of sweet potatoes from appellants in 1927, he actually received six bushels. He did not agree to buy a crop of sweet potatoes from appellants at $1 a bushel. An item of $43.02 appellants claimed to have paid in 1932 to discharge a chattel mortgage was not paid for that purpose, but was paid to apply on the town property contract. The records show the chattel mortgage was satisfied December 1, 1933. Appellee further testified that he did not, at any time, have charge of the renting of the farm lands. "The agreement between us was that these rents were to come to me until the property was paid for. That is about as short as I can make it. Appellants did not agree to turn the lands over to me to be managed or rented out for them, and I did not receive all of the rents collected by appellants. I did not at any time prevent them from renting any of their lands."

Following purchase by Whitmore of one acre of the town property under deed executed by appellee, Whitmore erected thereon a modern gin costing more than $8,000. On December 19, 1933, Willie Corder filed a circuit court action against Whitmore, seeking recovery of the one acre. The allegations were that she had purchased the property from Norsworthy; that she had not consented to the sale by Norsworthy, and that she had received no consideration. Norsworthy was made a party defendant in the suit. Judgment was rendered in favor of Whitmore.

The suit from which this appeal comes was filed December 13, 1935, by Norsworthy against S. E. Corder and Willie Corder. The plaintiff alleged (and testified) that the verbal contract of sale and purchase was made in February, 1927. The complaint alleged that no deed was to be executed until all of the installments had been met; that the last payment on the contract was $122, made on August 29, 1935, and that a balance of $1,124.67 was due. The prayer was for judgment in this sum, with

foreclosure of the vendor's lien, sale, etc. An itemized statement, duly verified, was attached to the complaint.

Appellants, in addition to their contention that the account has been overpaid, have interposed a plea of *res judicata,* contending that in the circuit court action, to which appellee was a party, Norsworthy prayed specifically for certain relief, "and all other relief to which he might be entitled."

The record contains more than 250 pages, and a great deal of testimony was taken. Although the chancellor did not make a detailed finding of facts, a refusal to allow interest charges of $559.43, as set out in appellee's statement, would account for a reduction of the claim from $1,124.67 to $565.24, and judgment was given for $559.43—a difference of $5.81. Appellants claim payments and request credits for $3,021.99.

It is indicated by the amount of the judgment that the chancellor allowed appellants' claim of $150 representing Jim Barker dry land rent for 1927; $217.13 for 1927 Crabtree rice land rental, and $150 and $43.16 for 1929 dry land rental, aggregating $560.29; also, that other items in the claim were rejected. To this the chancellor apparently added items taken from appellee's statement, as follows: Proceeds of sale of land to Whitmore, and Dean, $200, less abstract and survey charges of $36, or $164 net; $43.02 received in cash from Corder in 1932; and payments of $167 in 1935. The total of these three items is $374.02, or total credits of $835.31. This would show a balance of $664.69 due by appellants, or $105.26 more than the chancellor gave judgment for. It is obvious, therefore, that appellants were given additional credit, the nature of which was clear to the court at the time judgment was rendered, but which have not been analyzed in the abstracts of testimony in a manner admitting of their identification in the record. This is not important to a determination of this appeal for the reason that the discrepancy, if in fact it is such, is against the appellee, who has not cross-appealed.

To discuss all of the credit items urged by appellants and to amplify their demands by copying testimony ap-

plicable thereto would unduly extend this opinion. In view of the conflict of the testimony, the interest of the parties testifying, and the means available for verification, the result arrived at by the chancellor is not contrary to the weight of evidence.

The plea of *res judicata* may be disposed of by saying that in the circuit court action Willie Corder was plaintiff, claiming that Norsworthy had contracted exclusively with her, and the latter was brought into the proceedings as a party defendant. The present suit is by Norsworthy against Willie Corder and S. E. Corder. The parties being different, *res judicata* cannot be properly pleaded.

Another reason why this plea cannot be considered is that the judgment of the circuit court is not properly abstracted.

Affirmed.

STANDARD OIL COMPANY OF LOUISIANA *v.* WEBB.

4-4701

Opinion delivered October 4, 1937.

Cecil Morgan and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

Gordon B. Carlton, J. S. Lake and *Winfred Lake,* for appellee.

BUTLER, J. On the trial of the case in the lower court there was a verdict and judgment in favor of the appellee from which this appeal is duly and properly prosecuted.

The principal questions raised and argued relate to the refusal of the trial court to direct a verdict in favor of the appellant. The requested instruction was based on the contentions that appellee's injury was the result of his own want of care, and the result of the risk assumed by him. There is no contention that the evidence accepted by the jury was not of a substantial nature and sufficient to sustain the verdict, but the argument is made that if this evidence be accepted as true, it affirmatively appears that it sustains the contentions made by appellant relative to appellee's negligence and the assumption by him of the risk attendant upon the operation which resulted in his injury.

There is a decided conflict in the testimony, but the evidence stated most strongly for the appellee establishes the following facts: appellee's injury occurred while he was in the employ of the Standard Pipe Line Company, Incorporated. This company was merged or taken over by the appellant company which assumed liability for all claims against it. Previous to his employment with the Standard Pipe Line Company, appellee had been a farm laborer. He began to work for the pipe line company about the first of June, 1936, and was assigned work on ordinary jobs as a common laborer.

He did this work for a week or two, and was then assigned as a helper to a certain truck driver, one Swanders. This required the hauling of supplies from the warehouse to various parts of the line where the machines were at work. He worked at this a week, and was then assigned as helper to another truck driver, one Parker. Appellee was instructed to obey the orders of the truck drivers with whom he worked and he performed the same duties with both drivers. He received his injury on the 16th day of June, 1936, for which he brought suit and recovered damages.

On that day, appellee and his superior, Parker, went to appellant's warehouse for the purpose of loading steel drums containing gasoline, weighing 450 or 500 pounds each. The ordinary way of performing this work was to back the truck up to the edge of the concrete floor of the warehouse, then using a plank, 2 x 10, about ten feet long, recently procured and placed in the warehouse for that purpose. The floor of the truck was about 3½ feet above the floor of the warehouse. In loading the drums of gasoline, one end of this plank was placed upon the floor of the warehouse and the other upon the floor of the truck. The drums were then rolled to the end of the plank and the driver of the truck and appellee would place themselves at opposite ends of the drums and roll them upward on the plank into the truck. This is the manner in which this work had been performed previous to the time of appellee's injury.

Appellee had never been required to load a drum by himself, but had always been assisted by the driver of the truck. On this occasion, he and Parker had loaded one or two drums in the usual manner when Parker told appellee to load another as he was going back into the warehouse. Appellee told Parker he didn't believe he could load the gasoline by himself as it was too heavy. Parker made no reply, but proceeded into the warehouse. Appellee rolled a drum to the end of the plank and waited for Parker's return. He came back in two or three minutes and said, in effect, "You'd better load that gasoline or we will get a man that will." Appellee pro-

ceeded then to attempt to roll the drum up the plank without help. In doing this, he placed the center of the drum on the plank, got behind it and straddled the plank, and rolled it as far as he could while in that position. At this time Parker had again gone into the warehouse and appellee, believing that he could get the drum no further up the plank while straddling it, attempted to change his position by moving his right leg over to the left side. While in the act of changing his position, at the same time trying to hold the drum in its position on the plank, appellee lost his balance and suffered an injury to his back. Just about this time he observed grease spots on the plank which he had not before noticed. Appellee held the drum until another employee came to his assistance and, together, they rolled the drum into the truck.

Since there is no complaint made as to the amount of damages awarded, it becomes unnecessary to discuss the nature and extent of the injury claimed to have been sustained by appellee.

On the question of appellee's negligence, appellant contends that the injury did not result from the order of Parker to appellee to roll the drum unassisted, but from the careless and negligent manner in which such order was undertaken. One of the errors complained of in the motion for a new trial was the refusal of the trial court to direct the jury that if it should find appellee negligent in changing his position from astride the plank while attempting to hold the drum of gasoline and that such negligence was the sole cause of his injury, it would be the duty of the jury to find for the appellant. The instruction overlooked the fact that appellee was acting under the express order of his superior, Parker, who, if not present at the instant when his order was being obeyed, had been but a moment before and had personal knowledge of the weight of the object to be moved and the difficulty attendant upon the appellee in obeying his order. Parker testified that he had moved one of the drums unaided and he, therefore, knew better than ap-

pellee the trouble which might be encountered in carrying out the order.

The case of *Kurn* v. *Faubus,* 191 Ark. 232, 84 S. W. (2d) 602, relied on and quoted by appellant, is not in point, for in that case the servant did not undertake to follow the directions of his foreman, but to proceed by a different method which he was pursuing when injured.

Giving to the evidence of appellee its greatest weight in his favor, it may be reasonably inferred that he was trying to obey the order of his superior under the fear that he would lose his job if he did not do so. While it is in proof on the part of the appellant that Parker had no authority to hire or fire, it is admitted that appellee was under duty to obey his orders. It is not shown that appellee knew of the restricted authority of Parker; but, even so, he might have reasonably apprehended that a report from Parker that he would not obey orders would result in his discharge. Appellee simply undertook to obey the order and it appears that it was necessary for him to change his position in order to accomplish his purpose. We, therefore, see no negligence on his part in acting in this manner.

On the contention that appellee assumed the risk of the danger arising from the movement of the drum, reliance is placed upon the following statement, quoted with approval in *Kurn* v. *Faubus, supra*: "Knowledge, then, or opportunity by the exercise of reasonable diligence to acquire knowledge, of the peril which subsequently results in injury to the employee is the foundation of the liability of the employer. Liability exists when the perils of the employment are known to the employer but not to the employee; and no liability is incurred when the employee's knowledge equals or surpasses that of the employer."

As further authority for the contention that the risk was assumed by appellee, appellant cites the cases of *Missouri Pacific Rd. Co.* v. *Lane,* 186 Ark. 807, 56 S. W. (2d) 175; *McEachin* v. *Yarborough,* 189 Ark. 434, 74 S. W. (2d) 228; *Sinclair Refining Co.* v. *Duff,* 191 Ark. 888,

88 S. W. (2d) 322; *National Refining Co.* v. *Wreyford,* 189 Ark. 598, 74 S. W. (2d) 633. The facts in these cases make them readily distinguishable from the case at bar. Here, the appellee was acting under the express orders of his superior upon whose judgment he had a right to rely. Parker was a man of experience, while appellee was not; Parker had loaded drums of gasoline unassisted, but the appellee had not. It is clear, therefore, that appellee's experience and knowledge did not equal that of his superior, and, while he knew that the operation he was undertaking would be difficult, there is nothing to show that he appreciated its attendant dangers. Although Parker was not actually present when appellee attempted to obey his order, he was virtually so, and he not only gave the command to appellee, but, when he discovered it had not been obeyed, repeated it with emphasis accompanied by a covert threat. It was a question for the jury as to whether or not the danger of rolling the gasoline drum upward upon the plank by one unassisted was so open and obvious that a reasonable person would have refused to obey the order.

The facts bring this case within the general rule that the question of assumption of risk is generally one for the jury, and always so where a servant is acting in obedience to the orders of a superior unless it appears that he both knew and appreciated the danger in obeying such order; or, where such danger is so obvious that a reasonably prudent person would refuse to obey. This rule has been announced in many of our cases, among which are *Woodley Petroleum Co.* v. *Willis,* 172 Ark. 671, 290 S. W. 953; *Berry's Sons Co.* v. *Presnall,* 183 Ark. 125, 35 S. W. (2d) 83, and *Chapman* v. *Henderson,* 188 Ark. 714, 67 S. W. (2d) 570, cited in brief of appellee. The court correctly submitted the defense of assumed risk to the jury and its verdict against the contention of appellant has some substantial evidence to support it.

It is lastly insisted that the trial court erred in its declarations of law given to the jury at the request of the appellee. Instruction No. 1, in effect, told the jury that if the loading of the drum of gasoline unassisted was

because of the order and direction of Parker who knew, or should have known, by the exercise of ordinary care, that it would be unsafe "under the circumstances" to load the drum unassisted and injury resulted to appellee while attempting to carry out the order, the verdict should be for the appellee unless the jury should find from the evidence that he knew and appreciated the danger, or, that the danger was so obvious that no person of ordinary prudence would not have undertaken to obey the order.

There was no general objection to this instruction. The specific objections were, first, that it failed to take into account the defense of contributory negligence. This was not error. The relation of master and servant obtained between the parties, the master being a corporation, and in such cases contributory negligence is no longer a defense. The comparative negligence doctrine now obtains in this state.

The second specific objection was the same as the first presented in different language. The third and fourth were that the instruction ignored the capacity of appellee to perform the command and his assumption of risk, if he knew of his lack of ability, and that the instruction failed to notice the requirement that it must appear that the work was being done under the direct command and supervision of the master.

In the argument, appellant objects to the wording of the instruction because of the words, "under the circumstances." This is a matter of form and not of substance, and if the appellant thought the instruction inaccurate, attention of the trial court should have been called to it by special objection. We think the specific objections made are without merit as they deal with the question of assumed risk which was fully covered by other instructions given.

Instruction No. 2 given by the court on the doctrine of assumed risk is objected to because of the language used on the ground that it applies only to cases where the employee is undertaking to do the work under the direct command and supervision of the employer. We

think the evidence is not such as to warrant this objection. This instruction was further objected to because it assumes that the master was negligent. This would be a strained construction and we do not think it justified.

Instruction No. 3 objected to was also on the doctrine of assumed risk, which, without discussing it, we deem it sufficient to say was fully justified by the evidence.

Appellee's instruction on the measure of damages is also objected to and argued in its brief. The correctness of this instruction becomes immaterial when no complaint is made as to the amount of the award.

Numerous objections were made to the modifications by the court of instructions requested by the appellant. It would unduly lengthen this opinion to notice the various objections in detail. It is sufficient to say that when the instructions given are considered as a whole, the questions at issue seem to have been fully and fairly submitted to the jury, and the modifications by the court of appellant's instructions serve only to harmonize these with the others given. We find no prejudicial error in any of the court's declarations of law.

It follows, from the views expressed, that the judgment of the trial court is correct, and it is, therefore, affirmed.

HUDSPETH *v.* STATE.

Crim. 4053

Opinion delivered October 4, 1937.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

SMITH, J. Appellant was convicted upon the charge of sodomy, alleged to have been committed by having carnal intercourse with a certain beast, to-wit, a cow.

The conviction occurred at a second trial at the same term of court, and the action of the court in ordering this second trial at the same term is assigned as error. No prejudice is shown by this action of the court. It was expressly authorized by § 3194, Crawford & Moses' Digest, which provides that "In all cases where a jury is discharged, either in the progress of a trial or after the cause is submitted to them, the cause may again be tried at the same or another term of the court."

It is urged that the testimony is insufficient to sustain the conviction, the specific contention being that the testimony failed to prove penetration. Proof of this fact is required to sustain a conviction. Section 2745, Crawford & Moses' Digest. But this is a fact which may be proved by circumstantial evidence, provided the inferences to be deduced from the circumstances proved leave no reasonable doubt upon the subject. *State* v. *Gage,* 139 Ia. 401, 116 N. W. 596.

The disgusting testimony may be briefly summarized as follows. A boy reported to a patrolman that something was going on at Gann's barn. This officer, accompanied by another officer and the boy, went to the barn. When they arrived there they heard someone say, "Saw, saw, God damn you, saw." Someone was standing behind a cow. There was a tub turned upside down behind the cow. The cow was chained to a brace in the barn so tightly that there was no play in the chain. A light was flashed, whereupon the man standing behind the cow ran. He ran into a fence and was knocked down by the impact. His pants were unbuttoned, and there

was wet cow dung all over his clothes and the hairs around his private parts. This man was appellant.

This testimony clearly supports the finding that appellant was in the act of having carnal knowledge of a cow, and had so far accomplished his purpose as to effect penetration.

The judgment must, therefore, be affirmed, and it is so ordered.

WALLS AND MITCHELL *v.* STATE.

Crim. 4055

Opinion delivered October 4, 1937.

John Owens and *Tom Kidd,* for appellants.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

MEHAFFY, J. Appellants were convicted in the Pike circuit court of the crime of robbery, and their punishment fixed at three years in the state penitentiary. The case is here on appeal.

There are but two questions argued by the appellants. It is first contended that the court erred in ad-

mitting in evidence the transcribed testimony of Betty Lou Bryant, given by her in the preliminary hearing. There was an examining trial by the justice of the peace, and Betty Lou Bryant was present and testified, and the defendants were present and represented by an attorney. This testimony was transcribed by the stenographer and introduced in evidence over the objection of appellants.

Mrs. Verdeeba LeLongy testified that she worked for the prosecuting attorney, and on April 22, 1937, took the testimony in the justice of the peace court of Thompson township, Pike county, Arkansas, in a case in which the state of Arkansas was plaintiff and Altus Walls and Roy Mitchell defendants, and took the testimony of Betty Lou Bryant. Witness was sworn before she testified. The pages from 1 to 17 and about half of 18, is the truly transcribed testimony of Betty Lou Bryant in the cause.

The testimony was then offered and appellants' attorneys objected to the introduction of it, first, because the Constitution provides: accused should be confronted with witnesses and they are here on trial and not confronted with witnesses; that it was not a proper showing that witness is out of the jurisdiction of the court. The court then asked if counsel for appellants appeared at the hearing before the justice of the peace and cross-examined this witness. It was then stated that John Owens, lawyer for appellants, cross-examined Betty Lou Bryant, whereupon the court overruled the objections and admitted the testimony.

The evidence shows that Betty Lou Bryant lived in Spartanburg, South Carolina; that some days prior to the examination in the justice of the peace court she left Spartanburg, South Carolina, and arrived at Murfreesboro about 5:30 or 6:00 o'clock on Sunday; that she was on her way to Fort Worth, Texas. After the trial in the justice of the peace court, on the same day, the sheriff testified that he served a subpoena on Betty Lou Bryant warning her to appear in the Pike circuit court, and that she is not here. The sheriff did not know

where she was, but said she left Murfreesboro the next day after the trial.

The fact that she was on her way to Fort Worth, Texas, and did not live in the state of Arkansas, and no one knew where she was, was a sufficient showing to make her evidence taken before the examining magistrate competent in the trial in the circuit court. As to whether the foundation was sufficient was a matter in the discretion of the trial court, and he did not abuse his discretion in admitting the testimony.

Initiated Act No. 3, 1936, expressly provides that when a witness has been examined in the magistrate court and his testimony taken, as provided in said act, the transcript of his testimony shall be admitted in evidence upon the trial of the defendant, for any offense arising out of the criminal transaction for which he is held, either on behalf of the state or of the defendant, if for any reason the testimony of the witness cannot be obtained at the trial, and the court is satisfied that the inability to procure such testimony is not due to the fault of the party offering the transcript in evidence.

The act, also, provides that this evidence may be introduced when the former witness is dead, beyond the jurisdiction of the court, has become insane since the former trial or examination, or when, for any reason, the former witness may not be available. But long before the adoption of this initiated act, this court had repeatedly held that under circumstances similar to the circumstances in this case, secondary evidence was admissible.

This court recently said: "This court is committed to the doctrine that secondary evidence is admissible in the same case between the same parties if the witness who testified originally is beyond the jurisdiction of the court, without the procurement or connivance of the party seeking to introduce the testimony, and if the address of the witness was not or could not, by reasonable diligence, have been obtained in time to take his deposition, provided the adverse party had an opportunity to cross-examine the witness when his original evidence

was given; and it is within the sound discretion of the trial court to determine whether the proper foundation had been laid to admit the secondary evidence of an absent witness." *Pine Bluff Co.* v. *Bobbitt,* 174 Ark. 41, 294 S. W. 1002; *Clinton* v. *Estes,* 20 Ark. 216; *Shackelford* v. *State,* 33 Ark. 539; *McTighe* v. *Herman,* 42 Ark. 285; *Ry. Co.* v. *Henderson,* 57 Ark. 402, 21 S. W. 878; *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885; *Kansas & Texas Coal Co.* v. *Galloway,* 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79; *Wimberly* v. *State,* 90 Ark. 514, 119 S. W. 668.

It is true the Constitution provides that the accused shall be confronted with the witnesses against him; but it has been uniformly held by this court that the testimony of a witness taken at an examining trial, where the defendant was present and had the opportunity to cross-examine the witnesses, may be given in evidence on the trial of the defendant, where such witness at the time of the trial is dead, or is out of the jurisdiction of the court, or where his whereabouts cannot be learned, without any violation of the constitutional right of the accused to be confronted with the witnesses against him. *Williams* v. *State,* 156 Ark. 205, 246 S. W. 503.

If initiated act No. 3, 1936, had never been adopted, still the secondary evidence in this case would have been proper, as this court has frequently held.

It is contended by appellants, however, that they were denied the privilege of cross-examining the witness, and for that reason the evidence was incompetent. When witness, Betty Lou Bryant, was being cross-examined in the examining court, she testified that she went to Gainsville the first night from Spartanburg, then to Atlanta, and from there to Sanford, and had dinner that day. Appellants' attorney asked, "How much did you spend for that meal?" The court sustained objection, and attorney for appellants stated: "We offer to show by witness that she left Spartanburg, South Carolina, and went from there to Gainsville, Georgia, and then to Atlanta, Georgia, from Atlanta to some other place in Georgia, and that she had only $22 when she left Spar-

tanburg, South Carolina, and that on the way down here she spent all the money she left Spartanburg, South Carolina, with." No other objection was made, and no request to cross-examine witness, except to show that she had spent all her money.

She, herself, testified that she had $22 when she left Spartanburg. There could of course, be no reason to prove this on cross-examination, because it was undisputed. She further testified that she had $10 when she got to Murfreesboro, bought some beer and sandwiches, and had $8.50 left. Not only did she testify that she had the money when she got to Murfreesboro, but all the witnesses that knew anything about the matter at all, testified that she bought beer and sandwiches and had the money to pay for them.

Dorothy Van Winkle testified that she was working in Cox's Cafe in Murfreesboro and that Betty Lou Bryant purchased sandwiches and beer and that both Altus Walls and Roy Mitchell were in the cafe at the time and they were talking to the girl. She further testified that Roy asked her for a date and she told him she could not go. She had her money tied up in her handkerchief and paid for what she purchased. She bought three or four bottles of beer, two sandwiches and one coke. Roy Mitchell was there and had no money and wanted to buy beer on credit.

Margaret Jackson testified that Betty Lou Bryant and Walls and Mitchell were in the Jackson Cafe and that she paid for the beer that they all drank. She said that Betty Lou Bryant gave her two one-dollar bills and had them changed; bought the boys two beers each and got the change back.

Roy Mitchell, the appellant, testified that he went to Jackson's Cafe and that Betty Lou Bryant bought beer, and he, also, testified that he did not have any money.

Altus Walls, appellant, testified that he saw Betty Lou Bryant in Murfreesboro on the 18th, and saw Roy at Cox's Cafe; that she was drinking beer and talking.

He, also, testified that he saw her buy beer, but she did not buy any sandwiches.

It, therefore, appears from all the evidence that she had money which she was spending. There could be no possible prejudice in the court's failure to permit appellants to cross-examine this witness for the purpose of showing that she had spent all her money, and they did not request permission to cross-examine her for any other purpose.

The appellants were entitled not only to be confronted with the witness against them, but to cross-examine her. They did cross-examine her at length, and did not at any time claim that they wanted to cross-examine her further for any purpose, except to show that she had spent all her money before she got to Murfreesboro.

Appellants contend that the evidence is not sufficient to sustain the verdict; and that, therefore, the court erred in not directing a verdict. There is no dispute about appellants being in the cafes with Betty Lou Bryant, and when she was arrested by the officer and he told her that she was drunk and talking too much, and he would have to take her to jail, the appellants then agreed to take her out of town, and she was turned over to them. Up to this time there is no dispute in the evidence.

Betty Lou Bryant testified that about 8:30 o'clock, Altus Walls and Roy Mitchell, appellants, carried her off and went about three miles, Walls driving the car and going north; that they took her from the night marshal and said they would take her to some rooming house; they started to drive and she began to beg them to let her out and they would not do it; they drove on out in the woods and parked the car and Roy told her to get out; that he was going to do what he wanted to, and Mitchell said, "If she don't, we'll kill hell out of her." That she refused to get out and Roy pulled her out, threw her on the ground, took off some of her clothing and hit her in the eye; that he told her that if she did not do what he wanted her to do, she could walk to town; that he then threw her in a mud-hole and took her money

from her, $8.50; she had the money in her handkerchief; she testified that the spot under her eye was where Roy hit her; they drove off and left her, and she walked back to town. When she got to town she asked a man how to get out of town and the marshal came up and put her in jail; when Roy threw her on the ground, he held her there for about five minutes; she was fighting and he was trying to get to her. During all this time Walls was sitting in the car and never said anything else after the first statement.

She testified that she was 19 years old and was going to her uncle's in Fort Worth; had been working as a waitress in a restaurant; that the marshal started to jail with her and the boys got in the car and took her and she went with them to keep from being put in jail.

A. L. Henderson, the night marshal, testified that he saw Betty Lou Bryant at the cafe and the appellants were there; they were drinking beer and he asked the girl where she lived and she told him in North or South Carolina; he told her she was going to get drunk; that he was the marshal, and she said she was going to her room; that he told her if she was not going to leave the streets he would put her in jail, and Walls asked witness to let him take her to Glenwood. She got in the car with them and Walls was driving; saw Walls and Mitchell later that night, asked them if they had been to Glenwood, and they said no, that the girl had gone to a farm house and gone to bed. After they came back he saw Betty Lou Bryant and put her in jail; her clothes were dirty from the hips down, and she had bruises under her left eye.

Dorothy Van Winkle testified that Betty Lou Bryant was in the cafe and the appellants Walls and Mitchell were in there, and that she bought beer and sandwiches, and had her money tied up in a handkerchief and paid for what she purchased. Walls and Mitchell said at that time that they did not have any money and Roy wanted to buy beer on credit.

Margaret Jackson testified that when appellants came back they purchased two small chilis and paid her

twenty-five cents and she gave them a nickel back. They were in there before Betty Lou Bryant left, and did not make any purchases; she paid for the beer that they all drank. She had money and was spending it. She bought the boys two beers each.

The evidence of the appellants was in conflict with some of this evidence. In testing the legal sufficiency of evidence, it must be viewed in the light most favorable to the state. *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. (2d) 50; *Smith* v. *State, ante* p. 264, 106 S. W. (2d) 1019; *Turnage* v. *State,* 182 Ark. 74, 30 S. W. (2d) 865; *Link* v. *State,* 191 Ark. 304, 86 S. W. (2d) 15; *Clayton* v. *State,* 191 Ark. 1070, 89 S. W. (2d) 732.

The evidence is sufficient to sustain the verdict, and the judgment is affirmed.

RICE *v.* MOORE.

4-4731

Opinion delivered October 4, 1937.

Edward Gordon, for appellant.

Strait & Strait, for appellees.

BAKER, J. John A. Rice and the appellant were secretly married. They married and lived at Morrilton, Arkansas. After a few months John A. Rice filed a suit in the Dardanelle district of Yell county, praying for a divorce. Decree was rendered March 18, 1929, upon personal service had in the same district and county. There-

after, on the 16th day of June, 1931, Mrs. J. J. Roe Rice married M. C. Phillips, later moved with him to California, resided there for a period of about forty days and then returned to Morrilton. She says she returned upon receipt of a letter from her former husband, advising her that she was not legally married to Phillips as the divorce decree rendered in the Dardanelle district of Yell county was never a legal or valid decree. After her return to Morrilton she and Rice resumed their former custom of living, in the same house. Their marriage and divorce were not known to their friends or relatives. Thereafter, when she had become ill and was taken to the hospital, John A. Rice was taken by some of his relatives to the home of L. W. Moore, a son-in-law, where he died on November 22, 1932. Mrs. Rice, then Mrs. Phillips, filed a petition to secure a homestead and dower interest in the estate of John A. Rice, and upon being confronted with the decree of divorce, rendered on the 18th day of March, 1929, she filed a suit or motion to set aside and vacate the decree so rendered in the chancery court of the Dardanelle district of Yell county. The sole ground set up in her motion, or complaint, as she calls it, on appeal, is "that John A. Rice, the husband of this plaintiff, who was at the time a resident and citizen of Conway county, Arkansas, filed suit in the chancery court of the Dardanelle district of Yell county, Arkansas, and at the March term, 1929, obtained a decree of divorce. * * * It was necessary for the said John A. Rice to allege and prove that he was a resident of the Dardanelle district of Yell county, Arkansas; that the said John A. Rice did in said petition allege that he was a resident of the Dardanelle district of Yell county, Arkansas, and proved same to the satisfaction of this court, when in truth and in fact he was not a resident of the Dardanelle district of Yell county, Arkansas, but was an actual resident of the city of Morrilton, Conway county, Arkansas; that in testifying that he was a resident of the Dardanelle district of Yell county, Arkansas, the said John A. Rice perpetrated a fraud upon the court in procuring said decree, and that said cause should be reopened, said judgment set aside and the cause dismissed for the reason that the

chancery court of the Dardanelle district of Yell county did not and does not have jurisdiction over the parties and could not hear and determine said cause."

No other reason is given or assigned by the appellant to justify the setting aside of the former decree.

Upon a final hearing by the chancellor considerable proof was taken upon the one or sole issue before the court, and the chancellor prepared an elaborate finding of facts and declarations of law, and ordered the decree in accordance therewith, upholding the former decree.

If the case were of sufficient importance, we feel we would be justified in adopting the chancellor's opinion as our own, but his summation and decision are somewhat lengthy and we think it unnecessary to extend unduly the opinion in this case.

Appellant misconceived the meaning of the somewhat popular expression, "a fraud upon the court." No all-inclusive definition of the expression will be attempted, but, negatively, it may be said that, ordinarily, the giving of false or untrue testimony is not such fraud. If this were not true, it is certain that the absolute verities said to obtain in judgments would perish, and frequently judgments might be successfully attacked as soon as it became impossible to reproduce the testimony upon which they were founded. Such a condition would be intolerable and chaotic. *Lambie* v. *Rawley Co.*, 178 Ark. 1019, 14 S. W. (2d) 245; *American Liberty Ins. Co.* v. *Washington,* 183 Ark. 497, 36 S. W. (2d) 963; *Parker* v. *Nixon,* 184 Ark. 1085, 44 S. W. (2d) 1088.

The foregoing is sufficient for a settlement of this controversy, but, since counsel have so earnestly argued some collateral facts, we will discuss them as briefly as possible.

Proof taken upon this trial shows that John A. Rice first went to Dardanelle to have suit filed. He did not have sufficient money, according to the testimony, to justify the filing of the suit upon his first trip. Later, according to the appellant, she went with him to Dardanelle. Her object in going was to afford the officer an opportunity to serve upon her a summons. She did not wish to act in any manner in opposition to her husband's

wishes. According to other proof taken she remained at the office of the lawyer for a time and when it became necessary to have John A. Rice present, there is some proof to the effect that the young man, or boy, who drove the car to Dardanelle was sent to Stringtown in the Dardanelle district of Yell county to bring Mr. Rice to the lawyer's office. After a short time, the young man returned with the report that he had met Mr. Rice coming to town. The suit was filed, summons was placed in the hands of the deputy sheriff, who, according to the plan and arrangement between the parties, served summons upon Mrs. Rice at the lawyer's office. This, of course, amounted to a voluntary entry of appearance upon her part and must be so deemed from the further fact she did not employ counsel, did not file any answer or other pleadings in the suit she knew was pending, that she permitted the husband to take the divorce and knew thereafter when the decree was granted, and did not then seek, in any manner, to set aside or annul the decree.

Moreover, on June 16, 1931, she married M. C. Phillips and sometime thereafter left the state of Arkansas for a short period. She was gone only about forty days and returned a few weeks before the death of her former husband. After his death, and only when his property came into controversy, did she seek to set aside the divorce decree which had then been in full force and effect for more than five years. We have but recently declared that one who seeks to set aside or vacate a decree must act promptly. *Young* v. *Young,* 190 Ark. 530, 531, 79 S. W. (2d) 1005.

In that case, we also said: "The state is a silent third party to all marital contracts and divorce proceedings and is directly interested in the final results thereof."

Judgments and decrees do import absolute verities and the public policy of the state is not such that it will permit, after changed conditions and after the parties have assumed new relations, the vacation of a decree at the whim of the then surviving party to the former litigation and particularly in the absence of any fraud. Although in the former trial, the court upon substantial evidence determined otherwise, it is urged most vigor-

ously in this case that there was fraud in the filing of the suit in Yell county, when it should have been filed in Conway county, the place of the then alleged residence of the plaintiff. If there was fraud in this matter, it was one in which the appellant here was as guilty as the deceased plaintiff. In fact, the trend of the evidence is such that it is urged by counsel for appellees that the appellant here, not her deceased former husband, was the dominant party in the filing and maintenance of the suit for divorce in Yell county. However that may be, she participated in it to the extent of making possible what she now alleges was a fraudulent procurement of the decree of divorce and she continued to acquiesce in it until it became advantageous to her financially, to change her attitude and in effect plead herself guilty of a bigamous marriage, hoping that she might share or take a widow's allowance, homestead and dower in the property of John A. Rice, deceased. She does not come with clean hands. She did not proceed with any degree of promptness. There is no equity in her conduct. *Maples* v. *Maples,* 187 Ark. 127, 58 S. W. (2d) 930; *Corney* v. *Corney,* 97 Ark. 117, 133 S. W. 813.

In the last above cited case, the delay in proceeding was but two years. *Vanness* v. *Vanness,* 128 Ark. 543, 194 S. W. 498.

A further discussion would unduly extend this opinion. That is not warranted.

It follows, the decree should be affirmed. So ordered.

BASS *v.* MINICH.

4-4699

Opinion delivered October 4, 1937.

G. W. Botts, for appellant.

Rowell, Rowell & Dickey and *W. A. Leach,* for appellees.

BUTLER, J. Four points are raised and argued for reversal, the first being that the decree of the trial court is void because of disqualification of the chancellor to hear and determine the issues presented.

1. The contention as to the disqualification of the trial judge is grounded on the fact that when the suit was first filed, and before he became the judge of the court he was made a party defendant as special administrator of A. W. Nunn, deceased. In our examination of the record, we have been unable to discover any formal petition directed to the judge suggesting his disqualification. The only record relating to this matter seems to be the following entry on the docket of the court: "Motion of defendant to disqualify court for reason that court

was named as special administrator for A. W. Nunn, deceased, in the original complaint filed in the case on September 5, 1933. Overruled and exceptions saved." The suggestion of disqualification must have been grounded upon the fact that the judge was named defendant for the estate of A. W. Nunn. It seems clear, however, that this estate had no interest in the matters involved in the litigation and a disclaimer of any such interest was prepared and filed in the case.

Appellant insists that there was interest shown because the answer of the administrator, after setting out the formal disclaimer, concludes as follows: "He adopts the answer and cross-complaint of the said Rubye A. Collier and the said C. M. Ferguson & Son heretofore filed herein, and prays the same relief and all other and further relief." It is clear that no importance can be attached to the language of the answer above quoted, for if the administrator of the Nunn estate had no interest in the litigation he was entitled to no relief save an order dismissing him as a party to the suit. In overruling the motion, the judge clearly indicated that in his opinion he had no interest in the result of the litigation such as would work his disqualification, and if counsel thought otherwise, it was his duty to make proof of such facts as he thought necessary to establish the disqualification. No effort of this kind was made. No affidavit was filed relating to the disqualification of the judge nor any proof offered on that subject.

In the case of *Ingram* v. *Raiford,* 174 Ark. 1127, 298 S. W. 507, the following rule is announced with approval and is conclusive on the question of the disqualification of the judge: "Unless it is where the affidavit filed is considered conclusive, there is no presumption that a judge is disqualified, the burden being on the party asserting it to present facts showing such disqualification. The evidence must clearly show that a ground exists. A *prima facie* case only is not sufficient. 33 C. J., 1017, § 190. And in Ruling Case Law it is said: 'If the facts alleged are not admitted by the judge or are denied by the adverse party, it is the duty of the party objecting to

lay before the judge proof of their truth for his determination.' 15 R. C. L., 539, § 27."

2. It is assigned as error and argued that this case should be reversed on the ground that no competent testimony was introduced to establish the issues on behalf of the appellees in the instant case; that the testimony introduced was that of W. E. Collier, W. B. Sanders, trustee, E. B. Minich, T. P. Bass and H. H. Ferguson taken in a former case and transcribed and filed as depositions in the instant proceeding. It is insisted that it is not shown that any of these witnesses are dead or beyond the jurisdiction of the trial court, and that it does not appear that the testimony taken in the former case was between the same parties and relating to the same issues as in the case at bar. We have carefully examined the record, and are unable to find any objection to the testimony offered by the appellees save that contained in the "Motion to Suppress Depositions, filed 1/9/36." This is a motion to suppress the deposition of John H. Hooker and the testimony of W. B. Sanders and W. B. Collier with all the exhibits thereto. We have, also, been unable to find any testimony abstracted as given by W. B. Sanders or John H. Hooker. In reciting the testimony of the witnesses upon which the case is submitted, no reference is made to any testimony given by Sanders or Hooker. This leaves only the testimony of W. E. Collier, to which objection was made in the "Motion to Suppress." In *Minich* v. *Bass,* 189 Ark. 1171, 70 S. W. (2d) 1039, the testimony of Collier was given and transcribed and introduced at the trial of the instant case. A part of this testimony relates to Collier's contention that Bass was not in possession of the lands involved under a verbal contract of purchase, but only under an option to purchase, and that no part of the consideration for his option had been paid. This testimony, therefore, is both competent and relevant on the issue presented in the case at bar as to whether or not appellant had, in fact, paid anything on the purchase price and what balance, if any, was still unpaid. The testimony of the other witnesses complained of related to the same ques-

tion and was, therefore, competent and relevant to the issues here involved. So far as we have been able to discover, no objection was made to the testimony of any of the witnesses, except that of Collier, and no objection having been made to its introduction, appellant must be deemed to have waived the manner and form in which it was offered. There is no doubt but that W. E. Collier was dead at the time this case was submitted. This affirmatively appears in the record where his death is suggested and a special administrator appointed. Appellant insists that the suggestion of Collier's death and the appointment of a special administrator is no proof of his death. We think, however, that this establishes *prima facie* the death of Collier, and was sufficient to lay the foundation for the introduction of his former testimony.

3. The real question in this case is that raised by appellant's plea of *res judicata.* Appellant contends that if such plea was not available, the trial court erred in refusing to give judgment in his favor on his counterclaim for the money alleged to have been paid by him on the purchase price of the property, and to declare a vendee's lien for the satisfaction thereof. The plea of *res judicata* is based upon the contention that the issues involved in the instant case are the same as those adjudicated in favor of the appellant in the cases of *Minich* v. *Bass,* 183 Ark. 350, 36 S. W. (2d) 66, and *Minich* v. *Bass, supra.* The records in those cases are here presented for our consideration, with much of the testimony, but we are of the opinion that the issues there raised and determined can best be stated in the language of this court. In the first case, 183 Ark. 350, 36 S. W. (2d) 66, we said: "This suit in unlawful detainer and for the possession of lots 13 and 14 in block 14 in the incorporated town of Gillett was brought in the circuit court of Arkansas county, southern district, by appellant against appellee. It was alleged in the complaint that appellee entered into possession of this property under a verbal lease with the then owner, W. B. Sanders, trustee, for the term of five months beginning July 1st and ending December 31st,

1929, at a monthly rental of $25, and, although notified of the purchase of the property by appellant, and to vacate same in thirty days after the termination of the lease, he continued in the possession and refused to pay rent. Appellee filed an answer denying that he was in possession of the property under a rental contract, but, on the contrary, was occupying same under an oral contract to purchase from W. B. Sanders, trustee, which antedated appellant's purchase of the property." The jury resolved the issues in favor of the defendant and this court affirmed its action.

The second case, 189 Ark. 1171, 70 S. W. (2d) 1039, was a suit in ejectment brought by Minich against Bass. Referring to the first case, 183 Ark. 350, 36 S. W. (2d) 66, the court said: "That suit was between the same parties and involved the right of possession to the same property. The only difference in the two suits is that the first suit * * * was an action of unlawful detainer, and this suit is an action in ejectment. In both suits, it was claimed by the appellant that he was the legal owner of the property, having received a deed from W. B. Sanders, trustee, conveying him the property, and in both suits the contention of the appellee was that he was in possession of the property, occupying it under an agreement to purchase."

In both cases from which we have quoted, *supra,* the real question was who was entitled to the possession of the real property involved, Bass or Minich? In the case at bar, such is not the question. The right of possession is not involved and the parties are not the same, although much of the testimony taken in the previous cases is relevant to the issues in the case now before us. Minich, plaintiff in the court below, alleged that the title to the property in controversy was formerly vested in W. B. Sanders, trustee, for the use and benefit of A. W. Nunn, W. E. Collier and H. H. Ferguson; that he had purchased some of this property from Sanders, the trustee, who had conveyed same to him by warranty deed; that A. W. Nunn was deceased and Harry T. Wooldridge was the administrator of his estate; that the defendant, T. P. Bass, claimed to own the property and that defendant,

I. J. Rollison, had contracted to purchase certain parts of it, but had paid nothing thereon. Minich further alleged that if it were true that Bass had purchased the real estate in controversy, the vendors should have a lien on same to secure the payment of the purchase money remaining unpaid. He prayed for a receiver as to a part of the property. W. B. Sanders, trustee, W. E. Collier, H. H. Ferguson, Harry Wooldridge, administrator, and I. J. Rollison were made parties defendant with Bass. The prayer of the complaint was in effect that the court determine whether or not Bass had purchased the property, the terms of his contract, the amount paid under same, if any, the balance of the unpaid purchase price, if any remained unpaid, whether or not the contract could be specifically performed and for judgment for the balance of the purchase price, and that a lien be fixed upon the lands for its payment.

The administrator of the estate of A. W. Nunn filed an answer disclaiming any interest in the subject-matter of the controversy. Rubye A. Collier and C. M. Ferguson & Son filed an answer and cross-complaint in which the history of the dealings between Bass and the interests represented by them was set out. They prayed that if it should be determined that Bass was in possession of the property as vendee under a valid and subsisting contract of purchase, they should have judgment for the balance of the purchase money found to be due, and for the amount of taxes paid by them on the property, and that a lien be declared against the lands and the same sold to satisfy the judgment, if the money due them was not paid within a reasonable time.

Bass answered, denying execution of a deed by W. B. Sanders, trustee, to the plaintiff, Minich, and alleged that at the time of the purported execution he (Bass) was in possession of the property. He denied that the vendors had a lien upon the property or any part thereof for the purchase money, or that any purchase money is due "plaintiff or these defendants, and further states that it is immaterial, with reference to the issues in this case, as to whether there was a balance due or not

because the same has long since been adjudicated by the court in these cases." Then follows the formal plea of *res judicata.*

The trial court, after hearing the evidence, found that the defendant, Bass, was in possession of the property under a verbal contract of purchase for the sum of $10,500, no part of which had been paid, and which, with interest, amounted to the aggregate sum of $14,739.20; that under the contract of purchase, Bass was obligated to pay certain insurance premiums and taxes; that he failed to pay same, which sums were paid by C. M. Ferguson & Son in a total amount of $583.89. The court further found that all of the interest of A. W. Nunn, deceased, and H. H. Ferguson, deceased, in and to the above described lands and contract is now vested in C. M. Ferguson & Son and Rubye E. Collier; that the deed executed by Sanders, trustee, to the plaintiff, Minich, purporting to convey to him certain of the property involved, operated as an assignment *pro tanto* of said above contract of purchase and sale, and transferred to the plaintiff, Minich, an interest in said contract and all the rights of his grantors in the property which had been conveyed to him. The court then decreed that if the sums found to be due for unpaid purchase money, insurance premiums and taxes, be not paid within ten days, the contract under which Bass held should be foreclosed and the lands sold to satisfy the aforesaid sum of money, which was declared to be a lien prior and paramount to all others.

From the foregoing excerpts from the pleadings and decree of the trial court, it clearly appears that the questions presented and decided in the instant case were not raised or adjudicated in either of the former cases upon which appellant relies to support his plea of *res judicata.* These were law cases adjudicated in the circuit court. The relief requested by the defendants and cross-complainants, Collier and Ferguson & Son, in the case at bar was such only as a court of equity could grant, and, therefore, could not have been presented and adjudicated in the circuit court. It goes without question that a judg-

ment 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, but also to grounds of recovery or defense which might have been, but were not, presented. *Taylor* v. *Taylor,* 153 Ark. 206, 240 S. W. 6. This rule, however, has no application here because the question of a vendor's or vendee's lien was not within the issue in the former suits. Neither could it be. Another reason why the plea is not available is that the parties in the present suit are not the same as those in the cases pleaded in bar. *Corder* v. *Norsworthy,* 109 S. W. (2d) 136. Decided October 4, 1937.

4. It is insisted by the appellant that the conduct of the appellees in conveying a part of the lands involved made it impossible for them to carry out their contract, and that appellant is, therefore, entitled to recover the amount of purchase money paid by him and to have the same declared a lien on the property he contracted to purchase prior and paramount to all others. The answer to this contention is that the trial court found the appellant's possession to be under a valid contract of purchase, and that the only right acquired by Minich as against appellant was to share proportionately in the judgment for the balance of the purchase price found to be due by him. The trial court further found that nothing had been paid on the purchase price, and, therefore, there was nothing on which a vendee's lien could attach. As we interpret the decree, it provides that the appellant shall have the benefit of his purchase, when he has paid the balance of the consideration due, free and clear of the claim of any and all of the appellees.

In stating the grounds upon which reversal is asked, there is no contention that the decree of the trial court is against the preponderance of the testimony, but that question is incidentally argued in appellant's brief. For a history of the case, reference is made to our decisions in the two cases of *Minich* v. *Bass, supra.* Without attempting to review the evidence in detail, which would unduly extend this opinion and could serve no useful

purpose, we deem it sufficient to say that we are of the opinion that the holding of the lower court is not against the preponderance of the evidence.

The decree is correct, and it is, therefore, affirmed.

GOINS *v.* STATE.

Crim. 4059

Opinion delivered October 11, 1937.

V. N. Carter, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

GRIFFIN SMITH, C. J. Section 2668 of Crawford & Moses' Digest provides that "Any person who shall vend, sell, or otherwise dispose of any lottery ticket * * * shall be deemed guilty of a misdemeanor and liable to indictment, and on conviction thereof shall be fined in any sum not less than fifty dollars nor more than five hundred dollars."

Appellant was arrested in North Little Rock by officers Hunter and Blankenship and in his possession were found seventeen tickets of two distinct characteristics. Eight of these tickets are obviously carbon copies 2½ x 3½ inches, written with pencil, and taken from a pad of blank news print paper. They are of uniform size and were apparently taken from the same pad.

Various letters and figures appear thereon. These, although legible, are meaningless unless explained.

The remaining nine tickets are 1⅞ inches wide by 5⅞ inches in length. They, too, appear to be of common news or pulp paper. These exhibits carry the indorsement: "Frisco; Class No. 37 p. m. 890 Clearing House." There are other numbers on the slips, which appear to have been made with a rubber stamp.

Appellant was tried in the municipal court of North Little Rock and fined $50. On appeal to circuit court there was a jury trial, a verdict of guilty, and a fine of $200.

This appeal questions sufficiency and admissibility of evidence offered by the state, and the correctness of instruction No. 2. The testimony is presented here in an agreed statement of facts.

Officer Hunter testified that when appellant was arrested May 18, 1937, the tickets referred to *supra* were found in his possession. "These tickets were carbon copies of eight tickets used in playing the policy game and eight winning number pay-off tickets of the Frisco House. I have talked with a number of policy writers and buyers over a period of several months and have made a study of the game. In this manner I have learned the details. Two copies of each ticket are sold, the original being given to the buyer, and the carbon copy, such as those introduced in evidence, is retained by the seller. I only know from my study of the game and from talking with policy operators and buyers that a buyer receives an original copy and the seller retains a copy. I did not see the defendant sell these or any other tickets to any person."

Officer Blankenship's testimony was to the same effect, except that he calculated, in the presence of the jury, that cost of the original tickets corresponding with copies in evidence was $7.15.

The testimony was objected to on the ground that the officers lacked means of knowledge sufficient to qualify them to answer the questions, and exceptions were duly saved.

Appellant's testimony was a denial that he had sold any lottery tickets. He claimed that the tickets found in his possession had been purchased from time to time, and said that, when arrested, he had only 70 cents in his possession. On cross-examination appellant could not name anyone from whom he made purchases. He did not remember when the purchases were made, or whether in Little Rock or North Little Rock.

Instruction No. 2 reads as follows: "If the defendant had lottery tickets and they were possessed for the purposes of sale, then it would be a violation of § 2668, Crawford & Moses' Digest. To vend means to make an object of trade, especially to offer for sale or to peddle or to possess for the purpose of sale."

The instruction is erroneous. Section 2668 applies only to one who "shall vend, sell, or otherwise dispose of any lottery ticket." One who possesses such tickets for the purpose of sale has not violated the prohibition against "vending, selling, or otherwise disposing of any lottery ticket."

Webster's dictionary defines "vend" as follows: "To transfer to another for a pecuniary equivalent; to make an object of trade, especially by hawking or peddling; to sell; as to vend fruit." The expression "to make an object of sale," as used in the definition, obviously means that the object is the subject-matter of the sale. It does not mean that if an article has been made for the purpose of being sold, there has been a vending.

In Words and Phrases (1st Ed., p. 7287) the following is quoted: " 'Vend' means the habit of selling and offering for sale. Selling and exposing to sale are not coextensive. The former may include the latter; but a mere exposure to sale, i.e., with intent to sell or for the purpose of selling, is not only not equivalent to a sale, but, as regards the patentee, may be attended with wholly different consequences."

For the error in giving instruction No. 2, the judgment is reversed, and the cause remanded for a new trial.

WALTON *v.* RUCKER.

4-4744

Opinion delivered October 11, 1937.

McDaniel, McCray & Crow, for appellant.

Kenneth C. Coffelt and *Ernest Briner,* for appellee.

MCHANEY, J. This is the second appeal in this case. *Walton* v. *Rucker,* 193 Ark. 40, 97 S. W. (2d) 442. The case was reversed on the former appeal because the trial court dismissed the action after permitting a sufficient number of affiants to withdraw their names from the supporting affidavit, leaving the number thereon less than ten, ten being jurisdictional in an election contest case. On a remand of the case the trial court, after hearing the evidence, found the issues in favor of appellees, holding that appellant had failed to prove his cause of action, and dismissed the complaint and the amendments thereto. This order was made and entered on the 18th day of November, 1936, and appellant was given until December 14, 1936, to file his motion for a new trial. The motion was filed in apt time and overruled on the next day, December 15, and appellant was given one hundred days in which to prepare and file his bill of exceptions. Appellant did not file his bill of exceptions within one hundred days as given in said order, which expired on March 24, 1937, but on March 28, 1937, at a subsequent term, on the application of appellant, the court attempted to extend the time in which appellant could file his bill of exceptions to April 13, 1937, and made an order to this effect. The bill of exceptions was filed on April 9, 1937.

The terms of the Saline circuit court, as fixed by § 2207, Crawford & Moses' Digest, are the first Mondays in March and September in each year. Therefore, the September term of said court expired not later than the first Monday in March, 1937, and at the time the court made the order enlarging the time of filing the bill of exceptions, to-wit: March 28, 1937, the September term of court had lapsed and the court had no power at a subsequent term to enlarge the time. There are many cases so holding. In *Davies* v. *Nichols*, 52 Ark. 554, 13 S. W. 129, this court said: "There is no bill of exceptions in the record. The paper purporting to be a bill of exceptions was not signed by the judge and filed within the time first given by the court. The order fixing the time within which the bill of exceptions might be signed by the judge and filed became final, and passed beyond the control of the court, when the term at which it was made expired, and the court had no authority to shorten or extend the time at a subsequent term." Citing cases. See, also, *Engles* v. *Okla. Oil & Gas Co.*, 163 Ark. 270, 259 S. W. 749.

The bill of exceptions not having been filed in time, the paper purporting to be such cannot be considered on appeal, and this court will presume that the issues were correctly determined in the trial court. *Petroleum Producers Association* v. *First National Bank*, 165 Ark. 267, 263 S. W. 965; *L. D. Powell Co.* v. *Stockard*, 170 Ark. 424, 279 S. W. 1001.

There being no bill of exceptions and no error apparent on the face of the record, the judgment must be affirmed. It is so ordered.

LEWIS *v.* D. F. JONES CONSTRUCTION COMPANY, INC.

4-4747

Opinion delivered October 11, 1937.

George A. Hurst, for appellant.

Moore, Burrow & Chowning, for appellee.

BUTLER, J. This appeal comes from the granting by the trial court of a motion to retax the costs in a case which first came to this court on appeal from a verdict and judgment against the appellee, D. F. Jones Construction Company. The judgment of the lower court was affirmed and on remand the motion from which this appeal comes was filed, granted and the costs retaxed. The evidence is undisputed that the clerk, in making up the cost bill, issued to certain witnesses certificates in which they were allowed their fees for attendance on the court and, in addition to this, mileage. The mileage was allowed on the theory that the witnesses resided, and were summoned, in a county other than that in which the trial was had. It was discovered that these witnesses were all summoned in the county of the trial and were, therefore, not entitled to mileage. On discovering this, the motion was filed.

The appellant questions the correctness of the ruling of the trial court on the sole ground that the term of court at which the trial was had having lapsed, the court was without jurisdiction to entertain the motion.

In support of his contention appellant relies upon the doctrine of the New York cases cited in Note No. 49, § 452, 15 C. J. 188, to the effect that a motion for the retaxation of costs made subsequent to an appeal is too late, and this seems to be the rule supported by the weight of authority. 15 C. J., § 453, p. 189. We are

of the opinion that this rule relates to costs which require judicial action in determining the amount. In costs of that character the motion to retax should be made promptly for the reason that the judge who tries the cause is better acquainted with the materiality of the witnesses and can more understandingly exercise the large discretion in regard to costs which is vested in him. There is a distinction, however, between costs of that character, and those which are definite and fixed by law.

The appellant cites and relies, also, upon the case of *Burton* v. *Chicago & A. R. Company,* 275 Mo. 185, 204 S. W. 501. That case follows the well-considered case of *State ex rel.* v. *Keokuk & Western Ry. Co.,* 176 Mo. 443, 75 S. W. 636, from which we quote as follows:

"'It will be observed that all the cases treating of applications to tax costs at a term subsequent to the one at which final judgment was rendered make clear the distinction of taxing costs, which are definite and fixed by law and costs which require judicial action in determining the amount.'

"All the authorities agree that the former may be retaxed at any term of the court. Such action is more in the nature of a ministerial duty, and requires no judicial action on the part of the court. Where the costs are definite and fixed by statute, the clerk in the first instance is by law required to tax the costs of the case, which of course is purely a ministerial duty, and when the court is requested to review the clerk's action in that regard, it is exercising a similar duty, simply correcting errors made by the clerk in trying to obey the statutes; * * *."

The costs involved in the motion to retax were not such as to require judicial action in determining the amount, but such as are definite and fixed by law. Therefore, the authorities relied on by the appellant, if we should give to them full effect, do not support his contention. This court has seldom had occasion to deal with this subject. The case most nearly approaching the point involved in the instant case seems to be that of *Cain* v. *CarlLee,* 170 Ark. 859, 281 S. W. 661, cited by

the appellee. In that case there were two appeals and on each appeal the judgment of the circuit court was reversed and the cause remanded for a new trial. In each instance, judgment was rendered in favor of the appellant for the costs of the appeal. Executions for these costs were issued and levied upon the property of the appellee. After the executions were issued, appellee applied to the circuit court to retax the costs by the reduction of the stenographers' fees to the correct amount as claimed by the appellee. The circuit court made an order reducing same and an appeal from this order was taken. This court impliedly recognized the right of the appellee to have the costs reduced even after remand of the case to the circuit court, but held that this right should be asserted within a reasonable time. In that connection we said: "Appellee has waited more than a year after the filing of the first mandate of this court and about three months after the filing of the last mandate. A neglected right of this kind must be treated as an abandoned right, and as one which should be denied when not seasonably asserted."

Section 1860 of Crawford & Moses' Digest provides the remedy for the correction of errors in any bill of costs, but lays down no time in which the remedy may be invoked. It, therefore, appears that one seeking to invoke the provisions of that section would have to proceed only within a reasonable time. This seems to be the doctrine announced by the Supreme Courts of Iowa and Nebraska construing statutes similar to our own in *Fisher* v. *Burlington C. R. & N. Ry. Co.,* 104 Ia. 588, 73 N. W. 1070, and *Smith* v. *Bartlett,* 78 Nebr. 359, 110 N. W. 991, cited in brief of appellee.

The appellee's motion to retax was filed within a reasonable time and questioned items of cost which are definitely fixed by law. The trial court, therefore, properly entertained the motion and its judgment is affirmed.

RHINE *v.* MACK.

4-4746

Opinion delivered October 11, 1937.

[redacted]

Partlow & Rhine, for appellants.

Maurice Cathey and *Wm. F. Kirsch,* for appellees.

MCHANEY, J. On the 3rd day of July, 1925, J. M. Kinnard executed a warranty deed to his daughter, Bessie K. Tansil, now Bessie K. Childs, to a certain piece of real property in Paragould, Arkansas, for a consideration of $3,000, of which $2,000 was paid in cash and the balance evidenced by three promissory notes, the last of which is for the sum of $400 and is the only one involved in this lawsuit. This note became due and payable three years after date, or July 3, 1928. Kinnard reserved a vendor's lien on the land conveyed to secure the payment of this and the prior notes. Sometime thereafter, he sold and transferred the notes to Clyde Mack, who thereafter died, and appellees are the beneficiaries under his will and were the plaintiffs in this action. Kinnard did not indorse the note when same was transferred to Mack and no assignment was ever made on the mar-

gin of the record showing the sale and transfer of said note. On April 9, 1935, Bessie K. Childs conveyed said lands to her daughter, M. T. O'Dell, now M. T. O'Dell May, by deed in which it was recited that she warranted the title "except the mortgage liens that are now on said property." On January 30, 1936, M. T. O'Dell May conveyed by warranty deed without exception the same lands to appellants F. A. Rhine and Nettie H. Rhine, his wife, which recites a consideration of $600. On February 7, 1936, F. A. Rhine and Nettie H. Rhine conveyed the same property by warranty deed to H. C. Rhine and M. O. Rhine, a son and a daughter of the grantors, for a consideration as expressed in the deed of $1,000 in cash. On February 3, 1936, Kinnard executed a release deed, releasing the lien retained in his deed of July 3, 1925. He testified that he executed this release deed at the solicitation of H. C. Rhine who wrote him a letter under date of January 31, 1936, to his address at Cleveland, Oklahoma, advising him in part as follows: "My father has purchased this property, and although Mrs. Childs stated that this lien in your favor had been paid, in order to clear the record and the title in connection with this property, I am asking that you have the inclosed release deed executed and returned to me in the envelope which is inclosed." Mrs. Childs testified that she had no conversation with H. C. Rhine concerning the piece of property and that he was not quoting anything that she had said to him direct when he wrote the letter to her father. She, also, testified that she had made two payments on the $400 note, one in the amount of $20 on March 1, 1933, and one in the amount of $30 on April 4, 1933, which payments were indorsed on the note.

Appellees brought this action on February 13, 1936, to foreclose the lien securing the balance due on the $400 note, which amounted to $699.56 at that time. Service was had upon the defendants on February 14, 1936, on which date appellants H. C. Rhine and M. O. Rhine recorded the deed from their father and mother. Appellants H. C. and M. O. Rhine intervened in the action. They were not made defendants as their deed was not

put on record until the day after the suit was filed. Interveners set up their title as heretofore set out and alleged that Kinnard, the record owner of the vendor's lien, had released same which was duly recorded and that the vendor's lien had been fully released and discharged as set out by § 7399, Crawford & Moses' Digest. They prayed for a dismissal of the complaint and for costs. Appellees answered this intervention and alleged that the interveners were the son and daughter of F. A. Rhine and Nettie H. Rhine; that the deed under which interveners claim was obtained with knowledge of the rights of the appellees herein, was made without consideration and was made subsequent to the institution of the suit by the appellees against the appellants, was merely colorable and was made for the purpose of defrauding appellees in the enforcement of their rights. F. A. and Nettie Rhine answered admitting the conveyances above set out, denying the assignment of said note for value and before maturity to C. A. Mack. They further say that the assignment to Mack was never made on the margin of the record or in any other manner, and that there is nothing of record giving them notice that appellees claim any interest in said lien and that whatever lien there was on the land was released by the record owner by a proper deed which was duly recorded. They further alleged that they conveyed the land involved in this suit to their son and daughter by warranty deed for a consideration of $1,000 and pray that they be dismissed from the action.

On a trial of the case, the court found in favor of appellees, dismissed the intervention and cross-complaint of appellants for want of equity and rendered judgment in favor of appellees for the sum of $748.87, with interest and costs. The case is here on appeal.

For a reversal of the judgment against them, appellants first contend that the court erred in its findings of fact and conclusions based thereon as follows: "The evidence shows that the interveners were fully informed as to the condition of the title before they received the conveyance from F. A. Rhine and wife. There had been

no release by Kinnard at the time Mrs. May conveyed to F. A. Rhine and wife. The matter had been fully discussed between L. V. Rhine and Mrs. Childs and Mr. L. V. Rhine was in possession of all the facts in relation to the title. In his letter to Kinnard, dated January 31, 1936, H. C. Rhine shows that he, also, knew of the existing indebtedness. He prepared or had prepared the release deed which he inclosed in his letter to Kinnard. He states in this letter that Mrs. Childs 'stated that the lien in your favor had been paid.' Mrs. Childs denies that at any time she told Rhine or any other person that the note had been paid.

"Interveners do not offer any evidence tending to contradict this evidence or to explain it. The statement had the effect of misleading Kinnard into the belief that the indebtedness had been paid and he, therefore, executed the release deed. The deed from F. A. Rhine to H. C. Rhine was executed after the deed of release was executed by Kinnard, and if H. C. Rhine had not induced Kinnard to execute the release by making a statement to him in the letter which the evidence shows was false, the statute would apply."

It is said that these conclusions are not supported by the evidence. We cannot agree with appellants. Mrs. Childs testified positively that she had not stated to H. C. Rhine or to anyone else that the note for $400 had been paid. Mrs. Childs testified very positively that, in her conversation with L. V. Rhine, it was agreed that the sale to his father and mother should be for a consideration of $1,000, out of which she was to pay the Mack note, and we take this testimony to mean that she and L. V. Rhine discussed said note and that he as the agent of his father and mother, was fully informed that said note was outstanding and unpaid. While there was no express declaration to this effect by the witness, yet, in the absence of any contradiction or denial of this testimony by L. V. Rhine, we think the trial court was justified in concluding that such was the fact. Moreover, appellants were bound to take notice of the outstanding lien because it appeared in their chain of title, and we

think the evidence of Mrs. Childs was sufficient to establish the fact that it was still unpaid and that the note was held by the appellees. Corroborating the evidence of Mrs. Childs, the evidence shows that a deed was prepared by L. V. Rhine, conveying the property to his father and mother from Mrs. May wherein the consideration was recited as $1,000. This deed was left with Mrs. Childs to be signed by her daughter to whom she had made a voluntary conveyance of the property, but which was not signed because at that time her daughter was away from Paragould and in Hot Springs, Arkansas.

As to the release deed secured by H. C. Rhine from Kinnard, we think the chancellor was justified in finding that such deed was secured from him by the false statement made in his letter that Mrs. Childs had stated that the indebtedness had been paid and that the execution of the release deed was a mere formality. While the note was apparently barred on the face of the record, no payment or agreement for extension having been indorsed on the margin of the record either under § 7408 or 7382, Crawford & Moses' Digest, appellants have not pleaded the benefit of either of said sections. Section 7408 has no application to vendors' liens except as amended in 1935, act 36, and there is no contention in this record that § 7382 has any application because of any agreement to extend the maturity date of said note. For a discussion of these matters see *Elk Horn Bank & Trust Company* v. *Spraggins,* 182 Ark. 27, 30 S. W. (2d) 858, where it was said: "The record in this case does not show any extension or renewal of the debt or note of S. W. Hearn to Mrs. Spraggins, secured by the vendor's lien. Hence we are of the opinion that § 7382 has no application under the facts of the present case. Payments on the note or indebtedness of S. W. Hearn to Mrs. Spraggins were made from time to time, and proof of that fact was established by the testimony of Mrs. Spraggins, which is uncontradicted. Hence her debt was established by the uncontradicted evidence, and, under the principles of law above stated she had a vendor's lien on the lots in controversy which could be en-

forced in a suit in equity. In short, the effect of a renewal or an extension as provided in § 7382 is merely to extend the time of payment of the note or deed, and does not discharge the obligation. On the other hand, the payment as provided in § 7408 extinguishes the debt to the extent of the payment."

So here, the undisputed evidence shows that payments were made on the outstanding note to the appellees in 1933, within the period of limitations, and so far as this record discloses, there was no agreement to extend or renew the debt secured by the lien. Therefore, § 7382 would not apply even if it had been pleaded in the action, and § 7408, except as amended, relating to payments, has no application because it does not extend to vendors' liens.

As above stated, we think the facts and circumstances under which the release deed was acquired justified the conclusion that it was invalid on account of the misrepresentations contained in the letter which secured it. But appellants contend that because appellees did not allege fraud in their pleadings, the appellees were in no position to take advantage of it. It is, also, contended that for this reason no attempt was made on their part to introduce testimony in this connection. It is, of course, the general rule that fraud must be pleaded in order to rely on it, but we think, under the state of the pleadings here, appellees may do so. Appellants H. C. and M. O. Rhine filed an intervention claiming to be the owners through conveyances from their father and mother and asserted the validity of the release deed. Appellees answered the intervention with a general denial. These appellants, for the purposes of their intervention, became plaintiffs and the burden was on them to establish the allegations of their complaint by evidence. They offered no evidence of any kind except they exhibited with their intervention their deed from their father and mother and the release deed. The deed to them recited a consideration of $1,000. The answer to the intervention alleged that the conveyance to H. C. and M. O. Rhine by their father and mother was made with-

out consideration subsequent to the institution of the suit by appellees and that same is merely colorable and was made for the purpose of defeating appellants in the enforcement of their rights, as set forth in the complaint. The recital in the deed relative to the consideration, without any proof to support it, is merely *res inter alios acta,* and not competent to prove a consideration against appellees. The language used by Judge RIDDICK in *Leonhard* v. *Flood*, 68 Ark. 162, 56 S. W. 781, was quoted with approval in *Wasson, Bank Commissioner* v. *Greig, ante,* p. 420, 108 S. W. (2d) 463, as follows: "It has been several times decided by this court that when the creditors of a vendor attack his conveyance as fraudulent, and introduce proof making out a *prima facie* case of fraud against the vendor, the burden of showing a consideration is on the vendee, and that in such a case the recital in the deed is regarded only as *res inter alios acta,* and not competent to prove a consideration as against the creditor of the vendor."

We are, therefore, of the opinion that the lower court properly determined the question of the validity of the release deed, as the evidence, offered to establish the misrepresentations and fraud in its procurement, was competent under the pleadings, and the cases cited by appellants, holding to the general rule, are not in point.

Therefore, the release deed being void, there was no satisfaction under §§ 7399 and 7400, Crawford & Moses' Digest, relied upon by appellants, and the decree of the chancery court is correct and must be affirmed. It is so ordered.

EDMONDSON *v.* HAMMERSCHMIDT LUMBER COMPANY.

4-4739

Opinion delivered October 11, 1937.

Shouse & Walker, for appellants.

Cotton & Murray, for appellee.

MEHAFFY, J. The appellee, Hammerschmidt Lumber Company, a corporation, filed this suit in the Boone chancery court against appellants, J. B. Edmonson and Mrs. J. B. Edmonson, alleging that they were indebted to it in the sum of $95.77, balance due for material furnished appellants for the construction of a dwelling on real estate, set out in the complaint. Appellee prayed judgment for said sum and a lien on the lands involved.

The appellants answered, denying they owed appellee anything, and alleging that appellee owed them a balance of $60.46, after striking a proper balance upon the accounts.

This appeal comes from the chancery court, and the appellants contend first that the chancellor did not have jurisdiction to enter the decree. The decree was entered in vacation, and the record shows that it was by agreement of the parties, and from the record we must conclude that the chancellor had jurisdiction.

The only question in the case for our decision is whether the decree of the chancellor is contrary to the weight of the evidence.

We try chancery cases here *de novo,* and as contended by appellee, we do not reverse the decree of the chancellor unless his finding is against the weight of evidence. *Sullivan* v. *Wilson Mercantile Co.,* 172 Ark. 914, 290 S. W. 938; *Adams* v. *Harrell,* 173 Ark. 123, 292 S. W. 409; *Langston* v. *Hughes,* 170 Ark. 272, 280 S. W. 374; *Ark. Bankers' Assn.* v. *Ligon,* 174 Ark. 234, 295 S. W. 453, A. L. R. 534; *Vassar* v. *Mitchell,* 169 Ark. 792, 276 S. W. 605; *Bilyeu* v. *Wood,* 169 Ark. 1181, 278 S. W. 48; *Crill* v. *Trites,* 186 Ark. 354, 53 S. W. (2d) 577; *Woods* v. *Spann,* 190 Ark. 1085, 82 S. W. (2d) 850.

One item for which appellants claim credit is $1.90. It is conceded that this was court cost, and, therefore, it should not have been included.

The appellee agrees that cement was to be charged at 65 cents, and that, if any charge was greater than that, it was error. It appears from the evidence that the overcharge on cement was $2.40. About this there is no dispute.

The appellants claim credit, also, for $42.20 for merchandise returned. On this item Mr. Edmonson testified that appellee had charged him with $42.20 that should have been a credit, and this would make a difference in the account of $84.40. Mr. Ledbetter, the bookkeeper of appellee, testified that there was no credit to Edmonson on the account for $42.20, merchandise returned on June 14, 1933; that he personally knew nothing about the invoice or ticket showing the amount of $42.20, but on the ticket, he testified, there were the initials, A. P. H. He did not know who put them there, but he believed they were Mr. Hammerschmidt's initials. Ledbetter had been working for Hammerschmidt for eight years and saw his signature frequently, and testified it looked like his writing.

Mr. Hammerschmidt testified on this item that he had nothing to do with the making out of this ticket or with the delivering of the lumber. When unused material is returned from a job the customer should receive credit for it; that if the customer is not there when the material is returned, appellee makes out a credit sheet and furnishes him a copy at the end of the month, and this accounts for the fact that some credit sheets do not carry the signature of the customer. Where the customer is present he signs the credit slip; that he did not personally remember anything about the $42.20 item. He did not remember about Mr. Edmonson coming to him and calling his attention to the mistake, and did not remember that he wrote the word credit, in his own handwriting, signed by initials, at the bottom; he did not remember the transaction, the writing appeared very similar to his own. He said he went by the records al-

together, and that Mr. Ledbetter made the records, but he never at any time wrote the word credit on carbon copies of the ticket.

Other witnesses testified that the amount was not a credit, but a proper charge. Glen Reed testified that he helped handle the material that was returned. D. B. Boatright testified that he was a carpenter and assisted in the building of Edmonson's home; he helped to load some of the material which they could not use, and which was returned to the lumber yard. Witness himself went to Mr. Hammerschmidt and told him that some of the flooring was bad and they could not use it, and was returned with other material left over.

It appears from a preponderance of the evidence that this merchandise was returned, and that appellants should have been given credit for $42.20. It, also, appears from a preponderance of the evidence that appellants should have credit for $5 for hauling. This item of $42.20 appears to have been charged to Edmonson, when he should have been credited with the amount. There is an item of $1.14 that was charged to Layton Coffman, and it was afterwards charged to appellant. We think the evidence clearly shows that this $1.14 should have been charged to Coffman and not to Edmonson.

It, therefore, appears that the appellant is entitled to $94.84 and that appellee's claim is $93.87. We have given Edmonson credit for all the items that are shown by a preponderance of the evidence that he is entitled to.

We have reached the conclusion that as to all other items in the accounts of the parties, the finding of the chancellor was not against the preponderance of the evidence.

The decree is, therefore, reversed, and the cause remanded with directions to enter a decree not inconsistent with this opinion.

THE FEDERAL LAND BANK OF ST. LOUIS *v.* ARKANSAS STATE HIGHWAY COMMISSION.

4-4727

Opinion delivered October 11, 1937.

G. V. Head, J. R. Crocker and *L. F. Reeder,* for appellant.

Jack Holt, Attorney General, and *Leffel Gentry,* Assistant, and *Hernn Northcutt,* for appellee.

SMITH, J. This appeal is from a decree of the chancery court of Jackson county sustaining a demurrer to appellant's complaint. The allegations of the complaint are to the following effect. Appellant now owns, through a mortgage foreclosure proceeding, land opposite the city of Newport where the State Highway Commission constructed a bridge across White river. This title was thus acquired in 1933. In 1930, which was subsequent to the execution of the mortgage, but prior to its foreclosure, the State Highway Commission entered upon the land without right or authority and erected a high dump and built roads entirely across the land as ap-

proaches to a toll bridge across the river. Appellant was not advised of this appropriation and damage until 1932, at which time it brought suit to foreclose its mortgage. The Highway Commission was made party defendant and judgment was prayed for the damage to the land. The Highway Commission appeared and the court heard testimony, from which it was found and decreed that the damages to the land amounted to $10,000. The land was sold under foreclosure and a deficiency judgment rendered in the sum of $5,519.53. Judgment was rendered in favor of appellant against the Highway Commission for the amount of the deficiency.

This decree was entered before the rendition of the opinion in the case of *Arkansas State Highway Commission* v. *Nelson Brothers,* 191 Ark. 629, 87 S. W. (2d) 394, such suits being authorized before the rendition of that opinion. But the opinion in the Nelson case, *supra,* was delivered before this judgment was collected, and the judgment was thereafter null and void, as it was based upon an unauthorized suit against the state, the Nelson case having held that the State Highway Commission was not subject to suit. Appellant has since been unable to collect the judgment.

Thereafter and at some time between May, 1934, and December, 1935, the exact time being unknown to appellant, the State Highway Commission again entered upon the land without notice to appellant and "dug out all of the remaining tillable portions thereof and constructed another and higher dump, completely destroying the remaining value of the land." Upon learning of this second invasion and appropriation appellant filed claim on December 7, 1935, with the county court of Jackson county for the additional damage in conformity with § 5249, Crawford & Moses' Digest. Appellant has been unable to prevail upon the county court to act upon this claim, either by allowing or rejecting it. Appellant has filed claims with the State Highway Commission, the State Auditorial Department, and the Commission created by act 252 of the Acts of 1937 to audit and allow claims against the state, and the State Refunding Board,

without result. Appellant, therefore, prays that the Highway Commission be "enjoined from further trespass upon said land and from further use and occupancy of said road, bridge and viaduct across the same."

The effect of these allegations is that appellant stood by and permitted the State Highway Commission, an agency of the state, to appropriate, occupy and damage its lands, without making compensation therefor, by building the toll bridge across White river.

Appellant may not enforce its judgment against the Highway Commission, recovered in 1932, for the reason that the Nelson case, *supra,* makes it void. But it was held before the rendition of the opinion in the Nelson case, *supra,* (to quote the fourth headnote in the case of *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. (2d) 993) that, "While, under Const., art. 5, § 20, the state could not condemn and take possession of a toll bridge belonging to a private corporation until compensation paid, bondholders who expressly consented that the state should take possession of the toll bridge upon assuming the bonded indebtedness cannot ask for appointment of a receiver to take possession of the bridge and collect the tolls." It was so held for the reason stated in the first headnote to the Watson case that "Any suit, whether in law or equity, which has for its purpose and effect, directly or indirectly, of coercing that state, is one against the state."

The instant suit is one to coerce the state by taking from the possession of the state a portion of one of its highways. Under the allegations of the complaint, the state has wrongfully appropriated appellant's land, and the obligation to pay abides and, in morals and good conscience, should be discharged; but the state cannot be compelled to discharge this obligation through the coercion of being deprived of a portion of its highway. Such is the effect of the opinion in the case of *Watson* v. *Dodge, supra,* and results from the immunity of the state from suit. "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." So reads § 22 of art. 2 of our Constitution. Appellant had, therefore, the right to prohibit the Highway Commission, or any other agency of government, from taking its property until compensation had been paid. It was so expressly held in the case of *Arkansas State Highway Commission* v. *Partain,* 192 Ark. 127, 90 S. W. (2d) 968. But if the property owner fails to assert this right and permits the state to take and occupy his property before compensating him, he may not thereafter coerce compensation by retaking the property from the possession of the state. He must thereafter trust the state to deal fairly with its citizens. He then has no other remedy.

It follows that the relief prayed was properly denied, and the decree is, therefore, affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY ET AL. *v.* SHEPPARD.

4-4737

Opinion delivered October 11, 1937.

J. W. Jamison and *Warner & Warner,* for appellant.

Partain & Agee, for appellee.

HUMPHREYS, J. This suit was brought by appellee, as administratrix of the estate of George Sheppard, deceased, in the circuit court of Crawford county against appellant, to recover damages resulting from the death of George Sheppard, her husband, while crawling under a refrigerator car which had been stored or parked by appellant on appellant's switch or service track in its switch yard adjacent to an oil mill located on the west side of the switch track, in Fort Smith, Arkansas.

The allegation of negligence was that appellant had kicked three of its freight cars out of its train on the main line onto said switch track for the purpose of connecting them with the two refrigerator cars without maintaining any lookout or any means of stopping or controlling the movement of the freight cars or for giving any signal or warning to anyone who might be upon or near the switch track. In other words, the suit and right to recover for the death of George Sheppard was predicated upon appellant's failure to comply with the lookout statute in the movement of these freight cars, which statute is as follows:

"It shall be the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril, and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed." Crawford & Moses' Digest, § 8568.

Under this statute, in order for appellee to have recovered, she must have proved facts and circumstances from which the jury might have inferred that her husband had been killed on account of the movement of the freight cars and that the danger might have been discovered and the injury and death avoided if a lookout had been kept. The burden was upon her to make such proof in order to recover.

The cause was submitted to a jury upon the sole question of whether appellant or its employees failed to comply with the lookout statute set out above, resulting in a verdict and judgment in favor of appellee for $3,000, from which is this appeal.

The question for determination here is whether there is any substantial evidence to sustain the verdict.

The evidence shows that appellant had placed two refrigerator cars several days before the death of George Sheppard on the switch track located on the east side of and near the oil mill opposite a basement window in the wall of the building in which George Sheppard worked and had worked for a number of years. On the morning of June 1, 1934, about ten o'clock, appellant cut three freight cars out of its train on the main line about six hundred feet north of where the refrigerator cars were stored, and a little later kicked them back south on the west switch track and allowed them to move toward the refrigerator cars without anyone on top of them to keep a lookout for persons who might be on the switch track and to warn them of the danger or to use the brakes and stop them if need be to prevent damage to persons or property on or near the track. The freight cars were moving at the rate of about two and one-half miles an hour. The switch track was straight from the main line from where the refrigerator cars were standing, the curve therein being so slight that it was not appreciable. There was a space of about three feet between the refrigerator cars and the wall of the oil building. The freight cars struck the refrigerator cars with considerable force and moved them some distance in doing so. It was discovered in movement of the re-

frigerator cars that one of them and part of the other ran over and decapitated and cut off George Sheppard's arm, killing him immediately. At the time, he was under the refrigerator car where he had crawled to pass over to the east side of the switch track. He was a trespasser and guilty of negligence in attempting to crawl under the car to the opposite side of the track, but neither his negligence nor the fact that he was a trespasser would prevent a recovery by appellee under the lookout statute. George Sheppard had gone to the basement of the building in which he was working and stepped out through an open window into the narrow space between the refrigerator cars and the wall of the building. He was seen in this narrow space by Frank Carter who had heard the freight cars coming and had gone to a door in the north end of the building to observe it. He was 210 feet north of the refrigerator cars and, looking toward the south, observed George Sheppard in the passage and saw him crawl under the refrigerator car about the time the freight cars passed him and saw them strike the refrigerator cars and move them southward. His evidence, in part, stated in the most favorable light to appellee, is, in substance, as follows:

Witness was standing in a service door at the north end of the oil building looking at switching operations going on in the private switch yard of appellant. The engine backed up after pushing some cars out of the yard onto the main line and kicked some cars toward witness on the west switch track known as the old mill track. As they got even with him, he looked south where the refrigerator cars were standing and saw and recognized George Sheppard standing in the space between the building and cars and then saw the freight cars passing him. He then looked back and saw George Sheppard crawling under one of the refrigerator cars. Sheppard was 210 feet from witness. Witness realized Sheppard was in great danger as the moving cars were 40 to 50 feet distant from Sheppard. There was no one on the moving cars and no locomotive was attached to them. Witness did not know how far the refrigerator

cars moved after they were bumped into, but about one car and one-half ran over Sheppard. Witness said that from where he was standing he could see up or down the track two hundred or three hundred yards in either direction there being no intervening obstructions.

In an analysis of this testimony, the court is unable to find any substantial evidence, either positive or reasonably inferable, that the dangerous position occupied by George Sheppard might have been discovered and his injury and death avoided if an efficient lookout had been kept by appellant or its employees. Under the evidence, it is a matter of conjecture only whether if an employee had been standing on top of the approaching car and keeping a lookout he could have seen George Sheppard in the narrow space between the wall of the building and the refrigerator car. It cannot be reasonably inferred that because Frank Carter saw Sheppard standing in the narrow space that a person on top of the freight car could have seen him. Frank Carter was only four feet above and in line with George Sheppard, but a man on top of the freight car would not have been in the same favorable position for seeing George Sheppard as was Frank Carter. The court is of the opinion that the evidence is insufficient to support the verdict and judgment.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

JERNIGAN, BANK COMMISSIONER *v.* DAUGHTRY.

4-4742

Opinion delivered October 11, 1937.

Miles & Amsler, for appellant.

W. P. Beard, for appellee.

BAKER, J. R. V. Daughtry brought this suit in ejectment to recover possession of 224.49 acres of land from the Bank Commissioner held as part of the assets of the American Exchange Trust Company, insolvent. William H. Eagle was the common source of title to this property. He transferred it by deed to his daughter, Martha M. Daughtry. The grant was "unto said Martha M. Daughtry and unto her bodily heirs forever." This deed was executed on the 15th day of January, 1896. Thirty years later Mrs. Martha M. Daughtry and R. V. Daughtry, one of her two sons, and his wife, Beatrice, executed a mortgage, or deed of trust conveying this tract of land, and other lands to H. D. Case, as trustee for J. B. Duncan Company. There was a covenant of warranty warranting their ownership in the following language, "free from all lien obligations, of all incumbrances of every kind and character, free of any instruments of writing affecting our title, and we covenant to and with the said trustee, and also said

beneficiary or legal representative, that we have a perfect title to same."

As indicating the intention of the parties, the mortgage contained this expression, "224.49 acres of land, more or less, the entire interest of the said Martha M. Daughtry, whether for life or in fee simple, and the undivided one-half interest of the said R. V. Daughtry and his wife, Beatrice Daughtry, in and to the same, lying in Lonoke county, Arkansas"; also a further expression: "Above 220.49 acres of land Mrs. M. M. Daughtry has life estate then her heirs R. V. Daughtry and Will Daughtry will have full possession, according to deed."

The amount owing at the time of foreclosure of the said mortgage, not in dispute at this time, was in excess of seven thousand, five hundred dollars, but that is immaterial as the questions involved here are not affected in any manner by the amount of the debt secured. There was a controversy as to the amount at one time, and this arose when suit was filed to foreclose the mortgage and receiver was appointed to take charge of certain personal property.

R. V. Daughtry and his mother voluntarily entered their appearances and contested the right of the plaintiff to recover the amount sued for, and that question was determined by the decree of foreclosure, whereby other lands belonging to R. V. Daughtry were condemned and sold, as well as other property belonging to his mother. The tract in controversy here was also condemned for sale by the same decree, sold and purchased by J. B. Duncan Company, who by mesne conveyances transferred and conveyed the lands as owner until it came into the possession, by deed, of the Bank Commissioner.

It is unnecessary to set forth these several conveyances as they are not in dispute, except as affected by the decision of the main issue.

R. V. Daughtry claimed title to an undivided one-half interest in said land upon the death of his mother, as one of her two "bodily heirs" mentioned in the deed executed by his grandfather to his mother, the effect of which has been above set out. From a judgment of the

circuit court in favor of R. V. Daughtry, permitting the recovery of the above described tract of land comes this appeal by the State Bank Commissioner.

R. V. Daughtry, appellee, says that at the time of the execution of the above and foregoing mortgage, or deed of trust, he was the contingent remainderman, powerless to convey or transfer any interest in the contingent remainder in the property, which came to him upon the death of his mother; that his attempt so to convey was ineffectual and the mortgage was void insofar as it purported a conveyance thereof. He insists that the only thing conveyed was the life estate of his mother.

To support his position in this regard he relies upon the case of *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. (2d) 994.

(1) The appellant bank commissioner insists that the question now raised by the appellee was fully settled and adjudicated in the decree of foreclosure of the aforesaid mortgage; that Daughtry and his mother were then present in court, contesting claims asserted against them and that this matter, the validity of the mortgage covering this particular tract of land, was an issue therein, or at least might have been, and the adjudication in that case became conclusive upon all parties; and (2) that the conveyance made by R. V. Daughtry in the foregoing mortgage, if not effectual when made, became so, by reason of his warranties and assertion of ownership with power and right to convey, to pass or transfer his after-acquired title, for the benefit of his grantee and privies; and (3) that the appellee had asserted title and ownership with full right to convey and, having transferred, or attempted to do so, contemporaneous with such assertions of right and power to transfer, and having secured moneys, goods, wares and merchandise of considerable value on account thereof, and having permitted foreclosure and sale of the property, he is now estopped to assert his former incapacity to convey, or the invalidity of his mortgage, and will not now be heard to impeach such conveyance.

The original files in the foreclosure case cannot be found. The decree and the conveyances hereinbefore mentioned are set out in the record. Other proof is set forth in an agreed statement of facts. There is, therefore, no disagreement about the facts and our discussion will be confined to the legal principles involved in the determination of the rights of the parties. Preliminary to a discussion of the several phases of the case above mentioned, we suggest that our construction of the foregoing deed of trust or mortgage differs from the effect given to the said instrument by the appellee, who insists that in regard to this particular tract of land there was no attempt to convey more than the life estate belonging to Mrs. Daughtry, the mother of the appellee. We have already set forth above an extract from the mortgage, which indicated the intention of the parties, "the entire interest of Mrs. Martha M. Daughtry, whether for life or in fee simple, and the undivided one-half interest of the said R. V. Daughtry and his wife, Beatrice Daughtry." The parties themselves so explained their own act, and we do not find it within our power to say that when they added to said conveyance the declaration to the effect that "Mrs. Martha M. Daughtry has life estate and then her heirs, R. V. Daughtry and Will Daughtry, will have full possession, according to deed," this was a a limitation upon the amount of land which R. V. Daughtry intended to convey. True, one might examine the record of the deed referred to, and determine therefrom that R. V. Daughtry had only a contingent remainder in the property, but we do not think that it lies within his mouth at this time to assert that, although he had conveyed the one-half interest above, he was by the last quoted statement retracting and recanting and in effect advising the grantee, by this declaration, that he was powerless to transfer or convey. His description of the interest held by his mother, as set out in said conveyance, was not different from what it might have been, had he held a vested remainder instead of a contingent remainder in the same property.

(1) It is most strongly urged that in accordance with the principle announced in the case of *Deener* v.

Watkins, supra, the mortgage was void in so far as it affected the tract of land in controversy, and that, since the said mortgage was void, it was not effectual for any purpose; that all the proceedings of foreclosure, transfers and conveyances in no wise affected the right and interest of the appellee, and that he now takes the property, since the death of his mother and termination of her life estate, under the deed of his grandfather, and as one of the two bodily heirs of Martha M. Daughtry. Without attempting to analyze fully and completely the case of *Deener* v. *Watkins, supra,* a casual reading thereof would distinguish that case from the one under consideration, and without impairing the effect of the Deener case, but, after a reassertion of the principles announced there, we cannot give full effect to appellee's contention without running counter to other principles and established rules of substantive law equally cogent and effective, and much more in accord with a proper interpretation of the conduct of the parties than the judgment of the trial court. We said in the Deener case above, quoting with approval from *Horsley* v. *Hilburn,* 44 Ark. 458: " 'The estate vested in the surviving children and their issue at the death of her mother, and did not vest a remainder at all, in any one, during her life.' "

In another case, *National Bank of Commerce* v. *Ritter,* 181 Ark. 439, 26 S. W. (2d) 113, cited also in the Deener case, we said: " 'the interest of any child dying without issue prior to the termination of the said trust shall lapse and revert to the estate,' held that the children took a contingent remainder, it being uncertain who would take under the will until the death of the widow."

It must appear from an analysis of the foregoing decision, and the reasons therefor, that the contingent remainderman, prior to the death or termination of the life estate had no title. He might predecease the life tenant as happened in the Deener case, in which event the prospective title would never ripen into an actual title. Therefore, such a conveyance was ineffectual, more easily described perhaps as "void," but only under the conditions therein.

We declared the conveyance void in the Deener case because those interested in the title at the time the question could be litigated asserted their rights and presented the issue for a decision. Similarly, if R. V. Daughtry, appellee here, had at the same time that suit was brought to foreclose this mortgage, controverted the right of foreclosure, and the validity of his transfer, and the same question had come here on appeal that was raised in the Deener case above, it must necessarily have been decided according to the same principles, and that decision would have been reached prior to the time that the appellee was possessed of an after-acquired title, and would have been in the adjudication of the rights of all parties.

It is urged at this time that this matter was not an issue in that case. It did become an issue in the Deener case, above, upon an effort to foreclose and might well have become an issue in the same manner in the foreclosure of the mortgage affecting the lands in controversy.

There is no better settled principle in modern procedure than that of *res judicata* in the many typical cases recently decided by this court. But that principle is not new, though perhaps more clearly enunciated in the recent decisions. In the early case of *Hempstead & Conway* v. *Watkins, Adm'r of Byrd,* 6 Ark. 317, 42 Am. Dec. 696, this court announced that a decree or judgment of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which are interposed, or which could have been interposed in the former suit. It would be unnecessarily laborious, without a corresponding benefit, to attempt to set forth all the cases announcing or holding the rule just stated. A few will suffice.

"A judgment of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which are interposed, or which could have been interposed in the suit." *Church* v. *Gallic,* 76 Ark. 423, 88 S. W. 979.

The foregoing terse statement by Chief Justice McCulloch was more elaborately announced by Mr. Justice Hart in the case of *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614, as follows: "The decision of the chancellor was correct. In the first place, it may be said that the issues sought to be raised in this suit might have been litigated and decided in the suit to foreclose the vendor's lien on the land in controversy which was brought against these same defendants. The rule has been often announced in this court that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit."

We followed the same authorities in the case of *Smith* v. *Thomas,* 190 Ark. 261, 78 S. W. (2d) 380, and numerous other cases.

We have already discussed the fact that Daughtry may have made the same defense as was made in the case of *Deener* v. *Watkins, supra,* had he proceeded at the time he successfully controverted the full amount of the indebtedness sued for. He was present in court and actively litigated his rights to the land in controversy, though he may not have raised the exact question as presented here. He is the same Daughtry, the appellee therein, and the bank commissioner is a privy of the same plaintiff or party to that suit. Both are equally bound by all the matters concluded and defenses that were interposed or might have been. If he elected to litigate only to the extent of reducing the amount of the lien affecting the lands, it was his privilege, and when he suffered a judgment or decree condemning this land for sale that decree was effectual to seize the rights he waived, though he might have successfully defeated plaintiff's recovery in that respect had he sought at that time to have done so.

(2) We have already said that the reason for declaring the contingent remainder void or ineffectual is because of the fact that the remainderman under the circumstances in the case of *Deener* v. *Watkins, supra,* did not have title to the property at the time of his convey-

ance, and in that case predeceased the life tenant, and, therefore, never had title. The situation is not essentially different from one wherein a person might attempt to convey property under circumstances and conditions making him a total stranger to the title of the property deeded by him, but if he conveyed by solemn deed and covenants of warranty, as in the case before us, there is no question but that an after-acquired title to property conveyed would inure to the benefit of his grantee. Such is the effect of our statute, § 1498, Crawford & Moses' Digest, as follows: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

In this case the appellant not only asserted by his conveyance in the mortgage in due form that he was the owner, but he further said that his title was "free of obligations and encumbrances of every kind and character, free of any instruments of writing, affecting the title, covenanted to and with the said trustee, and also said beneficiary or legal representative that he had perfect title to same." Mortgagors asserted, further, that no person had any claim of title, in writing or otherwise, and that the mortgagors had a right to sell, contract, convey or encumber the same.

Appellee argued that this is the printed part of the form of mortgage used. We appreciate that this is said only by way of argument, and further that there is nothing in the record to indicate that it was the printed or written-in portion of the mortgage. Albeit, it does not appear to be in conflict with any other part of the instrument, nor is there anything to indicate invalidity.

It is, also, argued that the mortgage is one written or prepared by J. B. Duncan Company. That fact is not disclosed by any evidence presented in the record, to

which our attention has been particularly called, but, if it be so, there is no ambiguous matter here to be construed. Words and expressions or sentences may be given their ordinary meaning or meaning commonly accepted, and the instrument will be easily understood without any construction, favorable or unfavorable to either party.

We have here a grantor declaring himself to have complete and perfect title in the property, deeding it to secure money and supplies to be advanced to him, obtaining an amount of money so large that he was unable to repay it so that the property had to be condemned, sold and purchased by his grantee, and now asserting that, at the time he made the conveyance he did not have title; that he has now acquired a title superior and paramount to the title of his grantee and privies and is suing for possession of the land on this after-acquired title.

We cannot repeal statutes and have no desire to make them ineffectual by judicial fiat. It must appear that the above quoted § 1498 of Crawford & Moses' Digest is applicable; because it applies to conveyances by mortgages.

That fact is made clear by an opinion rendered by Chief Justice Cockrill in *Kline, Admr.,* v. *Ragland,* 47 Ark. 111, 14 S. W. 474. See *Broadway* v. *Sidway,* 84 Ark. 527, 107 S. W. 163, and the recent case of *Stone* v. *Morris,* 177 Ark. 745, 7 S. W. (2d) 796.

(3) It must become apparent to everyone acquainted with legal principles that estoppel might be well invoked under the facts set out above. To permit a grantor who contemporaneously with his conveyance, and as a part thereof to declare his title and ownership in property, his power and right and authority to convey, and by conveying obtain property, goods, wares and merchandise in large amounts of great value, and then to permit this same grantor, after he has acquiesced in the conveyance, possession and occupancy by his grantee and privies, to assert his lack of title at the time he conveyed, to insist upon the want of power, and take advantage of the inconsistent position and attitude to the

detriment and injury of those whom he put in possession by solemn compact and judicial decree would be intolerable. Courts may not become parties to such erroneous conceptions of right and justice by lending aid thereto or by condonation. But it can be of no real benefit to discuss under these circumstances the matter of estoppel. The foregoing announcements are conclusive of all the rights of the parties herein, without further elaboration or undue extension of this opinion.

It follows that plaintiff was without right to recover this property in the ejectment suit.

The judgment of the trial court is, therefore, for the errors indicated, reversed, and the cause remanded with directions to enter a judgment for the appellant.

ROGERS *v.* STATE EX REL., ROBINSON, PROSECUTING ATTORNEY.

Crim. 4058

Opinion delivered October 18, 1937.

George M. Bennett, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* for appellee.

SMITH, J. In a proceeding brought by the prosecuting attorney of the circuit of which Logan county is a

part, it was, on May 17, 1937, adjudged by the Logan circuit court that one Ken Flannery had so conducted his place of business in the city of Paris in said county as to be a public nuisance, because of the law violations which he permitted in said place. Authority for this proceeding is conferred by § 6196, Crawford & Moses' Digest. *Digiacomo* v. *State, ante,* p. 24, 105 S. W. (2d) 78.

The order and judgment of the court in that proceeding reads as follows: "It is therefore considered, ordered and adjudged, that the said place of business is a public nuisance and that the same is hereby ordered closed permanently and the defendant, Ken Flannery, his servants, agents, and employees, are hereby restrained from the further operation of the said business in the city of Paris, Arkansas, permanently and that the plaintiff have and recover of the defendant all of its costs herein laid out and expended." Later, Flannery was cited for contempt of court, it being alleged in the citation that he had violated the above order of court. One M. A. Rogers intervened in this proceeding, and on the final hearing thereof the following testimony was offered. Flannery was the owner and operator at South Elm Street in the city of Paris, Arkansas, of a snooker hall and beer parlor. There was no appeal from the order of court adjudging his place to be a nuisance, and Flannery abided this judgment until July 31, 1937, when his equipment was removed from the place ordered closed to another building on the west side of the public square on Magazine street in the city of Paris. That place was opened by intervener, M. A. Rogers. Flannery assisted Rogers in procuring a lease of the building on Magazine street and assisted, also, in removing the fixtures and equipment thereto from the building on Elm street, and was present in and about said building and snooker hall during the first few days after it was opened in the building on Magazine street. Rogers is a cousin of Mrs. Flannery.

It further appears, however, that Rogers purchased this equipment from Flannery for the agreed price of $2,897, of which $250 was paid in cash by the check of

Rogers to the order of Flannery on a local bank. This check was offered in evidence, and it was shown by the testimony of the bookkeeper of the bank that it had been honored in due course of business. The balance of purchase money was paid by the assumption of payment of an account due by Flannery to the Patterson-Hoffman Cigar Company for $647, and the balance of the purchase money was evidenced by the promissory notes of Rogers to the order of Flannery. It was also shown that after opening the new place of business Rogers paid the license required by the ordinances of the city of Paris to operate the business, and that he also paid $60 to the inspector of revenues for licenses to sell beer and cigarettes and to operate the snooker hall. The employee in charge of the operation of the new place of business testified that he had been employed so to do by Rogers, and that Flannery had no interest in or control over the business. Flannery testified that his only connection with the new business had been to find a purchaser for his property.

Upon this testimony, which appears to be undisputed except as to the inferences deducible therefrom, the court entered the order from which this appeal comes reading as follows:

"Now on this 11th day of August, 1937, comes the above entitled cause for hearing and the plaintiff appearing by her prosecuting attorney, Ralph Robinson, and the defendant appearing in person and by his attorney, Geo. M. Bennett, and announce ready for trial. Thereupon the court was duly and sufficiently advised in the premises by the pleadings and the testimony and exhibits, and from all of which the court finds: that the defendant, Ken Flannery, was and had operated his said place of business on the west side of the square in the city of Paris in violation of the order and judgment of this court made and entered on May 17th, 1937, and that said place of business now being operated by the said defendant, Ken Flannery, so operated in violation of the judgment of this court so made on the 17th day of May, 1937, should now be abated and closed permanently and the defendant, Ken Flannery, found to be in contempt of the court.

"It is therefore the order and judgment herein that the business now operated on the west side of the square in the city of Paris, be permanently abated and closed and the defendant, Ken Flannery, be held in contempt of court and a fine against the said defendant, Flannery, for the said contempt in the sum of $25."

We need not inquire into the validity of this judgment, insofar as it affects Flannery, for the reason that he has not appealed. The effect of the judgment, insofar as it affects Rogers, is to deprive him of property which the undisputed testimony shows he had purchased from Flannery. In defense of this judgment the following statement is made in the brief filed on behalf of the state: "Necessarily the finding of the court that Ken Flannery was operating the snooker hall and beer parlor business on the west side of the square was a finding by the court that appellant had not purchased same as he claimed and that the appellant's purchase was a device to enable Ken Flannery to continue in business after his snooker hall and beer parlor business had been permanently abated as a public nuisance."

This judgment cannot be sustained on the ground stated, for the reason that the testimony, hereinabove recited, does not support the finding that Rogers "had not purchased same as he claimed." The undisputed testimony is to the contrary.

It must be remembered that the original judgment of the court, upon which the contempt proceeding is had, did not direct the destruction or sale, under § 6201, Crawford & Moses' Digest, of the property which Rogers purchased. It directed that Flannery's place be "closed permanently," and that place has not been reopened. It further ordered that "Ken Flannery, his servants, agents and employees are hereby restrained from the further operation of the said business in the city of Paris, Arkansas," and it does not appear that his servants, agents or employees have further operated the business. Rogers has not operated that business, but has opened a place of business of his own on another street, and it is not even contended that Rogers has violated any law in so

doing. On the contrary, it is undisputed that he has obtained licenses from the proper authorities authorizing him to engage in business.

Special Act No. 469 of the Acts of 1921, p. 993, which prohibited the operation for hire of any billiard hall or pool room within three miles of any church or school in Logan and Craighead counties, has been repealed by act No. 17 of the Acts of 1935, p. 38. But prior to this repealing act, and while the Special Act of 1921 was in force in Logan county, it was held, in the case of *Ross, Graham and Logan* v. *State,* 184 Ark. 385, 42 S. W. (2d) 376, that snooker parlors may not be enjoined as nuisances, even though the persons conducting them may be prosecuted under the statute prohibiting the operation of billiard rooms. This Ross case arose in Logan county while the Special Act of 1921 was in force. That opinion defined the word "snooker" to be a game "very much like pool, played on a pool table with balls and cues, but with more balls, twenty, instead of fifteen, as in pool, and is a more scientific game." So that, even though the operation of a billiard hall was a violation of the law in Logan county as it formerly was, its operation could not be enjoined, as was done in the Ross case, and as has been done here. Of course, if Rogers should so operate his place of business, as Flannery was adjudged to have done, as to constitute a nuisance under § 6196, Crawford & Moses' Digest, by permitting the violations of law denounced by that statute, he, too, might be enjoined; but, as has been said, no testimony was offered to the effect that Rogers had violated the law or had so conducted his place of business as to constitute a nuisance under § 6196, Crawford & Moses' Digest. It was shown only that he purchased equipment which had formerly been used by his vendor in a place where that section of the statute had been violated. Rogers has the licenses which make legal his sale of beer and his operation of a snooker hall, and unless he so conducts his place of business as to make it become a nuisance under § 6196, Crawford & Moses' Digest, he may not be deprived of the use and enjoyment of property which he has purchased. This property is unlike the deodand of the common law, and the mere pos-

session thereof neither violates the law nor constitutes a nuisance.

It must be remembered that § 6196, Crawford & Moses' Digest, under which the court below proceeded, has no application to "snooker parlors" or pool halls and billiard rooms, but has application only to the sale of intoxicating liquors in violation of law.

In the case of *Parker-Harris Co.* v. *Tate, Sheriff*, 135 Tenn. 509, 188 S. W. 54, L. R. A. 1916F, p. 935, it was sought to enforce the lien given by the statute of Tennessee upon an automobile for injury done by it as prior to the right of a conditional vendor of the machine. To sustain this contention the principle was invoked upon which the common-law deodand was based. But the Supreme Court of Tennessee, in the case just cited, overruled this contention and said the doctrine had never been recognized in this country, and was expressly forbidden by the Constitution of the state, which prohibits corruption of blood and forfeiture of estate. Section 17 of Art. 2 of our own Constitution provides that "No conviction shall work corruption of blood or forfeiture of estate."

It follows, therefore, that appellant Rogers may not be deprived of his property because some portion thereof had formerly been used in another place of business where the law against the illegal sale of intoxicating liquors was violated by his vendor.

The judgment must, therefore, be reversed, and it is so ordered, and the proceeding will be dismissed.

MITCHELL *v.* POWELL.

4-4741

Opinion delivered October 18, 1937.

Bush & Bush and *Gaughan, Sifford, Godwin & Gaughan,* for appellants.

E. F. McFaddin, for appellees.

McHaney, J. Appellant, Oma Mitchell, is the wife of W. R. Mitchell. Appellant, Boswell, is the owner of a mineral deed and royalty contract from W. R. Mitchell dated June 13, 1936, to a portion of the land in controversy, and he, Boswell, conveyed a portion of his interest to H. C. Siemson, October 2, 1936. Appellant Bush was the owner of a royalty interest in said land by deed from W. R. Mitchell, dated October 8, 1936, but which he conveyed to appellant J. B. Warmack October 13, 1936. Appellees, Corinne M. Powell and Mildred M. Warmack, are the sisters of said W. R. Mitchell, and these three are all the children and heirs at law of appellee, W. T. Mitchell, a widower.

This action was begun on October 23, 1936, by the People's Bank of Waldo against W. R. Mitchell to foreclose a mortgage on the lands in controversy, given to secure the note of said W. R. Mitchell in the sum of $726.22, in which a number of persons holding oil and gas interests, mineral deeds or royalty interests were made parties, as were, also, said Mitchell's two sisters, Mrs. Powell and Mrs. Warmack. No defense was offered to the plaintiff's suit, but on December 7, 1936, W. T. Mitchell, the father and common source of all titles, intervened, claiming to be the beneficial owner of the land in controversy, and that he and his wife, now deceased, conveyed same to his said son on December 27, 1933, for the purpose of refinancing the indebtedness against it, and that said son was not to be the owner of the fee, but was to be a trustee for him. This conveyance was made

by W. T. Mitchell to his son under the following conditions, as alleged in the intervention, and as disclosed by the undisputed facts: He was the owner of 605 acres of which 545 acres constituted the home place, and 60 acres separated from the home place by some six or seven miles. On account of oil developments in the vicinity of the 60-acre tract it has become the most valuable, and it is concerning this latter tract that the principal controversy arises. All of said land was under mortgage to T. M. Bemis and a second mortgage to the People's Bank of Waldo, aggregating more than $5,000 and was all past due. Foreclosure was threatened, and an attempt was made by W. T. Mitchell to borrow money from the Federal Land Bank to refinance such indebtedness, but he was unable to do so on account of his physical condition, he being at that time, and for many years prior thereto, a helpless cripple on account of paralysis. It was suggested to him by the agent of the Federal Land Bank that if he would convey the land to his son, W. R. Mitchell, it might be possible that he, the son, could borrow the money. This was done by warranty deed, without reservation or exception, in which his wife joined, she being alive at that time. Thereupon, W. R. Mitchell made application to and secured a loan from the Federal Land Bank, which was used to discharge the Bemis debt, but was insufficient to do so, and W. R. Mitchell gave his individual note for the balance. He also renewed the note and mortgage to the People's Bank of Waldo. The intervention, also, alleged that, at the time of said conveyance to him, W. R. Mitchell was single, but in March, 1934, had married the appellant, Oma Mitchell; that they are now separated with a divorce suit pending, and that they had entered into a property settlement by which she had agreed that she had no property rights in said lands; that, since the discovery of oil near said 60-acre tract, she is claiming dower rights in all said land; that W. R. Mitchell, with his (W. T.'s) knowledge, advice, consent and approval, and for a good and valuable consideration, had conveyed by two deeds to his daughters, Mrs. Powell and Mrs. Warmack, an interest in said lands. He prayed that his son be declared

a trustee of all the lands for the benefit of himself; that the deeds to his daughters be recognized; and that all other conveyances executed by W. R. Mitchell be canceled as clouds on his title, except the two mortgages mentioned. The two daughters, appellees, filed an answer and cross-complaint, making similar or identical allegations to that of the intervener, and prayed that the interest of Oma Mitchell be removed as a cloud on their title, she not having joined in her husband's conveyance to them. All the other defendants, about twenty-two in number, to whom W. R. Mitchell had sold and conveyed an interest in said land, answered setting up their respective titles as innocent purchasers, without notice of any interest of W. T. Mitchell therein.

After hearing all the evidence, the court entered a decree sustaining the intervention and cross-complaint of W. T. Mitchell and the cross-complaint of Mrs. Powell and Mrs. Warmack, except as to all defendants to whom conveyances were made by W. R. Mitchell, other than appellants, and quieted and confirmed their respective titles in them, as to whom there is no cross-appeal by appellees. In other words, subject to the mortgages above mentioned, and subject to the interests, rights and title quieted and confirmed in various defendants just mentioned, the court held that the deed from W. T. Mitchell and wife to W. R. Mitchell, dated December 27, 1933, was not a conveyance that made W. R. Mitchell the owner of the property, but only a trustee for the use and benefit of W. T. Mitchell, and all right, title, interest, equity, or estate of W. R. Mitchell mentioned in said deed was canceled as a cloud on title; and that appellant, Oma Mitchell, does not and never has had any dower or other interest in said lands or in the minerals under same. The decree settles and quiets the title to the 545 acres in W. T. Mitchell and his daughters, subject to said mortgages.

Appellant's first contention must be sustained and that is that the court erred in holding that the deed from W. T. Mitchell and wife to his son, dated December 27, 1933, did not convey the whole title, but only made W. R.

Mitchell a trustee. The evidence to sustain it is too meager and unsatisfactory to overcome the recitals of his deed. He says it was so understood between him and his son, and in this he is not even supported by the son who did not testify. His deed recites a consideration of $10 and other good and valuable considerations. These other considerations were the cancellation of the burden of his indebtedness, by shifting it from his shoulders to those of his son, who executed his own notes in the refinancing of his father's indebtedness. At that time, a sufficient sum could not be borrowed to pay the Bemis debt. He offered to convey to his daughters if they would take over the debts, but they declined. He then conveyed to the son. At that time, we judicially know land values were at a very low ebb, on account of the depression in business, and it is doubtful if these lands could have been sold at foreclosure for the amount of the debt. For more than two and one-half years, no question was raised by W. T. Mitchell as to his son's title, and not until some months after land values began to increase, on account of oil activity on other lands in the vicinity of the 60-acre tract, did he question the absolute title of his son. During this time, W. R. Mitchell, to his father's knowledge, and with his verbal and silent consent and approval, made several conveyances of interests in said lands. All of them were made before he intervened in the action to foreclose, including the Boswell and Bush conveyances. In some cases, persons, desiring to buy an interest, were referred by him to his son.

W. R. Mitchell was a purchaser for value and the conveyance to him was not a voluntary conveyance. We so held in the recent case of *Ellis* v. *Nickle,* 193 Ark. 657, 101 S. W. (2d) 958. We there stated the general rule as follows: "Where the purchaser becomes irrevocably bound for the payment of the debt of his vendor for the security of which the property involved is encumbered, and the vendor is released from liability, the consideration is such as to create a purchase for value of the lands conveyed. *Henderson* v. *Pilgrim,* 22 Tex. 464; *Drey* v. *Doyle,* 99 Mo. 459, 12 S. W. 287; *Hanold* v. *Kays,* 64 Mich. 439, 31 N. W. 420, 8 Am. St. Rep. 835; *Warren* v. *Wilder,*

114 N. Y. 209, 21 N. E. 159; Case Note 7, L. R. A. (N. S.) 1020; 27 R. C. L., Chapter, Vendor & Purchaser, § 460."

Here, it is undisputed that the land was mortgaged for an indebtedness of W. T. Mitchell in excess of $5,000. It was not W. R. Mitchell's debt. W. T. Mitchell, being a helpless cripple, was unable to pay it and was unable to borrow the money to refinance it. The proof tends to show he was destitute and that his daughters helped to supply his groceries. He was unable to help himself or even to feed himself. These facts point very strongly to the conclusion that he was willing and anxious to convey to any of his children who would satisfy the debt. He not only did not make any express reservation of any interest in his deed, but his subsequent conduct shows that he had no thought at the time of retaining any beneficial interest therein. On several occasions, or at least more than once, he referred interested persons to his son as the owner.

We, therefore, hold that by his deed he conveyed the whole title to his son, and that all the conveyances made by the son are valid and binding, including the Boswell and Bush interests, and, of course, their grantees.

As to appellant, Oma Mitchell, it is contended that she waived her dower interest in all the lands by virtue of the following instrument executed by her while her divorce suit was pending against her husband, W. R. Mitchell: "The plaintiff Oma Mitchell and the defendant W. R. Mitchell, finding it impossible to live together and it being agreed that the plaintiff shall bring suit for divorce on the grounds of indignities to the person, and the defendant shall make no defense to the said suit, and there being no property rights to settle and the plaintiff being a prospective mother it is agreed between the parties that the defendant shall pay all the expenses of this divorce suit and shall pay the plaintiff's doctors bills for her in lying sickness and shall pay her the sum of twenty-five dollars in cash, and that this shall be in full discharge of all financial obligations between the parties hereto.

"Signed this 8th day of July, 1936.

"Oma Mitchell,
"W. R. Mitchell."

This agreement was never carried out and the divorce suit by said appellant has been dismissed. The undisputed proof shows that W. R. Mitchell failed to comply with his part of the agreement and so the consideration, if any, failed. The suit for divorce was not prosecuted. She has since given birth to his child, and she is still his wife. Moreover, the agreement may be void as being collusive, a question we do not now decide, as it is unnecessary to do so.

W. R. Mitchell, being the owner of the land and appellant, Oma, being his wife, her inchoate right of dower and homestead attaches and remains in all said lands which have not been released and relinquished by her in proper form.

The decree will be reversed, and the cause remanded with directons to enter a decree in accordance with this opinion.

OLIVER *v.* WATTS.

4-4740

Opinion delivered October 18, 1937.

L. B. Smead, for appellants.

Gaughan, Sifford, Godwin & Gaughan, for appellees.

BUTLER, J. From the decree of the court below dismissing the complaint for want of equity, this appeal is prosecuted. The vital question upon which this case turns is, what was the intention of the parties grantor and grantee at the time of the execution of an instrument in the form of a warranty deed, dated February 5, 1917, and duly recorded on or about that time, by which was conveyed a certain sixty-acre tract of land situate in Nevada county, Arkansas.

It is the contention of the appellants, Isaac and Mary Ann Oliver, the grantors in said deed, that same was executed to secure an indebtedness due the grantees, M. P. and T. J. Watts, merchants, doing business under the name of M. P. Watts & Brother. It is further contended that they remained in continued possession of the lands from the execution of the deed with the privilege of repaying the debt secured being, in that event, entitled to a reconveyance of the lands. These contentions are denied by appellees who assert that the purpose of the deed was as recited therein, the consideration of which was the payment of a debt of approximately $850 due by Isaac Oliver to the grantees and that the possession of the Olivers thereafter was permissive, with the privilege, however, of repurchasing the lands.

The testimony tending to support the conflicting contentions presents questions of fact only, for there is no dispute as to the applicable law. If, in fact, the warranty deed was but to secure an existing debt, it will be regarded in equity as a mortgage. The burden, however, rests upon the party claiming it to be such to establish that fact by clear and convincing testimony. The conveyance must be judged according to the intention of the parties. If there is a debt subsisting between them and it is the intention to continue the same, the deed is a mortgage; but, if the conveyance extinguishes the debt and the parties intend that result, a contract for resale at the same price does not destroy the character of the deed as an absolute conveyance. *Hayes* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023.

The question, therefore, for our examination and decision is whether or not the decree of the trial court is against the preponderance of the evidence. If such is the case, the finding of the chancellor must be reversed; but where the evidence leaves in doubt upon which side falls its greater weight, we adopt the view of the chancellor and affirm.

About much of the history of the transaction out of which this litigation arises, there is no dispute. This is as follows: Isaac Oliver and his wife, Mary Ann, are aged negroes, the former claiming at the time his testimony was given to be ninety-four years old. Both are illiterate. They owned the sixty acres in controversy and lived upon it for many years and reared a family which in the course of time grew up and moved away leaving their aged parents in the dwelling house which was also growing old and becoming more and more delapidated. It is doubtless true, although disclosed only by inference, that the small field which was being cultivated kept pace with the dwelling in its deterioration. This field appears to have been about fifteen acres in area, though it may have been larger at one time. For much of the time, Isaac Oliver was furnished for his needs by Watts & Brother and, being unable to pay for his annual advances, gave his creditors mortgages from time to time, generally annually, to secure the balance due. This course of conduct continued from year to year until finally, on February 5, 1917, instead of executing a mortgage, Isaac and the wife executed a warranty deed with release of dower and homestead by the wife. The market value of the land was not in excess of $600. They continued to live together on the lands still being furnished their necessary supplies by Watts & Brother, secured by crop and chattel mortgages, but no longer by mortgage on the land until 1921, when Watts & Brother declined to furnish longer. About 1923, Mary Ann Oliver also took her departure and appears not to have lived with her husband, Isaac Oliver, since that time. The old man remained alone in the house until it became uninhabitable. He then began to live around with his children. Part of the time he stayed with his son,

Will, who lived upon a tract of land adjoining the sixty-acre tract in controversy and whose house was only a few hundred yards away from Isaac's dwelling, which was destroyed by fire about the year 1931. Since that date, the lands have been uninclosed with no improvements being made thereon.

In 1923, there seems to have been exploration for gas and oil in Nevada county. Isaac Oliver, evidently, thought he could get the money on leases with which to pay the amount of the debt existing at the time of the execution of the warranty deed. This appears to have been agreeable to the administrator of the estate of T. J. Watts, who was then deceased, and also to M. P. Watts, for, on May 11, 1923, J. C. Watts, the administrator, filed a petition in the probate court for authority to join with M. P. Watts in a deed conveying to Isaac Oliver (also known as Ike Pipkin) the 60 acres of land. The petition recited that the Watts had acquired title to the lands on February 5, 1917, and that later had resold the said lands to Oliver for the consideration of whatever indebtedness he might owe to the firm of M. P. Watts & Brother and that said Oliver took possession of the lands under the terms of the agreement of sale. In the same year, apparently to secure money for the repurchase of the lands, Oliver executed an oil and gas lease on the lands to Mr. Rumph. This lease was never recorded because Rumph believed it to be of no value. What money, if any, was paid by Rumph to Oliver is not shown by the evidence, further than the testimony of Oliver who stated that he paid the money received from Rumph to Mr. Watts, but did not know how much he received. The negotiation for the repurchase of the lands by Oliver in 1923 fell through because he was unable to raise the money. Later, in 1926, Oliver again approached Mr. T. E. Watts, one of the Watts heirs (T. J. Watts died in 1922 and M. P. Watts in 1930), with a view of again getting an agreement for the purchase of the lands. T. E. Watts had been attending to all of the business from 1923 or 1924. He again agreed that Isaac might retain the lands, but told him that he would no longer permit him to repurchase for the original debt

of $850, but would reserve, in addition, one-half interest in the minerals. It does not appear that, at that time, the oil and gas lease market was active. At any rate, Isaac again failed to take advantage of the offer. On February 11, 1927, Ike Pipkin who is the same as Ike Oliver, executed in the office of Gaughan & Sifford, an instrument in writing by which he attorned to M. P. Watts and the heirs of T. J. Watts by formally acknowledging that the possession retained since 1917 was by their consent and as a tenant. He agreed to retain possession during the year 1927 and to pay as rent the sum of $25 on or before the first of December, 1927. This instrument was witnessed by Maude Crawford, an employee in the office of Gaughan & Sifford.

Nothing more appears to have transpired regarding the sixty-acre tract until 1936. During that year, there seems to have been reasonable expectation that the tract in controversy and the lands in that immediate section were underlaid by, and valuable for, petroleum oil and natural gas. On June 20, 1936, the Watts heirs executed an oil and gas lease to Joe McMahon on thirty acres of the sixty at $5 per acre, and, on October 13, executed a similar lease to Allen J. Wright for another part of the sixty acres for much more per acre than the first lease —about $70 per acre. About this time a producing oil well was brought in and, on October 23, 1936, Mr. H. W. Aarnes went to the town of Magnolia in Columbia county where Oliver was living with one of his sons, and secured an agreement from him in writing, acknowledged before a notary public, to the effect that Oliver would execute an oil and gas lease and deed to one-half of the minerals under the sixty-acre tract in consideration of Aarnes' paying the indebtedness secured by "a certain mortgage" on the sixty acres. Shortly thereafter Oliver and his wife, W. H. Aarnes joining as one of the parties plaintiff, brought this suit.

As before noted, the grantees in the instrument executed February 5, 1917, have been dead for many years and now the only living witnesses to the immediate circumstances of the transaction are Isaac Oliver and his wife, Mary Ann. Regarding the execution of the instru-

ment in question, Oliver testified that he had been giving mortgages from time to time for a number of years, that it was his understanding that the mortgages were on his crops and he does not remember anything about a deed; that he would give a new mortgage every year and make a note for supplies and furnishings every time he gave a mortgage; that he never executed a deed to anybody that he knew of, or a mortgage secured by his land. He stated that since 1917 a crop had been made on the lands every year. In support of his contention as to his continued possession and cultivation of the premises, he introduced a purported rent note signed by one, Boto Young, before Thomas W. Moss, a notary public. Moss, before whom the instrument of February 5, 1917, was executed and acknowledged, prior to the giving of the testimony by Oliver, had been dead seven or eight years. Mary Ann Oliver, wife of Isaac, testified that she never at any time signed a paper which she knew was a deed; that she remembered signing mortgages to Mr. Watts. She stated that the land was farmed every year until the time she left in 1923.

Will Oliver, Isaac's son, testified that the lands had been worked in 1928 or '29 and that he, himself, had worked them for several years from 1931 down to and including 1936. He didn't state how much land was in cultivation except that for the last year it was about an acre and a half.

T. E. Blakley, a witness called by appellants, stated that two crops were made on the lands from 1917 to 1927; that the house was burned in 1930 or '31 and since that time the lands had been farmed one year—1935.

The testimony on behalf of the appellees tended to show that it was the custom of Watts & Brother, when land was taken over from their customers by deed, to allow them to remain in possession and to have a reasonable time in which to redeem it, usually from three to five years. As a rule rent notes were taken. T. J. Watts handled the transaction when Isaac Oliver executed the instrument of February 5, 1917, and it was the understanding that he was to have a reasonable time in which to repurchase, but no rent notes were taken

from Oliver. This testimony was given by Mr. T. E. Watts who testified also about the transactions relating to the efforts of Oliver to repurchase the lands. He stated that, in 1927, he was managing the business and thought enough indulgence had been shown Oliver. He, accordingly, sent for him, explained the situation and Oliver agreed to renounce any further interest in the lands and executed the agreement of February 11, 1927. Oliver signed the agreement with full knowledge of its content, the same having been fully explained to him.

The testimony on the part of the appellees relating to the possession and cultivation of the lands is to the effect that only small patches were cultivated, carried on in a desultory fashion with frequent interruptions in the point of time. It had the appearance to the passer-by as being a small abandoned farm. One witness, a geologist, who made a close and critical examination of the land, testified that he saw no sign of recent cultivation, except a small patch of about a half an acre lying next to Will Oliver's house. This examination was made some time in 1936.

With respect to the instrument executed February 11, 1927, Isaac Oliver testified in effect that he was taken by Mr. Watts to an office in Camden and told to sign a paper which had been written out by a young lady; that he signed it, but didn't know what it was.

Appellants argue that the foregoing evidence preponderates in favor of their contentions and against the decree of the trial court. They first stress the evidence as to the continued possession of Oliver after the date of the deed executed in 1917 and the fact that Oliver executed an oil and gas lease in 1923 with the apparent knowledge of the appellees and the proceedings in the probate court by which authority was sought to convey the lands to Oliver and the recitals therein as to the agreement existing between the grantors and the grantees and the desire of the administrator and the surviving partner to carry the same into effect. We see nothing in any of these transactions tending more strongly to support the contentions of the appellants than that of the appellees. There is no serious controversy as to

the right of Oliver to retain possession of the lands, but the difference is as to whether he retained possession as mortgagor or under a contract of purchase; nor does the execution of the lease to Rumph controvert the contention of the appellee, it and the petition to the probate court being apparently contemporaneous and supplemental transactions; and, if the money could have been secured, a deed would have been executed to Isaac Oliver which would inure to the benefit of his lessee, Rumph. The recitals in the petition do not contradict the contention of appellees, but rather support it—namely, that there had been an outright purchase of the lands, the satisfaction being the extinguishment of the debt of Oliver, and that he was placed in possession by the grantees with the right to repurchase. As we understand it, appellees have never contended otherwise. The right accorded Oliver was extended for at least a reasonable time and perhaps this was occasioned by one of the facts urged by appellants for reversal—i.e., that Oliver was an infirm, illiterate negro of advanced age, who had long been associated in a business way with the Watts and depended upon them for advice and trusted their fair-dealing.

We are of the opinion that the decree of the trial court can be upheld if it was based on the conclusion that the evidence was not sufficient to overturn the solemn recitals of the warranty deed, and that more than a reasonable time in which to exercise the right had elapsed since the verbal contract of repurchase was made.

Relating to the attornment of February 11, 1927, all the evidence is given by interested witnesses, that of Oliver being vague and nothing more than a simple denial of knowledge of the character of the instrument he signed, while that on the part of the appellees is more definite and certain. Certainly, more cannot be said of the evidence than that it is equally balanced. That being true, the decree of the chancellor must be sustained if it be based on the theory that whatever Oliver's rights may have been prior to February 11, 1927, he released those rights and thereafter the relation existing between the parties was that of landlord and tenant. It follows that

the decree of the trial court must be affirmed. It is so ordered.

STATE EX REL., ATTORNEY GENERAL *v.* WRIGHT.

4-4752

Opinion delivered October 18, 1937.

Jack Holt, Attorney General, and *C. Floyd Huff,* for appellant.

Marshall Purvis, for appellee.

McHANEY, J. On November 19, 1935, W. S. Hickman died in St. Joseph Hospital, in the city of Hot Springs, Garland county, Arkansas, where he had been a patient for some time. Thereafter, on the 27th day of November, 1935, one Harmon Danield filed in the county court of Grayson county, Texas, for probate, a writing purporting to be the last will and testament of said W. S. Hickman, deceased. Thereafter, on December 9, 1935, the county court of said county in Texas admitted the purported will of said Hickman to probate. By the terms of the said will, two-thirds of the estate of the decedent was bequeathed to said Harmon Danield, and the remaining one-third thereof to appellee Homer K. Wright. The purported will recites that the said Hickman was a resident of Hot Springs National Park, Ark-

ansas. Appraisers were appointed by the county court of Grayson county, Texas, who appraised said estate at $59,057.45, consisting entirely of cash in two banks. Said Danield was appointed by said court, as the executor of said purported will to serve without bond and, in his final account, reported the payment of several claims against the estate of said decedent to creditors of Hot Springs, Garland county, Arkansas. The will nominated Harmon Danield as executor and directed that he be appointed to serve as such without bond. In his petition to the probate court of Grayson county, Texas, said Danield alleged that he was a resident of Hot Springs, Arkansas, and also that Hickman died in Hot Springs, Arkansas, where he had resided and had his domicile before his death and that he had no relatives or kindred in the state of Texas as far as he knew. One of the subscribing witnesses testified that he had known the decedent for about eight years and that he knew him to be a resident of Hot Springs, Arkansas, the witness himself being a resident thereof. On December 28, 1935, said executor, Harmon Danield, filed his final account and on the same day, the county court made an order approving the final account as filed by the executor and closed the said estate.

On April 7, 1936, the appellant filed a petition in the probate court of Garland county, Arkansas, alleging that said Hickman was a citizen of Hot Springs, Arkansas, and died intestate on November 19, 1935, leaving no widow and no heirs-at-law entitled to inherit and that, therefore, the said estate of W. S. Hickman escheated to the state of Arkansas, which estate was alleged to be of the value of $59,057.45, consisting of cash and United States securities in the hands of the First National Bank of Dallas, Texas, and the Merchants and Planters Bank of Sherman, Texas. It was further alleged that on November 14, 1935, Harmon Danield lodged with the clerk of the probate court of Garland county, Arkansas, a writing purporting to be the last will and testament of said Hickman; that on the following day, the said writing was withdrawn by the attorney for said Danield; that the writing purporting to be said will was not Hick-

man's will, but was a writing gotten up as a bogus will by said Danield and appellee Wright, who conspired together to cheat the state of Arkansas out of the estate of said Hickman by fraudulently concocting said writing; that the purported will was never signed by Hickman, never declared to be his will and never executed by him; that said Danield and Wright, knowing that said Hickman was a resident of Garland county, Arkansas, and that they could not carry out their fraudulent scheme in the probate court of that county, took said will to Grayson county, Texas, where, upon the proof of one witness, Van Buren Holmes, who was a confederate of said Danield and Wright in their scheme to get said estate, and there offered said will for probate; that the Texas court unlawfully entered an order probating said will; that said order of the county court of Grayson county, Texas, was fraudulent and void, and of no effect; that the estate should have been administered by the probate court of Garland county, Arkansas; that there has been no application made by any representative or creditor for administration, and that there is no one besides appellant, who, is in any way, interested in said estate. It was prayed that said Garland probate court appoint F. L. Thompson as administrator and that letters of administration be issued to him. The Garland probate court entertained said petition, granted the prayer thereof, made an order finding that said Hickman died intestate on or about the 19th day of November, 1935, and other findings in accordance with the allegations of said petition. Said Thompson was appointed administrator, and accepted the appointment, giving bond as such. Thereafter, in July, 1936, appellee, Wright, prayed and was granted an appeal to the Garland circuit court, where he filed a motion to quash the proceedings had in the Garland probate court, and to cancel the letters of administration issued to said Thompson. He offered in evidence an authenticated copy of the entire record and proceedings in the county court of Grayson county, Texas, to which appellant objected and excepted to the introduction thereof. Appellant offered to prove that Hot Springs was the residence of said

Hickman, but, on objection from appellee, the court refused to hear said evidence on the ground that the court had no jurisdiction to determine that question because it had been adjudicated by the Texas county court, and that the record failed to show that the decedent, Hickman, had any personal property in this state.

In the record, appears an order of the county court of Grayson county, Texas, which is the county in which Sherman is located, filed and entered May 6, 1936, amending its previous order which recited that said Hickman was a resident of Hot Springs, Garland county, Arkansas, so as to make it recite that the deceased was a resident of Hot Springs, Arkansas, temporarily, but that he "lived and maintained his permanent *bona fide* domicile in the city of Sherman, Grayson county, Texas, and was a citizen of the state of Texas, and that, at the time of his decease, the greater portion of his known property was located in the city of Sherman within the county of Grayson and state of Texas, and that he was temporarily residing in the city of Hot Springs, Garland county, Arkansas, and residing there temporarily on account of his health at the time of his decease and that Harmon Danield, the administrator named in the last will and testament of W. S. Hickman, deceased, was *bona fide* domiciled in the city of Sherman, Grayson county, Texas, and temporarily residing in the city of Hot Springs, Garland county, Arkansas, and that he was a citizen of the state of Texas." This order *nunc pro tunc* recites that it was made on the evidence produced and on the court's own personal knowledge, so as to make the record speak the truth.

Thereafter, the circuit court sustained the motion to quash the orders and proceedings had in the Garland probate court on the ground that the Texas court had fully adjudicated all of the questions involved under the law of the state of Texas and that the probate court of Garland county was without jurisdiction to proceed in the premises and that the letters of administration issued to said Thompson were null and void, *ab initio*.

Thereafter, appellee filed an amended and substituted motion to quash proceedings and, on February 23,

1937, the court sustained said motion. Appellant, thereafter, and in apt time, filed its motion for a new trial which was overruled and the case is here on appeal.

For a reversal of the judgment against it, appellant contends that the full faith and credit clause of the federal Constitution did not preclude the probate court of Garland county, Arkansas, from inquiring into the domicile of the testator, nor from attacking the validity of the will. Appellee concedes, for the sake of argument at least, that the Garland probate court did have jurisdiction to determine the domicile of the decedent, but insists that it had no authority to determine the validity of the will which had already been determined by the Texas court. It is conceded by both parties that all of the estate of the decedent was situated in the state of Texas, but that the bulk was in the city of Sherman, Grayson county, Texas. Under Art. 3293, Vernon's Annotated Texas Statutes, vol. 9, it is provided: "Wills shall be admitted to probate, and letters testamentary or of administration shall be granted: 1. In the county where the deceased resided, if he had a domicile or fixed place of residence in the state. 2. If the deceased had no domicile or fixed place of residence in the state, but died in the state, then either in the county where his principal property was at the time of his death, or in the county where he died. 3. If he had no domicile or fixed place of residence in the state, and died without the limits of the state, then in any county in this state where his nearest of kin may reside. 4. But if he has no kindred in this state, then in the county where his principal estate was situated at the time of his death." Subdivisions 3 and 4, of the above statute, seem to be applicable to the facts in this case, assuming, for the sake of argument, that Hickman was, at the time of his death, an actual resident of the state of Arkansas. It has been many times held by the Texas court that "the court granting administration upon an estate determines the question as to its jurisdiction over the decedent's estate, and its judgment in this respect cannot be impeached in a collateral proceeding." A number of cases are cited in note 5 to the above statute, sustaining that declara-

tion. So, if it be conceded, contrary to the *nunc pro tunc* order of the Grayson county court, that Hickman had no domicile or fixed place of residence in the state of Texas, and died in Arkansas, still his will was subject to probate and his estate to administration "in the county where his principal estate was situated at the time of his death," which was Sherman, Grayson county, Texas. Our statute makes somewhat similar provisions to that of Texas. Section 10511, Crawford & Moses' Digest, provides that wills may be admitted to probate in the county of the testator's residence, but if he had no known place of residence in this state, and land is devised, then in the county where the land, or the greater part thereof, lies. But if no land is devised, then in the county where he died, or that wherein his estate, or the greater part thereof, shall lie, or where there may be any debt or demand owing to him. So, it would appear under our statute that the will of a person, known to be a non-resident of this state might be probated in any county in this state wherein his estate, or the greater part thereof, shall lie, and this is similar to the above provision of the Texas statute. Therefore, we are of the opinion that the probation of the will in Grayson county, Texas, was authorized under the laws of Texas, and the purported will, having been admitted to probate there, is not subject to attack here. The county court of Grayson county, Texas, had jurisdiction over the subject-matter, given it under the statute above quoted, and its judgment is conclusive as to the validity of the will on collateral attack, either in Texas or Arkansas. Appellant might have appealed from the order of the probate court in Texas, but it did not do so, and under the full faith and credit clause of the federal Constitution, we must hold that appellant is precluded from attacking the will in the courts of Arkansas. This conclusion, is supported by the great weight of authority and we think it would be a work of supererogation to undertake a review of the cases so holding.

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

MEHAFFY, J., dissents.

BARNSDALL REFINING CORPORATION *v.* FORD, COMMISSIONER REVENUES.

4-4743

Opinion delivered October 18, 1937.

Miles & Amsler, for appellant.

J. Hugh Wharton, for appellees.

BAKER, J. This suit was begun by the appellant in the chancery court of Pulaski county. Its purpose was to restrain the Commissioner of Revenues and the sheriff of Pulaski county from enforcing a distraint warrant in the hands of the sheriff commanding him to seize and sell appellant's property.

As plaintiff in the chancery court, Barnsdall Refining Corporation alleged it was a manufacturer and dealer in gasoline with some of its refineries located in Oklahoma, and that it partly supplied its bulk sales plants and storage plants in Arkansas by hauling its gasoline from the refinery by tank trucks and storing the same in central business places to make it available for the retail trade; that it paid taxes on all shipments from the refinery to the several points in the state as the shipments were made, and not when the commodity was sold; and that every month it has furnished the Commissioner of Revenues with a statement of all gasoline shipped into the state during the previous month, and paid the tax on the same; pleads further that much gasoline, after it

has been shipped into the state, is left stored in bulk sales plants for a time; that some shipments are made by railroad; that the capacity for storage in the bulk sales plants varies, the larger ones being in or near the larger centers. Those are capable of holding many thousands of gallons.

One of the particular matters in controversy is that the Commissioner of Revenues has refused to allow one per cent. deduction in gallonage on account of evaporation upon shipments of gasoline made by tank trucks; but does allow one per cent. on account of evaporation losses from shipments made by railroad tank cars. The appellant took credit for the one per cent. evaporation upon shipments made by tank trucks in its last monthly statement preceding the filing of the suit, but the Commissioner of Revenues did not allow this credit, and placed a distraint warrant in the hands of the sheriff in order to collect the amount claimed.

It was, also, alleged by the appellant in this suit that at Helena, Arkansas, it had 1,095 gallons of gasoline upon which it had paid the regular tax, but that this gasoline remained in storage so long that it became defective, and that it was on that account destroyed. The tax of $71.17 had been paid; and there was, also, destroyed by fire, at Kensett, Arkansas, 307 gallons upon which was paid a tax of $19.95; that none of the gasoline making up the 1,402 gallons had been sold or used, and when destroyed was still the property of the appellant. It was the prayer of the appellant that it be given the authority to take credit of these several items totalling $397.60 on its monthly tax return and settlement. Of the foregoing total $306.48 was the amount for which credit was claimed at the rate of one per cent. for loss by evaporation under act No. 146 of the Acts of 1929 on shipments by trucks. The temporary restraining order was issued. Counsel, by stipulation, presented the facts in the case. The stipulation is as follows:

"Stipulation of Counsel

"1. The defendant Earl Wiseman is commissioner of revenues of the state of Arkansas, whose duty it is to

administer the laws of the state of Arkansas pertaining to the collection of taxes on gasoline sold within the state.

"2. The plaintiff, Barnsdall Refining Corporation, is a nonresident corporation, domesticated in the state of Arkansas, and authorized to do business in the state of Arkansas. It is engaged in the manufacture and sale of gasoline from points without the state to points within the state, in wholesale quantities.

"3. Plaintiff's refinery is in the state of Oklahoma, and it manufactures gasoline or motor vehicle fuel and ships the same to its dealers in tank carlots from points in Oklahoma to points in Arkansas.

"That the defendant refuses to allow plaintiff credit on its monthly tax report to defendant's department for evaporation, as provided for under act No. 146 of the Acts of the General Assembly of 1929, the same being approved March 14, 1929, because said shipments are not made by railway. Defendant contends that the act referred to embraces shipments made by rail only, and that it does not cover shipments made by motor trucks.

"4. If plaintiff is entitled to credit for evaporation on its tank car shipments on motor trucks, it is entitled to a credit of $306.48. An itemized statement of said shipments is hereto attached, marked exhibit A for identification and made a part of this stipulation.

"5. That on May 19, 1934, plaintiff destroyed 1,095 gallons of Ethyl gasoline in the city of Helena, Arkansas, upon which it had paid a tax to the state of Arkansas in the sum of $71.17. That no part of said gasoline was ever used on the highways of Arkansas, but, because of defects discovered by plaintiff, said gasoline was destroyed rather than sold to the public. A statement of which is hereto attached, marked exhibit B for identification, and made a part of this stipulation.

"6. That on May 3, 1934, plaintiff's service station at Kensett, Arkansas, burned, in which plaintiff had destroyed 307 gallons of gasoline upon which it had paid the tax, and that plaintiff claims that it is entitled to a credit for the tax in the sum of $19.95, a statement of which is hereto attached, marked exhibit C for the identification, and made a part of this stipulation.

"Exhibit A contains a statement of shipments of gasoline from June, 1935, to March, 1936, by tank trucks, upon which the one per cent., if allowed as a credit, would amount to $306.48.

"Exhibit B is a statement of the gasoline destroyed at Helena.

"Exhibit C is a statement of the gasoline destroyed at Kensett."

The issues were decided against the appellant, and from that decree comes this appeal.

It becomes necessary to state the applicable part of act No. 146 of the Acts of 1929. Section 1 of said act is as follows:

"Any dealer in gasoline or motor vehicle fuel who handles same in tank carlots, and pays the tax on said gasoline or motor vehicle fuel in the state, shall be entitled to take credit on the tax due the state for loss due by evaporation as set forth in § 2 of this act." Section 2 of the same act reads:

"All manufacturers of gasoline or motor vehicle fuel and dealers who handle same in tank carlots, shall be entitled to claim credit on any tax due the state as provided for in § 1 of this act to cover the loss that they have sustained by reason of evaporation of gasoline or motor vehicle fuel on which the tax has previously been paid to the state. Any claim for such evaporation shall be accompanied by an affidavit sworn to on a blank to be furnished by the Commissioner of Revenues by such official as the commissioner of revenues may designate, and the Commissioner of Revenues is instructed and empowered to allow claim for such evaporation losses not to exceed in any case 1 per cent. of the gasoline or motor vehicle fuel handled."

The principal issue presented will be settled by a consideration of the foregoing act. If "in tank carlots," as the expression is set forth in both sections of the act above quoted, means or includes tank trucks, appellant is correct in its first contention. The question is presented to us upon the theory of a reasonable construction in the consideration of the language used, wherein it is urged that loss by evaporation is a loss to the manu-

facturer or dealer to the same extent in shipments by tank trucks as in shipments by railroad tanks, and that it was the purpose of the Legislature, in the passage of act No. 146 of 1929 to permit such manufacturer or dealer to recoup for the actual loss in transportation, and not be required to pay a tax upon that portion of the gasoline which could not be delivered because of the actual loss incurred. It will appear that the revenue department has, since 1929, enforced and interpreted act No. 146 as applying to those shipments only which were made by railroad and not to transportation by truck. The legislature has been in session several times since 1929, and the act has not been amended or changed. The allowance so made on shipments by railroad has not been for an actually determined loss at the point of final destination, but for the arbitrary limit of one per cent. on such shipments without proof of actual loss. Without criticism or suggestion of a proposition of credit for this undetermined loss, this course was probably followed by the Commissioner of Revenues as a matter of expediency and good business, wherein under the rule of the law of averages the state would suffer no appreciable loss, and the shipper or dealer would know at all times the amount of tax due upon each shipment without the consequent expense of gauging or measuring each shipment at the point of destination and reporting the loss as there determined. The last statement inferable from the record, is not made in approval or criticism of the rule followed, but by way of explanation.

The foregoing statement is partly inferable from the facts hereinbefore set out, and we think justified by them. No question is raised about the power of the commissioner and his department to make and enforce reasonable rules and regulations, and this rule is not attacked save and except it is urged that the revenue commissioner is arbitrary in his refusal to allow the credit for the shipments made by tank trucks.

We think there is an essential difference in the "tank carlots" and in shipments made by "tank trucks," though it is urged that small tank car loads will probably contain about 6,000 gallons and tank trucks may

contain 3,000 gallons. Some of the railroad tanks, of course, contain considerably more than 6,000 gallons.

In the aforesaid act No. 146 of the Acts of 1929, wherein the expression "tank carlots" is used, "carlots" is written as one word, preceded by the word "tank." We are presumed to give each one of these words the usual or ordinarily accepted meaning as such meaning was most probably intended by the Legislature. Webster's New International Dictionary, Second Edition, defines "tank car": "Railroads—A railroad car especially constructed for transporting liquor or gases in bulk in nondetachable tanks." It also defines "carlot" as a car load. The words "tank truck" have been in use so long as to have taken on a definite or certain meaning. By the same eminent authority "tank truck" or "tank wagon," is defined as a truck or wagon having a tank for the transportation of liquids as oil, milk or gasoline.

Not only are the above and foregoing definitions set forth by one of the greatest lexicographers, but common usage or everyday application of the terms in controversy accord with the definitions given.

From the foregoing, it appears that there is authority for a distinction between the "tank truck" and the "tank carlot" or "tank carload lot." In one there is an authorization for an exemption of as much as one per cent. for evaporation. There is no authority for such reduction or exemption of one per cent. from tank truck shipments. Only by strained construction, and by an effort on the part of the courts to determine what the Legislature should have done that it did not do could the extension of the exemption authorized by said act 146 be made to apply to tank trucks. We possess no legislative functions and there is no apparent error or failure on the part of the legislative body to express fully and completely the meaning intended. Therefore, there is no room for construction. *Refunding Board of Ark.* v. *Bailey,* 190 Ark. 558, 80 S. W. (2d) 61.

The other question presented arises from the fact that certain gasoline was destroyed after the tax was paid; that inasmuch as the gasoline was not used or sold

for use upon the highways, the manufacturer or dealer should have credit upon new shipments for the amount of tax paid upon the destroyed gasoline.

We do not agree with this contention. There are several reasons why this may not be done. The first is that the Revenue Commissioner is without power or authority in law to allow this credit. To allow it would be tantamount to refunding the tax to the taxpayer. If the taxpayer has the right to recover, the same taxpayer has the right to retain the money. We see no virtue in the proposition that this refunded money will be used to pay the tax on other gasoline.

The foregoing announcements are made with full recognition of the authority and doctrines as set forth in the cases of *Standard Oil Company* v. *Brodie,* 153 Ark. 114, 239 S. W. 753, and in the subsequent case of *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. (2d) 182, cited and relied upon by appellant. The theory as announced in the two foregoing cases as the basis for the taxation is in no manner criticised or impaired by this discussion of the "tax on gasoline." Such terms are used merely to identify the kind of tax and to indicate amounts or values involved, rather than taxation upon a specific article.

In the Sparling case it was held that the amount of the tax levied applied to each gallon of the motor vehicle fuel sold, and that no substantial right was violated where the quantity of such fuel used for other than highway purposes was negligible.

The quantity of gasoline here involved is by comparison not only negligible, but it was lost after shipment into the state for use on highways and after it had become subject to the tax which was in due time paid.

It is not contended by appellant here that the quantities of gasoline upon which they had paid the tax were shipped into the state for use except as motor vehicle fuel. There is no difference in small quantities unfortunately destroyed, one small bit by a fire and the other by reason of appellant's failure or delay to use or sell, and other larger quantities shipped into the state for same or identical purposes. Taxes as well as costs of labor,

freights, and other expenses of transportation enter into the sale price paid by the retail customer, and no part is recoverable under the conditions stated.

Some insurance company, for premium paid, may make good property lost including these added charges as part of the value thereof. But the revenue department has not insured the tax charge in favor of appellant. By the same token the appellant would not be required to refund the tax to one of its customers who might lose his gasoline by fire.

We do not think appellant has brought itself within any rule exempting it from the enforcement of the taxing power against it upon the shipments of motor vehicle fuel into the state, either by the particular manner of shipment or on account of the fact that some of the motor vehicle fuel was destroyed after delivery. Under the enforceable rules it had already become subject to the tax which it was the duty of the commissioner to collect in the one instance, and in the other, having collected the same, he was not possessed of power to forgive, refund or credit elsewhere or upon other shipments. Those who are entitled to such exemptions must show themselves within the exception to the general rule. *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 1021, 1029, 88 S. W. (2d) 1007, 103 A. L. R. 1208.

The decree of the chancery court is affirmed.

CHAMBERS *v.* BURKE.

4-4754

Opinion delivered October 18, 1937.

Archie D. Murphy and *Coulter & Coulter,* for appellant.

Marsh & Marsh and *J. S. Brooks,* for appellees.

BUTLER, J. Marvin J. Burke, in 1929, became the owner of lots 3 and 4, block 6 of Combs' second addition to the city of El Dorado, Union county, Arkansas, by purchase. At the time of the purchase lot 3 was encumbered by mortgage in the sum of $3,000, which was assumed by Burke as a part of the purchase price. The taxes were not paid on these lots for the year 1932 and they were forfeited and sold to the state for the delinquent taxes on June 17, 1933, and, being unredeemed, were purchased from the state by J. M. Chambers which executed to him a deed on June 13, 1936. Within twenty days thereafter, Chambers instituted an action in ejectment against appellees, Marvin J. Burke and Allie Burke, his wife. At that time, Mrs. Allie Burke and her children, all of whom are minors, were living on the property. The receiver for the mortgagee was made

a party and filed answer in which he alleged the tax deed was void and moved to transfer to equity and that the deed be canceled.

Various other pleadings were filed, among which was the intervention of Merle Marie Burke, Aubey Jean Burke and Robert Derle Burke by their mother and next friend. It was alleged that all of the interveners were minors at the time of the sale and conveyance to the state and that they now are; that about May, 1933, the property in dispute had been conveyed to them by their father, Marvin J. Burke, which deed had not been placed of record and had been lost or destroyed. They alleged the right to redeem from the tax sale and tendered to Chambers the amount of taxes, penalty and costs for which he had purchased from the state. The cause was transferred to equity and, on the evidence adduced, a decree was rendered sustaining the allegations of the minor interveners, quieting title in them as against the plaintiff, Chambers, and canceling his deed. From that decree plaintiff has appealed.

The appellant contends that the decree should be reversed (1) because the evidence was not sufficient to show the execution of the deed from the father to the children, its delivery, or its loss, and (2) that, even though the deed had been executed as alleged, the right to redeem did not exist because the state's lien for taxes had attached prior to the conveyance.

In support of the first contention, a number of our decisions are cited which affirm the well-recognized rule that the evidence to establish the execution and content of an alleged lost deed must be clear and decisive, and it is contended that the evidence in this case does not meet those requirements. In testing the correctness of appellant's contention, due deference must be given to the conclusion reached by the trial court, which, if not against the preponderance of the evidence, must be approved by us. The evidence relating to the execution of the deed in question and the circumstances which induced it may be thus stated: in the summer of 1932, during the absence of the family, the residence on lot 3 covered by the mortgage was burned. The check covering the amount

of the insurance was made to M. J. Burke, the mortgagee, and was delivered to Mrs. Allie Burke. At that time the insurance agent received information that it was the intention of Mr. and Mrs. Burke to convey the property to their children. He advised Mrs. Burke that when this was done it would be well to notify him so that the proper changes might be made in the policies of insurance. He received no notification of any change in ownership, but in the early part of 1933, sometime in the spring, Mr. Burke prepared a warranty deed, naming in it as a consideration "$10 and other valuable considerations," by which the property involved was conveyed to the children. He, in company with Mrs. Burke, went to an office building in El Dorado and acknowledged the execution of the deed before a person to whom they were directed as an officer qualified to take acknowledgments of deeds. After the execution and acknowledgment of the deed, it was delivered by Mr. Burke to Mrs. Burke to keep for the children. The deed was not recorded because of the financial condition of the grantors at that time. Mrs. Burke took it home and placed it in a book containing some other papers. She is uncertain as to what particular place the book containing the deed was deposited, but, as she remembered, it was in a dresser drawer. About this time, or shortly thereafter, Mr. Burke left home under rather distressing circumstances, taking with him some of his personal belongings, and when Mrs. Burke made search for the book containing the deed, she was unable to find it. Mr. Burke also made search among his papers in the place to which he had moved with like result.

The circumstances which induced the execution of the deed to the children were that Mr. Burke had suffered severe financial reverses and became very dissipated and it was feared that in that state of mind and his then course of conduct he might dispose of or further incumber the property, thus leaving the children entirely destitute. To prevent this, it was determined that the property should be conveyed to the children.

There is no direct evidence tending to dispute that above recited. The appellant relies upon circumstances

to overturn this evidence, which are as follows: neither Mr. nor Mrs. Burke were able to recall the date of the deed; they could not remember the name of the notary before whom it was acknowledged. Mrs. Burke could not state the name of the building where she executed and acknowledged the deed and the consideration therefor. In the opinion of the trial court these circumstances were not sufficient to overturn the testimony of Mr. and Mrs. Burke although they stood in near relation to their grantees. This conclusion seems to be warranted. There is no fraud alleged or proven, for at that time no one had any interest in the property except Mr. Burke and the mortgagee whose rights were fully protected. The state, at that time, had no interest. Therefore, there was no one to defraud. Mrs. Burke's failure to remember the details of the execution of the deed and Mr. Burke's failure to remember the name of the notary is not so remarkable as to do more, at best, than to cast suspicion upon their testimony regarding the execution of the deed. It must be remembered that, at about that time, their situation was of a distressing nature—the state of mind of Mr. Burke, his over-indulgence in intoxicants, the fact that he was acknowledging his failure as a husband and father and preparing to leave his wife, children and home to begin life anew elsewhere. This seems sufficient to excuse a fault in memory as to the details of the transaction. These facts, the trial court doubtless considered and deemed insufficient to destroy the value of the testimony of these people, or to throw the weight against the truth of their statements.

On the question of the delivery of the deed, we find no difficulty. The evidence is positive to the effect that from the time of the execution of the deed the sole care and custody of the children would devolve upon the mother, that immediately upon the execution of the deed it was given to her to keep for them, and that she received it for that purpose alone. While it is essential to the validity of a conveyance by deed that there be a delivery of the instrument, it is not always necessary that such delivery be made to the grantee in person. It may be made to another for him. The grantees in the instant

case were laboring under the disability of minority and could not act for themselves. Therefore, a delivery of the deed to their mother and her acceptance of it for the children is sufficient to satisfy the law that a valid delivery is made when the grantor, by act or word, manifests an intention to pass the title to the grantee and the latter intends to accept it. *Eastham* v. *Powell*, 51 Ark. 530, 11 S. W. 823; *Brown* v. *Brown*, 134 Ark. 380, 203 S. W. 1009; *Cleveland* v. *Breckenridge*, 173 Ark. 387, 292 S. W. 377.

We think, too, the testimony is sufficient to establish the loss of the deed. The evidence is that the deed was received and put away for safe keeping and, upon search, could not be found. The search for the missing deed appears to have been diligent and made by both Mr. and Mrs. Burke at their separate abodes.

The contention made on the second ground for reversal is that the deed granting its execution and delivery was ineffectual to confer upon the grantees the right to redeem because of their minority, as the state's lien for taxes had attached before the execution of their deed. We do not think this position is sound. We construe the statute on the subject to relate not to the attachment of the tax lien, but to the sale of the property to satisfy the same. The statute (§ 10096, Crawford & Moses' Digest) in plain terms, among other things, provides that all lands, city or town lots, belonging to minors which may be sold for taxes may be redeemed within two years from and after the expiration of such disability. From the date of the execution of the deed in question, the property in controversy belonged to the minors, and it was not until after acquisition of title by them that the lands were sold. Therefore, under the express provision of the statute, their right to redeem existed and continued until after two years from the time they reached majority.

There is preserved in the assignments of errors, though not argued in appellant's brief, the contention that the intervention of appellees should have been dismissed because it failed to contain any affidavit to the

effect that a tender of the amount of the taxes, penalty and costs, which appellant had discharged, had been made to him before the filing of the intervention. Section 3708, Crawford & Moses' Digest, providing for the necessity of a tender of the taxes in actions where defendant claims under a tax title, relates to suits in ejectment for the recovery of lands or the possession thereof by anyone who holds lands by virtue of purchase either from the county collector of revenue or the state, and suits by minors to redeem are not controlled by this statute. *Burgett* v. *McCray,* 61 Ark. 456, 33 S. W. 639; *Hodges* v. *Harkleroad,* 74 Ark. 343, 85 S. W. 779.

Affirmed.

COCA-COLA BOTTLING COMPANY OF SOUTHEAST ARKANSAS *v.* BELL.

4-4751

Opinion delivered October 18, 1937.

Joe W. McCoy and *Rowell, Rowell & Dickey,* for appellant.

F. D. Goza and *Glover & Glover,* for appellee.

SMITH, J. Evangelee Bell, a girl thirteen years old, suing by her father as guardian and next friend, recovered judgment for $7,500 against appellant, to compensate damages alleged to have been sustained by drinking a portion of a bottle of Coca-Cola, bottled by appellant, containing an infected fly. The child's mother purchased the Coca-Cola and brought it home to her daughter, who, upon drinking a portion thereof, became violently ill. Testimony was offered by appellant to the effect that the child was sick at home before drinking the Coca-Cola; but this fact was denied. The drink was purchased and partly consumed on June 17. The child continued sick and grew worse, and on September 11 or 12 was carried to Malvern, where Dr. W. F. Barrier was consulted, and he finally diagnosed the illness as a case of amoebic dysentery. This appears to be a tropical disease, which is very rare in this country. Dr. Barrier testified that the disease was caused by the amoebic germ, which is carried from the secretion of human beings, and medical authorities say that flies carry the amoebic germ.

In answer to a hypothetical question, Dr. Barrier stated that "If I had a patient on the 17th of June, 1936, who was in good health and was normal in every particular, and on that occasion she drank two-thirds of the bottle of Coca-Cola, and immediately started to vomit, and vomited all night, and that, after that vomiting, she started to lose weight, and would pass off mucus, and continued to do it until this time, and if there was a fly in the Coca-Cola, and the fly had an amoebic germ on it, I would attribute the disease to the fact that she had drank the Coca-Cola with a fly in it." This doctor stated that anywhere from four days to three months would be required to develop amoebic dysentery after the germ had been received in the system. It was not contended that the child swallowed the fly.

Dr. Barrier did not testify that the fly in the bottle had an amoebic germ on it, nor did any other witness. On the contrary, Dr. Mahlon Prickett, who entertained the same opinion, hypothetically expressed by Dr. Barrier, stated that he was called to attend the child. He further

testified: "I removed the top from the Coca-Cola and poured some of it out and strained it, and the objects we strained out we put on a slide, and half of the remaining solution I sent to the state laboratory, and received a report from the state laboratory; testing for ova parasites and intestinal parasites." Asked what that report was, he answered: "They reported no parasites found." This witness stated further that he did not always rely on negative reports of any laboratory tests, and did not regard the test made as conclusive. A wing and a leg of the fly were preserved, but they were not examined, as they were in a decomposed state.

Over the objection of appellant the court gave an instruction numbered 1 reading as follows: "If you find from a preponderance of the evidence in this case that the said Evangelee Bell drank the Coca-Cola as alleged and that there was a fly, bug, insect or foreign substance, in the said Coca-Cola, as alleged, and that she became poisoned or infected by reason of having drunk from the said Coca-Cola, as alleged, then you are instructed that this evidence is sufficient to make a *prima facie* case of negligence against the defendant company, and shifts the burden of proof on the defendant to prove that it was not negligent in cleansing, refilling, and inspecting the bottle. And if you find that the most modern machinery was used in cleansing, refilling and inspecting the bottle, and that its plan and system was to use every precaution in the cleansing, refilling, and inspecting the bottle, this is not sufficient alone to meet the burden of proof cast upon the defendant company and overcome the *prima facie* case."

The giving of this instruction is defended upon the ground that it declares the law as stated in a headnote to the case of *Coca-Cola Bottling Co.* v. *McBride,* 180 Ark. 193, 20 S. W. (2d) 862. We there said that the presence of a deleterious substance in the bottle was sufficient to make a *prima facie* case of negligence, and shifted to the manufacturer the burden of proving that there was no negligence in cleaning and refilling the bottles with Coca-Cola and in inspecting them after they were filled, and

that proof of the manufacturer's plan and system to exercise every precaution was not sufficient alone to meet the burden and overcome this *prima facie* case.

We reaffirmed that holding in the case of *Coca-Cola Bottling Co.* v. *Massey,* 193 Ark. 423, 100 S. W. (2d) 681, but we there explained this language as follows: "By this it was meant that such testimony was not conclusive as a matter of law, but that the presumption of negligence arising from proof of the presence of the deleterious matter was not overcome by showing the care usually employed to prevent its presence, and to discover it, if it were in a bottle. In other words, the case presented, under the conditions stated, is for the consideration and determination of the jury whether, as a matter of fact, there was extraneous matter in the bottle when sold to the consumer, and, if so, whether it was there when it left the plant of the bottler and its presence had not been discovered through lack of care in bottling the drink and the inspection of the bottle containing it."

This instruction declares as a matter of law what should have been submitted to the jury as a question of fact, that is, whether the testimony as to the care used by the manufacturer had overcome the *prima facie* presumption arising from the presence of the fly in the bottle. This instruction tells the jury as a matter of law that this testimony as to care in bottling and inspecting "is not alone sufficient to meet the burden of proof cast upon the defendant company and overcome the *prima facie* case." It was for the jury to find—and not for the court to say—whether the testimony had overcome the *prima facie* case of negligence arising from the presence of the fly in the bottle. It has been frequently held, following the case of *Duckworth* v. *State,* 83 Ark. 192, 103 S. W. 601, that the unexplained possession of property recently stolen constitutes evidence legally sufficient to warrant a conviction of larceny or the crime of knowingly receiving stolen property. But it was held in the case of *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029, that an instruction that such evidence is sufficient to sustain a conviction amounts to a charge on the weight of the evi-

dence and is for that reason an invasion of the province of the jury.

In condemning a similar instruction in the case of *Blankenship* v. *State*, 55 Ark. 244, 18 S. W. 54, Judge BATTLE said that it was within the exclusive province of the jury to determine, under the instructions of the court as to the law of the case, when the evidence is sufficient to convict, as the court has no right to point out what inferences may or should be drawn from particular facts in proof.

In the case of *L. B. Price Mercantile Co.* v. *Cuilla,* 100 Ark. 316, 141 S. W. 194, Chief Justice MCCULLOCH said that while the jury may infer malice from want of probable cause it is error to instruct the jury that they may make such inferences, as this would amount to an instruction on the weight of evidence, which may not be done. See, also, *Thomas* v. *State*, 85 Ark. 138, 107 S. W. 390; *Reeder* v. *State*, 86 Ark. 341, 111 S. W. 272; *Mitchell* v. *State,* 125 Ark. 260, 188 S. W. 805; *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398.

The judgment must be reversed for another reason. Proof of the fact that a fly was found in the bottle, and that flies do carry the germ of the disease from which appellee is suffering, does not suffice to support the verdict. It is mere conjecture that the fly found in the bottle was a carrier of the germ and had communicated the disease to appellee. The only definite proof upon the contamination of the drink is to the effect that no parasites were found therein, and while it may be true that this test was not conclusive the fact is that it is the only testimony upon that issue of fact, and it is mere surmise and conjecture to say that the portion of the drink consumed by appellee was in fact tainted and infected with a germ which caused the disease, while the remaining portions of the drink were not.

The judgment must be reversed as the testimony does not support the finding that appellee's illness was caused by the presence of the fly in the bottle; but if there was other damage compensation for that damage, alone, may be recovered. The judgment is reversed, and the cause remanded.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD. *v.* SIMMS COMPANY.

4-4748

Opinion delivered October 11, 1937.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Gaughan, Sifford, Godwin & Gaughan, for appellees.

BAKER, J. A judgment was rendered in the circuit court of Ouachita county against the appellant for $1,003, upon an alleged breach of a policy of employer's liability insurance issued by the appellant in favor of the appellees.

It was alleged that two former employees, H. B. Blackwell and Leon V. McAdoo, instituted separate suits against appellees to recover damages alleged to have been suffered by reason of the negligence of the appellees. Notice of these suits was given to the appellant company with the request that it defend the actions then pending in the circuit court, in accordance with the contract or policy of insurance. The appellant company declined to take upon itself the defense of the suits, and, thereafter, appellees defended the suits and judgments were rendered for $500 in favor of Blackwell, and $200 in favor of McAdoo. This suit was, then, instituted by the appellees against the appellant for the recovery of

the amounts so paid, and in addition for attorneys' fees and costs incurred, together with interest, and from a judgment in favor of the appellees comes this appeal.

The whole controversy is presented to us upon an agreed statement of facts or stipulation, copy of which follows:

"Agreement

"It is hereby stipulated and agreed by and between the plaintiffs, Simms Company and Simms Oil Company, acting through their attorneys, Gaughan, Sifford, Godwin & Gaughan, and the defendant, Zurich General Accident & Liability Insurance Company, Ltd., by its attorneys, Buzbee, Harrison, Buzbee & Wright, that the following stipulation as to the facts in the above and foregoing case may be treated as true, with the right reserved in favor of each party to introduce any additional competent testimony not inconsistent with the following facts, and with the further specific right reserved in favor of the plaintiffs to object to the incompetence (for any reason) of any portion or all of paragraph No. 6 herein:

1.

"The defendant issued a contract of insurance commonly known as an employer's liability policy in favor of the plaintiff, Simms Oil Company, the predecessor of plaintiff, Simms Company; that the said Simms Company succeeded to all the rights of its predecessor, Simms Oil Company, and assumed all its liabilities; and that said policy or contract of insurance was in full force and effect at the time that H. B. Blackwell and Leon V. McAdoo claimed that they received injuries while in their employment with the Simms Oil Company, which will hereinafter be referred to as the assured.

2.

"Due notice of the claims presented by the said Blackwell and the said McAdoo was given to the defendant, and the defendant refused to handle the claims or defend the actions brought by Blackwell and McAdoo, on the ground that the claims so made by them were based on occupational diseases, and were not covered

by the policy. Actions were instituted by Blackwell and McAdoo respectively against the assured, which resulted in a judgment in favor of Blackwell in the sum of $500, and a judgment in favor of McAdoo in the sum of $200. The assured paid both judgments, together with the costs accrued by reason thereof, and such judgments have been satisfied and so indicated on the record by the attorneys for the plaintiffs in those actions. In addition to the payment of said judgments, the assured also incurred costs and attorney's fees in the amount of $137.30 in the Blackwell case, and $117.95 in the McAdoo case. If the plaintiffs in this action are entitled to recover, the total amounts will be the sums of $637.30 in the Blackwell case and $317.95 in the McAdoo case, or a total of $955.25, with interest at the rate of 6 per cent. per annum from and after February 28, 1936, until paid; and it is agreed and understood that the costs and attorneys' fees in said actions above mentioned, were reasonable and incurred in good faith.

3.

"Blackwell brought suit against the assured because of the alleged negligence of the assured, in the following particulars, to-wit:

" 'The plaintiff's injuries were due to the carelessness and negligence of the defendant, Simms Oil Company, its agents, servants and employees, in exposing him to said coke dust, dust-laden air and poisonous, noxious and deleterious vapors, fumes and gasses, consisting of carbon dust, carbon monoxide and hydrogen sulphide over a long period of time, which finally in March, 1934, resulted in totally and permanently injuring the plaintiff's lungs.'

4.

"McAdoo brought suit against the assured because of the alleged negligence of the assured in the following particulars, to-wit:

" 'That said defendant company was negligent and careless in that they failed to furnish the plaintiff a reasonably safe place in which to do his work, and sent him into the tanks, stills, tubes and other machinery for

the purpose of having said plaintiff clean out and clean up said machinery, without furnishing him with a gas mask or any other protection from the poisonous fumes and vapors that arose from the refuse gases and other substances that gathered in said tanks, tubes, stills and other machinery of said refinery. That said defendant company well knew the danger of said gases, vapors and other fumes, or could have known by making an inspection, and that said carelessness and negligence was the direct and proximate cause of plaintiff's injuries as herein alleged.'

5.

"The insuring clauses of the policy issued by the defendant are as follows:

"Insuring Clause

" 'In consideration of the premium herein provided and of the warranties herein made the Zurich General Accident and Liability Insurance Company, Limited, (herein called the company) does hereby agree with the assured, respecting bodily injuries, or death at any time resulting therefrom, including instantaneous death, accidentally suffered or alleged to have been suffered, during the policy period defined in special condition 7, by any employee or employees of the assured, while engaged in the assured's business operations described in special condition 5, at the places mentioned in special condition 4, as follows:

" 'Agreement 1—Damages.

" 'To indemnify the assured against loss from the liability imposed by law upon the assured for damages.'

6.

"On February 20, 1935, the agents of the defendant, Marsh & McLennan, wrote to the secretary of the assured and offered to add an indorsement, upon the payment of an additional premium by the assured, known as occupational disease coverage, to the employer's liability policy herein. This coverage was declined by the assured. The insuring clause of the said occupational disease indorsement is as follows:

" 'In consideration of an additional premium computed as explained herein, it is agreed that the insurance provided under paragraph one (b) of the agreements of the policy to which this indorsement is attached is hereby extended to indemnify this employer against loss by reason of the liability imposed upon this employer by law for damages on account of occupational disease suffered by any employees covered by the said policy necessitating cessation of work during the policy period, including death at any time resulting therefrom, provided such occupational disease shall have arisen out of this employer's operations covered by the said policy, subject, however, to the limits of liability hereinafter stated.

" 'With respect to the extension of coverage provided by this indorsement, the word, "accident" and the word "injuries," wherever used in the said policy, shall be construed to include occupational disease as hereinbefore defined.'

"It is agreed that Blackwell claimed he was injured in March, 1934, and McAdoo claimed he was injured in July, 1934.

"While plaintiffs agree that on February 20, 1935, the agents of the defendant wrote a letter offering to write an indorsement above set out, plaintiffs object to the competency, relevancy and materiality of the said letter, and to the said indorsement.

"The foregoing clauses in paragraph 5 are the only ones involved in the policy which was issued to the assured."

It will be observed from the foregoing stipulation, as to the facts upon which the judgment was rendered, that the plaintiffs in the original suits against the appellees alleged that they were exposed to noxious, poisonous gas and dust-laden air that caused damage to their lungs. McAdoo alleged that for hours at a time he breathed gases which were present about the machinery that he cleaned. The allegations contained in Blackwell's complaint are set forth in paragraph "3" of the stipulation showing that he had breathed fumes, gases, carbon monoxide and hydrogen sulphide over a long period of

time, and that this resulted finally in March of 1934 in permanently injuring his lungs. Both of the original plaintiffs against the appellees alleged a breach of duty in failing to use ordinary care to provide a safe place in which to work. The appellant here relies upon the facts as developed in the agreed statement of facts, as showing that the two plaintiffs who sued the appellees were suffering from occupational diseases for which there could be no recovery at common law, and that the policy of insurance to indemnify the appellees was not sufficient to cover this alleged liability. Therefore, the two principal propositions are urged to reverse the trial court's action. The first is to the effect that the servants of appellees suffered from occupational diseases for which there was no recovery at common law, and the second is the policy of insurance sued on did not cover the liability adjudged against the appellees in the former trials.

The appellant presents a very interesting proposition in relation to occupational diseases. It will be observed that these occupational diseases are not defined or covered by any stipulation of fact, but the argument is made that the conditions as alleged in the original complaint, copied in the stipulation, present as a matter of law the pathology and history of occupational diseases. Numerous authorities are cited in that regard, some of which we will consider in relation to the testimony furnished us by appellant.

We have just examined appellant's authority, *Associated Indemnity Corp.* v. *State Industrial Acc. Com'n,* 124 Cal. App. 378, 12 Pac. (2d) 1075. Therein occupational disease is defined as follows: "An occupational disease such as that which is before us in the present proceeding (silicosis) is one in which the cumulative effect of the continued absorption of small quantities of deleterious substance from the environment of the employment ultimately results in manifest pathology; any one exposure to the deleterious substance is inconsequential in itself, but the accumulation of repeated absorptions is the factor which brings about the disease."

In that case we find that the employee had been at work for a period of fourteen years, the last three or four of which he cleaned rock-grinding machines with blower and waste, and was exposed to rock dust daily. About three years before the date of the hearing the applicant first noticed his breath getting short. This condition gradually progressed so that ultimately he could hardly handle a fifty-pound ladder. Finally he noticed pains in his chest and his condition required him to sit down and rest quite often. From then, on, he got gradually worse, the symptoms continuing the same, but more marked, except that in addition he noticed a dry hacking cough setting in.

A short definition is given in the case of *Adams* v. *Acme White Lead & Color Works,* 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283 Ann. Cas. 1916D 689.

"In occupational diseases it is drop by drop, it is little by little, day after day, for weeks and months, and finally enough is accumulated to produce symptoms."

The finding of fact in the last cited case was that during the period between December 18, 1912, and June 27, 1913, Adams was in the employ of the Acme White Lead & Color Works; that during said period, while in the course of his employment, he contracted an occupational disease, to-wit, red lead poisoning, upon the premises of the company; that on June 27, 1913, he died as a result of said disease. The announcement of the court in the case under consideration was "that the undisputed medical evidence shows that lead poisoning does not arise suddenly, but comes after long exposure. It is a matter of weeks or months or years, brought about by inhalation, or by the lead coming into the system with food through the alimentary canal, or by absorption through the skin.

Another definition is: "A diseased condition arising gradually from the character of the work in which the employee is engaged. It does not occur suddenly, but is a matter of slow development." *Peru Plow Company* v. *Industrial Commission,* 311 Ill. 216, 142 N. E. 546.

The announcement in this last cited case is to the effect that the applicant had worked for plaintiff in error for five years as a machinist, operating a lathe used in boring out or enlarging the inside of metal wheel hubs. Prior to that time he had been employed as a machinist in other shops and in the cement mills at Oglesby. The operation of the machine upon which he worked for plaintiff in error caused a fine metal dust to arise from the iron upon which he was working. The dust was sufficiently light to float in the air and was discernible in the sunlight. From this dust the clothes of workmen would turn yellow with rust. There being no appliances for the purpose of carrying this dust away, it was inhaled by the workmen. Medical testimony was offered in regard to the physical condition of the employee, a physician testifying in part that the condition of the employee's lungs was such as could be produced by a hard, cutting dust, which would irritate the mucous membrane, but that soft dust, such as coal, chalk, or cement would have little or no damaging effect. The question was whether the employee was suffering as a result of an accident or from an occupational or industrial disease.

Perhaps the most interesting case is that of *United States Radium Corp.* v. *Globe Indemnity Co.*, 13 N. J. Miss. 316, 178 Atl. 271. This case, the last one we will cite upon this matter, offers what is, perhaps, the typical occupational or industrial disease, and in addition a policy of insurance or indemnity contract containing, it is said, an identical insuring clause to the one under consideration. Most readers of newspapers remember that Helen Tuck was employed by the plaintiff and worked from May 29, 1917, until August 24, 1921, a little more than four years, in mixing certain luminous materials with adhesives, the mixture being commonly known as "radium paint."

She was applying said mixture to numerals and designs on watch dials and other objects, and she, as stated in the opinion, became affected with an occupational disease resulting from her employment, wherein she "ingested by mouth" the mixture known as "radium paint." It was not a question of whether she suffered an acci-

dental injury or if she was afflicted with an occupational disease. She pleaded or conceded the point and sought a recovery in damages for an occupational disease.

There are other cases of similar import, and perhaps of equal authority as the ones that we have cited, but we think that the foregoing are typical, thoroughly illustrative of what the courts have found and determined under certain facts and conditions to be occupational diseases. We have taken the trouble to call attention to the facts and conditions motivating or at least furnishing the basis to the courts' announcements wherein they have distinguished a certain class of injuries or afflictions arising in industry from which injuries the employees have suffered, and these have been classed as industrial or occupational diseases as distinguished from accidents. We have not attempted to state all the facts in any one of the cases, but we have stated salient matters as a basis upon which each announcement has been made as above set forth.

It appears that time is one of the essential elements in distinguishing what may in one instance be an accident or might in another result in the typical occupational disease, and there is no difficulty in determining the one typical case of accident and another typical case of disease incident to some particular occupation or work. The foregoing citations, however, show servants engaged for weeks, months, and, in some instances, years before they fell victims of the contaminated air and environment in which they had to live and breathe.

In these suits, wherein the appellees were sued, McAdoo filed his suit alleging that such injury was due to carelessness and negligence of the Simms Oil Company in that they failed to exercise ordinary care to furnish the plaintiff a safe place in which to do his work, but sent him into tanks, stills, tubes and other machinery for the purpose of having said plaintiff clean out said machinery. The length of time that McAdoo was so employed is not stated. It may have been for many weeks or months. On the other hand we are not prepared to

say, as a matter of law, that it was for any very extended period.

Blackwell's case was not essentially different. He alleges negligence in failing to use ordinary care in furnishing a safe place to work; that the exposure to coke dust, dust-laden air and poisonous, noxious, deleterious vapors, fumes and gases and hydrogen sulphide, over a long period of time, finally, in March, 1934, resulted in totally and permanently injuring the plaintiff's lungs. Apparently that statement "over a long period of time" might furnish a means for the settlement of the controversy as against Blackwell, but upon due consideration we are compelled to say that "a long period of time" is a very indefinite and uncertain statement. Perhaps if such statement were made by one who was suffering, the length of time would be measured by the intensity of his pain, his physical distress and the resulting conditions therefrom, also, by the actual or supposed danger and discomfort in a performance of labor under the conditions stated. None of these things are described with more certainty than above set out. No expert testimony as to the condition of either one of the two parties suing is offered and we are asked as a matter of law to state under the foregoing facts that the afflictions of the two parties suing the appellees are occupational diseases. What ever might be our impulse upon casual or superficial examination of these matters we feel ourselves influenced or governed by that time honored rule, that verdicts of juries and judgments of courts should be upheld when there is any substantial evidence to support them, and that for this purpose testimony should be considered in aspects most favorable to the appellee.

Therefore, from this viewpoint we suggest that it could not be reasonably controverted that if these employees had ever been injured upon the occasion of one or two daily periods of work, no one would hesitate to say that they were suffering as a result of accidents. On the other hand if there was an indefinitely long period of years in which they were engaged in their occupations and insidious diseases followed the occupation, as

a natural sequence of conditions, on account of the work done in foul air in which they were forced to labor, necessarily, the elements of an accident would not be present. We are not prepared to say in regard to these two cases where the line of demarcation should be drawn to define the limit, under the conditions stated, that one must be employed in order that his affliction be classed or termed an occupational disease. On that account, we cannot say that the court, as a matter of law, committed an error in finding against the appellant in that regard.

The remaining question for consideration is the effect of the policy of indemnity insurance. That gives us no real concern since the question of liability must be determined, as we think, in this matter upon appeal, by the facts rather than upon a construction of the insurance contract. We have already copied in the stipulation the insuring clause. It is unnecessary to repeat it. We do not take time or occasion to cite numerous authorities to the effect that insurance policies, if ambiguous, will be construed most favorably for the insured and against the insurer. We do not hesitate to say that if there was liability of the appellee companies for the bodily injuries, for which they sued, the policy might well be construed, without doing violence to any part thereof, as sufficient to indemnify the insured. There is no question that these matters arose during the life of the policy. The serious proposition is that it is contended the two afflicted employees did not suffer their bodily injuries accidentally, but the insurance contract is even broader than that. The insurer agrees to indemnify for bodily injuries alleged to have been suffered during the policy period defined in special condition 7, by any employee or employees of the assured, while engaged in the assured's business operations described in special condition 5, at places mentioned in special condition 4.

What those special conditions are we do not know. But under "Agreement 1—Damages" is the contract to indemnify the insured against loss from the liability imposed by law upon the assured for damages.

Appellant argues forcefully that in 1935 their agents offered to the insured, for an additional consideration or premium, to add an indorsement upon the policy known as "occupational disease coverage," and that this should be considered by us and to aid us in the interpretation of the policy to the effect that it did not have an occupational disease coverage prior to that time. This offer was refused. This fact, even if admitted, does not possess that attribute of proof.

It may explain appellant's position at that time, but it does not bind the appellees who thought otherwise, and who regarded their prospective losses by reason of damages as fully covered by the policy as written.

We think the position of appellant is very similar to that of the insurer in the case of *Life & Casualty Insurance Co. of Tenn.* v. *Barfield,* 187 Ark. 676, 679, 61 S. W. (2d) 698. Thereunder, liability is indicated, and appellant has not met or produced that measure of proof to establish the exception.

Gwaltney worked a week in oil and slush and suffered oil poisoning in his feet. Just how long he must have worked under the same conditions to have been deemed a victim of occupational disease and to have thereby freed his master from liability we cannot determine as a matter of law. *Standard Pipe Line Co.* v. *Gwaltney,* 186 Ark. 230, 53 S. W. (2d) 597.

It follows we could not, for the same reasons, say just when the insurer in such case would cease to be liable. But ordinarily if there was liability of the insured, the insurer must respond.

Judgment affirmed.

GRIFFIN SMITH, C. J., and MCHANEY, J., dissent.

GRIFFIN SMITH, C. J. (dissenting). While it is true that this case was tried upon an agreed statement of facts, and there is no testimony abstracted showing how long appellees had been exposed to conditions they allege occasioned their disabilities, yet it is clear they were not peremptorily coerced into unsafe places with respect to which they were strangers. On the contrary, they had been working from day to day at assignments with which

they were familiar, using tools or appliances ordinary to the employment, in circumstances common to the occupations.

Appellant's policy insured against "bodily injuries *accidentally* suffered." Sickness from any cause may be said to result in bodily injury, and by the same logic sickness is usually accidental, for there are few indeed who intentionally embrace a physical malady.

Though the liability judicially imposed upon appellant in the instant case does not depart far enough from accepted constructions to convert *all* accident insurance into policies guaranteeing health against disease in any of its forms, it seems to me that the majority opinion, though excellently written, takes liberties with the contract which have the effect of creating a liability where none existed.

I am authorized to say that Mr. Justice McHaney concurs in this dissenting opinion.

State ex rel. Herbert Lewis, Sheriff *v.* Allen.

Criminal 4049

Opinion delivered October 11, 1937.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellant.

BUTLER, J. The appellee, H. M. Allen, was charged in the state of Kansas, with the crime of obtaining property and cheating by false pretenses as defined by the laws of that state. Allen was arrested by the sheriff of Washington county, Arkansas, on application of the Kansas authorities and in due time a requisition was issued by the Governor of Kansas and honored by the Governor of this state. At this stage of the proceeding, a petition for writ of *habeas corpus* was filed with the judge of the Washington circuit court and a writ issued directed to the sheriff of the county in the usual form. A response was filed and a hearing had upon the petition and response. The trial judge found that there was no evidence that the petitioner was a fugitive from justice from the state of Kansas and ordered his discharge. From that order an appeal was prayed and prosecuted to this court.

The appellee has filed his motion to dismiss the appeal on the ground that the case has not been properly brought to this court for review, in that the proceeding should have been by writ of certiorari and not by appeal. We overrule this motion. The proceeding has brought the entire record to this court and it is immaterial whether that proceeding be denominated certiorari or appeal. *State* v. *Hudspeth,* 191 Ark. 963, 88 S. W. (2d) 858, as it will be treated as proceeding by certiorari.

The charge against the appellee is that he obtained the sum of $43 in Kansas on the false representation that he had authority to draw a certain check and sign the name of his employer to it, and that it would be paid when presented. At the hearing on the petition, appellee introduced evidence to the effect that he is a citizen of this state, residing at Springdale in Washington county; that he was engaged in driving a truck for the Lindley Truck Company; that at the time of his alleged offense he was driving said truck in the state of Kansas; that it became necessary for him to purchase a tire for the truck, which purchase was for the benefit of the

truck company by which he had been employed for approximately three months; that at the time he gave the check he had the truck with him and had no interest in the purchase of the tire except to further the interests of his employer. The seller of the tire made inquiry as to appellee's authority to make the purchase and he thought he had it because some of the other drivers had done so before. When appellee returned to Arkansas he had some dispute with his employer. He was thereupon discharged and the truck company refused to honor the check he had given. The tire was then on the truck. There was further evidence to the effect that the appellee's employer sent the tire back to the seller.

If the circuit judge had authority to consider the petition, *Stewart* v. *Johnson,* 192 Ark. 757, 94 S. W. (2d) 715, it could have been only for two purposes; first, to establish the identity of the prisoner; and, second, to determine the question of whether or not he was a fugitive. These questions are primarily for the Governor of the asylum state and, where the requisition shows the necessary facts to entitle the demanding state to the return of the alleged fugitive, the two questions stated are the only ones to be considered. The evidence submitted did not relate to either of these questions, but was to the effect that the petitioner was innocent of the crime charged.

In *Appleyard* v. *Massachusetts,* 203 U. S. 222, 27 S. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073, it was held that where a person is properly charged within a given state with the commission of an offense in that state, covered by its laws, and, who, after the date of the commission of the alleged offense, leaves the state, he becomes a fugitive from justice within the meaning of the provisions of the federal Constitution [Const., Art. 4, § 2; 18 USCA, § 662], and laws relating to extradition regardless of the purpose or the motive, or under what belief he leaves the demanding state, even though at the time of leaving he had no knowledge or belief that he had violated its criminal laws, and did not consciously flee from justice in order to avoid prosecution for the alleged crime. The Governor of

Arkansas, by his act in honoring the requisition, found that appellee was a fugitive from justice. In this state of the case the rule seems to be that before he would be entitled to a discharge by court order, the evidence would have to be practically conclusive in his favor. *Keeton* v. *Gaiser,* 331 Mo. 499, 55 S. W. (2d) 302; *Munsey* v. *Clough,* 196 U. S. 364, 25 S. Ct. 282, 49 L. Ed. 515.

The appellee's evidence conclusively establishes the fact that the transaction which is alleged to have been a criminal offense in Kansas was committed there, and that afterwards he left the state of Kansas and came to Arkansas and was a resident of this state when arrested. Therefore, under the rule announced in *Appleyard* v. *Massachusetts, supra,* he was a fugitive from justice within the meaning of the requisition laws. The question of his guilt or innocence is one to be determined on a trial of the charge in the demanding state and the judge erroneously granted the prayer of the petition. His order is accordingly reversed, and cause remanded with directions to dismiss appellee's petition and remand the appellee to the custody of the sheriff.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY, INC. *v.* HITT.

4-4736

Opinion delivered October 11, 1937.

Barber & Henry and *John B. Thurman,* for appellant.

Frankel & Frankel, for appellee.

GRIFFIN SMITH, C. J. This appeal is from a judgment rendered on a verdict of nine jurors who found for the plaintiff on a complaint filed November 23, 1936. Plaintiff-appellee alleged that on November 1, 1932, appellant issued to him its policy of insurance, under the terms of which the assured was entitled to $20 per week in the event he became totally disabled. It is alleged that appellee became totally disabled on March 1, 1933; that on March 12 he was paid $120, and again, on May 5, 1933, was paid $140, such payments being the amount due for thirteen weeks of disability; that by reason of wrongful information and misrepresentations regarding his physical condition, he was induced to surrender the policy on May 5th, at the time payment of $140 was made; that the wrongful information was given and the misrepresentations made by appellant's agent and physician; that appellee has been unable to perform his duties from March 1, 1933, and has remained totally disabled during the contract period of the policy; that he was confined to his bed and was unable to walk without the aid of a cane or the assistance of some one; that from March 1, 1933, he has been suffering from arthritis, a stiffness of the spine, and heart trouble, and is still so disabled. The judgment was for $1,800, covering 90 weeks of disability in addition to the payments previously made; an attorney's fee of $250; penalty of $216; and interest at 6 per cent. on $1,800 from March 11, 1935, to the date of judgment, amounting to $219.90 —a total of $2,485.90.

In testifying as to his condition and the circumstances attending settlement with appellant, appellee said:

"Prior to February, 1933, I was in perfect health, but about February 25, 1933, I went to the Veterans' Bureau and was advised to go to the hospital. I became ill with pains in my back, hernia and fistula, and had to go to bed and wasn't able to go to the hospital. Between February, 1933, and up to date, I have continuously taken sedatives which in a good many cases eased my pain, and at the same time dulled my mind and left

it in a daze. In February, 1933, I was working for the National Life & Accident Insurance Company. This company wrote a group policy on its employees and I was covered by this policy, paying half the premium and the company paying the other. I was given a certificate of insurance providing for $20 a week for one hundred and four weeks total disability. I have another policy with the company and at the time it was issued I was examined by Dr. Jobe.

"At the time I became totally disabled, around March 1, 1933, Mr. McAllister, the superintendent, and Dr. Jobe came out to see me, and Mr. McAllister kept trying to get me to make a lump sum settlement. The company paid me for six weeks. I imagine Mr. McAllister suggested having Dr. Jobe come out. I met Dr. Jobe when he was working for the company. Dr. Jobe had examined me before I went with the company, and was representing the company. Dr. Jobe would examine applicants for the company. I can't be sure whether I called Dr. Jobe or Mr. McAllister brought him along, but am of the opinion Mr. McAllister brought him or sent him out. I did not receive a bill from Dr. Jobe. Dr. Jobe told me I had colitis and the rest was more mental than anything else. During this time the company was trying to settle with me and I settled about May 5, 1933. Dr. Jobe was the company's physician and I had confidence in Mr. McAllister and took their word there would not be anything wrong. If I had thought I was totally disabled I wouldn't have accepted the $140. I had seen Mr. McAllister on several occasions and Mr. McAllister said if there was anything wrong the company would take care of me. I surrendered the policy and stayed in bed until around the middle of July, then began to drag along a little. Would complain about these different ailments, but they would say it was only my mental attitude. I made this settlement on that account. If I had known I was totally disabled, I wouldn't have made the settlement. I had been in the insurance business a long time and made the settlement because I had been sick for a long time and my

wife and children needed food and I had to take medicine and medicine cost money, and, as I had been sick, we didn't have any money.

"The last part of August, 1933, I went to work for the Reliable Life & Accident Insurance Co., carrying a debit. I spent one-half of my time at work, the other at home, working there until December, and I played out again. I worked as a bookkeeper for the County Relief Office from January to April, 1934. Mr. White did most of my work. I was suffering continuously, but couldn't go to bed, as I had to take care of my family. In April I went on the road and tried to sell magazines. I was out about one-half the time. I did this until about September. In September, 1934, I went to work for the Life & Casualty Company. One of its agents helped me to do my work. In the latter part of August, 1935, until November, 1935, I went with the Union Life, doing the same work. One of the agents helped me do my work. I was not able to do all of the substantial things which I had done with the National. My physical condition was getting worse all the time. I worked until November 30th and had to go to bed. Dr. S. F. Hurle treated me regularly every week or two. From 1933 to 1935 I thought I would get well. I was taking drugs when I made the settlement. About December 6, 1935, I went to the Veterans' Bureau where I had my tonsils taken out. I stayed there thirteen or fourteen weeks. I had a hernia, but my physical condition would not permit an operation. A few months after the tonsil operation, my neck and back was practically ossified. I have the same pains now as I had in 1933. I learned I was totally disabled in March, 1936. I am now drawing $30 a month from the Government as total disability. I surrendered the National Life & Accident Company policy because of the fact they misrepresented my condition. McAllister and the company doctor both said I would be all right, that it was my mental condition. If I had thought I was totally disabled, I would never have turned the policy loose. I now spend part of my time in my wife's news stand, mostly looking after the finances."

The compromise check indorsed by appellee was introduced. It bore the indorsement: "In full settlement of claim under Certificate No. 3894, Employees' Insurance."

If, in fact, appellee's total disability dates back to May 5, 1933, and settlement under the policy was induced through erroneous information given appellee by Dr. Jobe at a time when the physician was acting for the company, or by the fraudulent conduct of Superintendent McAllister, this appeal should be affirmed.

Four subjects of primary importance were included in the proceeding: (1) Whether appellee was totally disabled at the time indicated; (2) Whether the disease occasioning such disability is the same disease now complained of; (3) Whether appellee knew what his real condition was, or as a reasonable person should have known; (4) Whether [assuming that the total disability now complained of did exist in May, 1933] appellee, with knowledge of disability, voluntarily settled with appellant and surrendered the certificate; or, being disabled, and such disability having been continuous, was appellee imposed upon by appellant's agents and induced through fraudulent representations or erroneous statements to enter into a compromise which yielded compensation for the relatively insignificant sum?

As was said in *Sanders* v. *Berry,* 139 Ark. 447, 214 S. W. 58, "The law requires good faith in every business transaction, and does not allow one party to intentionally deceive another by making false representations or by concealment." In *Lone Rock Bank* v. *Pipkin,* 169 Ark. 491, 276 S. W. 588, we said: "If the means of information as to the matters represented is equally accessible to both parties, they will be presumed to have informed themselves; and, if they have not done so, they must abide the consequences of their own carelessness."

Tested by this rule, and because of the indefinite nature of appellee's evidence as to what representations were made to him by McAllister, and in view of appellee's own experience as an insurance agent, it must be held that appellee was not justified in relying upon ex-

pressions of opinion by a layman. In short, appellee, with respect to his own physical condition, will be presumed to have been as well informed as McAllister, and no fraud can be predicated upon what appellee says McAllister told him as to the nature and extent of the disability. On the contrary, appellee volunteered the information that in February, 1933 — approximately three months before the conversations—he went to the Veterans' Bureau and was advised to go to a hospital. Appellee says that the pains he is now experiencing are "exactly the same, or worse," than those complained of in 1933, but he did not learn that he was totally disabled until about March, 1936.

To determine whether the settlement should be set aside, we must scrutinize the conduct and determine the status of Dr. Jobe—this for the reason that in numerous cases we have decided that an injured person will not be held to the terms of an improvident settlement where such person relied upon information supplied by a physician acting for the offending agency, which information or diagnosis was subsequently shown to have been incorrect, though made without fraudulent intent.

This case, therefore, turns upon whether Dr. Jobe, in making the examinations of appellee and advising with him, was the agent of appellant.

At the time Dr. Jobe was offered as a witness for appellant, appellee's attorney made this objection: "If Dr. Jobe is Mr. Hitt's physician, we object to his testimony." The court then remarked: "It is a question of whose physician he was. I thought you (appellee) contended he was the company's physician," to which appellee's attorney replied: "He can't testify to anything he did for Mr. Hitt."

From this colloquy it will be seen that appellee claimed the right to testify to what Dr. Jobe had told him, but insisted that appellant did not have a right to use the doctor as a witness for the purpose of testifying *to anything he did* for appellee, although, at least inferentially, he was conceding that the doctor might testify as to conversations. This would create a somewhat

anomalous situation, inasmuch as exclusion of the testimony could only be based upon the confidential relationships with which the law clothes physician and patient.

Appellee testified he was not sure that Dr. Jobe called upon him at his (appellee's) request, or whether McAllister brought the doctor along, but he was "of the opinion McAllister brought or sent the doctor." The company required as a condition precedent to employment that all agents should submit to a physical examination, and before or at the time appellee went to work for appellant he was examined by Dr. Jobe. He also carried another policy of insurance with the appellant company, as to which there is no controversy here, and Dr. Jobe made examination for the company incident to such policy. Appellee further testified that he worked for the Union Life Insurance Company after severing his connections with appellant, and continued in the latter employment until November 30, 1935.

"Q. Did you have a physician or medical attention during that time? A. Yes, sir.

"Q. Who were your physicians? A. I had Dr. Jobe and Dr. Hurle, and Dr. Hogue had a laboratory test for Dr. Jobe around April, 1933, I think."

Appellee remained in the Veterans' Hospital from December 11, 1935, until August 25, 1936.

Dr. Jobe testified positively that he was called by Mrs. Hitt; that he was not employed by appellant to treat or advise with appellee, and that his bill had been charged to Mr. Hitt, as reflected by his books.

We are of the opinion that there was no substantial testimony to sustain appellee's contention that Dr. Jobe was appellant's agent for the purpose of advising with appellee as to the status of his health on May 5, 1933.

Chronological sequence of appellee's activities is highly persuasive of appellant's contention that there was no intentional or careless deception. After accepting the settlement, appellee, during the latter part of August, 1933, went to work for the Reliable Life & Accident

Insurance Company, and continued with the company until December. In January, 1934, he secured employment as a bookkeeper in the Pulaski County Relief Office and worked until April, then went on the road selling magazines until September. He was subsequently employed by the Union Life Insurance Company. In 1934 he applied to the Mid-Continent Life Insurance Company for insurance and in the application stated that he was in good health. Appellee explained this by saying the state manager of the Mid-Continent was a friend of his and needed some additional business, and he signed the application to help the agent, but did not know what representations were made as to the condition of his health.

In 1935, while appellee was working for the Union Life Insurance Company, he was issued two life insurance policies, based upon applications made out entirely in his own handwriting. In the applications, appellee said that he was in good health, and had not consulted a physician within the past two years.

J. M. Hester, manager of the Reliable Life Insurance Company, testified that appellee was employed by his company in July, or the last of June, 1933, as agent. His duties were to solicit new business, collecting on a regular debit, and adjusting claims; that appellee worked regularly until the last of December; that the work required a great deal of walking, and appellee performed his duties. Appellee quit of his own accord and did not mention total disability.

N. E. Blasingame testified that he was formerly an agent for the Life & Casualty Company; that appellee went to work for that company on September 8th or 10th, 1934, and worked until July, 1935, writing business and paying claims. "I was in the office with him each day, and, as far as I know, he performed the services of an agent during the time he was with the company. I couldn't say I heard him say he was disabled, as he did his work. I did hear him mention being sick a time or two in the office several times, but didn't observe him lose any time from his work."

Clifford Jordan, manager of the insurance department of Union Life Insurance Company, testified that he employed appellee, who worked for the company from August, 1935, until December, and "during that time he worked regularly and I have no recollection of hearing him complain of suffering any illness or disability." The witness testified that as agent appellee had authority to take applications for insurance. The applications made out by appellee, wherein he applied for insurance on his own life, were introduced by the witness, one for $500 bearing date of August 26, 1935, and one for $300 having been written subsequently. The company accepted at face value statements by the applicant that he was in good health and had not consulted a physician within two years, and policies were written. Referring to one of the applications, the witness testified: "This is the original, and was written entirely by Mr. Hitt and signed by him. He did both. From July, 1935, until December, he worked regularly for the company."

Dr. J. R. Wayne testified that he had known appellee for less than a month. Examined him March 2, 1937, and found him suffering from arthritis, with deformity in the neck and back; heart not compensating properly. "He has arthritic condition of his back and complained of a pain in the abdomen with colitis. Has crepitus. Mr. Hitt may have been totally disabled since March, 1933. It can vary. It can come on in a short period of time and a longer period of time. Arthritis sometimes begins in childhood. It can go back quite a length of time or it can come on within a reasonable time. The infection has usually extended over a period of many years and usually in later life the deformity comes on. You can have acute arthritis within a period of a few months. When you get calsification, as appellee has in his neck and spine, that is over a period of a good many years."

In *Jarrett* v. *Langston*, 99 Ark. 438, 138 S. W. 1003, we said: "To be fraudulent, representations must be made by one who either knows them to be false; or else, not knowing, asserts them to be true, and made with

intent to have the other party act upon them to his injury, and such must be their effect."

Corpus Juris, vol. 26, p. 1131, states the following rule as to fraud: "An honest but erroneous expression of opinion or belief is not fraud. Since a statement concerning a matter not susceptible of exact knowledge by the speaker is no more than expression of a belief, one making such a statement in good faith is not liable for its falsity. The rule may apply, although the statement was made in terms of positive personal knowledge, the test being the character of the facts asserted to be true rather than the form of the assertion."

A recent decision by the Circuit Court of Appeals for the Eighth Circuit, *Pacific Mutual Life Insurance Co. of California* v. *Jacob,* 87 Fed. (2d) 870, held that a mutual mistake of the insurer and the insured as to probable future duration of insured's disability would not justify cancellation of an agreement compromising and settling claim for disability benefits and cancelling disability clause of a life policy.

This court held in *Phoenix Utilities Company* v. *Smith,* 185 Ark. 587, 48 S. W. (2d) 238, that a release is not binding on the releasor where the physician of the party responsible for an injury represents to the injured person that his injuries are temporary when in fact they are permanent, and where the injured person executes a release relying upon the statements of such physician.

In that case the appellee, plaintiff below, sustained a serious injury, and was treated at his home by a physician furnished by the Phoenix Utilities Company. Later he was taken to a hospital and operated upon. Nine days after the operation the company's adjuster visited appellee at the hospital for the purpose of settling any claim for damages. Appellee stated that he was not ready to settle, and would not do so until he had consulted his doctor. The adjuster then suggested to appellee that he see his doctor, and stated that he would return the following Friday. On the day this conversation was had, the doctor who had performed the operation under employment by the company called

on appellee at the hospital. Appellee told the doctor that the adjuster had called, and said, "I would like to know how long it will be before I will be able to go to work." According to appellee's testimony the doctor replied, "You will be able to go back to work in three months. You will be just as good as you ever were, or maybe stronger." Based upon this and corroborating testimony as to representations made by the doctor, this court affirmed a judgment for $3,000, the effect of which was to set aside the settlement, made for $400. The opinion contains this statement: "There is no contention that Dr. Tribble intentionally deceived appellee or practiced any fraud upon him, but the testimony supports appellee's contention that he relied upon the doctor's opinion as to his recovery, and that the doctor was mistaken in his prognosis."

This declaration of the law has been consistently followed, and the justness of its application to that class of cases which come within the rule cannot be seriously questioned.

Appellee, in the case at bar, was in no sense inexperienced. For eleven years he had been employed by insurance companies, and he must have understood the business and the reasons for and effects of settlements. "Disability" was not a term unknown to him, and the degree of physical impairment required to establish liability under the terms of a policy or certificate such as he carried necessarily was discussed by him on many occasions with claimants against companies he represented.

After settling with appellant, more than three years elapsed during which no premiums were paid on the policy because he regarded the transaction as closed, admitting no liability to the company, and claiming none from it to himself. He repeatedly consulted physicians, as reflected by his own testimony. He was again employed in the same kind of business, and the record indicates that he quit of his own accord. His services had not been complained of, nor was there a showing other than by appellee's own testimony that he was not able

to perform all of the essential duties required of one in his profession.

The verity of appellee's testimony is open to question. He declared, in making application for insurance in the Mid-Continent Company, that he was in good health, but explained that he signed the application in order to help a friend "make a showing." The effect of this transaction was to perpetrate a fraud upon the insurance company. This is lightly brushed aside with the inference that such practices are frequent. In 1935 appellee was still representing himself to be a well man, and applied for two policies of insurance in another company. His statements then made as to the condition of his health may have been mere expressions of opinion, but the additional assertions that he had not consulted a doctor within two years, being untrue, go vitally to the question of his credibility.

There being no substantial evidence upon which the jury could have based a finding that Dr. Jobe was appellant's agent at the time in question, the judgment must be reversed, and the cause dismissed. It is so ordered.

MEHAFFY, J., concurs.

SIMS *v.* STATE.

Crim. 4054

Opinion delivered October 18, 1937.

McDaniel, McCray & Crow, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

HUMPHREYS, J. On information, in due form, of the prosecuting attorney of the seventh judicial district of Arkansas appellant was tried and convicted of murder in the first degree in the circuit court of Saline county for unlawfully, feloniously, maliciously and with premeditation and deliberation, killing his wife on the 9th day of May, 1937, with a double-bit ax.

From the judgment of conviction appellant has duly prosecuted an appeal to this court, arguing six assignments of error contained in his motion for a new trial as grounds for reversal of said judgment.

The first assignment of error argued is that the evidence is insufficient to sustain the verdict.

The evidence reflects that appellant had been convicted of transporting a stolen automobile across the state line and that he was sentenced for three years and after serving seventeen months of his time was released and returned to Traskwood where his wife and other relatives lived.

After returning, he lived with his wife in peace and harmony, but he drank excessively and got drunk frequently.

Appellant pleaded as defenses that he did not kill his wife, and that if he did, he was in a drunken condition and did not know what he was doing. There is evidence in the record tending to show appellant was insanely

drunk on the day his wife was killed, and, also, tending to show that he was sober on that day. The murder was committed between six and eight o'clock on Sunday, the 9th day of May, 1937. Grant Baker testified, in substance, that he was with appellant about 1:30 o'clock in the afternoon and was talking with him about his brother. He saw him again about 1:30 or 2 o'clock in the afternoon in Winter's store when he came back from dinner. He saw him again about 8:15 o'clock in Winter's store. Appellant asked for a cigarette paper and made a cigarette and lighted it. He said that he had killed his wife or guessed he had. He said that liquor was the cause of it and for us to beware and take warning. He told us goodbye and shook hands with us. He said he was going away; that he would not see us any more; that he would be dead. He said for us to throw his body in a hole. Witness saw him again about nine o'clock at the saw mill of Mr. Mobley. He had a pint bottle of whiskey in his hand. Witness went to Benton with him. Just before they started appellant was crying and witness asked him why he did it and he said "I didn't want to go back up to the federal penitentiary and I just went blank." He said that his wife told him that if he did not quit drinking he would have to go back to the federal penitentiary and that at that time he went blank. Appellant seemed to know what he was doing when he was talking to witness. He said that whatever he had done, liquor was the cause of it.

Charlie Covington, step-father of appellant, testified that on Sunday afternoon, May 9, 1937, he saw appellant down town. He saw him again about dusky dark. Appellant came over to witness's house and Ora Sims, his wife, was there. She had only been there a few minutes. She was on the back porch and appellant said, "Yes, you run off from me." Witness told him to let her alone, but appellant took her by the arm and jerked her off the porch. She got up and walked out to the back gate and witness and his wife followed them and tried to get him to let her alone and go straight, but he would not pay any attention. Witness and his wife caught up with him and told him again to let her alone; that wit-

ness wanted to talk with him when he got straight and told him that he ought to go home and go to sleep. He was wild looking and crazy looking—whatever you might call it. Appellant said, "I am not going back to Fort Leavenworth." He then went on and did not know what happened. Witness went on to see about calling an officer. When he got something like a quarter of a mile away he heard a scream. He did not know who it was. It took witness about fifteen minutes to make the round trip and when he got back he found appellant's wife lying on the ground. An ax was exhibited to witness and he said that it was his ax, but that it had been over at appellant's house. It was a woman he had heard screaming. When witness returned appellant was not there and he did not see him until three or four days afterwards.

Mrs. Lilly Ray testified that she lived about three or four hundred feet from witness's home. In going to the depot Sunday evening, she saw appellant and his wife. They were walking up and down arm in arm, like anyone would, and were going toward their home. When witness returned she heard screaming and went toward appellant's home, and discovering that some trouble was on she ran away screaming for help. A man at Winter's store heard her and came running and they went to appellant's home and found appellant's wife lying at the gate. She saw a lot of blood and recognized the body as being that of appellant's wife. At the time she heard the screaming it was about five minutes after eight o'clock p. m.

Jason Couch testified that he got word appellant had killed his wife, and went to the telephone to call Mr. Rucker and Mr. Ashley. He saw appellant standing in the road talking to Mr. Mosely, and said he was going to have the whiskey or tear up the God damn place. As he walked up, appellant said, "Isn't that Jason?" Mosely told him yes. Witness had a conversation with appellant and appellant asked him if he had called Mr. Rucker and he informed him that Mr. Rucker was not in town. Appellant said he would die and go to hell before he would go back to Leavenworth. Witness asked him what in the world he had done, and he said he guessed he had killed

his wife. Appellant said he didn't know what made him do it; that she had always been good to him. Appellant said he was going to leave, but he told him he could not do that; that he would have to stay and face the music. Appellant had a pint bottle of liquor practically full. Appellant and witness went to Benton in a car. Appellant drank up most of the whiskey on the way to Benton. Witness had a gun on him and appellant told him to go ahead and shoot him. Appellant asked him to give him the pistol that he would finish it up in half a minute; that he would not hurt anybody but himself. Appellant held up a bottle of liquor and said, "This is what sent me to hell and I still am going to stay with it." Appellant gave them a lecture on drinking and what it would do for them. Appellant then said, "I guess I will burn for it, but I have had it coming to me for four or five years." Witness saw appellant between ten and ten-thirty o'clock a. m. and at that time appellant was perfectly sober. When he saw him at Mobley's house later he was drunk. Appellant was asked if he had hurt Ora (his wife) and sometimes he would say, "What did I do it for?" "What made me do it?" Appellant would cry a while and then he would say, "Oh, hell, forget it." Then he would dance and sing. He would act about as normal as any drunk man. He said several times that he was not going back to Fort Leavenworth. Appellant was a lot drunker at the time they got him to jail in Benton than he was when witness first saw him. Appellant had been drinking heavily for the last month.

O. K. Baker testified that he saw appellant in Fay's place of business about eight o'clock p. m. and that he seemed to know what he was doing while in Fay's restaurant; that he had seen him about three or four o'clock in the afternoon in an automobile and that he was drinking, and that witness asked him to let him drive him back to town and he consented. Witness saw him again about six o'clock and said that he was still drunk and that he saw him about ten-thirty or eleven o'clock p. m. after his wife was dead and that appellant looked like a wild man. This was after the murder had been committed an hour or so, but that when he saw him in the

cafe about eight o'clock p. m. he talked with good sense and knew what he was doing.

Bob Summerville testified that he saw appellant about noon and that he acted pretty full and that he saw him again after his wife was dead and that he was then mighty drunk; that he saw him about five-thirty p. m. riding a bicycle.

Dick Barber testified that he saw appellant in the afternoon in Fay's place and that he acted like he was perfectly sober, but that around four o'clock he noticed that he was acting like a drunk person would.

Fay Barber testified that appellant came into Fay's place about two o'clock in the afternoon and that if he had been drinking he could not tell it; during the afternoon he was drunk and appeared to be sick at the stomach and that he gave him some bromo.

Other witnesses testified that he was sober and others that he was drunk.

C. B. Davis testified, in substance, that he was funeral director for R. J. Ashley and a licensed embalmer in Arkansas, Tennessee and Missouri; that he was called on May 8, 1937, and picked up the body of Mrs. Sims, wife of appellant, lying near the front gate of appellant's home; that the body was lying on its stomach with the head turned to the left; that the head was twisted considerably; there was considerable blood there; that he embalmed her; that she must have been struck with a sharp instrument judging from the wounds on her neck and head; that one wound on her neck was a cut about the second or third joint going through the vertebral column and severing the vertebral cord and the esophagus. That the other wound on the neck was about an inch higher and was deep enough to where you could see the arteries in the wound and that grass was in the wound; that there was a cut about the center portion of the face going through the skull and that this cut was crosswise and about two inches long; that there was another cut above it not quite as long that did not go into the skull; that this cut mashed the skull and forced brains to ooze out; that there was another cut on the face severing the lower jawbone; that there was a

scratch or cut several inches long across her back. Witness then identified the clothing he took off the body showing grass stains on the underskirt and hair and brains on the dress and a cut place high up on the neck of the dress. Witness then stated, over the objection of appellant, that the cuts, except the one on her back, were inflicted after the body hit the ground, giving as his reason that brains were on the ground by the head and that grass was in one of the wounds and further reason that the position of the body and the location of the cuts indicated that she was on the ground at the time the cuts were inflicted.

Dr. J. W. Burke testified, in substance, that he was called and, upon arriving at appellant's home, found the dead body of Mrs. Sims and made an examination of her head; that one gash was in her temple; one through the bone (indicating) and one in the joint of the neck. An ax was exhibited to him which he identified as the one that he picked up at the wood pile which looked like it had hair and blood on it; that the ax was found by him about sixty feet from where the body was lying; that he also found blood from the gate to the body and that she was lying in a pool of blood.

We think appellant's conduct and actions just before his wife was killed and his conduct and admissions in a short time after she was killed were sufficient to warrant the jury in finding that he, appellant, killed her with a double-bit ax.

We also think that there was ample evidence of a substantial nature to sustain the finding of the jury that he did know what he was doing when he killed her.

The insistence, therefore, that the evidence was insufficient to support the verdict and judgment is not correct.

The next assignment of error argued is that the court permitted C. H. Davis, the embalmer, to testify that the deceased was struck while lying on the ground. The question propounded to the embalmer was as follows: "Can you tell from your observation of the position of the body whether or not the licks were struck

when deceased was standing or lying down?" His answer in full to the question was as follows:

"A. From the appearance of the body and the location of the licks and the circumstances that I found, I would say those licks were struck after that body had hit the ground. The brains were on the ground by the head; there was grass in one of the wounds. That would have to come from the instrument after it had gone in there, because the grass would never have gotten in the wound had it not been on the point of the instrument when it made the wound. There was only one lick that seemed to me like was made in any other position except lying down and that was the lick on the back. That wound was probably five or six inches long. It was not deep—just like a scratch. Like running under a barb wire fence would make a mark there—probably four or five inches long. It was not deep—just a flesh wound. The other licks would have to have been made lying down to have caused the force they did." The general rule is that non-expert witnesses may not give their opinions concerning transactions, but we are unable to see how any prejudice resulted to appellant on account of the opinion of the embalmer that the cuts were inflicted after deceased was lying on the ground. If appellant intentionally inflicted the wounds that killed her either before or after she fell to the ground he was guilty of murder in the first degree. The position one is in when intentionally assailed and killed by another would not be a defense to the crime nor would it change the degree of the crime. The only defenses interposed were that he did not kill her, but that if he did he was so drunk he did not know what he was doing. What difference would it make then whether he killed her when she was standing up or lying down? Had he pleaded self-defense as an excuse for killing her then her position when killed might have been material, but not so if he assailed and killed her intentionally.

The next assignment of error argued is that the court erred in not permitting Jason Couch to testify that appellant had been drunk for a week before the killing occurred. It is true that the court excluded this testi-

mony when interrogated on direct examination, but on recross examination he was permitted to state that appellant had been drinking heavily for the last month. This removed any prejudice resulting from the refusal of the court to admit the testimony of the witness when first interrogated about the extent of appellant's drinking.

The next assignment of error argued is a refusal of the court to permit counsel to confer with appellant at the time the trial was in progress and just after the noon recess. In the course of the trial, appellant's attorney asked permission to talk to appellant out of the presence of the sheriff, and the court stated that the attorney had had that opportunity at the noon hour, and denied the request. It is not shown that any prejudice resulted to appellant on account of the refusal of the court to permit appellant's attorney to talk to his client out of the presence of the sheriff at the particular time he made the request. The record does not show that he wanted to talk to appellant about anything which might aid him in the trial of the cause.

The next assignment of error argued is that the prosecuting attorney made statements to the jury not warranted by the evidence. The first statement objected to was, "Now, gentlemen, I hope you don't blame me for not bringing appellant's mother into court." And the next statement objected to was "The appellant said to his wife, 'I will show you how to get away from me.' " In both instances the court directed the prosecuting attorney to confine himself to the evidence and said to the jury, "Gentlemen of the jury, you will consider the evidence as given by the witnesses only." If any prejudice might have resulted to appellant on account of these remarks, it was removed by the court when he told the prosecuting attorney to confine his argument to the evidence and told the jury to consider the evidence as given by the witnesses only. *Hicks* v. *State,* 193 Ark. 46, 97 S. W. (2d) 900. The next statement of the prosecuting attorney objected to was, "I am sorry to say that I know what it is to be drunk, but I do know that a man could not get that drunk and not know what he was doing."

When the objection was made the court interrupted and said, "I again instruct the jury that they consider the testimony given by the witnesses only, and the only purpose of an argument of counsel is to refresh your memory as to what the witness testified to." The counsel for appellant then said, "I want the court to instruct the jury not to consider what he knows." The court again said, "The jury will not consider anything only what the witnesses testified to."

We think the statement of the prosecuting attorney is in the nature of an opinion based on testimony and resulted in no prejudice to appellant, but if any prejudice did result it was removed by the statement of the court to the effect that the jury should consider the testimony as given by the witnesses only, and that the only purpose of the argument of counsel was to refresh their memory as to what the witnesses testified to. *Raprich* v. *State,* 192 Ark. 1130, 97 S. W. (2d) 429.

The last assignment of error argued by appellant relates to the giving of instructions over his objection, the refusal to give certain instructions requested by him and the modification of other instructions which he requested. We have read all these instructions very carefully and have concluded that the instructions given by the court were correct, and that the instructions requested and which were refused by him were properly refused, and that the instructions requested by appellant which were modified by him were properly modified.

No error appearing, the judgment is affirmed.

BUTLER and BAKER, JJ., dissent.

MARTIN *v.* STATE.

Crim. 4063

Opinion delivered October 18, 1937.

John C. Sheffield; for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Phillips county for the crime of grand larceny for stealing a red cow, the property of Walter Moore, and, as a punishment for the crime, was adjudged to serve a term of five years in the state penitentiary, from which judgment an appeal has been duly prosecuted to this court.

Appellant was indicted at the April, 1937, term of court and his case was set for trial at the May term thereof. On the fourth day of May it was reported to the court that appellant had been and was sick and could not attend court, whereupon, the court ordered that he be taken to the city hospital at Helena and kept there under observation of Dr. Bruce, county physician, and treated. He was delivered to the hospital as directed, where he remained for several days at his own expense, and then was removed to his home. His case was set for July 5, 1937, at which time he did not appear, but sent the court a certificate of his attending physician, Dr. E. F. Norton, to the effect that he was still sick and unable to attend court for trial. The cause was again set for trial on July 6, and the sheriff was ordered to take charge of him and bring him to court for trial, which was done.

On July 6, appellant's attorney filed a motion for a continuance of the cause setting up, in substance, that appellant had been sick since May, 1937, and had been and was unable to confer with his attorney about his case, and was then unable to help in the selection of a jury, the examination of the witnesses or to, in any man-

ner, be of assistance to his attorney in making his defense. He, also, stated in his motion that his relatives were trying to make financial arrangements to send him to a specialist in Memphis which he believed they could do in the next ten days, and that his physician was of the opinion that he would recover if treated by a specialist.

The motion was presented to and heard by the court upon evidence introduced by both appellant and the state. At the conclusion of the evidence the court overruled the motion, over the objection and exception of appellant.

Three physicians were introduced as witnesses upon the hearing of the motion for a continuance. Dr. Norton testified, in substance, that he was of the opinion that when he was called in May to treat appellant that appellant was suffering from ptomaine poisoning for which he treated him without favorable results, and that he is now of opinion that he has pericarditis which continues over a period of one or two years, and sometimes becomes chronic; that appellant has lost thirty-five or forty pounds; that appellant was and is in no condition to be out of bed, and that in his opinion he is not able to participate in the trial of his case.

Appellant was sitting in court at the time the physicians were testifying.

Dr. Bruce, county physician, testified in substance, that on the first occasion he visited appellant, the symptoms indicated that he was suffering from belladonna poisoning; that his pulse was 120 and his temperature normal; that on his next visits his heart beats were 100 and his temperature still normal; that the pupils of his eyes were dilated; that he never discovered any symptoms of pericarditis; that he had made three reports to the court to the effect that appellant was able to attend court and stand trial without seriously impairing his condition or endangering his life, and that from his observation of him sitting in the court, he was able to remain for the trial of his case.

Dr. J. W. Nichols examined appellant on Sunday July 4, 1937, only two days before the trial and testified, in substance that in his opinion it would not endanger

the life of appellant to stand his trial except perhaps it might make him a little nervous.

Appellant's wife testified that he had been sick six or eight weeks, and that she was making arrangements to get money to take him to a specialist and thought she would be able to send him in about ten days.

We are unable to say from the evidence adduced that the trial court abused his discretion in overruling the motion for continuance. The evidence was conflicting between the physicians, and the appellant was present where the court could observe him. He remained in court during the trial, and there is nothing in the record to indicate that his condition was affected by doing so. This court recently said that the question of a continuance rests in the sound discretion of the trial court, and that 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; *Smith* v. *State,* 192 Ark. 967, 96 S. W. (2d) 1.

Appellant assigns as error the insufficiency of the evidence to support the verdict. J. W. Moore testified that the cow was stolen on Friday night April 16, 1937; that the cow was a big red cow that weighed about one thousand pounds gross; that he and W. J. Bradshaw tracked the cow across the road from the pasture to a tree near appellant's home, and found the head and feet of the cow in a woods lot or a butchering lot near appellant's house.

J. W. Bradshaw testified that he had been looking after Moore's cattle, and that he helped Moore follow the tracks of the cow from the pasture across the road, and to the woods lot near appellant's home. He identified the head and feet of the cow in the woods lot as being the head and feet of Moore's red cow.

A deputy sheriff testified that after Moore and Bradshaw identified the head and feet of the cow he rounded up some suspects, among them Elbert Crawford, who admitted that he and Alfonso Drake helped appellant get the cow out of Moore's pasture Friday night; that they led her across the road and tied her to a tree until appellant could go home and get a rope and

some more help; that appellant came back in about thirty minutes in his truck with Jack Sims; that they all loaded the cow in the truck and hauled her to the butchering pen in the woods lot; that appellant was present when Elbert Crawford made the statement and made no denial of it. Witness also stated that he went to the tree where he said the cow was tied and found signs made by the truck.

On the trial, Elbert Crawford testified to the facts just as he stated them to the deputy sheriff, and, in addition, said that on Saturday morning he and appellant butchered the cow and loaded her into appellant's truck.

Jack Sims testified corroborating the statements made by Elbert Crawford.

M. M. Hollawell testified that he bought a carcass of a large cow from appellant Saturday morning, April 17, 1937.

The evidence of Elbert Crawford and Jack Sims is positive, but appellant argues that because they admitted being accomplices in the crime their uncorroborated testimony was insufficient upon which to convict him. This would be true if their evidence stood alone and was uncorroborated by substantial evidence, either direct or circumstantial, that tended to connect appellant with the commission of the offense. The tracks from the pasture to the tree where the cow was tied, the signs of the truck at that place, and the nearness of the woods lot to appellant's home where the cow was butchered, and the sale of a large cow to M. M. Hollawell Saturday morning, which had been freshly butchered, and appellant's failure to deny the statement of Elbert Crawford made to the deputy sheriff in his presence, are all substantial evidence of a circumstantial nature tending to connect appellant with the commission of the crime.

The question as to whether the accomplices were sufficiently corroborated was one for the determination of the jury as there is substantial evidence in the record tending to connect appellant with the crime charged. *Mullen* v. *State,* 193 Ark. 648, 102 S. W. (2d) 82.

No error appearing, the judgment is affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* REYNOLDS.

4-4745

Opinion delivered October 18, 1937.

[redacted]

Moore, Gray, Burrow & Chowning, for appellant.

Glover & Glover, for appellee.

GRIFFIN SMITH, C. J. The only question involved in this appeal is whether there was any substantial evidence to sustain the jury's verdict that appellant was liable on a policy of insurance, on which judgment for $1,305, inclusive of penalty, was given.

On November 13, 1934, appellant issued its policy on the life of appellee's husband. Quarterly premiums were $5.59, the first having been paid shortly after delivery of the policy. The second installment was due February 13, 1935, the assured being entitled to 31 days of grace on all premiums. There was default as to the second premium, but application for reinstatement made March 27, 1935, was duly accepted. This application, signed by the assured, recited payment of the delinquent premium of $5.59. The third installment fell due on May 13, and was paid June 13.

It is alleged by appellant that default occurred with respect to the premium due August 13, and that there-

after no payments were made, the policy automatically lapsing 31 days after August 13, 1935.

The assured died January 8, 1936. Appellee, wife of the assured and beneficiary under the policy, testified that the policy lapsed near the end of the year—the latter part of 1935, and that it was reinstated in November, to the best of her memory. She denied that it lapsed in August, and produced a receipt which reads: "Received of Geo. H. V. Reynolds $5.59 on policy No. 939407-A to reinstate for last qt. Metropolitan Life Insurance Co. W. O. Guerin." This receipt, appellee testified, paid the premium from November, 1935, until after the assured's death. The receipt, she said, was given to her husband by Mr. Guerin, admitted agent of appellant, while witness was out of town. Some time after her husband's death she found it among his papers. Asked if she knew what quarter it paid for, she answered: "It said for the last quarter." The receipt was not dated.

Witness further testified that her husband had other receipts that had been kept in a bill fold, but he lost them. She thought there were four in addition to the one introduced. Asked what period the lost receipts covered, witness replied: "I can't say just exactly, because I did not look at each one of them. The premiums were all paid by my husband, but I know he had other receipts showing other periods of time through the last part of the year. The premiums were all paid by my husband." Question: "State whether or not this receipt was given at the time the policy was reinstated—you have stated that the policy was reinstated the latter part of 1935. Was this receipt given at the time the policy was reinstated?" Answer: "I said I did not know anything about the receipt until I found it." Question: "You state positively that the policy did not lapse but once, is that correct?" Answer: "That is correct." Question: "You do not know how many premiums were paid on this policy?" Answer: "I do not." Question: "And you do not know what period of time this receipt covers?" Answer: "The last part of the year."

W. O. Guerin testified that he issued the undated receipt at the time the policy was reinstated on March 27,

1935. His explanation was that the official company receipt could not be issued until the application for reinstatement had been approved at the home office in New York, where questions on reinsurability were passed upon. When the August premium was not paid, he talked with the assured, urging payment, but without effect. On behalf of appellant, in substantiation of its claim that the policy lapsed, the deposition of Leon C. Blackman, in charge of records of the New York office, was read in evidence. Mr. Blackman testified that the policy was reinstated but once—on March 27, 1935—and that no premiums were received after August, 1935.

The effect to be given appellee's testimony, viewed in its most liberal light, is that she had seen some policy receipts in her husband's bill fold; that she did not examine them as to dates; that she thought there were four such receipts, not including the undated one in question; that she had no personal information with reference to the undated receipt other than what the writing imported; that the insurance policy was reinstated but once, and that she thought this occurred in the latter part of 1935.

Appellant's testimony, undisputed except as to the circumstances, impressions, information and belief of appellee, is that the undated receipt was given for the quarter beginning February 13, 1935, and that the expression "for last quarter" did not refer to the last quarter of the year, or, in fact, to a calendar quarter; that there was but one reinstatement, this being on March 27, 1935, and that the policy lapsed thirty-one days after August 13, 1935.

The receipt, by its own terms, shows that it was given to reinstate the policy, but the added words, "for last quarter" created an ambiguity admitting of explanation by oral testimony. The admission of appellee on cross-examination that the policy was reinstated but once, and the introduction by appellant of the original application for reinstatement, dated March 27, 1935, show clearly that appellee was mistaken as to the date of reinstatement. On cross-examination the unsatisfactory nature of appellee's testimony is shown. In reply to a

question as to whether the policy had ever lapsed, she replied, "Not that I remember." Asked if she could say positively, she answered, "It did not." Witness later said that she would not be positive, and corrected this statement by adding, "Well, it was reinstated." The date of reinstatement was then fixed as of the last of 1935, "Best I remember."

The same uncertainty characterized appellee's reference to the lost receipts. It was not substantial. There is little doubt that appellee believed that the undated receipt evidenced payment for the last quarter of 1935, but testimony to the contrary is too conclusive to permit her beliefs and impressions to outweigh the affirmative evidence offered by appellant.

Another important factor must be considered. If appellee's assured had, in fact, paid the premium maturing August 13, the policy would have been paid to November 13, 1935. Thirty-one days of grace would have extended the protection to December 13. It is not contended that a single month's premium, as distinguished from a quarterly premium, was ever paid, and there is no provision in the policy for such payment.

In view of the record, we feel justified in holding that there was no substantial evidence before the jury upon which its verdict could be based, and there should have been an instructed verdict for appellant.

Reversed and dismissed.

MORGAN *v.* FIELDER.

4-4771

Opinion delivered October 25, 1937.

Russell C. Roberts and *Clark & Clark,* for appellants.

R. W. Robins, for appellees.

Jack Holt, Attorney General, *John P. Streepey* and *T. H. Humphreys, Jr.,* Assistants, *amici curiae.*

McHaney, J. Three cases are involved in this appeal which were consolidated for trial and are briefed together here. Appellants are passenger motor bus owners and operators, each operating over a different route over state highways in and out of Conway, Arkansas, except that where one's route is over a portion of another's, he operates with closed doors, and takes no passengers on such portion. They hold license certificates, issued by the Corporation Commission, under the statutes of this state, authorizing them to transport persons, passengers and property for hire over routes on the designated improved public highways of Faulkner, White and Cleburne counties, as set out in each of their complaints. They have each spent a considerable and substantial sum of money to qualify, for equipment, for insurance against negligent injury to passengers and others, and are maintaining the type of service required of them under their respective permits.

They instituted three separate actions against the appellees, identical as to form and substance, except as to the name of the defendant and the route involved, alleging, as in *Morgan* v. *Fielder,* that said appellee, "his agents, servants and employees are wilfully, wantonly, and maliciously transporting and carrying persons or passengers and property over said route of this plaintiff, for compensation, and are now and have been doing an

irreparable injury to the business of this plaintiff without said certificate and authority as required by law." The prayer was that said appellee be enjoined from so doing and for actual damages in the sum of $250 and for punitive damages in the sum of $150. The defense in each case was a general denial of the allegations of the complaint.

After hearing the evidence, the court found that it did not show such interference with or injury to the business of appellants by the operations of appellees on that portion of the highways covered by appellants' permits as would entitle them, or either of them, to injunctive relief, and dismissed their complaints for want of equity.

We think the court erred in so holding. Section 2025 of Pope's Digest, act 99 of 1927, p. 257, § 3, as amended in 1929 and 1933, provides: "Every corporation or person, their lessees, trustees, or receivers, before operating any motor propelled vehicle upon the improved public highways of the state, the counties or cities, for the transportation of persons or property for compensation within the purview of this act, shall apply to the Commission and obtain a license certificate authorizing such operation and such license certificate shall be secured in the following manner." Section 2029 of Pope's Digest, being § 11 of said act 99 of 1927, reads as follows: "The Commission shall have a right to employ one or more inspectors as may be needed for the purpose of making inspection of licensee from time to time, and if any person, firm or corporation, is operating without complying with provisions of this act, then the attorney general of the state of Arkansas, or any interested party may institute suit in any chancery court where service on the defendant may be had, restraining the further operation of motor vehicles by such person, firm or corporation until the provisions of this act are complied with."

It is admitted that appellants have and that appellees have not complied with said statutes. It is, also, undisputed that appellees are operating their motor buses, in part at least, over the routes covered by the

permits of appellants, and that they pick up passengers and property along such routes and accept compensation therefor.

Appellees seek to uphold the decision of the learned trial court, first, on the ground that "the Corporation Commission has no power to regulate vehicles on public roads"; and, second, that they are not common or public carriers, and, therefore, not subject to regulation or licensing by such commission. As to the first proposition, appellees argue that because this court held in *Gray* v. *Duffy,* 152 Ark. 291, 238 S. W. 60, that the Railroad Commission, predecessor to the Corporation Commission, did not have power, under the constitutional amendment authorizing its creation, to regulate ferries and fix tolls or charges for ferriage, that the Corporation Commission has no power to regulate vehicles on the public highways. It is insisted that the same provision of the Constitution, Art. VII, § 28, conferring exclusive original jurisdiction on county courts in all matters relating to ferries, also, confers on the same courts the same jurisdiction in all matters relating to roads. But the word "county" in said section of the Constitution modifies or limits the words following it, so that it refers to county roads, county ferries, etc. We so held in *Connor* v. *Blackwood,* 176 Ark. 139, 2 S. W. (2d) 44, where we said: "If the word 'county' modifies the words 'roads,' 'bridges,' and 'ferries,' as we think is necessarily true, then it follows, as a matter of course, that the exclusive original jurisdiction of the county courts extends only to county roads and county bridges, and that they do not have *exclusive* original jurisdiction over state roads and state bridges." We have heretofore held against this contention. *Hester* v. *Ark. Railroad Com.,* 172 Ark. 90, 287 S. W. 763; *Messina* v. *Galutza,* 178 Ark. 608, 11 S. W. (2d) 468; *Merchants' Trans. & Warehouse Co.* v. *Gates,* 180 Ark. 96, 21 S. W. (2d) 406.

As to the second point that appellees are not common carriers, but private carriers not subject to regulation, we think the court again fell into error. While it is true that each has a card in his bus, stating he is not a

common carrier, and that each testified he refused to carry negroes and drunks, still they are violating the statute above quoted by each operating a "motor propelled vehicle upon the improved public highways of the state, the counties or cities, for the transportation of persons or property for compensation within the purview of this act" without "a license certificate authorizing such operation." Appellees so recognized the force and effect of the statute when they applied to the Commission therefor and a license was refused, because there was no showing of public convenience and necessity, and there is no contention that they fall within the class of excepted persons named in the act.

Nor is the case of *Jones* v. *Ferguson,* 181 Ark. 522, 27 S. W. (2d) 96, helpful to appellees, as there Jones was hauling goods for ten merchants or citizens exclusively under a single contract under which they furnished the truck.

A third point made by appellees is that the granting of injunctive relief would result in great inconvenience to the public. This may be true as to a very small part of the public who live some miles distant from the highways, but the Legislature determines the public policy of the state, and the courts have no right to disregard the statute. If the public convenience and necessity demand additional service, the proper forum to determine the matter in the first instance is the Corporation Commission. It denied appellees the right to operate and there was no appeal from its order. Other arguments are advanced by appellees which we have duly considered, but find them without substantial merit.

The decree of the chancery court will be reversed, and the cause remanded with directions to grant the injunctive relief prayed, and such damages as the proof may show appellants have sustained by the unlawful operations of appellees.

CADDO RIVER LUMBER COMPANY *v.* HENDERSON.

4-4766

Opinion delivered October 25, 1937.

[redacted]

Buzbee, Harrison, Buzbee & Wright and *John M. Harrison,* for appellant.

Tom Kidd and *Emory & Ridgway,* for appellee.

SMITH, J. Appellee recovered judgment to compensate damages for an injury sustained by him while employed by appellant. The judgment recovered is not complained of as being excessive and it will, therefore, be unnecessary to discuss the extent of the injury.

Appellee and other employees were working on what was called the steel gang. They were engaged in taking up steel rails off crossties. The work was done by using tools called scissors weighing about eighteen pounds, with which twelve men would carry a steel rail to the train on which it would be loaded. Small barrels called spike kegs were employed. These contained the new spikes which were required in replacing new rails, and

were thereafter used for the deposit of old spikes which had been extracted from the ties. Occasionally one of these kegs would be knocked down and the staves thereof used for wedges. When this was done, it was the custom to throw off the track and on to the railroad right-of-way the wire hoops which had held the staves in place. The work in which appellee was engaged was of a transitory nature; the crew did not long stay in any one place, and on the day of appellee's injury had covered several miles of track. The station nearest the injury was more than half-a-mile away. The scene of the injury was not, therefore, a place where men were regularly employed.

Appellee testified: "We were taking up steel on spur on one of their set-outs when I got injured." When quitting time came in the afternoon, appellee, in pursuit of his employment, placed a pair of the scissors on his shoulder and started with it to place it in the tool box. Appellee walked along the path at the end of the ties, when his foot became entangled in one of the wire hoops lying in the path, and he was thrown violently to the ground.

Recovery of damages was sought and had upon the ground that the appellant company had negligently failed to furnish appellee a reasonably safe place in which to work by permitting the presence of the wire hoop on the path along which his duties required him to walk.

For the reversal of the judgment, it is insisted that appellant was guilty of no negligence, and that such risk of damage as existed was assumed by appellee, as it was open and obvious.

We think the testimony, viewed in the light most favorable to appellee, fails to establish negligence on the part of appellant. The master does not insure the servant's safety, and is not, therefore, required to furnish a place in which the servant may perform his employment so exempt from danger that the servant will be free from all risk of injury. Neither this nor any other court has ever so held. It is the master's duty to exer-

cise ordinary care to furnish the servant with a reasonably safe place in which to perform his duties while the servant himself is exercising ordinary care for his own safety.

In applying the well-settled principles of law defining the duty of the master to furnish the employee a reasonably safe place in which to work, it must be remembered that appellee was employed in a transitory work. His duties carried him from place to place and over considerable distances. The place of his injury was not a shop or a railroad yard where men are continually at work, but was on a spur track, where the men had been at work for only a short time and where they were not expected to long remain. It would be to impose the highest degree of care, rather than ordinary care, to require the appellant to keep its tracks clean where and while men were at work of any and all objects which might occasion injury. We think the danger here to appellee was not such that appellant should have foreseen it; nor do we think that the danger could have been discovered by the exercise of the ordinary care which the occasion required. Appellant had the right to assume that appellee would exercise some care for his own safety, and its duty must be measured in the light of that assumption. We conclude, therefore, that it would require something more than ordinary care to make appellee's working place so safe as to be free from any danger.

The hoop over which appellee tripped was not concealed as was the hoop in the case of *Malco Theatres, Inc.* v. *Murphy,* 193 Ark. 240, 98 S. W. (2d) 962, upon which appellee relies. The opinion in that case recites the facts to be that "The evidence is practically undisputed that the hoop was imbedded in the mortar and sand or concealed in the debris, so that one walking on the sidewalk in the exercise of ordinary care for his own safety would not or could not observe the hoop as long as it was in that position." Here, the hoop was not concealed, and the men had been at work at the place where appellee tripped for only about thirty minutes.

The instant case is more nearly like that of *Missouri Pacific Rd. Co.* v. *Martin*, 186 Ark. 1101, 57 S. W. (2d) 1047. The facts in that case were that the employee, while carrying a ladder, which his employment required him to use, from one place to another, in doing his work, stepped on some pieces of lumber which had fallen from the pile on which they had been placed. In holding that the employee could not recover it was there said: "It would be placing too high a duty upon the master to require him to keep the employee's place of work clear of every object upon which an employee might step and slip or fall. They are not insurers, but are only held to the exercise of ordinary care to furnish a safe place to work."

We conclude, therefore, that no negligence was shown in this case, and the judgment must, therefore, be reversed, and, as the case appears to have been fully developed, it will be dismissed.

CLEVELAND *v.* SUMMERFIELD.

4-4765

Opinion delivered October 25, 1937.

E. Chas. Eichenbaum, for appellant.

House, Moses & Holmes and *H. B. Solmson, Jr.,* for appellee.

HUMPHREYS, J. This proceeding originated in the chancery court of Pulaski county by the issuance of a writ of garnishment against appellee's employer, Summerfield Dairy Company, on April 30, 1934, on a deficiency judgment rendered against appellee in a mortgage foreclosure proceeding in said court wherein appellant and J. T. Hammond, Jr., trustee for W. B. Worthen Company, Agent, were plaintiffs and appellee and his wife *et al.*, were defendants.

The foreclosure suit was instituted in September, 1932, on a trust deed executed by appellee and his wife in September, 1929, to J. T. Hammond, Jr., as trustee, in trust for W. B. Worthen Company, Agent, to secure two notes totaling $6,000 given for borrowed money. All the dealings of appellee with respect to this loan, notes and mortgage were with said bank and all interest payments he made were to the bank.

The note was purchased from the bank by appellant, but the bank continued to collect the interest until default was made in the payment of same. When the suit was instituted a summons was issued and duly served upon appellee and he handed the summons to his attorney. He made no defense to the action and a default judgment was rendered against him and the property was sold. In the meantime a receiver was appointed to take charge of the property. At the sale, appellant bought the property for $3,836.60, which was insufficient to pay the judgment, leaving a balance due thereon of $2,994.77. The commissioner deeded the property to him and after the receiver was discharged, on December 16, 1932, appellant took possession of the property and still owns it.

On January 6, 1933, appellee filed a voluntary petition in bankruptcy in the federal court at Little Rock. He filed a schedule of his creditors listing this particular judgment as follows:

"W. B. Worthen Company, Little Rock, Arkansas, judgment on real estate $6,000; W. B. Worthen Company, property at 1623 West Twenty-second Street, $6,000."

Notice was mailed out to W. B. Worthen Company notifying said W. B. Worthen Company that the said appellee had been duly adjudicated a bankrupt and that a meeting of creditors would be held for the purpose of considering the affairs of said bankrupt and electing a trustee.

The issue joined in the garnishment proceeding was heard by the trial court upon a stipulation of facts and the testimony of appellant and appellee.

Appellant testified that he was a resident of DeValls Bluff, Arkansas, and had resided there continuously since 1919; that he had purchased the Summerfield notes from W. B. Worthen Company; that, on the bank's failure to collect interest money, he had taken the matter out of the hands of the bank and terminated their agency; that he had himself filed a suit in foreclosure; that he never did take the matter up personally with appellee, except to file suit; that he had seen appellee before, had known him on the road as a traveling man; that Worthen Bank had not told him about the bankruptcy; that when the foreclosure suit was through with, he took charge of the rental of the property and has had charge thereof subsequently to such time; that he still owns the property and was getting $60 per month therefrom and that he could get $5,000 for the property, but that it was worth more than that; that he never mentioned to appellee that he owned the note.

Appellee testified that he had never known appellant to be in the deal at all; that he had never heard of appellant owning the notes until the garnishment proceeding was begun; that he had always done business with respect to this indebtedness with Worthen Bank;

that the bank had never informed him that Cleveland had purchased the notes and that he did not know that Cleveland was in the deal at all; that his dealings had been strictly with the Worthen Bank.

The trial resulted in dissolving the writ of garnishment at the cost of appellant, from which judgment is this appeal.

Appellant contends that the decree of the chancery court should be reversed because the undisputed evidence shows his deficiency judgment against appellee was not listed in appellee's schedule of debts although appellee had actual knowledge of its existence before his schedule was filed, and also that he, appellant, had no notice or actual knowledge of appellee's proceedings in bankruptcy. In support of this contention he calls our attention to clause three of § 35 of the bankruptcy act which is as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * have not been duly scheduled in time for proof and allowance with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy * * *." 11 USCA, § 35.

It is true that appellant had no actual notice of appellee's bankruptcy proceedings, but it is, also, true that appellee had no actual knowledge of appellant's deficiency judgment against him. It is argued by appellant that the service of the summons in the foreclosure proceeding upon him was actual notice to him; that W. B. Worthen Company had assigned the notes for $6,000 to him and that he, appellant, was the owner thereof and that the service of the summons conveyed to him actual knowledge of all the proceedings in the foreclosure suit in which he recovered a deficiency judgment against appellee, at the time he filed his voluntary petition in bankruptcy. Had appellee read appellant's complaint in the foreclosure suit, or made answer thereto, or followed the proceedings therein to a conclusion, he would have gained all this information, but he did not do that. He ignored

the summons and allowed the judgment to go against him by default, and he testified that at the time he filed his petition in bankruptcy he did not know that the notes had been assigned by W. B. Worthen Company to appellant. The summons showed that two of the plaintiffs in that suit were two of the parties to whom he had executed the notes and mortgage. Appellee must have believed at the time he filed his petition in bankruptcy that W. B. Worthen Company secured the judgment against him in the foreclosure proceeding because in listing a schedule of his debts and creditors he listed this particular one in the following language:

"W. B. Worthen Company, Little Rock, Arkansas, judgment on real estate, $6,000; W. B. Worthen Company, property at 1623 West Twenty-second Street, $6,000."

The object, of course, in listing this judgment was to be discharged from the payment in the bankruptcy proceeding and had he actually known appellant was the owner thereof, every incentive on his part would have been to name appellant instead of the bank as owner of the debt and mortgage. This is a strong circumstance tending to corroborate his statement that he had no actual knowledge that appellant owned the judgment.

The bankruptcy act referred to above requires that the name of the creditor be named, if known to the bankrupt. It is said by Mr. Remington on Bankruptcy, Vol. 7, § 3567, that:

"A scheduling of the debt in the name of the original creditor is sufficient, where no notice was received by the bankrupt of an assignment of the claim. Nor is the bankrupt bound to search the records to ascertain if any assignment has been made. The duty of giving notice rests on the assignee."

We have read the cases cited by both appellant and appellee and they seem to be in harmony with this general rule. They hold, in substance, that in order for the bankrupt to obtain a discharge of a debt, he must schedule the debt and the name of his creditor if he knows who his creditor is; but, if he does not know who his

creditor is, in order to obtain the discharge, he must list the original creditor; and that having listed the original creditor, the burden falls upon the owner of the debt to show that at the time he listed the original creditor he had knowledge that the debt had been transferred or assigned to some third party. So the only test in all these cases seems to be whether the bankrupt knowingly failed to list an assignee or transferree of the debt.

In the instant case appellee listed the bank as the owner of the debt in his schedule believing, in good faith, that the bank was the owner of the deficiency judgment. The decree is, therefore, affirmed.

McHaney, J., disqualified and not participating.

Taylor *v.* Magnolia Loan & Investment Company.

4-4759

Opinion delivered October 25, 1937.

W. H. Kitchens, Jr., for appellants.

Ezra Garner, for appellees.

Smith, J. Suit was filed July 10, 1935, by the Magnolia Loan & Investment Company to foreclose a mort-

gage given it to secure a note executed to its order by Lee Taylor and Eva, his wife. The note thus secured was dated March 6, 1928, and indorsed thereon were various credits of payments, one dated September 6, 1929, the last August 5, 1934. There was no dispute about any of the payments except the one last named, which was $9.12. The mortgage covered only an eighty-acre tract of land, which had been sold in October, 1930, together with other lands under a judgment in favor of the Newco Cotton Company against Lee Taylor, and a deed had been executed to the cotton company pursuant to this sale. It was prayed that the mortgage be foreclosed and that the execution deed be adjudged subordinate to the lien of the mortgage, and from a decree granting that relief is this appeal.

It was denied by the mortgagor and by the cotton company that the $9.12 payment had been made, and both defendants pleaded the statute of limitations in bar of the action. This payment was indorsed upon the note as having been made on August 5, 1934, which day was a Sunday. The notation upon the margin of the mortgage record also gave the date of the payment as August 5. This indorsement was made December 1, 1934. The sufficiency of the marginal indorsement upon the mortgage record to comply with §§ 7382 and 7408, Crawford & Moses' Digest, is raised by the cotton company; but these sections are unavailing to the cotton company if the note was not barred by the statute of limitations when the foreclosure suit was filed. In the case of *Citizens Bank & Trust Co.* v. *Garrott,* 192 Ark. 599, 93 S. W. (2d) 319, it was held (to quote the headnote) that "Under §§ 7382 and 7408, Crawford & Moses' Dig., an execution creditor purchasing at his own sale is not a third party entitled to protection against the rights of a mortgagee whose mortgage, though apparently barred because payments made had not been entered on the margin of the record, was in fact not barred by the statute of limitations; but, under the rule of *caveat emptor,* took subject to the rights of the mortgagee."

The controlling question in the case is, therefore, the one of fact whether the note was barred when suit was

filed, and that question is answered when it is determined whether the $9.12 payment was made by the mortgagor.

W. A. Boyd, the mortgagee's secretary and treasurer, testified that just before the time of the alleged payment he gave Taylor, the mortgagor, a statement of the balance then due and made demand that Taylor make some payment. Taylor agreed to make a payment, and was told that he could either pay witness or could deposit the money in the Citizens Bank to the credit of the Loan & Investment Company.

W. C. Blewster testified that he was the assistant cashier of the Citizens Bank of Magnolia, and had been since its organization in May, 1934. He entered deposits on the books of the bank and had charge of deposit slips. He testified to a deposit made by Lee Taylor August 4, 1934, to the credit of Magnolia Loan & Investment Company with the Citizens Bank amounting to $9.12, as shown on a deposit slip headed "Columbia-Peoples Bank," which bank appears to have been succeeded by the Citizens Bank. The witness had no independent recollection of the transaction, but the deposit slip on file and the records of the bank show a deposit was made with the Citizens Bank on August 4, 1934, by Taylor to the credit of the Loan & Investment Company.

Both Taylor and his wife denied having made the deposit.

The argument as to the effect of a payment made on August 5—which was a Sunday, may be disposed of by saying that if the payment was made at all, it was made on August 4, and the indorsement upon the note and on the margin of the record showing receipt of a payment on August 5 was a mere error. We think the testimony fully supports the finding that the payment was made by the deposit in question. There could have been no point in giving this credit as having been made through the bank deposit and indorsing it upon the note at that time unless it had actually been made, for the reason that at that time the note was not barred. The payment which was admittedly made in September, 1929, operated to extend the life of the note to a date beyond

August 4, 1934. There was no occasion on this last named date to practice a fraud by simulating a payment when none had been made. The obvious purpose of the demand for some payment on the note, which Taylor admitted was made, although he denied having agreed to make it, was to prevent the bar of the statute of limitations from falling. Had the payment not been made, the suit to foreclose would, no doubt, have been commenced, as it could have been done, the debt not then being barred.

The decree does not appear to be contrary to the preponderance of the evidence, and it is, therefore, affirmed.

McGee *v.* Swearengen.

4-4757

Opinion delivered October 25, 1937.

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

A. B. Shafer and *E. C. Gathings,* for appellee.

GRIFFIN SMITH, C. J. This appeal questions the correctness of a judgment of the Crittenden circuit court which awarded a writ of ejectment, the effect of which was to take from the possession of appellants, defendants below, a certain tract of land.

Prior to April 24, 1926, [and presumably prior to 1915, although on this point the agreed statement of facts upon which the cause was tried by the court sitting as a jury is not clear] the southeast quarter of section 12, township 6 north, range 8 east, was owned by Norman Monaghan, trustee. State highway No. 70 running westward from its point of intersection with Highway No. 61 in West Memphis is coincident on the south with the south line of section 12. In 1915, Drainage District No.

6 of Crittenden county was created, whereby a strip of land 45.8 feet wide immediately north of and paralleling highway 70 was acquired for public use in connection with the drainage project.

On April 24, 1926, Monaghan conveyed to appellant McGee a certain lot in the southeast quarter of section 12, the entire section having been previously platted as Compress Subdivision. In this plat highways 61 and 70 were shown. Block 18 is in the southeast corner of the subdivision, bounded on the east by highway 61. To the south Nance avenue is identified, and then, south, is the drainage canal, south of which is highway 70. Lot 8, the property conveyed to appellant McGee forms the southeast corner of block 18, and Monaghan's deed contained the following description: "A lot in the Compress Land Company's Subdivision of a part of the southeast quarter of section twelve, township six north, range eight east, as shown on the recorded plat of said subdivision particularly described as follows: Beginning at a point in the east line of lot eight, block eighteen of said subdivision one hundred feet south of the north line of said lot and running thence in a southerly direction along the east line of said lot eight one hundred and forty feet to a street; thence in a westerly direction along the north line of said street two hundred seven and seventy one-hundredth feet to the west line of said lot eight; thence north along the west line of lot eight, one hundred feet; thence in an easterly direction two hundred feet to the point of beginning; being all of said lot eight except one hundred feet in the form of a parallelogram off the north side thereof. This property is sold and conveyed subject to the restrictions that all improvements erected thereon must be set back forty feet from the east line thereof."

On April 21, 1930, Monaghan executed in favor of W. A. Doyle a deed conveying the following: "A certain tract of land in the southeast quarter of section twelve, township six north, range eight east, as shown on the plat of the Compress Subdivision, recorded in the office of the clerk of Crittenden county, state of Arkansas, par-

ticularly described as follows: Beginning at the point which is the intersection of the south, or southwest line of Nance avenue with the westwardly line of Route 61; running thence in a southerly direction along the north line of Route 70; running thence westwardly along the north line of Route 70 two hundred feet; running thence north to the south line of Nance avenue; running thence eastwardly along the south line of Nance avenue to the point of beginning."

Subsequent to this conveyance, Doyle procured permission in writing from the commissioners of Drainage District No. 6 to erect a building over the property conveyed to him, such permission having been coupled with a stipulation that flowage through the canal should not be interfered with.

In 1935, the limits of the city of West Memphis were extended westward from the right-of-way of highway 61 a distance of 200 feet from the eastern line of section 12, and the Crittenden county court ceded to the city of West Memphis all of section 12. Nance avenue was vacated as a public highway from its western terminus to the western limits of West Memphis, and Monaghan (January 7, 1935) quitclaimed unto the several property owners along the north side of Nance avenue, in proportion to their respective frontages, all of his interest "to so much of Nance avenue as may be vacated and to my residuary interest in the right-of-way of the drainage ditch lying along the north side of highway No. 70 and between said highway and Nance avenue so that each of said property owners shall abut upon highway No. 70."

Subsequent to the institution of the instant suit the city of West Memphis, with consent of the parties hereto, vacated that part of Nance avenue lying within the corporation limits, including the area south of lot 8 in block 18.

Whatever interest W. A. Doyle may have had in the property in question went to appellee as devisee under the will of said Doyle. The appellant Perkins is a tenant of appellant McGee.

The contention of the appellants as expressed in their brief, is that, since the south boundary of the property specifically described in the deed to Letitia V. McGee is separated from the south boundary of section 12 only by the right-of-way of Nance avenue, the right-of-way of the drainage canal, and the right-of-way of highway No. 70, the conveyance included the reversionary interest in all the land occupied by the right-of-ways, and vested in appellant McGee, by operation of law, the fee simple title to the property in question, subject only to the rights of the public therein.

Appellee agrees to the issue, saying: "Stated in another way, the question is: Does a deed bounded by the north boundary line of Nance avenue carry title across Nance avenue, the right-of-way of Drainage District No. 6, and to the middle thread of highway No. 70? The contention of appellee is that, in view of the fact that the tract conveyed to the appellant McGee is described by metes and bounds, her title extends no farther south than the north line of Nance avenue; or, if her deed be construed as bounding upon Nance avenue, her title extends no farther than the middle thread thereof."

Appellants rely upon *Taylor* v. *Armstrong,* 24 Ark. 102. The facts in that case, briefly stated, are that certain lots fronting on Water street were conveyed by Gilmore to Taylor. Water street, dedicated to public use, extended in its width of 140 feet to the Arkansas river. Three years after execution of the conveyance to Taylor, Gilmore deeded in fee to Armstrong and Rye all of that portion of Water street between Main and Walnut, which included the area upon which Taylor's lots fronted. By the terms of the deed the grantees were to hold the legal title to the property, permitting use of the same as a public street. Subsequent to Gilmore's conveyance to Armstrong and Rye, Taylor constructed a warehouse on a portion of Water street on which the lots purchased by him of Gilmore fronted, and Taylor was in possession of the warehouse at the time a suit in ejectment was brought by Armstrong & Rye. The latter were successful in the lower court, but on appeal the

judgment was reversed. The court, after quoting from Kent (1 Com., vol. 3, p. 433), said:

"If a highway be laid out through the land of A, and he afterwards conveys the land upon one side of the highway to B, and the land upon the other side to C, without reservation, they become the owners of the fee in the soil of the highway equally, each owning to the center. So, if A and B, being the proprietors of adjoining tracts, contribute equal quantities of land to a highway, and afterwards convey their lands respectively, their grantees become the owners of the fee in the soil of the highway equally, each going to the center. But if a highway be laid off entirely upon the land of A, running along the margin of his tract, and he afterwards conveys the land, the fee in the whole of the soil of the highway vests in his grantee. The same rules are applicable to streets in towns and cities.

"It was proven and admitted that Taylor was the owner of the lots, and the presumption follows, in the absence of proof to the contrary, that he was the owner of the fee in the soil of that portion of the street upon which the warehouse was situated; not only to the center of the street, but to the margin of the river, there being no opposite proprietor."

Appellants also cite *Johnson* v. *Grenell,* 188 N. Y. 407, 81 N. E. 161, 13 L. R. A. (N. S.) 551, and *Delachaise* v. *Maginnis,* 44 La. Ann. 1043, 11 So. 715. The effect of the Grenell case is to hold that an owner of a lot fronting on a street, which intervened between the lot and a river, owned the fee in and to the street, subject to the public easement. The court said:

"What the original deed of Mrs. Grenell intended to grant was to be ascertained from her map. It conveyed a piece of land known as lot No. 34 on the map, being on the southeast shore, with a road in front of it extending to the waters of the river. Had the grantor intended to reserve the land in the roadway, or any part of it, she could have done so; but there is an absence of any language from which such an intention could be implied. Indeed, there is no sufficient reason apparent to infer an

intention by the grantor, when parting with her title to the only land adjoining the road, to reserve any interest in the fee of the road itself. Manifestly, from the facts, an inducement to the purchaser of the lot was its being shown, and stated, to lie upon the shore of the island, and the enjoyment of the riparian advantages conferred a distinct value * * *. That Mrs. Grenell's grantees took by her deed, certainly, one-half of the road, was conceded; and, had she owned any land upon the other side of the road, the other adjoining half of the road would have remained hers."

The Delachaise case held that where a party sold the entire estate owned by him upon a public road or street bordering on a river, and beyond which no property susceptible of private ownership existed at the time of the sale, the grantor retained nothing to which the accessory right of future alluvium could attach.

The Taylor-Armstrong case is cited in an opinion written by Mr. Justice BATTLE, *Packet Company* v. *Sorrels,* 50 Ark. 466, 8 S. W. 683, where the rule announced by Kent is quoted and adopted. "It follows, then," says the opinion, "that land dedicated by the owner as a street to the use of the public cannot lawfully be used for any other purpose; and that if lots bounded by it have been conveyed by such owner, without reservation of the fee in the street, the right to the use and possession of the one-half of the street adjoining such lots would pass to the person owning the lots, when the right to use the same as a street ceased to exist; and that the authorities of the town or city in which the same is situated cannot lawfully appropriate or divert it to uses and purposes foreign to those for which it was dedicated; nor is it within the power of the legislature to authorize a disposal or diversion of it to uses foreign to the dedication." See, also, *Kilgo* v. *Cook,* 174 Ark. 432, 295 S. W. 355.

In *Fordyce* v. *Hampton,* 179 Ark. 705, 17 S. W. (2d) 869, we said: "It is true that it is well settled in this state that a conveyance of land by lots and blocks carries the fee to the middle of the existing streets and alleys

on which they abut, subject to the right of the public to use the same as highways, provided there are no specific words describing the property evidencing a different intent. But this rule applies only to existing streets and alleys at the time of a conveyance."

Corpus Juris, vol. 9, § 88, p. 199, lays down the following rule: "Where a conveyance of land bounded by a street or highway makes use of the expression 'bounded by,' 'on,' 'upon,' or 'along' such street or highway, it is very generally held to indicate an intention to convey to the center thereof."

We find no Arkansas decisions adjudicating a controversy analogous to the instant case, but the principles quoted, *supra,* point to the following conclusions:

(1) When a part of Monaghan's land was taken for drainage purposes in 1915, the fee remained in the original owner, and this is true whether the easement was acquired by condemnation or purchase, in the absence of language in the deed (if acquired by purchase) showing an intent to convey a fee. There is no such showing here.

(2) Having retained such fee, Monaghan, for all purposes not inconsistent with the public right of user, remained the owner of that portion of the drainage ditch acquired through him, and he had a right to sell, or lease, or deal with it in any legal manner he saw fit, subject to the public restrictions.

(3) The same rule applies to his fee in that portion of highway 70 acquired through him, except that his fee extends only to the center of the right-of-way, unless it should be shown that he owned the property south of such highway. In that event his fee would include all of the area of the highway abutting upon his property on both sides.

(4) Since the drainage district had been created prior to the time Monaghan plotted the block and lots in section 12 and dedicated the streets and alleys, inclusive of Nance avenue, and no words appearing in the dedication of Nance avenue evidencing an intent to extend its area south of the 40 feet shown by the plat, it

will not be presumed that any part of the drainage property was included in the grant, nor did Monaghan's reserved fee in the drainage tract, by operation of law, attach to and become a part of Nance avenue to such an extent that a conveyance of the fee to lot 8 in block 12 (lying immediately north of Nance avenue) would vest in the grantee any rights in the fee of the drainage district property.

(5) When, in 1926, the appellant McGee purchased lot 8, so situated, and so described in the deed by specific measurements, projecting appellant's south line to the north line of Nance avenue, she nevertheless acquired a fee to the center of Nance avenue. This, for the reason that there were no expressions showing an intent to limit the grant in a manner contrary to the general rule of construction. It is true that the deed recites "A lot in the Compress Land Company's Subdivision of a part of the southeast quarter of section 12," etc., and it is urged by appellee that the word "part" evidenced an intention upon the part of the grantor that the southern boundary should be definitely fixed at the point reached by the specific measurement. However, it is our view that the expression "a part" has reference to the fact that the Compress Company's Subdivision was a part of section 12, and does not mean that only a part of the lot was conveyed.

(6) In the view that we have taken, Monaghan's quit-claim deed of January 7, 1935, has no bearing on the case, appellee's rights having attached prior to its execution.

We hold, therefore, that appellant's south line is the center of Nance avenue, and that appellee retained the fee to the drainage district land, subject to its public attributes; and that appellee's fee in Nance avenue, incidental to his fee in the drainage district lands, extends northward to the center of Nance avenue to the point where it meets the fee of appellant McGee.

The judgment of the circuit court is modified to conform to this opinion, and, as thus modified, it is affirmed.

MID CONTINENT QUICKSILVER COMPANY *v.* ASHBROOK.

4-4775

Opinion delivered October 25, 1937.

[redacted]

J. H. Lookadoo, for appellant.

Tom Kidd, for appellee.

BAKER, J. The appellant is a corporation that owns and operated cinnabar mines in Pike county. The ore is found by cutting tunnels into the mountain side until the vein of ore is struck and that is followed and the cinnabar removed. A tunnel about 8 by 8 feet was cut into the side of the mountain about 150 feet back or away from the entrance. Timber supports and braces were put up to within about 20 feet of where a shot of dynamite was exploded in the side or top, or at a point where cinnabar had been found.

Leo Yount was the agent or general manager of the company. Marvin Cummins was the general foreman. L. R. Ashbrook was a foreman in charge of a small squad. These mines are operated by working small squads of men consisting of only three or four in one particular place. They remove or get out the ore from which the quicksilver or mercury is obtained.

The appellee, with whatever help was necessary, placed dynamite and caused an explosion, according to his contention, which may be said to have been found by the jury to be in conformity with his theories, then he entered the tunnel and went to the point of the explosion as soon as it was reasonably possible to get rid of smoke. An examination was made and it was found that there

was a large rock, weighing perhaps twelve tons slightly loosened, or, if not shaken, perhaps, made somewhat insecure by the explosion. We understand that this rock was overhead, it might have been in a side wall of a tunnel. There is no real difference.

Ashbrook, although a foreman himself, says that immediately after the explosion he inquired of Yount, who had much more experience than he had, and who was the general manager, about whether it would be safe to work under or by the large rock. Yount, according to his contention, gave assurance that the rock would not fall and directed him to proceed with his men with the work. This work was to remove loose particles of stone, shale, or other debris that had been broken up by the explosion, using a pick or crowbar on the walls, or overhead, as the case might be, and carrying out the debris or muck with buckets. While the men were at work the large stone, the one weighing about twelve tons, fell on it, or another falling at the same time, fell or rolled upon appellee's feet and legs, causing the injury for which he sued.

The alleged negligence was, according to the complaint and testimony of the appellee, in the failure to exercise ordinary care to furnish a safe place within which the appellee might do his work, and further in the alleged assurance by Yount that the rock would not fall, which assurance was relied upon; and, while working under such assurance, that the appellee suffered the injuries complained of.

The record as presented urged several grounds for the reversal of this case. The view we have taken of it renders it unnecessary to consider more than one of these and our conclusion in that regard disposes of all the other matters. In addition to the foregoing statement which we think is the most favorable that can be stated of the appellee and in thorough accord with his contention, he makes the following explanation of his conduct at the time of the falling of the stone causing the injury.

"At this particular time the hole was about 150 feet back in the mountain and we had deepened it back some 50 feet and started to make a tunnel out at the side. 'Q. The timbers had been built up to catch the rocks that

might fall from the top, up to the end of it, hadn't they? A. Yes.' I tended to the supervising of placing the shots under Mr. Leo Yount. He told me where to put it; he isn't a driller; I am. He just showed us where to work. Mr. Yount went back in there after I had blown the smoke out where the shot was and we all looked at this big rock hanging from above. I asked Mr. Yount about this big rock and he said he thought it would be all right. I asked him if he thought it would be safe and he said he did. Q. If timbers had been placed under that big rock and another shot placed in there wouldn't it have blown those timbers out? A. Not if we had put in the right size. I knew the rock was in the condition that it was in, I saw it hanging there. Bud Pierce and I were picking the smaller particles from around the big rock. 'Q. You knew the rock was in the condition it was in? A. I just knew it was hanging there. Q. You and Bud Pierce were picking the smaller particles from around the big rock? A. That is right.' I did not know whether the big rock would come down or not, Mr. Yount said that it would be safe. George Richardson did not say anything about the rock being dangerous."

This appellee has made an intelligent statement of the conditions under which he was working. It is susceptible of only one meaning, the one which we must presume he intended. Mr. Yount thought the rock was safe, but appellee knew its condition and proceeded to its removal. He, himself, was the one engaged in the picking out or taking out of the loose, shattered or broken rock around it. One of the other workmen was holding the light. He knew its exact condition and anticipating that it, or other rock, would fall and sever the electric cord which furnished the current for light with which they worked, he was expecting the rocks to fall. While he was stooping it did fall and caused his injury.

No doubt, he was a good "boss" or foreman; understanding that the rock was loose and was liable to fall, he took the place of danger and picked out the rock supporting or holding the one that was dangerous. He is the witness that testifies that it weighed twelve tons. It

would be foolish to argue that he did not know or appreciate the danger of this rock falling or rolling upon him.

But it is urged that Mr. Yount thought this rock was safe. We assume Mr. Yount was mistaken; that further investigation would have disclosed the convincing fact that the other workmen discovered when they went to work upon it and that prompted them to make the effort to remove it. It is true, he adds, as a part of his testimony, "I did not know whether the big rock would come down or not," but he and Bud Pierce were picking the smaller particles from around the big rock and "he knew the condition that it was in, that it was just hanging there." Mr. Ashbrook's information and his attitude toward this work is further expressed by the following questions and answers:

"Q. And then you say that Mr. Yount did not think it was dangerous; and, after Mr. Yount left, Bud Pierce suggested that he didn't want to work under it as it was and suggested that you pick it down and 'I agreed with him?' A. I did say that. Q. And you agreed with him? A. Yes." Plaintiff further testified that when Mr. Yount was not there he was the foreman; in fact, he was the foreman all of the time and the other boys took orders from him.

The foregoing statements are conclusive of another fact, that is that Ashbrook and Pierce did not rely upon the statements made by Mr. Yount in which he expressed a belief that the rock would not fall; but they deemed it unwise to work near it in the condition in which they found it, and relying upon their own judgment, began efforts for the removal of the rock. Mr. Yount was not present, ordering and directing that work to be done, but Mr. Ashbrook, as foreman, had control of the men assisting him in the removal of the large stone.

The record discloses that he was a man of mature years. He was more than ordinarily intelligent. At the time of his injury he was a foreman in charge of the work and knew that the safety of the men working under him depended upon the soundness of his opinion and judgment. He was working to make a safe place within which

the employees of the company might work. It is shown by his own testimony that the walls and top of the tunnel could not be shored up with timber until the loose rock or shale had been picked or cut out and removed. It is apparent that it would have been foolish to attempt to brace up a twelve-ton rock that was about ready to fall. He knew that, and attempted to remove it before bracing could be placed.

We appreciate the fact that he had only a few months experience and also the further fact that it is argued that Yount had had many years of experience, but there was no reliance on Yount's statement as to the safe condition of the large stone. Ashbrook and Pierce, in the exercise of their own judgment and discretion, were removing the stone, and their experience, the common or ordinary everyday experience of all men, was such that they must have known and fully appreciated the fact that when they took away the rock or particles holding or supporting the larger stone or rock, it would fall. They understood that; they knew more about this condition than Mr. Yount did; and, of course, they knew and appreciated the danger of the very accident that happened. They knew that rock was liable to fall which would or might sever the electric cord. *Union Saw Mill Co.* v. *Hayes,* 192 Ark. 17, 90 S. W. (2d) 209; *McEachin* v. *Yarborough,* 189 Ark. 434, 438, 74 S. W. (2d) 228.

The last cited case and authorities there presented control here, and are conclusive as to all matters in controversy.

The conversation with Yount did not bring this case within the exception to the general rule. Yount made no statement, gave no assurance, which, being relied upon, was the result of the injury.

The necessary conclusion must be that the court should have directed a verdict for the defendant as requested. On account of the failure to do so there was error for which we reverse the judgment of the trial court.

This case has been completely developed. The appellee's statement, made with the complete understanding

of the conditions that prevail, forecloses or shuts off any right to recover. There is no necessity for remanding the case.

The cause is, therefore, dismissed.

JENNINGS *v.* WASSON, BANK COMMISSIONER.

4-4772

Opinion delivered October 25, 1937.

Ezra Garner and *Harry C. Steinberg,* for appellants.

McKay & McKay, for appellees.

BUTLER, J. Appellants, husband and wife, being indebted to Wade Kitchens in the sum of $2,256.67, executed a promissory note for that sum securing it by a deed of trust covering a certain tract of land lying partly in Columbia and partly in Union counties. Later, the note and deed of trust were assigned to the Columbia Peoples Bank as collateral security for an indebtedness due that bank by Wade Kitchens. The bank became insolvent and was taken over by the State Bank Commissioner, who, as the representative of the bank, filed suit in the Columbia chancery court seeking judgment on the note and fore-

closure on the mortgage. A summons was issued and delivered to the sheriff of Columbia county who in due time, returned the same with his indorsement of service thereon. Suit was filed November 6, 1935, the return of the sheriff was made November 8, 1935, and on June 4, 1936, the note and certified copy of the deed of trust were filed with the clerk and on that day a decree was rendered for the principal sum of the note with accrued interest. The deed of trust was foreclosed and July 25, 1936, fixed as the date of sale. On that date the bank commissioner offered the sum of $1,250, and as there was no other bid, the lands were sold to him for that price. Subsequently, a summons was issued in the case directed to the sheriff of Union county and served by him upon the appellants, as shown by the return filed September 10, 1936. On December 11, 1936, the clerk of the Columbia chancery court, who had been appointed commissioner to make the sale, filed his report of same. At this juncture, appellants appeared by their attorney and "excepted to the approval of the same, and, after said exceptions were heard by the court, the court was of the opinion that the same should be overruled and the report was approved." On the same day, the deed was made, approved by the court over the exceptions of appellants, who prayed, and were granted, an appeal to this court.

The appellants contend that the decree was void because of lack of proper service, and, therefore, that all of the subsequent proceedings were of no force and effect. From an examination of the record, it appears that no appeal has ever been taken from the rendition of the decree of June 4, 1936. Therefore, the only matter presented for our review is the correctness of the trial court's order approving the sale. We are not advised as to the nature of the exceptions made by appellants to the approval of the report of sale; they are not disclosed by the abstract filed with us by the appellants, nor are they set out in the transcript. We surmise that these exceptions were based upon the contention that the decree of June 4, 1936, was void. That decree, however, contains the necessary recitals to give the court jurisdiction over the person of appellants and the subject-matter

of the suit, and the mere fact that another summons was issued by the clerk, directed to the sheriff of Union county and by him served upon the appellants in Union county, is not sufficient to overturn the recitals of the decree and the return of the sheriff of Columbia county, even though these matters are presented by the record for our consideration. It follows that the decree of the trial court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY ET AL. *v.* HINKLE.

4-4762

Opinion delivered October 25, 1937.

R. E. Wiley and *Richard M. Ryan,* for appellants.
Glover & Glover, for appellee.

McHANEY, J. Appellee, a minor, brought this action by her mother as next friend, against appellant to recover damages for personal injuries she alleged she sustained

as a passenger while alighting from one of appellant's trains at Malvern, Arkansas. She alleged that, while attempting to alight with two heavy suitcases and a bucket of syrup, and without assistance from the train porter, the train, after stopping, gave a sudden lurch or jerk, throwing her to the station platform from the train, and caused her severe and painful injuries. Issue was joined on the alleged negligence and there was a plea of contributory negligence. Trial to a jury resulted in a verdict and judgment in her favor for $750.

The two general assignments of error relied on for a reversal of the judgment are, 1, that the verdict and judgment are not supported by the evidence, and 2, that the court erred in giving and in refusing to give certain instructions.

As to the first contention, there is no dispute that appellee is a colored girl, a minor fifteen years of age, and that she was a passenger on appellant's train from Fulton to Malvern, Arkansas, having purchased a ticket and paid her fare. It is, also, practically without dispute that she fell, in alighting from the train in Malvern. Appellant's only contention is, in this regard, that "there was a total failure to show any negligence on the part of the defendants or the operators of the train," that is, no proof of a sudden lurch or jerk of the train. We cannot agree that the evidence is lacking in this respect. Appellee testified as follows, in describing how the injury occurred and the cause of it:

"Q. Tell the jury in your own way just how you got hurt? A. The train reached Malvern, and train porter came through and called the station, and went on out somewhere. I thought he would go back and get my suitcases and he never came back, and I got up and got my suitcases and come out to the door where you step out of the train and the train jerked and threw my two suitcases and syrup out and I fell down. Q. Describe the movement of the train. A. It jerked or did something—I don't know what it did. It stopped suddenly and then jerked. Q. Jerked you and threw you off? A. Yes, sir. Q. Where was the porter at that time? A. I don't know

where he was. Q. Was he there to assist you at all in getting off? A. No, sir, he did not do anything."

Another witness, Booker Hughes, testified that the train gave a sharp jerk causing her to fall out, and a number of others testified to seeing the accident, saw her come out with the two suitcases and the bucket; saw her fall and otherwise corroborating her testimony. Appellant's witnesses contradicted her as to the jerk of the train and as to her fall and injury. This is sufficient to take the case to the jury and its verdict, on a disputed question of fact, is binding here.

It is, also, argued that the court erred in giving each of appellees instructions 1, 2, 4 and 5. We think these instructions are all correct declarations in this case with the exception of No. 4, which coupled up the right of recovery for the negligent movement of the train with the alleged negligence of appellants' servants "in negligently failing to exercise ordinary care to assist her off of said train." The porter testified that he did take her two suitcases out for her at Malvern, a fact which she denied. There was no specific objection to this instruction, or at least the abstract does not show what it was, and we think no prejudice resulted, even though it were erroneous. Objections made to the other instructions are without merit.

The court gave all of appellant's requested instructions except its request for a directed verdict and its No. 7A, as follows:

"You are instructed that the defendant company is not liable for the jolts and jars of a train that are necessarily incident to the starting, stopping and running of said train, and if you find and believe from the preponderance of the evidence that there was such a jolt or jar of said train, as stated above, which caused the plaintiff to fall then you are told that the defendant would not be liable." No error was committed in this regard. It was not contended that the jerk or lurch relied on was one incident "to the starting, stopping and running of said train." The basis of the action, as we understand it, was

a sudden jerk or lurch of the train given it after stopping and as the passenger was alighting.

We find no error, so the judgment must be affirmed.

MISSOURI PACIFIC RAILROAD COMPANY ET AL. *v.* OVERTON.

4-4761

Opinion delivered October 25, 1937.

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

Glover & Glover, for appellee.

MEHAFFY, J. The appellee commenced this action in the Hot Spring circuit court against the appellants for personal injuries he alleged he sustained while working for the Acme Brick Company near Malvern, Arkansas, while he was assisting other employees of the brick com-

pany in unloading brick from wheelbarrows into a box car of the appellants. He alleged that while he was performing his duties that the operators of appellants' engine negligently and carelessly, and without warning ran said engine and car into the box car where appellee was working, unloading brick; that, by reason of the force or impact of the cars, the bricks were thrown over the appellee, and he was severely injured in his back and body, and prayed for damages in the sum of $3,000.

The appellants answered and denied all the material allegations in the complaint, and alleged that if appellee had been damaged or injured in any sum, his damages and injury were caused by his own negligence.

There was a jury trial and a verdict and judgment for the sum of $750, and the case is here on appeal.

The appellee testified in substance that on October 16, 1936, he was working in a box car unloading brick, was working with a man named Buckley, and that while they were at work the switch engine came in and he saw it coming; that every day when a car was about to be moved the brakeman would tell them and notify them of the approach of the train. On the day of the injury he saw the engine coming, and they took the plank or runway from the box car, and put it on the platform. This was a rule and witness knew the train was coming in there, and he came out of the car when they had taken the plank up. He knew the engine was coming after the box car, but said they always got orders to get out. Witness testified that when the engine struck the car he was in he fell and brick fell on top of him; that he had suffered ever since his injury, and was under the care of a physician at this time; that Dr. Hodges treated him; that after the brick fell on him he heard the brakeman say to the engineer: "I told you to stop"; that the conductor called his engineer and fireman and said to them: "See what a mess you've made."

The evidence shows that the engine was coming toward the box car and appellee and Buckley got out of the car, and the engine then stopped. They got back in the car to finish their work so that the car could be taken out by the switch engine. Appellee said that the train never

struck a box car that hard before, and every time before he had been warned to get out.

Witness, Herman Gulley, testified to substantially the same things as appellee, and said that he heard someone say: "Why didn't the conductor give a signal to stop?" He also testified that he saw the train coming around the curve, and it stopped about the office.

Dr. McGill testified that he took an X-ray picture and that the picture showed an injury to the region of the articulations, between his fourth and fifth lumbar vertebrae; his back was swollen and stiff in that region. He found that bones or callouses had grown out on appellee's back, and that appellee had a permanent injury.

Dr. Williams, also, testified that his injuries were permanent. Fred Jackson testified for the appellant in substance that he was present when the switch engine of appellants coupled up with the box car; that he heard the warning given to appellee, and saw them come out of the car, and then they went back in the box car; that they expected that the train would be held until the car was loaded.

W. F. Coffman, another witness, testified that he worked for the Acme Brick Company, and was at the other end of the car when the accident happened.

E. L. Buckley testified in substance that he was working for the Acme Brick Company; that the appellee was working in the box car with witness on the day of the accident; he knew that a switch engine was coming in that day to get the box car, and heard it coming in; that he and appellee got out of the box car onto the ground; that he thought they could get back in the car and get it loaded before the train pulled out, and that he and appellee went back into the car. Witness testified about the appellee's falling and brick falling on him. He said he and appellee were already out of the car, and it was not necessary for the brakeman to tell them; that the engine had been stopped a short time, and that sometimes the engine would wait twenty or thirty minutes for them to load; he did not remember about the whistle or bell; the coupling had never knocked down brick before.

C. B. Lawrence, a brakeman for appellants, testified that warning was given, and that the engine stopped before the coupling was made; that he and the engineer worked with signals.

W. J. Dillon, the conductor, testified that they switched in to the Acme Brick Company to get a car, and he saw appellee and Buckley come out, and did not see them go back into the car; that when they went in to get a load of brick they would usually wait when the car was not loaded.

Dr. Hodges testified that he examined the appellee, his foot and ankle, and did not find any abrasions, cuts or wounds.

It was admitted that appellee was working in the box car, and that the train crew knew he was in there. There seems to be no dispute about the fact that after appellee and Buckley got out of the car the engine stopped. They then got back into the car to finish their work so that the railroad company could take the car of brick out. It is, also, undisputed that when the engine would come after the car, they would frequently wait until the loading was finished.

Appellants contend first that there is no evidence to show any negligence on the part of the railroad company or the operators of the switch engine. If the switch engine came to the brick plant, the workmen saw it, and got out of the car and then saw the engine stop; and after it stopped they got back in the car, and the engine was run into the box car without giving any warning, the jury had a right to find that the appellants were guilty of negligence.

The question of the contributory negligence of appellee was, also, a question for the jury.

It is next contended that the court erred in giving appellee's instruction number 1 over the objections and exceptions of appellants. That instruction reads as follows:

"You are instructed that if you find from a preponderance of the evidence in this case that the plaintiff was injured by the operation of one of the trains of the defendant company as alleged in the complaint, then you

are told and instructed by the court that the law presumes negligence on the part of the defendant company, and it will be your duty and you are instructed to find for the plaintiff, unless the defendant has overcome that presumption by a preponderance of the evidence in the case.''

This court has often held that, under § 8562 of Crawford & Moses' Digest, where an injury is caused by the operation of a train, a *prima facie* case of negligence is made out. In other words, where it is shown that an injury is caused by the operation of a train, negligence is presumed; but of course, after evidence is introduced, the jury must find according to the evidence, and their verdict must be supported by the evidence. However, whenever it appears that an injury was caused by the operation of a train, the presumption of negligence arises.

It is next contended that the court erred in giving appellee's instruction No. 2. This instruction told the jury in effect, that if they found for the appellee, and that he was injured in the operation of appellants' engines, the plaintiff would be entitled to recover in this case, and it should so find, if the appellee was himself in the exercise of ordinary care. This was a correct declaration of the law.

Appellants contend that instruction number 6 was erroneous. That instruction told the jury that if they found for the plaintiff, they would find such a sum of money as would reasonably compensate the appellee for his injuries, etc. This was an instruction on the measure of damages, and the objection of appellants was that there was no proof that appellee's injury was caused by the negligence of appellants, and, also, that there is no evidence that appellee was injured permanently or otherwise. These are the only objections urged to this instruction. Besides, this is an instruction on the measure of damages, and appellants do not contend that the amount of damages awarded is excessive.

Appellants, also, contend that the court erred in giving appellee's instruction number 7. This instruction was correctly given under § 8575 of Crawford & Moses' Digest.

Appellants contend that the court erred in refusing to give their instruction number 1A. This was a peremptory instruction, and while the evidence was in conflict, there was sufficient evidence of negligence to submit the case to the jury, and the jury's finding on this question is conclusive.

We find no error, and the judgment is affirmed.

COOK *v.* MALVERN BRICK & TILE COMPANY.

4-4770

Opinion delivered October 25, 1937.

Rose, Hemingway, Cantrell & Loughborough, for appellants.

A. T. Davies and *House, Moses & Holmes,* for appellees.

MEHAFFY, J. The appellants filed in the Pulaski chancery court the following complaint:

"The defendant is a domestic corporation engaged in the business of manufacturing and selling brick and tile. Plaintiff, Mrs. Essie Bordis Cook, is administratrix of the estate of A. B. Cook, deceased. The defendant, Malvern Brick & Tile Company, is authorized to issue and has issued 1,000 shares of common stock owned as follows:

"Plaintiff George B. Cox	75 shares
Plaintiff, Mrs. Essie Bordis Cook, as administratrix aforesaid	405 shares
Defendant George A. Callahan	305 shares
Defendant Charles B. Bryan, as administrator of the estate of C. A. Bryan, deceased	70 shares
Defendant Charles G. Bryan individually	25 shares
Defendant B. J. Chamblin	20 shares
G. L. Callahan	100 shares

"Defendant Charles G. Bryan is the administrator of the estate of C. A. Bryan, deceased. At the annual meeting of the stockholders of the defendant, Malvern Brick & Tile Company, held in January, 1935, defendants, George A. Callahan, Charles G. Bryan, as administrator of the estate of C. A. Bryan, deceased, Charles G. Bryan, individually, and defendant B. J. Chamblin, owning and controlling a bare majority of the outstanding stock of the corporation, conspired to control and operate it for their individual selfish interests and elected themselves directors of the corporation, giving themselves a majority of the board of directors. They, also, elected as directors the plaintiffs, George B. Cox and Mrs. Essie Bordis Cook.

"The defendant, George A. Callahan, is well advanced in years. He resides in the city of Hot Springs and has had no experience in the management or operation of a brick and tile manufacturing plant and the sale of its products. He is president and general manager of the Quapaw Bath House in Hot Springs, has his office in

Hot Springs, devotes practically all of his time, which he devotes to business, to its management, and receives a substantial salary therefor. His son, G. L. Callahan, twenty-seven years of age, was employed by the Malvern Brick & Tile Company as shipping clerk at a salary of $100 a month. Prior to the death of A. B. Cook in 1934, he had managed the business of the Malvern Brick & Tile Company successfully and well. Following his death, the plaintiff, George B. Cox, was made manager of the business at a salary of $175 a month. He devoted all of his time to the business, and, having a full knowledge thereof, managed it so well that in the year 1935 the company was able to and did declare and pay a dividend on the stock of 30 per cent. At a meeting of the stockholders in January, 1935, and in pursuance to the policy of defendants to operate the business for their selfish individual interests, they refused to permit plaintiff, George B. Cox, to continue as manager, but instead installed George A. Callahan as manager, knowing that he was without experience in such work and that because of his health and business activities he had neither the strength nor the time to manage said business.

"In April, 1936, the defendants constituting a majority of the board of directors, over the protests of the plaintiffs, for the purpose of effectuating their continued control over the operations of the business, for their selfish interests, attempted to increase their own salaries to be paid them by the corporation in the following amounts and constituting the following per cents. of their prior salaries: George A. Callahan from $150 a month to $200 a month, an increase of 33 1/3 per cent.; Charles G. Bryan from $175 a month to $325 a month, an increase of 85.70 per cent.; B. J. Chamblin from $215 a month to $300 a month, an increase of 39.53 per cent. They, also, arranged to increase the salary of G. L. Callahan, son of George A. Callahan, from $100 to $150 a month, an increase of 50 per cent. They also increased the salary of A. F. Henry, a salesman, from $125 a month to $200 a month, an increase of 60 per cent. Defendant Charles G. Bryan was employed as bookkeeper and plant superintendent.

He had ample time to perform his work, but, in addition to increasing his salary 85.70 per cent. the individual defendants employed for him an assistant bookkeeper at a salary of $55 per month. G. L. Callahan had ample time to do his work as shipping clerk, but in addition to increasing his salary 50 per cent. they employed an assistant for him at a salary of $55 per month. Salesman A. F. Henry had been employed by the company for considerable time and was entitled to some increase in salary, but not to the increase of 60 per cent. which was given him. None of the increases were justified by the work or the ability of the respective persons whose salaries were increased, and no increase in the salaries, except possibly a slight increase in the salary of A. F. Henry, was at all justified by the work they did or the responsibility they had, or their ability.

"The action of the defendants who, as directors, attempted to increase their own salaries is void. Each of the increases in salary has been paid every month, beginning in May, 1936, and there has been paid the defendant, George A. Callahan, for fictitious expense accounts as general manager of the Malvern Brick & Tile Company to this date $300; to the defendant, Charles G. Bryan, on the void raise of his salary, $900; and to B. J. Chamblin on the void raise of his salary $510. The said increases in the salaries of the three defendant directors are void, as an attempted increase of their own salaries by said directors, arranged and carried through by them, and their said raises in salaries and the raises in the salaries of the said G. L. Callahan and A. F. Henry increased the salaries of each of said persons beyond what they were justly entitled to for their positions and work they did. The increase in the salary of George A. Callahan of $50 per month is described on the books as an expense account, but as a matter of fact the said George A. Callahan was put to no substantial expense on account of the business of the company, and any small expenses such as he might incur were only occasional as traveling expenses and telephone calls and were more than amply covered by the salary of $150 per month allowed and paid

to him as president of the company. As a matter of fact, as president and ostensible manager of the company, the said George A. Callahan during this year has devoted only a nominal amount of his time to the business of the company. He resides in the city of Hot Springs and devotes practically all of his business time to the management of the Quapaw Bath House there. He is not in Malvern, except to attend the monthly meeting of the board of directors, and then for not more than an hour and an occasional trip from Hot Springs to Malvern between meetings of the board of directors and on which he spends less than an hour and his said salary of $150 per month, as president of the company, should, for the best interests of the company, be discontinued.

"The plaintiffs have not requested the board of directors of the corporation to institute this action for and on its behalf, because the affairs of the corporation are under the dominion and control of the said majority of the board of directors, and the said majority of the board of directors would be defendants in such an action, and the litigation would be in their control and they would be opposed to its success. Neither the plaintiffs nor the defendant corporation have any plain, adequate or speedy remedy at law. The action of the defendant directors in attempting to raise their own salaries and in raising the salaries of the other employees, as mentioned, constitutes an injustice and fraud upon the defendant corporation and upon the plaintiffs as stockholders therein, and has the effect of unlawfully diverting the corporation's assets and revenues to the defendants in large part and to others, and wastes a substantial portion of the corporation's assets and revenues which should be disbursed to the stockholders ratably, or held to their benefit."

The prayer was for judgment for the use and benefit of the Malvern Brick & Tile Company, and that the defendants be restrained and enjoined from further paying the amount of the officers' purported raise in salaries.

Service was had upon George A. Callahan in Garland county, where he resided; on Charles G. Bryan in Hot Spring county where he resided; on B. J. Chamblin

in Pulaski county, the county of his residence, and upon the defendant, Malvern Brick & Tile Company, by serving B. J. Chamblin as its agent in charge of its office in Pulaski county.

Appellees filed motion to quash service and summons upon the corporation and alleged that the corporation was organized under the laws of Arkansas with its domicile and principal place of business in Malvern, Hot Spring county, and that it had no principal office, branch office or place of business in Pulaski county, and its chief officer or any other officer does not live in Pulaski county; that it does not maintain a branch office or any other place of business in Pulaski county, Arkansas: second, that the action against the defendants is a matter which concerns solely and only the internal affairs of the corporation, and that this court is without jurisdiction of the cause of action; that the defendant, B. J. Chamblin, is merely a salesman for said corporation, and that service was not had upon any officer of the corporation in Pulaski county.

B. J. Chamblin testified that he was salesman for the Malvern Brick & Tile Company and he lived in Little Rock; that the plant of the Malvern Brick & Tile Company and main office is at Malvern; that it has a display room in Little Rock; they had stock in the sense that they frequently make deliveries to Little Rock, and for some reasons there may be rejections in which case they had to do something with it; that it was too expensive to take it back to Malvern, and they place it on the yard in North Little Rock; the brick is not originally sent here for resale, it is sent from Malvern on a definite order; witness takes orders as agent or salesman; such orders are sent to Malvern for confirmation; the company's books are kept at Malvern and stockholders meetings are held there; witness has been sales manager about eight years, and was sales manager at the time summons was served; the company has an office at 218 West Second street in Little Rock and witness is in charge of the office; witness identified a photograph as a correct picture of the office.

The photograph was introduced and the sign on the windows is "Malvern Brick & Tile Company."

Witness further testified that the company has had this same office for years, and that the rent on the office is paid by the Malvern Brick & Tile Company; the office telephone is listed in the directory under the same name; the company pays the telephone bill and pays all expenses incident to the maintenance of that office; the company also maintains in Pulaski county a brickyard to this extent, the place where is stored rejected material in North Little Rock with E. M. Merritt; the company does not pay rent, but permits the Malvern Brick & Tile Company to unload material there for any hauling they have that they can throw to him, and that has been the status for eight years. The company itself does not send any material there directly from the plant, except in rare instances when they may have an order for a few hundred brick from some lumberyard, up at Harrison or some other place where they want a truck here to pick it up and haul it up to Harrison. The company at Malvern does send brick from the brickyard up to this yard in North Little Rock where it is picked up by other parties. The brickyard is listed in the telephone directory under the name of Malvern Brick & Tile Company. When a customer comes into the Little Rock office and makes a large order, witness sends the order in to the plant and the bookkeeper fills in all the information as to consignee, etc., and this is called acknowledgment. A copy is sent to the buyer and also to witness, that he may recheck it. There are four steel filing cabinets in the Little Rock office; in one of the files there is a permanent file, marked "Checks received"; there is listed the checks received for payments of orders; the Little Rock office has authority to receive payment for material and may receive checks or cash. Witness has authority to give customers a receipt; there are no other selling agencies or offices in Arkansas other than the Little Rock office; as sales manager, witness sends material to all selling outlets or agencies of the company throughout the different states where it does business; the main part of witness' duties and employ-

ment is selling the output of the Malvern plant; the office in Little Rock accounts for the great bulk of the output of the Malvern plant; it accounts for virtually all the brick manufactured by the company except that sold in the immediate vicinity of the plant. Witness is required to and does devote all of his time to his duties. It is a part of his employment and duty to call on all past-due accounts, and attempt to collect them; it sometimes happens that a purchaser may decline to take the delivery and, in that event, it is witness' duty to dispose of those rejected and get rid of them in the best way he can; wherever they have a rejection in Louisiana or elsewhere, witness may go down and negotiate about the disposing of the property; if they have something in the North Little Rock yard that is rejected, witness gets rid of it; witness testified that you could come to the office in Little Rock and that he would sell tile that is on hand in the brickyard, and the Malvern office would not know anything about it until the transaction was completed; in handling the duties pertaining to his office witness has some discretion in what to do. The company furnishes witness an automobile and pays for its maintenance and expense; he has authority to charge gasoline, oil, etc., to the company and to charge repairs to the company.

George B. Cox testified that he had been connected with the Malvern Brick & Tile Company since about 1928; that Mr. Chamblin is sales manager, and, unless his authority has recently been revoked, he has absolute authority to bind the company on contracts for the sale of its products, and there is nothing conditional about his authority.

At the conclusion of the testimony counsel for appellees made a motion to dismiss the complaint as to the Malvern Brick & Tile Company for the reason that no relief was asked therein, no cause of action stated against the company, and that it was not a party nor a necessary party and the action is a matter which concerns solely and only the internal affairs of the corporation, and the court is without jurisdiction of the cause of action.

The court granted this motion and dismissed the cause as to the Malvern Brick & Tile Company. The court, also, quashed service of summons upon the Malvern Brick & Tile Company and dismissed the complaint for the reason that no relief was asked against the company and that it was not a necessary or proper party. The complaint of the plaintiff was dismissed by the court for the reason that the cause stated concerns solely and only the management of the internal affairs of the corporation which has its domicile without the jurisdiction of this court.

The case is here on appeal.

Section 1152 of Crawford & Moses' Digest provides that where a corporation, foreign or domestic, keeps or maintains in any of the counties of this state a branch office or other place of business, it shall be subject to suits in any of the courts in any of said counties where said corporations so keep or maintain such office or place of business, and service of summons or other process of law from any of 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.

It appears from the evidence in this case that, except for the manufacture of brick and tile and the sale of bricks and tile in the immediate vicinity of the plant, practically all of its business is transacted in Little Rock, and the agent here, according to the testimony, has absolute authority to conduct the business. This office in Little Rock also has charge of the yard in North Little Rock.

We do not think that the corporation could do the business in Little Rock that the evidence shows that it does do through an agency for that purpose, without, at the same time, being here for the purpose of service, and that the service on the agent in Little Rock in charge of the office, was sufficient service on the corporation. *Ark.*

ansas P. & L. Co. v. *Hoover,* 182 Ark. 1065, 34 S. W. (2d) 464; *Ramey* v. *Baker,* 182 Ark. 1043, 34 S. W. (2d) 461; *Mississippi River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. (2d) 255; *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6; *Berryman* v. *Cudahy Pack. Co.,* 189 Ark. 1151, 76 S. W. (2d) 956; *Ft. Smith Lbr. Co.* v. *Shackleford,* 115 Ark. 272, 171 S. W. 99.

In the cases cited the law seems well settled, and § 1152 of Crawford & Moses' Digest was construed in those cases, and we do not deem it necessary to discuss the matter further here, as under those cases the service in this case is valid. In fact, the evidence is much stronger in this case as to the corporation's doing business in Pulaski county than the evidence in some of the cases cited.

The court dismissed the complaint for the reason that the cause of action concerned the internal affairs of the corporation only. The complaint stated that the directors had voted an increase of their salaries, and the court having jurisdiction of all the parties, it should have tried the case.

The complaint shows, and it is undisputed, that when the directors increased their salaries, there were but four directors present, and one of them voted against the increase. It, therefore, appears that the three directors increased their own salaries.

This court recently quoted with approval from 14A C. J. 118 the following: "The rule obtaining in a majority of jurisdictions is that a director may deal or contract with the corporation where he acts in good faith and the corporation is represented by a quorum of disinterested directors or other independent officers or agents authorized to contract for it. Such a contract is not void *per se* nor is it voidable, except for unfairness or fraud, for which it will be closely scrutinized in equity. Similarly an officer may deal with the corporation if his acts are open and fair and known to the directors and stockholders; but all dealing between an officer of a corporation and board of directors must be scrutinized care-

fully, and to bind the stockholders must bear evidence of having been in the interests of the corporation." * * *

"An officer is without authority to fix or increase his own salary. Directors are precluded from fixing, increasing, or voting compensation to themselves for either past or future services by them as directors or officers, unless they are expressly authorized to do so by the charter or by the stockholders. The director who claims compensation for his services, being disqualified from voting on the question, if he is necessary to make up a quorum of the board, or if his vote is necessary to the result, the resolution will be void. But where his vote is not necessary to the adoption of such a resolution, it will not necessarily be void, although he may have voted for it, or although he may have been present when the vote was taken." 14A C. J. 143-144. *Oil Fields Corporation* v. *Hess,* 186 Ark. 241, 53 S. W. (2d) 444.

The suit was properly brought in equity. 4 Fletcher Enc. Corporations 4038; *Redbud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340; *Redbud Realty Co.* v. *South,* 153 Ark. 380, 241 S. W. 21.

The corporation was a necessary party, because, if the salaries had been wrongfully paid and a recovery was had, it would be the property of the corporation. 14A C. J. 160; 7 R. C. L. 490.

The decree of the chancery court is reversed and the cause remanded with directions to overrule appellees' motion and proceed with the trial of the cause not inconsistent with this opinion.

POWELL BROTHERS TRUCK LINES, INC. *v.* BARNETT.

4-4781

Opinion delivered November 1, 1937.

Cotton & Murray and *Westbrooke & Westbrooke,* for appellant.

V. D. Willis, Ben C. Henley, Ralph R. Rhea and *Shouse & Walker,* for appellee.

BAKER, J. The accident which was the foundation of this suit occurred at Seligman, Missouri, on the morning of September 6, 1936. Barnett, the plaintiff, had gone to sleep upon a "bandstand" or platform erected upon an automobile frame and wheels placed near the highway, on the night of September 5, and early next morning, perhaps, about daylight, the truck driven by one of the drivers of the appellant corporation was permitted to skid or run into this platform upon which appellee was asleep and caused the injuries for which he sued. A very brief statement will be made in order that the contention of the appellant may be presented. There will be no effort to state the entire controversy nor all the contentions of the parties as this is unnecessary.

Powell Brothers Truck Lines, Inc. was operating a tractor-trailer truck from Springfield, Missouri, to Harrison, Arkansas. In the town of Seligman there is an "S" curve upon the highway and near one of these curves, just a few feet away, the exact distance being much in dispute, was a "bandstand" upon which Otto Barnett went to sleep the night before the accident and upon which he was still sleeping the next morning at the time of the accident. At the place of the accident there was a down grade. The truck was loaded with about 10,000 pounds of freight. One of the tractor wheels is said to have locked and the driver of the truck contends that he was attempting to steer the truck from

the main traveled highway upon the roadside when, by reason of the locked wheel, it was impossible to keep the truck under such control as to prevent it striking the "bandstand." The "bandstand" was not turned over, but was knocked a short distance. Immediately after this collision, perhaps within two or three minutes, Barnett appeared with a skinned place on his nose and advised the driver of the truck that he had been thrown from the "bandstand," that he was more scared than hurt. First-aid was administered to Barnett in which his nose was treated, there apparently being no other injury. He was given his breakfast, which he ate with relish. After that, on the same day, he went by train from Seligman to his home at Harrison.

The suit for $35,000 was filed and numerous short continuances were had and the case was finally tried, and a verdict and consequent judgment were rendered for the plaintiff in the sum of $10,000. Appeal has been prosecuted from that judgment.

One of the matters contested, with considerable conflicting testimony, was the extent of the injuries of Barnett. Several doctors testified, each detailing in his testimony conditions found and observed by him. Some of this testimony was in irreconcilable conflict with other portions covering the same points.

The defendant had asked for the appointment of physicians to make an examination of the plaintiff. The court had appointed for this purpose Dr. McCoy and Dr. Kirby. No objection was made to the appointment of either of these physicians at the time of the appointment or prior to the time that the examination was made by them of the plaintiff. It is conceded by the appellee, plaintiff below, that the appellant had the right to have this examination made. It appears to have taken a portion of two days for the examination to be made. At the time Dr. McCoy was offered as a witness, objection was made to the competency of the witness, and the court sustained the objection, and the witness was not permitted to testify on account of the fact that he had at one time treated the defendant for some of his alleged

injuries and was his "personal and family physician," and that he had been employed as plaintiff's doctor in the case.

Plaintiff's counsel knew that Dr. McCoy had been appointed prior to the time of his having made the examination about which he was called to testify; in fact, it is a fair inference they delivered him to the doctor's office for the examination. He had completed the examination and was called as a witness when the first objection was offered on account of his alleged incompetency.

We think the court was in error in sustaining this objection, and that, on account thereof, the case will have to be reversed and for that reason it is unnecessary to discuss other matters raised upon the appeal for the reason that the other alleged errors may not occur in a new trial.

After the court had ordered the examination to be made by Dr. McCoy and Dr. Kirby, it was in fact made on January 21st and 22nd. Dr. McCoy was called as a witness during the trial on February 4. Until that time there had been no suggestion of impropriety in the appointment of the doctor to make the examination and testify in regard thereto.

The court sustained the objection made and declined to permit the doctor to testify. The effect of this ruling at that time made ineffectual the order of the court appointing the same physician to make the examination. The objection was made and sustained under provisions of § 4149, Crawford & Moses' Digest, as then in full force and effect; as amended § 5159, Pope's Digest.

Without regard to the merits of a timely objection of the kind, it must be said the objection to this witness under the circumstances came too late. Whatever, otherwise, there might have been of merit in the objection was waived. By submitting to this examination with consent of counsel who had acquiesced in the appointment, although they may not have expressly agreed thereto, the waiver became effective. *Triangle Lbr. Co.* v. *Acree,* 112 Ark. 534, 548, 166 S. W. 958, Ann. Cas. 1916B 773.

It is urged now that appellant has failed to set out what evidence was expected to be had from the witness, and, therefore, even if the ruling were wrong, the testimony may not have been important. But that is beside the issue. The objection was on account of the disqualification of the witness, and not to the offer of any evidence that was excluded. Had the issue arisen over a ruling excluding evidence, then appellee's contention would have value. Prejudice is presumed when a party is denied the right to use a competent witness. *Miles* v. *St. L. I. M. & S. Ry. Co.,* 90 Ark. 485, 119 S. W. 837; *Rickerstricker* v. *State,* 31 Ark. 207. See, also, *National Annuity Association* v. *McCall,* 103 Ark. 201, 146 S. W. 125, 48 L. R. A. (N. S.) 418.

We carefully refrain from the expression of any opinion or impression as to the alleged negligence of appellant or its driver, as well as the alleged negligence of Barnett. This last statement is made so that parties will understand that we are not determining the sufficiency or insufficiency of proof upon any phase or issue of the case. A new trial may present new developments, and such consideration at this time would be out of place. These issues arise under the laws of the state of Missouri, in which jurisdiction the comparative negligence doctrine does not obtain, but contributory negligence is a complete defense.

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

HUMPHREYS and MEHAFFY, JJ., dissent.

ÆTNA CASUALTY & SURETY COMPANY *v.* PEOPLES BUILDING & LOAN ASSOCIATION.

4-4779

Opinion delivered November 1, 1937.

John Sherrill and *Frank Wills, Ira J. Mack* and *Buzbee, Harrison, Buzbee & Wright,* for appellants.

Fred M. Pickens, for appellee.

McHaney, J. At all times hereinafter mentioned, appellant, W. T. Parish, was secretary of the appellee, People's Building & Loan Association of Newport, Arkansas, and the appellant, Aetna Casualty & Surety

Company, hereinafter called Aetna Company, was surety on his bond as such. At the same time said Parish was cashier of appellant, First National Bank of said city, hereinafter called the bank, and the appellant Fidelity & Casualty Company of New York, hereinafter called Fidelity Company, was surety on his bond as such cashier. He was the chief executive and operating officer of appellee and kept the books and conducted its affairs at the office of the bank. In December, 1934, he was relieved of his duties with appellee and the bank, on account of certain peculations disclosed by an audit of the books of appellee. The bond of the Aetna Company provides that it "binds itself to pay to People's Building and Loan Association, Newport, Arkansas (as employer), such pecuniary loss as the employer shall sustain of money or other personal property (including that for which the employer is legally responsible) through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, misappropriation, or any other dishonest or criminal act committed by the employee directly or in connivance with others while such employee holds such position at any location in the service of the employer, during the period commencing with the first day of August, 1929, at twelve o'clock noon, Standard Time." This bond was in force from August 1, 1929, to August 1, 1934. Another provision of the bond is, that, upon discovery of any loss by the employer, notice shall be promptly given to the surety and within three months make a written statement of the claim giving particulars of such loss. And further: "The surety shall have two months after claim has been presented in which to verify and pay same, during which time no legal proceedings shall be brought against the surety as to that claim * * *." No claim was made against the Aetna Company until April 19, 1935, and suit was not filed until August 13, 1935.

On the last mentioned date, appellee brought this action against all appellants to recover on the items hereinafter discussed. Issue was joined and a trial resulted in a decree against appellants for the different items hereinafter mentioned, with interest from the date

of the loss, in one instance running back to 1929. The case is here on appeal.

Appellants first contend that they are not liable for interest. We agree to this extent, that they are only liable for interest on the claim from June 19, 1935. Under the plain provision of their bonds, above quoted, they had sixty days after the claim was filed, to pay it, during which time no suit could be brought. The claim having been presented on April 19, 1935, they had until June 19th in which to pay. After that time they were liable, in the event of recovery on the claim, for interest at the legal rate of 6 per cent. per annum. In this respect, the judgment will be modified.

We will now consider the separate items of the claim. No. 1 is referred to as the Claire N. Phillips note. As to this item, the proof shows and the court found, that, on August 6, 1932, Parish put in the assets of appellee a note purporting to be signed by Mrs. Phillips for $2,000, but which was not signed by her, and was a forgery; and on the same day he drew a check in her favor for $2,000 on the bank, which was paid and charged to the account of appellee. Mrs. Phillips did not get the check, did not indorse it and did not receive any of the proceeds therefrom. The check itself was not available and was not put in evidence, but the stub of the check was and it reflected the character of the check as stated. Appellants contend that the appellee suffered no loss by this transaction. If the note had been genuine, there might be some force to this argument. But it was not, and appellee is out the $2,000 from its deposit in the bank. The latter says it is not liable, because Parish obtained possession of the check through his connection with appellee. That is true, but he was enabled to cash it on a forged indorsement because he was cashier of the bank. Therefore, both the Aetna Company and the bank, including the Fidelity Company, are liable for this item.

Item 2 relates to the Roy Moon note, amounting to $474.60, which was made payable to Parish personally for insurance premium. On November 29, 1929, Parish placed this note in the assets of appellee and withdrew

from its funds the amount for which it was discounted to it. Moon paid Parish one-half this note prior to his death, and his administratrix paid the other half after his death on the claim presented. Parish did not account to appellee for these payments. It is contended by the Aetna Company that appellee still has the note and can collect upon it. But the undisputed proof shows that its agent received the full amount of money to satisfy same and did not account to it therefor. Therefore, the court correctly held that the Aetna Company only is liable for said amount.

Item 3 relates to two checks drawn on the bank by J. Collison and payable to appellee, one for $440 dated September 29, 1929, and the other for $340, dated October 10, 1931. These checks were promptly cashed, charged to the account of Collison, but were not credited to appellee's account in the bank. The former was cashed on a rubber stamp indorsement, while the latter was not indorsed at all, although it was the unvarying custom in the bank not to cash a check on a rubber stamp indorsement, but only to credit to the account of the payee, and not to cash any check with no indorsement by the payee. The necessary inference is that Parish, by virtue of his connection with the appellee, came into possession of the checks, but which he would have been unable to embezzle, except for his position with the bank. He later credited appellee's account in the bank with $100 on account of the latter check, leaving a net loss to it on the two checks of $680. Therefore, both the Aetna Company and the bank are liable, as the court correctly held.

Item 4 relates to the draft of the Manhattan Savings Bank & Trust Company of Memphis, Tennessee, drawn on the bank for $1,251 and which was paid by Parish by taking the money of appellee and charging same to appellee by a charge ticket. This occurred on July 6, 1934. Later he put back into appellee's account $251, leaving a loss to it of $1,000. We think the court correctly held the Aetna Company and the bank both liable.

Item 5 relates to a check drawn by Parish as secretary of appellee, payable to J. M. Arthurs, dated No-

vember 6, 1934, in the sum of $1,000, purporting to be in payment of the maturity value of stock certificate No. 52, owned by Arthurs. The check was cashed by the bank without indorsement and Parish got the money. Arthurs did not get it and the stock was not canceled, but the check was charged to the account of appellee in the bank, and the latter is liable for said amount. The Aetna Company is not, as its bond had expired. The court correctly so held.

Item 6 relates to a check drawn by Parish to W. A. Rossington Estate—G. Hurt, Administrator, for $949.17, purporting to be in settlement of the maturity value of stock in appellee. This check was cashed on a forged indorsement and charged to appellee's account June 8, 1934. Said estate did not get the money. Later appellee paid the estate the amount of the stock, so appellee paid it twice. The Aetna Company and the bank are both liable for the amount of this item to the extent of $949.17, instead of $1,000, as allowed by the court.

Item 7 relates to the withdrawal by Parish from the personal account of P. L. Oliver with the bank of $1,000, on November 6, 1934. Later, on November 30, 1934, Parish cashed a counter check on appellee for the same amount and credited it back to Oliver's account, and entered it on appellee's books as a loan to him on the latter date. For this item, the bank alone is liable to appellee as the Aetna Company's bond had expired. Certainly the bank would have been liable to Oliver had the money not been returned to his credit, and it appears to us that it should be liable to appellee when its own agent stole from the latter to repay Oliver.

These are all the items claimed for which the court allowed judgment. A total of these items shows that the Aetna Company and the bank, and, of course, its surety, the Fidelity Company, are jointly and severally liable for the sum of $4,629.17; that the Aetna Company alone is liable separately for the sum of $474.60; and the bank and the Fidelity Company are separately liable for the sum of $2,000. All of these items to bear interest from June 19, 1935, until paid, at 6 per cent. per annum. The Aetna Company's liability is limited to $5,000 principal

in its bond, and the judgment against it, will be limited to that amount, but not including interest.

In the respects above indicated, the judgment will be modified, and as so modified, it will be affirmed. It is so ordered. Judgment will also be rendered against the Fidelity Company in favor of the bank for the full amount of the judgment herein rendered against said bank, with interest and costs, as prayed in its cross-complaint.

STUTTGART COOPERATIVE BUYERS ASSOCIATION *v.* LOUISIANA OIL REFINING CORPORATION.

4-4791

Opinion delivered November 1, 1937.

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

Ingram & Moher, for appellee.

BAKER, J. The appellant prosecuted this suit to prevent the sale of eleven shares of capital stock issued by the appellant to C. G. Stecks. Stecks was one of the

members of the appellant company. He became indebted to the company over and above the value of his capital stock. He did not or would not pay his debt and the appellant corporation alleged cancellation of the stock. Thereafter, while Stecks still had possession of the stock certificate, he executed a note to the Louisiana Oil Refining Corporation, the appellee, and delivered this certificate as collateral security for the payment of his debt.

He did not pay that debt and the appellee in this case filed its suit in the chancery court for judgment and decree foreclosing the pledge and asking for sale of the eleven shares of stock pledged to it by Stecks. It was to prevent this sale that this suit was instituted, and Louisiana Oil Refining Corporation, made a party to that suit, demurred to the complaint and the demurrer was sustained. The Stuttgart Cooperative Buyers Association refused to plead further and its complaint was dismissed. It was from this order and decree of the chancery court that this appeal has been prayed.

The complaint to which the court sustained the demurrer among other things alleged that the plaintiff is a cooperative association organized and chartered under act 632 of the Acts of the General Assembly for the year of 1921; that it was organized for the purpose of purchasing merchandise, chiefly oil and gasoline, and for the distribution and sale of such merchandise, such distribution and sale being principally to the members of the association. It further alleges that C. G. Stecks became a member; that there was issued to him a certificate of membership which carried with it a conditional ownership of certain shares of capital stock; that he became thereby entitled to vote upon matters relating to the conduct of the business of the plaintiff association and had all other rights of membership; that the defendant, Louisiana Oil Refining Corporation, had filed a suit against Stecks to foreclose an alleged lien upon the shares of stock and membership of Stecks in the plaintiff Association; that the said Louisiana Oil Refining Corporation had obtained judgment and it was having the said shares of stock advertised for sale; that said

shares of stock were not subject to said sale and that it was transferable only under conditions set forth in art. 8 of plaintiff association's charter. The applicable part of art. 8 of plaintiff association's charter is as follows:

"Eighth

"The subscriptions for and the ownership of all common stock in this corporation are made and taken upon the conditions:

"(a) The common capital stock of this corporation may be held and owned by persons actually engaged in farming or engaged in such other business as makes of them, consumers of the commodities handled by this corporation.

"(b) Whenever a stockholder shall cease to be engaged in the business of farming or any other business necessitating the use of the commodities handled by this corporation and/or shall engage in business wholly or partially competitive to the business conducted by this corporation, such stockholder must tender his stock to this corporation to be purchased by it, at par, as hereinafter provided.

"(c) All such tenders must be in writing by registered mail addressed to the corporation at its office in Stuttgart, Arkansas; and the corporation shall at the first regular meeting of its Board of Directors, after such written tender to it, act thereon; and in the event that it accepts said tender, it shall give notice of its acceptance and shall within ninety days after the receipt of such tender, pay in cash the par value for said stock at some bank in Stuttgart, Arkansas, to be designated by the corporation in its notice of acceptance.

"(d) In the event any such stockholder fails to make such written tender as aforesaid the corporation may cancel said stock and shall give notice to the stockholder of such cancellation and shall pay to such stock holder for such cancelled stock its par value in like manner as payment for stock tendered for sale. Such payments to be made not less than ninety days after the cancellation thereof.

"(e) No stock can be issued, sold or transferred otherwise than as above set forth; in the event any person ceases to be eligible as a stockholder or his legal representatives, for purchase at par as herein provided and the corporation shall have the exclusive option to purchase said stock at par for cash at any time within sixty days after such tender."

The complaint further alleged that Stecks had purchased merchandise of the plaintiff association in an amount equal to the value of the said shares; that said Stecks had received assets and property of the association of amounts sufficient to absorb and cancel his said shares and his proportionate interest in the plaintiff association. It also pleaded a cancellation of the said stock; that Stecks had never surrendered his certificate, but had pledged the same to the defendant; proper exhibits were made to this complaint showing copies of the stock certificates, of the by-laws of the plaintiff association, and prayer was to prevent the sale and transfer of the stock to a non-member of the plaintiff association.

In discussing the matters at issue we shall refer to the appellant as the "cooperative" or as the "association" and to the appellee as the oil company. It will perhaps be of some aid to eliminate the long names and simplify statements. Appellee's brief offered to sustain the demurrer presents numerous rulings of the Supreme Court of this state in the matter of the transfer or disposition of capital stock of corporations and it may be said that defendant's position is well taken, provided, only, the general or business corporation statutes of this state are applicable to the present association and like cooperative enterprises.

A determination of that question will be a settlement in this case of the entire controversy presented on this appeal. Act 632 of 1921 is the authority for the organization of the cooperative association. That act as amended now appears in Pope's Digest, § 2262 *et seq.*

The principle of cooperative associations is not by any means new. As corporations, however, these organizations are relatively recent.

Men have always had their clubs, their voluntary associations, their organizations for the cultivation of fraternalism and sometimes for the advancement of their fortunes, or for the education and culture of the membership. In all these organizations, so long as they were unincorporated, there was rarely a question about the members having the full right to prescribe the qualifications for membership and to select or elect members entitled to receive the advantages and benefits of the association. They likewise had the power of exclusion of members under such rules and regulations as they themselves agreed to. Development of these organizations progressed along certain lines, and some of these particular organizations that made most progress were later organized under the law into corporations possessing practically all the attributes and powers incident to the original cooperative association, or voluntary organization. For instance, fraternal insurance associations as distinguished from so-called "old-line" insurance organizations became corporations. Now, practically all the states have recognized this class of organizations and have provided for the incorporation, regulation and control thereof as distinct from other insurance corporations.

From some of the earliest cooperative banking associations, we are told, came the building and loan associations and these are controlled and regulated under the laws of practically all the states peculiar to their own group, but distinct and different from the laws of banking organizations, and from other business corporations. These are mentioned merely by way of illustration and to show the development of some of the earlier cooperative associations. It was found at an early time, however, that cooperative associations, when formed for business purposes by those engaged in particular fields of endeavor, frequently defeated their beneficent purpose by hazards, perhaps, not contemplated by members. The courts found that they possessed practically all of the arduous burdens and consequent liabilities of partnerships. 4 American Jurisprudence, p. 481, § 41, 7 C. J. S., p. 74, § 32.

It is argued in this case by the appellant association that in 1921 the Legislature attempted to encourage farmers to organize themselves into local business corporations which they could control and operate for their mutual benefit and advancement, and thereby have the benefit of larger buying or purchasing powers as organized groups as distinguished from individual activity. The act, however, takes a much wider range than that suggested by appellants as it provides "for the formation and carrying on of cooperative associations" and provides for the rights, powers and liabilities and duties of such cooperative associations. Pope's Digest, § 2262, act 632 of Acts of 1921.

We take notice that there are organizations for agricultural advancement and development, those doing mercantile business, cooperative banking business and, perhaps, some manufacturing enterprises, all upon the cooperative plan as provided in § 2 of the above mentioned act. Pope's Digest, § 2263.

If the purpose of the foregoing act was to furnish a method for the incorporation of what was formerly known as the voluntary associations, permitting them to retain their former custom of uniting those possessing common interests and to enable them to cooperate with each other in the matter of the development and advancement as groups, with only such limitations as may be found in the above-mentioned act, as it now appears in the digest of the statutes, as it has been amended, the problem presented on this appeal is much simplified.

The act authorizing the incorporation of cooperative associations is complete in itself. It provides for the title or name of the corporation and what the articles of incorporation shall contain, where such articles shall be filed, the percentage or amount of subscribed capital stock that must be paid, and that may be held by a member, for regulation and control by a board of directors, the authorization for the formulation and enforcement of by-laws including the manner of becoming a member and other matters that enable such members to make the corporation effective as a business organization. It pro-

vides also, for the subscription for stock and fixes the extent and conditions of liability of members for debts.

In fact, without going into minute details, it may readily be determined that a cooperative association may be organized as a corporation, may be carried on as such, with each phase of its business determined under the aforesaid act 632 without reference to the laws applicable to other business corporations.

Particular attention is called to the fact that the name of the corporation shall begin with the word "The" and end with the word "association," "company," "corporation," "exchange," or "union." Moreover there is a provision significant in itself, that although shares of stock may be issued, such stock is not voted at meetings of the corporation, but the holder of the stock may have one vote as a member without regard to the number of shares he may hold. The foregoing distinctive characteristics of the cooperative association must indicate to anyone conversant therewith, that it was intended to be an aid and to serve those who have mutual interests. For those who desire investments only and who are not impelled to organize as an aid to separate or individual enterprises, the business corporation act would serve every purpose. But this is not true of groups desiring to act as a unit only in respect to a matter in common, but connected with individual activities, though separable therefrom. It was not the purpose of the Legislature in providing for the organization of associations as corporations to destroy that unity producing the groups, nor was it the purpose of the Legislature to destroy the beneficial effects of voluntary associations of allied interests, but rather to supply a legal agency to take the place of the former almost futile and more dangerous voluntary associations.

With this act there came a new form of corporation not before known to our law.

When the oil company took this certificate of stock it took it with notice imposed by law as to the nature of this organization. It took it with notice of art. 8 of the association's charter, heretofore copied, and which

contained a provision that said stock might not be issued to anyone not eligible to hold the same or that in the event one ceased to be eligible or moves from the state, or dies, or desires to sell his stock, that it must be tendered to the corporation. It took it with knowledge already in its possession, or easily ascertainable, that only a resident could hold stock in the association; that it was ineligible, on that account, and for another vital reason, that it was engaged in a competitive business. It knew that the stock in its hands was of no value and subject to be canceled at any time if cancellation had not already taken effect. The certificate in its possession was the key to all this information.

Certificates of stock of the association are in no sense negotiable. They are rather certificates of membership, but indicate also a voluntary contribution in funds by the member. Any kind of transfer or negotiation to have been effectual necessarily must have been made with the consent of the association. Such was the effect of the agreement made by Stecks with all other members. Had the oil company been eligible to membership it was in no better position than was Stecks in regard to obtaining any return upon surrender of the stock for redemption. It could not elect itself nor anyone else a member, nor by any act of its own, substitute a stranger to take Stecks' place.

An examination of the subject of "Associations and Groups," 4 American Jurisprudence, 455, and, also, "Articles of Associations," 7 C. J. S. 18, will disclose interesting discussions with reference to these voluntary associations, together with some disertations as contained in said chapters on the effect of incorporating. 16 Fletcher Cyclopedia Corporations, § 8286, page 1205, is as follows:

"Relation to members; their rights and liabilities.

"The relations between the association and its members and the rights and liabilities of the latter are fixed, almost entirely, by the enabling statutes, the articles of incorporation or association, and the marketing agreement between the association and members. In the case

of incorporated associations it would seem warrantable to state that as to matters not specifically provided for, the general rules of corporation law as set out in the several chapters of this work are applicable to such associations and their members, at least where they are not contrary to, or inconsistent with, specific provisions of the enabling statute or the contract between the association and its members. The enabling statutes universally limit membership to growers or producers of the particular product or persons connected with the growing, producing or handling of such product as specified therein, and an association may limit the transfer of memberships to growers of the particular product which it handles. It may also provide for the repurchase of shares of a member or stockholder who dies or removes from the locality served by the association. Members have an interest in the assets and accumulated surplus of the association, but, in the absence of a declaration of dividend or other constructive distribution of surplus or earnings, they cannot ordinarily sue the association and recover any proportionate share therein. Members of the association have been held liable for the debts of the association and for assessments levied to pay debts, or for other legitimate purposes where the statute authorized such assessments."

The citations given sustaining the foregoing announcements are voluminous and instructive.

We hold that the court erred in sustaining the demurrer.

The case is, therefore, reversed with directions to overrule the demurrer and take such further proceedings as may be necessary and not inconsistent with this opinion.

PRIEST *v.* MACK.

4-4763

Opinion delivered November 1, 1937.

Ras Priest, for appellants.

BAKER, J. The complaint was filed in the chancery court by the appellants against the county judge, county treasurer, and county board of election commissioners of Jackson county, Arkansas. The purpose of the suit was to enjoin the officers from operating under the county salary law, initiated in 1934, and to require or compel, by mandatory injunction, the election commissioners to certify the result of the election for or against Initiative Act No. 1, said to have been voted upon at the November election of 1936. The complaint was arranged in two counts.

In the first, it was alleged that the Initiative Act, fixing the salaries of the county officers of Jackson county was void, and, second, it was alleged that Initiative Act No. 1, said to have been voted upon and passed at the November election of 1936 was an act repealing the said void act. It was further alleged that the election

commissioners had not certified the election returns in regard to the repealing act.

The plaintiffs, appellants here, sued in the aforesaid suit as resident taxpayers and qualified electors of the county and they alleged that they had an actionable interest in the proper application and distribution of the tax money or funds of the county and that they were seeking an observance of all constitutional and legal provisions in regard thereto.

Among other things it was alleged that the county treasurer had $457.73 in money in the treasury belonging to Lee Reid as tax collector; that he had $672.38 in money and $538 in county warrants of Jackson county belonging to W. H. Reid, circuit clerk, and $110.59 in money and $272.80 in county warrants, the property of Fred Ball, county and probate clerk; $316.22 in money, the property of A. W. Jackson, the county treasurer; that these funds, or several items, were in the hands or custody of the county treasurer, arising out of the initiative salary act, and that the several sums had been deposited or paid over to the treasurer in accordance with the terms, conditions and requirements of the said initiative act.

In the trial court, the first count of the complaint was disposed of upon a general demurrer. The elaborate brief furnished us by appellants, printed in small type, with closely placed lines, is largely devoted to a discussion and argument that the electors of the counties may not proceed under Amendment No. 7 to the Constitution to initiate salary acts.

This case was argued orally, and it is conceded by appellants that unless we are willing to reconsider and overrule the case of *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. (2d) 779, the principal contention of this suit must fail.

The arguments presented are in a large measure the same as were presented in the *Dozier* v. *Ragsdale* case, *supra,* and in *Tindall* v. *Searan,* 192 Ark. 173, 90 S. W. (2d) 476. Of course, there is considerable elaboration. There are dozens of citations, some of which appear to

be applicable upon their face, but, after reading this most elaborate brief and having given full consideration to all these matters, we conclude it offers nothing that was not fully considered and disposed of in the cases just cited.

Let it suffice to say that the people of the state of Arkansas adopted Amendment No. 7. It became a part of the state's Constitution upon its adoption; it fits into that organic body, displacing whatever may be in conflict with or repugnant to the provisions of the amendment; that it is self-executing. The purpose of the court in the case of *Dozier* v. *Ragsdale, supra,* in accordance with its long and well considered policies, was to make effective the will of the people as declared in the said amendment. This was done at that time and no occasion has arisen since then to justify, in any measure, a reconsideration of what was said in that case. Because the opinion of this court is fully declared in that announcement, it would be a labor without justification to attempt a repetition at this time. There has been brought us in this case, as presented here, several questions which have been argued with great vigor and supported by numerous citations of authorities. Some of these are to the effect that the initiated act of Jackson county has provisions in violation of § 11, art. XVI, of the Constitution of 1874, or, for a diversion of funds. For instance, officers are required to collect the original fees and turn them into the treasury, and if any portion of the said fees shall remain, after payment of the salaries of county officers, such funds shall then become county general funds and be so held by the county treasurer.

It is also urged that where salaries of county officers are paid in part by the state that such officers are required to turn these into the county treasurer and to surrender any claim thereto. We appreciate the significance of this argument, but at this time all these questions are moot propositions, unnecessary to be considered, or to be passed upon by us. Let us suggest that as to these questions there is no real merit in the proposition stated in appellant's complaint to the effect that

there was, as before set out, $457.73 in money, the property of Lee Reid, the tax collector, in the county treasury, because Reid is not suing for this money, nor is W. H. Reid, the circuit clerk, suing for what is alleged to belong to him, nor is J. Fred Ball suing for any sum alleged to belong to him. These taxpayers do not purport to represent any school district, the funds of which had been taken and converted into county general funds, nor do they represent any officer in whose name they could sue to recover such official's salary.

This is not a new proposition urged here for the first time. The same matter was considered in the case of *Blocker* v. *Sewell,* 189 Ark. 924, 75 S. W. (2d) 658. We said there: "The proposed initiative act is criticized, and it is alleged that in its operation it will result in a diversion of taxes, contrary to constitutional provisions. That may or may not be true, but that question is not before us at this time for several reasons. The first is that the proposed act may not be adopted by Miller county. If it should be adopted and objections then be raised, and a case be presented upon the proposition as to a wrongful diversion of funds, that question will then be determined."

What we said in the case of *Blocker* v. *Sewell, supra,* and what we now repeat must apprise anyone of our position. We are not anticipating the rights of any particular officer or school district, and, at this time, issuing a declaratory opinion in regard thereto. Appellants here show no real interest in such matters. In fact, they do not show that any actual fund is involved. They admit by oral argument that their effort to have an initiative act declared unconstitutional and void, or in the alternative have it declared repealed at the alleged election said to have been held in November of 1936 and thereby force officers to return to whatever fee system prevailed in the county before the county began operating under the initiated act is the purpose of the suit. It is not shown by the complaint, nor by oral argument, or in the brief, how one or a few taxpayers might, by a proceeding purporting to be a taxpayer's suit, proceed against,

or in opposition to the financial or pecuniary interest of the taxpayers generally, and yet such proceedings be a representative or class suit. It is pleaded and argued in the brief that there are substantial savings to taxpayers under the regime of the initiated act, and there does not appear to be any corresponding benefit to the public in striking down such act. No public interest is shown. The proceeding is, therefore, individual, and not representative, notwithstanding the alleged beneficent design.

As to the second count of the complaint, it is urged that it was disposed of in the trial court upon a motion to dismiss, which appellants say, amounted to a special demurrer and that the proper remedy would have been, at most, a motion to strike rather than any form of demurrer. Whatever the motion was, it is not abstracted in full, and we, therefore, presume that, by whatever name it was called, the merits thereof were considered and disposed of by the trial court. We have frequently held that the effective contents of a pleading, and not a name given it by the pleader, will determine whether the matter therein is entitled to consideration. *Montague* v. *Craddock,* 128 Ark. 59, 64, 193 S. W. 268.

In this second count the appellants allege that in the election held in November, 1936, Initiative Act No. 1 of 1936 was presented, the purport of which was to repeal Initiated Act No. 2 of 1934, which was known as the County Salary Act. The purport of appellants' pleading is that the alleged Initiated Act No. 1 was presented to the county clerk, who upon consideration, declared the petition sufficient and certified the matter to the election commissioners; that the election commissioners did not put this proposition upon the ballot. But it is shown that some electors at different precincts in the county voted for and against this matter. The election commissioners, though some votes were certified to them by the election officers, did not certify such result. The prayer was for a mandatory injunction to compel the election commissioners, who were also joined as parties defendant, to certify the result of the alleged election,

which it must be conceded, they did not hold, or authorize the election judges and clerks to hold.

It is urged very strongly that the duty of these election commissioners was purely ministerial; that the chancery court should have determined from the pleadings that an actual election was held upon Initiated Act No. 1 and that the result thereof should have been declared by these officers and that their conduct in that respect could be controlled by the chancery court.

Without attempting to define what may be an election contest, we are willing to say that such a proceeding, that is an election contest, is not necessarily a matter of determining whether one candidate, or matter submitted to electors shall have received more or less votes than another. Such contests may go far enough to determine whether or not an election was actually held, and, if so, what issues were properly or legally presented for consideration of the electors. To whatever extent these propositions, the legality of which might be questioned and might have to be determined by a trial court, if they are in the ultimate conclusion and result election contests, we have no hesitancy in saying that courts of equity do not now and have never had jurisdiction to act thereon, since the adoption of the Constitution of 1874. *Walls* v. *Brundidge*, 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980; *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. (2d) 68.

No occasion arises for a discussion of these principles, nor will it be at all helpful to paraphrase opinions of this court which have long since disposed of such issues. The foregoing citations are conclusive, and the curious may consult them and authorities there cited.

It follows the trial court was correct. Decree affirmed.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY *v.* COOK.

4-4778

Opinion delivered November 1, 1937.

J. D. Frank, John J. DuLaney and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Shaver, Shaver & Williams and *Sam T. Poe* and *Tom Poe,* for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Little River county by appellee against appellant to recover $409 on an insurance policy issued by Merchants Life Association in February, 1915, to Thomas B. S. Cook insuring him for $5,000, all obligations of which were assumed by appellant on September 30, 1928.

After the assumption of the obligations in the contract by appellant, Thomas B. S. Cook, the insured, or his sons paid all assessments to appellant except the assessment levied on January 31, 1936, payable within

the grace period or on February 29, 1936. The indemnity provided in the policy was $5,000 in case of the death of the insured, or, in lieu thereof, $500 payable annually to him in the event of his total and permanent disability. The quarterly assessments increased from time to time, and the quarterly assessment which became due on January 31, 1936, amounted to $91. This assessment was not paid on that date nor within the grace period.

Appellee alleged in his complaint that, prior to that assessment, he became totally and permanently disabled, and that appellant owed and had in its hands $500 of the insured's money out of which appellant should have paid the assessment instead of declaring a forfeiture of the policy for failure to pay said assessment. The policy sued upon contained the following provisions relative to liability for total and permanent disability:

"Should the insured while the policy is in full force and effect become totally and permanently disabled by accident or by sickness or disease so as to be wholly and permanently incapacitated thereafter from doing any work or conducting any business for compensation and profit * * * then upon request in writing, and the forwarding to the association satisfactory proof of the happening of such event he shall be entitled to recover an amount equal to one-tenth of the policy until the whole amount of the policy shall be paid provided said partial payment shall be indorsed on the policy, and upon the death of the assured shall be deducted from the amount payable at death, and provided also that the quarterly calls shall be made and payable the same as though the partial payments were not made and with like penalties, force and effect. * * *."

Appellant filed an answer denying that the insured was totally and permanently disabled prior to the levy of the assessment; and as a further defense alleged that the insured did not notify it that he was totally and permanently disabled and forward to it satisfactory proof of the happening of such an event.

The cause was submitted upon the pleadings, evidence and instructions of the court, which resulted in a

judgment against appellant for $409, from which is this appeal.

Appellant contends for a reversal of the judgment because the court refused to peremptorily instruct a verdict for it, giving as a reason therefor, that the testimony of C. N. Cook was insufficient to carry to the jury the question as to whether forms for furnishing proof of disability had been requested by the insured and refused.

It is not seriously questioned that the proof was sufficient to carry to the jury the issue whether the insured was totally and permanently disabled during his lifetime, and while the contract was in force. The jury has found that he was, and the finding is supported by substantial evidence.

The argument is that C. N. Cook's testimony failed to show that he directed the letter written in December, 1936, to appellant informing it that insured was permanently disabled, and requesting forms to make proof of disability or that he directed it to the place of business of appellant. The purport of C. N. Cook's testimony was to the effect that he wrote and mailed such a letter to appellant in December, 1936. Appellant cites the case of *Cotton States Life Insurance Company* v. *Tanner,* 180 Ark. 877, 23 S. W. (2d) 268, in support of its argument and quotes from it as follows:

"The evidence also shows that notice was sent to the company, but this evidence was insufficient, for the reason that it does not show to what place the letter was addressed and in order to show that proof was made by a letter, it would be necessary to show that it was mailed to the company at some place where the company had a place of business. The evidence on these issues does not seem to have been developed, but upon another trial the parties can either present this evidence or find out that they are unable to do so."

Appellant bases its argument upon the assumption that furnishing proof of disability by appellee was by the policy made a condition precedent to liability for the disability benefits. We have frequently construed similar paragraphs in policies to the paragraph in this

policy which is quoted above and relied upon by appellant to mean that the proof of disability need not be made during the life of the insured, but that the proof of disability might be made at any time within the statutory period of limitations. We so ruled because no time limit for making the proof was contained in the policies, and for that reason was not a condition precedent to liability. In the case of *Sovereign Camp, W. O. W.*, v. *Meek,* 185 Ark. 419, 47 S. W. (2d) 567, this court said:

"Appellant contends for a reversal of the judgment because appellee made no satisfactory proof to it of his total disability. Under our construction of paragraph 12 of the certificate quoted above, the existence of total disability during the life of the certificate was enough to create liability. Under a correct interpretation of the meaning of paragraph 12 the obligation of appellant rested upon the total disability of appellee during the life of the certificate, and not upon receipt of the proof of disability by appellant. A similar clause or paragraph in an insurance policy was thus construed by the Circuit Court of Appeals, 29 Fed. (2d) 977, and approved by the Supreme Court of the United States in the case of *Bergholm* v. *Peoria Life Ins. Co. of Peoria, Ill.,* 284 U. S. 489, 52 S. Ct. 230, 76 L. Ed. 416. It will be observed that no time was fixed in the paragraph construed for making the proof of total disability." Following the rule in the Meek case this court said in the case of *Sovereign Camp, W. O. W.*, v. *Law,* 190 Ark. 653, 80 S. W. (2d) 50:

"It is true that proof of disability was not made, but the disability occurred while the policy was in full force and effect, and, when the total disability occurred, the rights of the parties were fixed. * * * The policy in the instant case did not require proof of disability to be made at any certain time."

This rule was reaffirmed in *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. (2d) 912. In the last cited case it was said that, "it was immaterial how, or when, proof of disability was made, if within the statutory period." The rule in the Meek case was also followed

in *Home Life Insurance Co.* v. *Keys,* 187 Ark. 796, 62 S. W. (2d) 950. In that case this court said: "The question presented for decision is, was the making of proof of disability a condition precedent? We hold that it was not." The rule was again affirmed in *American Nat. Ins. Co.* v. *Chastain,* 188 Ark. 466, 65 S. W. (2d) 899, and again in *American Nat. Ins. Co.* v. *Westerfield,* 189 Ark. 476, 73 S. W. (2d) 155.

Appellant cites the case of *Chandler* v. *New York Life Ins. Co., ante,* p. 6, 104 S. W. (2d) 1060, to the effect that furnishing of proof of disability was a condition precedent, but in that case this court ruled that the language of the policy itself made it so. The case is not applicable in support of appellant's contention.

Under the facts of this record and under the law as declared, it is immaterial whether the letter C. N. Cook claims to have written was directed to appellant at its usual place of business or not, because the undisputed evidence shows that on November 3, 1936, which was within the statutory period of limitations (C. & M. Dig., § 6950), appellee's attorney demanded by letter the payment of the indemnity and requested blanks to furnish proof of insured's total and permanent disability, and that on November 16, 1936, in reply to that letter, appellant denied liability and, also, refused to furnish blanks for making proof of disability.

This, of course, under the law amounted to a waiver of proof of disability.

Appellant, also, contends that the court erred in not granting it a continuance because the testimony of C. N. Cook was at variance with the allegations in the complaint. We do not think so because it was alleged in the complaint that all conditions of the policy had been performed, and that appellee had requested blank forms to furnish proof of disability, but that appellant had refused to furnish same, and appellant filed an answer denying that appellee had complied with all the conditions in the policy. The allegation and denial was broad enough to cover the testimony of C. N. Cook as well as the testimony that the attorney for appellee on Novem-

ber 3, 1936, had notified appellant of the permanent disability of the insured within sufficient time under the terms of the policy. Under our construction of the terms of the policy, it was not necessary to give notice of the disability and make proof thereof during the lifetime of the insured, but such notice was sufficient if given within the statutory period of limitations. Appellant was not surprised or misled in any way because it took the deposition of R. G. Stagg under stipulation of date December 16, 1936, and in that deposition appellant propounded the following questions to Stagg to which the following answers were made: "Q. Did the insured, Thomas B. S. Cook, at any time during his lifetime, ever request in writing that the Lincoln National Life make payment of one-tenth of the policy on account of total and permanent disability? A. No. Q. Did Thomas B. S. Cook, during his lifetime, ever submit or furnish to Lincoln National Life Insurance Company proof of total and permanent disability? A. No." Appellant did not file a motion to make the complaint more definite and certain, and these questions propounded and answers received from R. G. Stagg show that it anticipated that proof of this character would be admissible under the allegations of the complaint. There was no material variance between the allegations of the complaint, and the proof in the case, and the court did not err in denying appellant's motion for a continuance.

Appellant contends that the court erred in giving instruction number seven which is as follows: "If you find from a preponderance of the evidence that the defendant, when requested, failed or refused to furnish insured, the plaintiff, forms for making proof of total and permanent disability then you are instructed this relieved insured, and plaintiff, from furnishing further or other proof of total and permanent disability." It is argued that this instruction assumed that the evidence was undisputed on the question whether appellant waived the furnishing of proof of disability if it declined to furnish blank forms when requested. We do not think it susceptible of this construction. It is left to the jury to

find from a preponderance of the evidence whether defendant declined to furnish blank forms when requested.

Under our construction of the contract which does not make the proof of disability a condition precedent to recovery appellant had in its hands on January 31, 1937, $500 belonging to appellant out of which it could have paid the assessment due on that date, hence it had no right under the law to declare a forfeiture of the policy.

No error appearing, the judgment is affirmed.

ELDRIDGE *v.* WHITE & BLACK RIVER VALLEY RAILWAY COMPANY.

4-4790

Opinion delivered November 1, 1937.

John D. Eldridge, Jr., and *Hal B. Mixon,* for appellant.

Coleman & Riddick, for appellee.

BUTLER, J. The appellant brought suit in the Woodruff chancery court to quiet title to a strip of land fifty feet wide before granted by his predecessor in title to the White & Black River Valley Railway Company (hereafter called White & Black Company) on the

ground that same had been abandoned and was no longer used for the purpose of a railroad. Appellant further prayed that the conveyances from the original grantee to subsequent companies be canceled and that the buildings, ties and rails upon said strip of land be decreed to be a part of the realty, and that his title to the same be confirmed and quieted as against all the appellees. The said White & Black Company and its lessees were made defendants; also, the Farmers Loan & Trust Company, now City Bank Farmers Trust Company of New York. These parties answered denying the allegations of the complaint and pleading to the jurisdiction of the court on the ground that the property involved was being administered by the federal district court in the state of Illinois in bankruptcy proceedings and that these proceedings were still pending.

The case was submitted upon the pleadings and agreed statement of facts. The trial court, without passing upon the merits of the controversy, held that it was without jurisdiction and dismissed the complaint "without prejudice, however, to another suit for the same cause after the final disposition of the Chicago, Rock Island & Pacific Railway Company and the Choctaw, Oklahoma & Gulf Railroad Company Reorganization Proceedings now pending in the district court of the United States for the Eastern Division of the Northern District of Illinois."

The sole question presented is the correctness of the trial court's dismissal of the complaint for want of jurisdiction. Therefore, those stipulations of fact relating to the merits need not be noticed. Those relating to the question of jurisdiction will be summarized as follows.

In the year 1900, the White & Black Company, to secure $600,000 of its bonds, executed a deed of trust covering all of its properties including the subject of this controversy to the Farmers Loan & Trust Company (now City Bank Farmers Trust Company of New York), which bonds are outstanding and not due. At the same time, the said White & Black Company executed a lease of its properties for a term of eighty years to the Choc-

taw, Oklahoma & Gulf Railroad Company (hereafter called Choctaw Company), which company, in 1904, assigned to the Chicago, Rock Island & Pacific Railway Company (hereafter called Rock Island Company) its lease of the properties of the White & Black Company, the Rock Island Company assuming the obligations of its lessor with respect to the operations of the White & Black Company. Thereupon, the Rock Island Company took over the White & Black Company and operated it as a part of its system.

In 1933, the Rock Island and Choctaw Companies filed petitions in the district court of the United States for the Eastern Division of the Northern District of Illinois for a reorganization under the provisions of the "Railroad Reorganization Amendment" to the National Bankruptcy Act (11 USCA, § 205 note). These petitions were approved by the court and Frank O. Lowden, James E. Gorman and Joseph B. Fleming were appointed trustees for the railroad companies, are in possession and control of their properties and now operating same under the orders of the court. The said trustees operated the White & Black Company until February 10, 1935, at which time, under order of the Interstate Commerce Commission, operations ceased. The corporate existence of the White & Black Company is still maintained, its franchise is in force, and the state of Arkansas has not through its constituted authorities, authorized the abandonment of the railroad or any part thereof.

There is now pending in the federal court, and undisposed of, the petition of the White & Black Company challenging the powers of the trustees of the Rock Island and Choctaw Companies by the exercise of which they are attempting to violate the covenant in the lease from the White & Black Company, and seeking to have said trustees carry out the lease according to its terms. The trustees have filed a reorganization plan with the Interstate Commerce Commission which provides for a disposition of all of the properties of the Rock Island and Choctaw Companies held by them, including leases of all other railway properties.

In this proceeding, both the state of Arkansas and White & Black Company have intervened in protest of the plan of the said trustees, which protest is still pending and undetermined by the court. On June 7, 1934, the federal district court, in which the aforesaid proceedings are pending, issued an injunction which is still in force and which prohibits all persons, firms and corporations from interfering by any legal process or otherwise, or disturbing any portion of the properties in possession of the trustees, or taking possession of any of said properties, or from bringing any suits or actions. It is further stipulated that no permission was applied for or obtained by the plaintiff herein from the district court above mentioned to file or prosecute the present suit, and, also, that since February 10, 1935, no trains have been operated over the tracks on the strip of land in question and the depot located thereon has been leased by the trustees to an individual to be used in no manner connected with the operation of the property as a railroad, and that no benefits have accrued to the plaintiff or any resident in the vicinity of the property from the aforesaid date.

We are of the opinion that the stipulated facts, as above summarized, are sufficient to show that the properties in controversy are held by the Rock Island Company under an eighty-year lease and have been incorporated into, and operated as a part of, the Rock Island Company since 1904; that there is now pending and undisposed of in the federal court a proceeding under which the trustees above named were appointed to take charge of the properties of the Rock Island Company and to effect a reorganization under the plan provided by the "Reorganization Amendment" to the National Bankruptcy Act. In that proceeding, the White & Black Company is a party intervener seeking to require the Rock Island Company to carry out the lease in which the former company is lessor and the latter lessee, according to its terms.

The appellant concedes that by the provisions of the National Bankruptcy Act the court in which any

proceedings are pending under said act acquires exclusive jurisdiction of the debtor and his property, wherever located. There can be no doubt that such is the law. 11 USCA, § 205; Ex parte *Baldwin,* 291 U. S. 610, 54 S. Ct. 551, 78 L. Ed. 1020; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645. The appellant, however, contends that this law has no application because (1) "the property involved in this action is not within the custody and control of the bankruptcy court for the reason that the court voluntarily abandoned that property as of no value to the bankrupt estate," and (2) that the trustees in bankruptcy have waived objection to the jurisdiction by voluntarily appearing in the court below and praying for affirmative relief.

The first contention overlooks the intervention of the White & Black Company, namely, that the trustees be required, under the proposed reorganization plan to operate the property according to the terms of its lease to the Rock Island Company, or that all the property be restored to said White & Black Company. In that intervention the state of Arkansas joined and these matters are still pending in the bankruptcy court.

On the second contention we think appellant is in error for the record shows that no affirmative relief was asked other than that the complaint be dismissed for want of equity. Moreover, the question of the interest of the trustee, City Bank Farmers Trust Company of New York, is involved as it holds a mortgage on the railroad track and depot buildings and its rights are being adjudicated in the bankruptcy proceedings.

We think the trial court correctly concluded that the instant suit is premature, which obviates the necessity of determining the validity of the appellant's contention insofar as it relates to the question of fixtures.

Affirmed.

MARSHALL MOTOR SERVICE *v.* NORM COMPANY.

4-4782

Opinion delivered November 1, 1937.

Glover & Glover, for appellant.
Thomas W. Roland, for appellee.

GRIFFIN SMITH, C. J. Norm Company, a corporation operating from New York, filed suit in the court of M. T. Norton, a justice of the peace of Hot Spring county, and on June 19, 1933, judgment was given against the defendants, Marshall Motor Service and H. H. Marshall, manager, for $104.30. The demand was based upon a writing which the plaintiff contended was a contract.

The circumstances were these: On January 8, 1932, an agent of Norm Company called on Marshall late one evening at his place of business in Malvern and undertook to sell an advertising service. It is admitted that a writing was prepared by the agent and signed by Marshall on behalf of himself and the motor company. Alleging this writing to have been a contract and that payment for the service supplied thereunder had not been made, Norm Company brought the suit referred to, *supra.*

The defendant in the proceeding employed John L. McClellan as his attorney, the plaintiff having been represented by Attorney Thomas W. Roland. At the trial the writing was introduced, whereupon the defendant testified that when he was urged by plaintiff's agent to sign such contract he explained that Claud Mann, a news-

paper publisher of Malvern, handled his advertising, and that he (Marshall) would not definitely enter into the agreement until he had discussed the matter with Mr. Mann and secured his approval. Thereupon, according to the construction contended for by appellant on this appeal, plaintiff's agent went to Arkadelphia after an oral understanding had been reached that the result of Marshall's conversation with Mann would be telephoned to him at Arkadelphia the following morning, and, if Mann approved of the service, the terms of the contract would become fixed. It was Marshall's contention that he did see Mann and that the latter disapproved the service, following which the agent was directed to disregard the tentative agreement. This direction was given by telephone the morning after Marshall had talked with Norm's representative, but the latter informed Marshall that the contract had been mailed to New York and that it was too late to retract. Marshall then sent a letter to appellee at its home office in New York, asking that the writing be disregarded. Appellee chose to stand on the contract which it claimed had been unconditionally signed, and the advertising service was shipped according to written directions.

The justice of the peace gave judgment for the full amount contended for by the plaintiff. The justice's docket shows that on June 6, 1933, an appeal was prayed for and allowed, but this is obviously an error, inasmuch as the judgment was not rendered until June 19, and the proper date is probably July 6, 1933, at which time Marshall filed his affidavit for appeal.

Affidavit for appeal was not lodged with the clerk of the circuit court until December 3, 1934—more than seventeen months after rendition of the judgment.

In the meantime both Marshall and Justice Norton had died. On January 21, 1935, a petition was filed in the circuit court praying that the cause be revived in the name of Mrs. Theresa Marshall, administratrix, and the prayer of this petition was granted July 15, 1935.

On May 1, 1937, when the cause came on to be heard, appellee (plaintiff below) moved to affirm on the ground

that due diligence had not been shown in prosecuting the appeal. The motion was overruled. An amended and substituted answer setting out defense contentions was filed. Issues were joined and the defendant offered the depositions of John L. McClellan and Claud Mann in evidence of the construction contended for with respect to conditions under which the so-called contract was executed, such depositions having been taken by agreement. Appellee's motion to quash the depositions was sustained, and this action of the court, with 19 other specific assignments, is urged as error.

We are of the opinion that appellee's motion to affirm the judgment of the justice court because of the failure of appellant to bring up the record and prosecute the appeal in a timely manner, should have been granted.

Section 8479 of Pope's Digest makes it the duty of a justice of the peace, on or before the first day of the next term of circuit court after an appeal has been allowed, to file in the office of the circuit clerk a transcript of all the entries made in his docket relating to the cause, together with all process and all the papers relating to such suit.

In *Carden* v. *Bailey,* 87 Ark. 230, 112 S. W. 743, we said: "It was the duty of the appellant from the justice of the peace court to see that the transcript was lodged with the circuit clerk as the law requires, and upon failure to do so it was within the discretion of the circuit court to dismiss the appeal or affirm the cause for failure to prosecute."

This court said, in *Hart* v. *Lequieu,* 110 Ark. 284, 161 S. W. 201, that § 4670, Kirby's Digest, now § 8479 of Pope's Digest, had been construed in several cases, and that while the statute makes it the duty of the justice of the peace to file the transcript in the clerk's office within the time prescribed, it is nevertheless incumbent upon the appellant to see that this is done—that the appellant must prosecute his appeal. The opinion says: "That case [*Hughes* v. *Wheat,* 32 Ark. 292] holds that although the provisions of this section are directory, they must not be ignored, and other cases hold that where the tran-

script is not filed within the time limited by the law, the appeal should be dismissed, in the absence of a satisfactory explanation of this failure." See *Smith* v. *Allen,* 31 Ark. 268; *McGee* v. *McCarroll,* 31 Ark. 550; *Wilson* v. *Stark,* 48 Ark. 73, 2 S. W. 346; *Bates* v. *Mitchell,* 96 Ark. 555, 132 S. W. 917; *Geo. E. Keith Co.* v. *January,* 131 Ark. 389, 199 S. W. 89.

Of course, if there is a satisfactory showing that the delay is due to matters over which the appellant had no reasonable control, and justice requires that the delay be disregarded and that the cause be heard *de novo* on its merits, then the circuit court should overrule a motion to dismiss.

In the instant case there is no such showing. On the contrary, the situation of the parties has changed through death of the personal defendant below and the justice of the peace who rendered the judgment.

In the circuit court it was sought through the depositions of McClellan and Mann (who heard Marshall testify on June 19, 1933) to establish Marshall's contention that the writing relied upon by appellee was not, in fact, a contract, because finality of the agreement depended upon Mann's approval.

The trial court assumed that such testimony was incompetent under the rule that parol testimony is not admissible to vary the terms of a written contract. While this is the law, it does not necessarily apply here, for if appellant's construction of the transaction is correct, no contract was entered into. A late decision to that effect is *Dodson* v. *Wade,* 193 Ark. 534, 101 S. W. (2d) 182, the holding in substance being that "Where there is a written contract in which ambiguities do not appear, oral evidence is inadmissible to contradict, vary or add to its terms, but this rule applies only to contracts which have been fully executed and finally consummated."

In spite of errors of which appellant might have taken advantage if the appeal had been perfected and prosecuted within a reasonable period, we are of the opinion that the delay was an injustice to which the appellee should not have been subjected. A jury in circuit

court returned a verdict for appellee, and since the effect of affirming the judgment rendered on that verdict is the same as though the appeal from the justice of the peace court had been dismissed, such judgment is accordingly affirmed.

PAGE *v.* OATES.

4-4787

Opinion delivered November 1, 1937.

A. W. Page and *Kerby & Kerby,* for appellant.

G. B. Colvin, for appellee.

McHANEY, J. Appellant brought this action against appellee on a promissory note given for a carload of fertilizer, in the sum of $939.51, dated March 24, 1930, due and payable October 1, 1930, bearing interest at 8 per cent. from May 1st until maturity, and thereafter at 10 per cent. per annum until paid. This note was credited with $107 on October 16, 1930, and it is conceded that it should be credited as of its date with the further sum of $27.10, which was the amount of shortage of weight of fertilizer, and with the further sum of $4.80 as interest, paid on the ..... day of ..... Appellee defended on the ground that, although he executed the note sued upon, at that time there was an understanding and agreement between them that the defendant would sell said carload of fertilizer on credit to persons needing the same, and that settlement for such sales would be made by notes of the purchasers made payable to appellant,

and that he was to accept said notes and credit same on the note given by appellee to appellant; and that he delivered to appellant notes aggregating the sum of $927.75, with the understanding that said notes were to be accepted by appellant in full settlement of the note sued on in this action. Trial resulted in a verdict and judgment in favor of appellee, and the case is here on appeal.

We are of the opinion that the court erred in not directing a verdict for appellant at his request. The contract between the parties is in writing and consists of appellant's letter to appellee under date of March 24, 1930, his reply thereto, dated March 26, 1930, and the note itself. On March 24, 1930, appellant wrote appellee the following letter:

"We inclose herewith invoice covering shipment of carload of fertilizer to you under date of March 18, amounting to the total sum of $939.51.

"The company insisted upon my accepting responsibility for this shipment, and I have agreed to do so. So, I inclose also, a note for the amount of the invoice, drawn in my favor, due on October 1, with interest at 8 per cent. from May 1, 1930. Please sign and return this note to me at once.

"It is my understanding that you will dispose of most if not all of this shipment for cash, and I hope that you will do so, and will forward the amount received to me, for credit on this note. Of course, the note is not due until October 1, but by sending in the cash you will have the advantage of the discount of 9 per cent. if sent in before April 10, and 8 per cent. if cash is sent before May 10.

"All remittances on this shipment should be sent direct to me at Little Rock."

Appellee replied under date of March 26, as follows:

"I received your letter, the note inclosed and also have received the car of fertilizer which is on the track and will be unloaded today.

"I note that you understand that this will be sold for cash or mostly so, will say that I sure would hope so but if I have stated such a fact I am not aware of same.

"I told your brother Mr. Page that there would not be a great deal of fertilizer business here this season as people were unable to pay the cash for same and I understood that the fertilizer people were hesitating about making fall terms on their goods owing to the poor collections last season.

"I doubt very seriously if it would be possible to sell enough to pay the freight of $150.28 and as per contract I am entitled to 9 per cent. discount on this amount which you have not credited on invoice, but I suppose you will attend to this later, and if it is not credited I shall call your attention to it later.

"Let me say tho Mr. Page as you have become responsible to the company for this shipment I will sign the note and take only farmers who have paid their notes in the past or those whom I know can pay when their cotton is gathered in the fall and as stated to you in the letter I shall become directly responsible to you for this carload of goods and will deliver all farmers notes to you which you may attach to my note as collateral.

"Will say further that I have sent 5 tons to my own place to two of my croppers, and they are unable to pay for it now but my one-fourth rent will be responsible as well as their crops for this amount and there is a list of other good men who have always paid the Floyd Plant Food Co. that are unable to pay cash for their fertilizer that I think will sell but if possible I will sell it for cash.

"I appreciate your position in this matter and know that you do not want to lose any money and neither do I, and I shall strive to sell only to men who I think will pay and will not try to sell more than this one car for you this season. * * *

"Thanking you very kindly for your interest in this matter and assuring you that I shall take care of the matter as tho it was a banker's note and I will also send in the farmers notes to you as stated above."

These letters together with the note very clearly and definitely constitute the contract which is in writing and under the very elemental rule of law that a written contract cannot be varied by parol testimony, the court should have directed a verdict for appellant. All of the

testimony given by appellee which tended to show his defense as above stated was in direct contradiction to this contract and should have been excluded upon appellant's objections.

The judgment will be reversed, and judgment will be rendered here for the balance due on the note with interest according to its terms. It is so ordered.

OATS *v.* SMITH.

4-4792

Opinion delivered November 8, 1937.

James D. Head, for appellants.

Ned Stewart, House, Moses & Holmes and *H. B. Solmson, Jr.,* for appellees.

HUMPHREYS, J. This suit was brought on October 16, 1936, by Hon. Ned Stewart, prosecuting attorney of the eighth judicial circuit, in the circuit court of Miller county, against Wiley J. Smith, ex-treasurer of said county, and his surety, the National Surety Company, in the name of the state of Arkansas for the benefit of Miller county to recover from him and his bondsmen $29,982.41,

alleged to have been paid out by said treasurer on warrants issued in excess of the general revenues of said county during the years of 1932, 1933 and 1934 in violation of law, specifically alleging the amount he paid out on warrants wrongfully and unlawfully issued during each year. The complaint was filed on a report made to him and information furnished to him by the auditorial department of the state.

A joint answer was filed by appellees (defendants below) denying the allegations of the complaint and pleading that a large part of the warrants had been paid by him under an order of the circuit court in a mandamus proceeding against him.

On March 9, 1937, the prosecuting attorney wrote a letter to Hon. Milton Oats, county judge of Miller county, that the suit he had brought was one to recover $29,982.41 for the alleged payment of void and illegal warrants issued during the years 1932, 1933 and 1934, and that after a series of conferences with Mr. Bryan Sims, representative of the State Comptroller's office, he was of opinion that only about $9,000 or $9,500 might be recovered, and that the bonding company had increased its offer for full settlement of the claim to $7,500 cash and that in his opinion, concurred in by the representative of the comptroller's office, the cash offer of settlement was to the best interest of the county and should be accepted. He stated in the letter that he was willing to take full responsibility for settlement, but did not want to settle the claim unless the county judge agreed with him that it was for the best interest of the county.

Having received no response from the county judge, the prosecuting attorney wrote him another letter of date April 29, 1937, to the effect that he had agreed with the attorneys of the National Surety Company to settle the claim for $7,500 and that he was advising the State Comptroller's office that he had done so, but that before the settlement became final and judgment was entered he wanted to take the evidence of Mr. Bryan Sims, representative of the Comptroller's office, before Judge Bush and that he wanted him, the county judge, to have an opportunity to enter his objections to the settlement. The

prosecuting attorney stated in the letter that although he disliked to settle the claim over the objection of the county judge he felt that the responsibility was his, and that he thought a settlement for $7,500 was fair and equitable.

On May 4, 1937, after receiving the second letter informing him that a settlement had been agreed upon, the county court rejected the compromise offer and entered an order employing Hon. James D. Head to represent the county as special counsel in the litigation.

On the 4th day of May, 1937, appellant, in his capacity as county judge and as a taxpayer, filed an intervention alleging that the proposed settlement by the prosecuting attorney with the bonding company was an improvident settlement, stating that after an investigation he had concluded that the county could recover a very much larger sum in a trial of the cause upon its merits than $7,500, and prayed that the court reject the proposed settlement and proceed to a trial of the cause upon its merits and praying that the attorney employed by him be enrolled as attorney for the county to prosecute the suit to a conclusion.

The trial court heard the evidence of J. B. Sims and others, over the objection of appellants, tending to show that the settlement was fair and equitable and that in his opinion to the best interests of the county, and refused to try the cause on its merits, holding that the prosecuting attorney had authority to compromise the case, and over the objection of appellant entered a judgment against the bonding company for $7,500 in keeping with the compromise agreement, from which is this appeal.

The only question for determination on this appeal is whether the prosecuting attorney had authority to settle the claim set forth in the complaint over the protest of Milton Oats, in his capacity as county judge and as a taxpayer. This suit was instituted by the prosecuting attorney on the report made to him by a representative of the State Comptroller to the effect that Wiley J. Smith, ex-treasurer of Miller county, had paid warrants wrongfully and unlawfully issued in excess of the revenues for the years 1932, 1933 and 1934 in the sum of $29,-

982.41, advising that suit be brought for said amount against the ex-treasurer and his bondsmen.

Act 146 of the acts of the General Assembly of 1933 is entitled "An act to facilitate recovery on bonds of officials in this state, and for other purposes." Section one of the act is as follows:

"It shall be the duty of the State Comptroller and ex-officio director of county audits to give notice and make proof of loss to, and demand payment of the surety or sureties on any bond executed by any officer, the affairs of whose office said State Comptroller and ex-officio director of county audits is now or may hereafter be directed or authorized by law to check or audit, of any shortage or other liability of said officer for which said surety or sureties may in any wise be liable."

Section 2 of said act provides that the State comptroller shall certify the liability of officers or the sureties to the Attorney General or prosecuting attorney of the circuit in which said officer resides. And said section of the act makes it the duty of the Attorney General or prosecuting attorney to immediately take the necessary legal action to recover from said officer and the surety or sureties the amount of the officer's liability. It also provides that in the event the Attorney General or prosecuting attorney fails or refuses to take action on the claim that the Comptroller shall do so. The section also provides that the Attorney General, prosecuting attorney, or State Comptroller may, with the written approval of the Governor, employ special counsel to assist in the prosecution of the suits. Section three of said act provides for the compensation the special counsel may receive in case of recovery. Section five of the act provides that all laws and parts of laws in conflict with this act are repealed.

There is nothing in this act authorizing the county judge or a taxpayer to institute or prosecute such a suit and there is no provision in it authorizing the county court to employ special counsel to prosecute such a suit. There is no provision in this act providing for the Attorney General or the prosecuting attorney or the State Comptroller to receive any part of a recovery had in the

prosecution of such a suit as a fee. It imposes the duty to prosecute such suits upon them as a part of their official duties and without pay. It is not expressly provided in the act that the Attorney General or prosecuting attorney or the State Comptroller can compromise such a suit after it has been instituted, but certainly it was not the intention of the Legislature to prevent the Attorney General or the prosecuting attorney or the State Comptroller from compromising such a suit if in the exercise of a sound discretion they regard a compromise as being best for the county. The Attorney General and prosecuting attorneys are elected by the people and the State Comptroller is appointed by the Governor, and the Legislature in the passage of this act seems to have imposed upon them this important duty and to have conferred upon them the sole authority to institute and prosecute such suits to the exclusion of all other officials. It was most fitting that the Legislature impose this duty upon them, for in suits of this character an accounting as well as legal knowledge is required. There is no allegation in the intervention of fraud on the part of these officers in effecting the settlement and without such a showing any settlement made by them after the institution of such suits by them must be regarded as having been made in the best of faith and to the best interest of the county or counties involved in the litigation. In addition to this act we find that by §§ 8312 and 8313 of Crawford & Moses' Digest such duties as the institution and prosecution of suits, both civil and criminal, is conferred upon prosecuting attorneys in the several districts and there is nothing in those sections which deprives the prosecuting attorney from controlling such litigation.

Section 2279 of Crawford & Moses' Digest conferring general powers upon county courts imposes no duty upon them to institute and prosecute suits of this character.

We have concluded from a careful reading of all these statutes that when the prosecuting attorney brings a suit against an official upon a liability to the county and against his bondsmen he, not the county judge or some taxpayer, has control over the litigation.

The trial court in this case allowed the prosecuting attorney $750 or 10 per cent. of the amount recovered for a fee, but we find no authority for this in the statutes of our state. These duties are imposed by the Legislature upon the prosecuting attorney as a part of his legal duties and no fee has been fixed by the Legislature for services in this regard. The trial court was correct in rendering a judgment against the bondsmen of Wiley J. Smith for $7,500, the amount agreed upon in settlement of the claim sued upon, but was in error in allowing 10 per cent. of the amount to the prosecuting attorney.

The judgment rendered in favor of the state for the benefit of the county for $7,500 is affirmed, but the judgment allowing the prosecuting attorney $750 is reversed and the cause remanded for proceedings not inconsistent with this opinion.

SMITH, J., dissents.

GRIFFIN SMITH, C. J., disqualified and not participating.

OWENS *v.* THE OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD.

4-4785

Opinion delivered November 8, 1937.

Tom F. Digby, for appellants.

House, Moses & Holmes and *Richard C. Butler,* for appellee.

GRIFFIN SMITH, C. J. Appellants conduct a funeral home, and in connection with their business operate an ambulance or invalid coach.

Appellee, in 1934, issued its policy of insurance, under the terms of which it became liable to appellants for damages on account of bodily injuries, including death at any time resulting therefrom, and loss of services in consequence of such injuries sustained by any person or persons, caused by the ownership, maintenance, or use of a certain Henny ambulance invalid coach, as described in said policy. The contract further provided that the insurer would investigate any claim for such injury or damage and negotiate settlement thereof, and would defend suits arising from any such injury or damage, and would pay all costs incurred in the defense of suits, so instituted, growing out of the ownership, maintenance, or use of said motor vehicle, even if such actions were groundless.

In 1935, at a time when the insurance was in force, the ambulance identified in the policy was sent by appellants to the home of Mrs. Mollie Mason in North Little Rock for the purpose of transporting Mrs. Mason to the Baptist State Hospital. The ambulance was parked on the street in front of Mrs. Mason's home. A cot, utilized as a part of the ambulance equipment, was taken therefrom and Mrs. Mason was placed on it. While the cot was being so utilized in carrying Mrs. Mason from her home to the ambulance, she was carelessly allowed to fall from the cot to the pavement just as the attendants or servants were passing with the patient from the yard to the sidewalk. Appellee was promptly notified of the accident.

Subsequently, suit for damages to compensate for the injuries sustained was filed by Mrs. Mason against appellants. Appellee was notified that suit had been filed, but it declined to defend, assuming that under the terms of the insurance contract it was not obligated.

Appellants thereupon employed an attorney, who for $306 effectuated a settlement of Mrs. Mason's $30,000 claim. The attorney's fee was $250.

This appeal is from the action of the Pulaski circuit court, second division, wherein the judge, sitting as a jury by agreement of the parties, found that the policy issued by appellee did not apply to an accident sustained in the manner and in the circumstances herein stated.

Appellee relies upon a Tennessee case, *J. H. Hinton & Son* v. *Employers' Liability Assurance Corporation,* 166 Tenn. 324, 62 S. W. (2d) 47, the facts there being almost identical with those now before us. Mrs. Bell Hall, for the purpose of being conveyed from her home to a hospital, was placed on a stretcher taken from an ambulance, and while being taken to the ambulance an attendant negligently permitted the stretcher to fall, injuring Mrs. Hall. Suits were filed against the ambulance company, which were successfully defended, after the Employers' Liability Assurance Corporation had denied liability under its policy. The suit of Hinton & Son against the Employers' Liability Assurance Corporation was to recover court costs and attorneys' fees incurred in defending the suit brought by Mrs. Hall. The Supreme Court of Tennessee held that the insurance company was not liable. The clause of the insurance contract, claimed by Hinton & Son to be applicable, indemnified against damages "resulting from the ownership, maintenance, operation, or use" of the ambulance. Citing I Couch, Cyc. of Insurance Law, 174, the Tennessee court said: "This general and broad language must be construed with reference to the subject-matter and the nature of the risk involved, with due regard to the objects and intentions of the parties as the same may be gathered from the whole instrument."

In arriving at a determination of non-liability, the Tennessee court reviewed *Panhandle Steel Products Co.* v. *Fidelity Union Cas. Co.,* (Texas Civ. App.), 23 S. W. (2d) 799, and *Quality Dairy Co.* v. *Fort Dearborn Casualty Underwriters,* (Mo. App.), 16 S. W. (2d) 613. In the Texas case, liability was affirmed in favor of a pedestrian who had been struck by an iron beam while the beam was being unloaded from a parked truck.

It was held that the accident resulted from the "use of the truck" within the meaning of the insurance contract. The Texas court said: "It will be noted, further, that the language used in the liability clause of the policy is broad and general in its scope, and not restricted by any words to the effect that the injuries covered by that clause must be the 'proximate' result of the use of the truck, or that the injury must be sustained while the truck was being driven, or the result of collision or overturning."

In the Quality Dairy (Missouri) case, the court held that the obligation incurred by the insurer under a policy employing the words "by the reason of ownership, maintenance, or use" of an automobile was not limited to cases where the truck itself produced the injury, but that the contract was expressly drawn in terms broad enough to cover all claims arising by reason of the use of the truck.

In the Texas case, the facts showed that at the time the pedestrian was injured, the truck was backed up to the curb, and the iron beam was being moved across the sidewalk into the building. When about one-half of the beam was off of the truck, the accident occurred. The Tennessee court, in distinguishing between the cases, said: "If the accident assigned by Mrs. Hall as the cause of her injury had occurred while the stretcher was being placed in the ambulance, or while it was being removed therefrom, we would be strongly inclined to follow that case, and hold it the result of the use of the ambulance. But the authorities and liberal rule of construction cited do not, in our opinion, justify the further extension of the terms of the contract, so as to include the accident in suit. When the stretcher was dropped, the ambulance had not been reached. Mrs. Hall was being transported to the ambulance, and not by it or on it. The transportation of sick persons from bed to street curb was a necessary incident to the conduct of complainant's business of operating an ambulance for hire, but was not a necessary incident to the operation or use of the ambulance as a motor vehicle,

as the actual placing or removal of persons therein and therefrom would be. Complainants were insured against liability arising from the operation and use of the vehicle, and not against liability arising from the conduct of their business." See, also, *Commonwealth Casualty Company* v. *Headers,* 118 O. St. 429, 161 N. E. 278; *Caron* v. *American Motorists Insurance Company,* 277 Mass. 156, 178 N. E. 286; *Luchte* v. *State Automobile Insurance Company,* 50 Ohio App. 5, 197 N. E. 421.

It will be observed that the contract construed by the Supreme Court of Tennessee contained the words, "By the reason of ownership, maintenance, or use." In the policy written by appellee in the instant suit, it affirmatively appears that the automobile covered by the insurance is a commercial vehicle identified as "one Henney ambulance invalid coach," and it is shown in the policy that appellants are engaged in the undertaking business. The following definitions then appear in the policy: "(a) The term 'pleasure' is defined as personal, pleasure and family use, including business calls. (b) The term 'commercial' is defined as the transportation or delivery and the loading and unloading of goods or merchandise in direct connection with the assured's occupation or business."

In the Hinton case, discussed *supra,* the Tennessee court felt that allowance of recovery would require that "terms of the contract be further extended." Therefore, the decision rests upon the proposition that there could be no liability unless the automobile, *per se,* had been the efficient cause of the accident, or unless the event with which its use was associated had been so closely allied to or connected with the automobile as to justify a finding that effect flowed as a natural sequence to cause, one being the complement of the other. With this general principle we are in accord. We are also in agreement with the express holding in the Hinton case that "The transportation of sick persons from bed to street curb was a necessary incident to the conduct of the business, but was not a necessary incident to the operation or use of the ambulance as a motor vehicle."

But, conceding the correctness of these conclusions, does it imperatively follow that liability can only arise in those cases where the negligence upon which an action is predicated occurred at a time when the automobile was being used as a necessary incident to its operation as a motor vehicle? Obviously, there are lawful and logical uses to which a commercial vehicle may be put which are not necessarily incident to its operation as such; yet, an incidental use of such vehicle might be the predominating cause of loss, even though, in point of time or distance, it was not the nearest agency in contact with effect.

"Ownership, maintenance, and use" are general terms. These words were selected by the insurer to indicate or circumscribe the scope of coverage contemplated; and, where such expressions are adopted, it is not a perversion or extension of the contract, when applied to the instant case, to say that, although use of the stretcher to convey Mrs. Mason from her home to the waiting ambulance was not a necessary incident to use of the automobile as a motor vehicle, it was an essential transaction in connection with use of the automobile as an ambulance. When we add to these conclusions appellee's knowledge that the vehicle insured was, by express terms of the contract, to be used as an ambulance, it necessarily follows that any transaction so closely identified with the operation of the vehicle as an ambulance as to form a link in its general utility and functions would fall within the purview of the risk insured against, and appellee would become liable.

In the view that we have taken, it is not necessary to discuss the language of appellee's contract appearing in subdivision "(b)," defining the term "commercial" as pertaining to the transportation or delivery and the loading and unloading of goods or merchandise in direct connection with the assured's occupation or business. Such discussion is pretermitted for the reason that the accident to Mrs. Mason did not occur while the stretcher was in contact with the ambulance. We prefer to place the decision upon the ground that use of the stretcher at

the time and in the manner shown was an incident to the use of the vehicle as an ambulance, it having been admitted by stipulation that the stretcher or cot was a part of the equipment.

The judgment is reversed, and the cause remanded with instructions to enter judgment consistent with this opinion.

POLLARD *v.* FOWLER.

4-4798

Opinion delivered November 8, 1937.

Vol T. Lindsey, for appellant.
Clyde T. Ellis, for appellees.

SMITH, J. This suit was filed in the Benton chancery court September 29, 1933, by Arthur B. Pollard against George L. Fowler and wife and N. M. Chinn and his wife, praying judgment on a note executed by George L. Fowler to the Inter-State Mortgage Trust Company on February 19, 1926, for the sum of $1,600, due February 1, 1933, bearing interest at 6 per cent. To secure the payment of this note a mortgage was executed by Fowler on a farm which he then owned in Benton county. At-

tached to the original note were 14 interest coupons, one in the sum of $44 and the other thirteen for $48 each, representing semi-annual interest due on the note as the coupons matured.

The complaint alleged the assignment to plaintiff of the note and mortgage on March 1, 1926, and that all interest had been paid thereon to February 1, 1932; one-half of the interest due August 1, 1932, and one-half the interest due February 1, 1933, and that no other payments had been made except the interest maturing prior to those dates. The mortgage was made an exhibit to the complaint, and showed that all the interest coupons had been detached except the one due in August, 1932, and another in February, 1933. It was alleged that the mortgage company became insolvent and was placed in bankruptcy in 1931, and that the trustee in bankruptcy had made a formal assignment of the mortgage to Pollard May 20, 1931. It was then—and not before—that the assignment was noted of record.

Fowler and wife made default, and filed no answer, but the defendants Chinn and his wife answered that they had purchased the mortgaged property from their co-defendant, Fowler, under an assumption of payment of the notes secured by the mortgage, and that they had paid the mortgage company, as plaintiff's agent, all interest as it matured, together with $800 of the principal, and made tender of payment of the balance due. They also alleged tender of payment prior to the institution of the suit. The mortgage provided that any multiple of a hundred dollars might be paid on the principal at any interest-paying period, and they alleged such a payment in the sum of $800 had been made in August, 1928, to the mortgage company.

The court made a finding supporting the allegations of the answer and rendered a decree foreclosing the mortgage for the balance adjudged to be due, from which decree plaintiff has prosecuted this appeal.

The mortgage company's principal place of business was in Greenfield, Massachusetts, and its loans secured by mortgages, as in the instant case, were payable there. It operated a western branch office in Parsons, Kansas,

and maintained a local office at Rogers, in Benton county, in charge of E. W. Dawkins, whose duties were to collect and remit payments both of principal and of interest. He had certain other duties such as seeing that insurance was maintained on mortgaged property where this was required by the mortgages. This agency of Dawkins continued until the mortgage company became a bankrupt.

All payments made by Chinn were made to Dawkins prior to the bankruptcy proceedings, after which they were made to the trustee in bankruptcy, and it is undisputed that when he paid the $48 interest due in August, 1928, he also paid $800 on the principal. This money was remitted to the mortgage company, and in due course Chinn received the mortgage company's receipt therefor.

Pollard was first advised of this payment in 1931, and on October 20th of that year wrote Chinn a letter, in which he stated that he had advised with his attorney, who would take the matter up with some attorney in this state, and that he would make Chinn a visit. The visit was made, and other correspondence was had between Pollard and Chinn. Pollard wrote Chinn in 1933 that he would accept a new mortgage and note for $800 if Chinn would have them properly made out and mailed to him. A new note and mortgage were prepared and mailed to and received by Pollard. The sufficiency of the new note and mortgage does not appear to have been questioned. Pollard did not record this mortgage, neither did he return it or the note. He testified, however, that he claimed no rights under either, and did not know what had become of them. Pollard bought other notes and mortgages from the mortgage company amounting altogether to about seven or eight thousand dollars. His practice was to deposit money with the mortgage company in multiples of $500, and when the company had notes to sell for the amount of his deposit, notes would be sent him and the mortgages securing them also if his purchase covered the entire indebtedness secured by a mortgage. He purchased the Fowler note and mortgage in this manner March 1, 1926, and both were delivered to him and remained in his exclusive possession until this suit was

filed, although the mortgage was not formally assigned until May 20, 1931, and that assignment was made by the trustee in bankruptcy of the mortgage company on that day, of which proceeding more will be presently said.

The assignment was never noted on the margin of the record where the mortgage was recorded until the date stated, and when Chinn purchased the land in 1928 the examination of the title then made did not disclose that the mortgage company was not the owner of the note. Of course, being negotiable, Chinn was charged with notice that it might have been sold. But after his purchase of the land Chinn was advised by the mortgage company to make the payments in the manner in which they were made. The payments were thereafter made as above stated, and properly receipted for. Chinn did not take up the note when he made the eight-hundred-dollar payment. He was not entitled to do so, as he had paid only one-half of the note. It is especially significant that after this eight-hundred-dollar payment on principal was made in August, 1928, the semi-annual interest payments were reduced to $24, and upon the remittance of that amount Chinn was sent the interest coupon then due for $48 prior to the bankruptcy proceeding. Pollard testified that when the $48 coupons matured they were forwarded to the office of the mortgage company where they were payable, and the company would send checks to cover. These remittances were always promptly made until in 1930, when the mortgage company became "slack," as Pollard expressed it, in making remittance.

During one of Pollard's visits to Benton county he agreed one day—and declined the next—to receive $800 in payment of the balance due on the note.

When the mortgage company was adjudged a bankrupt Pollard attended the creditors' meeting, and he later filed the mortgage and a claim for the $800 payment for allowance in that proceeding. These he later withdrew, the mortgage being then assigned him, but a first and final dividend of 4¾ per cent. was declared in favor of creditors, and a payment of that per cent. on the mortgage amounts to $38. This sum was paid Pollard, but he attempts the explanation that he supposed the payment

was on a certificate of deposit of money for the purchase of other mortgages which had never been delivered to him. He received another check, which apparently covered that item. Only the grossest inattention could have led to this misapprehension. His explanation of his withdrawal was that the note had been assigned to him without recourse. It is suggested that the $38 payment should now be disposed of by allowing credit for it. Whatever else may be said of this demand and of the action of Pollard in filing his claim in the bankruptcy proceeding, it is certainly a strong circumstance tending to show that Pollard recognized the mortgage company as his agent in receiving this payment from Chinn, otherwise there was no authority for filing the claim.

For the reversal of the decree herein, appellant cites numerous decisions of this court to the effect that one makes, at his own peril, any payment of either principal or interest upon his negotiable note to a person not then in possession of it, as he is charged with knowledge that another person may be the owner thereof, and that mere authority of an agent to collect interest does not imply authority to collect the principal, and especially so when the principal is not then due. It is the duty of the maker of a note to see that the person to whom he pays is in possession of it. We reaffirm these holdings, but they do not govern here. There are other legal principles which must be applied.

In his excellent work on Arkansas mortgages, Judge Hughes says, at page 239: "But, though the agent have not the securities, his authority may be inferred from the course of business and the conduct of the parties. If that conduct has been such as to lead the mortgagor to believe that the agent had authority to receive payment, a payment to him will discharge the mortgage," citing *American Freehold Land Mortgage Co.* v. *Wood,* 140 Ark. 452, 215 S. W. 696.

At page 221 of the chapter on Agency in 3 C. J. S., it is said: "Payment to a known agent is binding on the holder (of a promissory note) if the agent had express, implied, or apparent authority to collect and discharge

the instrument, notwithstanding the agent does not have possession of the instrument."

At page 1063 of the same chapter in 2 C. J. S., it is said: "Where a person, by acts or conduct, has knowingly caused or permitted another to appear as his agent, to the injury of third persons who have dealt with the apparent agent in good faith and in the exercise of reasonable prudence, he will be estopped to deny the agency." Among the cases cited in support of the text last quoted is our own case of *Harris Hyman Co.* v. *Choctaw Cotton Oil Co.,* 179 Ark. 780, 19 S. W. (2d) 1100. We there said, quoting from the case of *Ozark Mutual Life Ass'n* v. *Dillard,* 169 Ark. 136, 273 S. W. 378, that " 'Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume, or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess.' "

Here, over a period of years Pollard let the payee named in a note collect at the place of payment remittances of interest, knowing, as the mortgage in his possession would have disclosed, that the agent had the same authority to collect, in multiples of a hundred dollars, the principal on any interest-paying date, that he had to collect the interest itself. He knew that these interest payments were being made to the payee named in the note while the mortgage which secured it was owned, so far as the public record disclosed to the contrary, by the payee. These circumstances, reinforced by the fact that Pollard filed claim for the $800 paid by Chinn to the mortgage company in the bankruptcy proceeding against that company and accepted and retained a new note and mortgage covering the $800 payment, compels the conclusion that if the mortgage company was not in fact Pollard's agent, he had clothed it with that apparent authority, and it would now be inequitable to hear his denial that the mortgage company was his agent. For these reasons the decree must be affirmed, and it is so ordered.

PONDER *v.* JEFFERSON STANDARD LIFE INSURANCE COMPANY.

4-4803

Opinion delivered November 8, 1937.

Trieber & Pope, for appellant.

Owens, Ehrman & McHaney, for appellee.

BUTLER, J. The appellee insurance company instituted this proceeding in the Pulaski chancery court against the appellant, Nora D. Ponder, to recover judgment in the sum of $2,329.90, and caused to be issued out of that court a writ of garnishment directed to the Hercules Life Insurance Company thereby impounding in the hands of that company such moneys as might be due by it to the appellant, Nora D. Ponder. The com-

plaint, as finally amended, alleged in brief that Edgar T. Ponder, in his life-time, had procured from appellee certain life insurance policies in the aggregate sum of $15,000 which were issued in reliance upon the truth of the statements made in the insured's application, and that the premiums charged him were in accordance therewith; that the insured died on December 7, 1935, and proofs of death were made and submitted by appellant who was the beneficiary named in the said policies; that, relying upon the statements made by the beneficiary in the proofs and those made by insured in his application, appellee paid the beneficiary the face of the policies less certain indebtedness due by the insured to it.

It was further alleged that each of the policies provided that if the insured's age had been misstated, the only sums payable upon the death of the insured would be the amount which the premiums he paid would buy had his age been correctly stated; that the insured, in his application, and the beneficiary, in the proofs of death, knowingly, fraudulently and falsely misstated the date of insured's birth as December 24, 1882, when, in fact, the true date was December 24, 1878; that relying upon the statement and in ignorance of its falsity, appellee paid the appellant the face of said policies less the indebtedness due which was $2,329.90 more than the sum to which she was entitled. The complaint alleged further that appellee had no adequate remedy at law, that the Hercules Life Insurance Company was indebted to appellant, and concluded with a prayer for judgment in the sum above named with interest and for writ of garnishment, and that the garnishee be required to pay into the registry of the court so much of the money it held for the appellant as would satisfy the demands of appellee.

The garnishee answered admitting that it was indebted to the appellant in the sum of $8,733.42.

After the final amendment to the complaint and the response of the garnishee, the appellant, on June 15, 1937, filed two pleadings; one, a motion to dismiss the garnishment and, the other, a demurrer to the jurisdiction

and motion to transfer to a law court. The trial court overruled the appellant's motion to dismiss and the demurrer and motion to transfer to law, and, the appellant declining to plead further, judgment was rendered against her and the garnishee in the sum sued for with interest and costs. To this action of the court separate and several exceptions were saved and an appeal prayed and granted.

1. The motion to discharge the garnishment is based upon the provision of act No. 102 of the Acts of 1933, which act became effective on March 16 of that year. Except as to a retroactive application, this act has been held constitutional, both under our own Constitution and that of the United States, in the case of *W. B. Worthen Company* v. *Thomas*, 188 Ark. 249, 65 S. W. (2d) 917, 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344, 93 A. L. R. 173. The appellee concedes the validity of that act, but contends it has no application to the instant proceeding; (a) that the act, properly construed, exempts from judicial process only those debts of the beneficiary for which he was liable before and at the time the insurance policies matured by reason of the insured's death; and (b) that an obligation arising out of the fraudulent conduct of a beneficiary which may be made the basis for a recovery in a proper proceeding is not a debt within the meaning of the statute which provides that the proceeds of insurance policies shall be exempt from seizure under judicial process, because, it is said, it is one created by fraud.

In support of these contentions counsel for appellee in their brief have presented an ingenious argument which, in many of its aspects, is most persuasive of the harmful effects of the act, *supra,* and the injustice which might arise from its application. This argument might well be addressed to the General Assembly for a modification or a limitation upon the provisions of the act. But we have nothing to do with those questions. It is for us to give effect to the act as written and derive the legislative intent from the language used. Counsel for appellee have cited *Bull* v. *Case,* 165 N. Y. 578, 59 N. E.

301, and *Amberg* v. *Manhattan Life Ins. Co., etc.*, 171 N. Y. 314, 63 N. E. 1111, in support of its first contention. It is apparent from an inspection of those cases, however, that the New York statute is unlike our own. However just the reasoning of the court in those cases in denying the contention of the beneficiary, namely, that in all cases the proceeds of a policy after payment to the beneficiary are exempt from all legal process issued against the property of the beneficiary, they are not of controlling importance, as it is clear we are dealing with a statute different in its terms. Our statute, § 7988, Pope's Digest, provides:

"All moneys paid or payable to any resident of this state as the insured or beneficiary designated under any insurance policy or policies providing for the payment of life, sick, accident and/or disability benefits shall be exempt from liability or seizure under judicial process of any court, and shall not be subjected to the payment of any debt by contract or otherwise by any writ, order, judgment, or decree of any court, provided, that the validity of any sale, assignment, mortgage, pledge or hypothecation of any policy of insurance or of any avails, proceeds or benefits thereof, now made, or hereafter made, shall in no way be affected by the provisions of this act." The language of the statute does not impose any limitation as to the time of the origin of the debt and for us to give to it the meaning for which the appellee contends would be to read something into it which the Legislature did not. In other words, it would be necessary by judicial construction for us to amend the statute and thus usurp legislative authority.

What we have said regarding appellee's contention (a) applies with equal force to contention (b). The statute exempts from seizure under judicial process "any debt by contract or otherwise." This language exempts all debts of whatever nature and in whatsoever manner incurred. This all-inclusive exemption may be unwise and work injustice in cases, but with that we have no concern. We repeat that this is a matter to be addressed

to the judgment of the General Assembly. We deem no authority necessary for our conclusion beyond the general rule of statutory construction, but such courts as have passed upon statutes exempting from process the avails of insurance policies have declined to read into them any limitation not specifically expressed therein. *State ex rel.* v. *Collins,* 70 Okla. 323, 174 Pac. 568, 6 A. L. R. 603; *Clark* v. *Lynch,* 83 Hun 462, 31 N. Y. S. 1038.

2. The demurrer is as follows: "The defendant, Nora D. Ponder, demurs to the complaint, and for grounds of demurrer states: 'A court of equity is without jurisdiction to try the issues that will arise herein.' 'Declining to submit her defense outside of a court of law, defendant moves that the cause be transferred to law.' "

We think that the demurrer should have been sustained and the case transferred to the circuit court. The action is a simple one to recover a money judgment with the ancillary aid of a writ of garnishment to impound in the hands of the garnishee moneys due by it to the defendant (appellant) to be applied so far as necessary to the payment of the judgment which might be obtained. Before the authority given to law courts to sequester money or property in the hands of another due the defendant, the remedy was to proceed at law to recover a judgment against the defendant and then to invoke the aid of chancery through a writ of "equitable garnishment" so called. Since the passage of the statute (§ 7988, Pope's Digest) the law court may, either before or after judgment, issue writ of garnishment and thus the remedy at law is full and adequate. "It is an elementary principle of remedial procedure that equity will not assume jurisdiction where there is a complete and adequate remedy at law." *Bassett* v. *Mutual B. H. & A. Assn.,* 178 Ark. 906, 12 S. W. (2d) 893.

But it is insisted that the instant case falls without the principle announced because (1) the right to transfer was waived by not being raised in apt time. The authorities cited by appellee on this contention are

Arkansas Construction Co. v. *Pidgeon-Thomas Co.,* 172 Ark. 721, 291 S. W. 57; *Southern Surety Co.* v. *Pfeifer Stone Co.,* 175 Ark. 708, 1 S. W. (2d) 43; and *Stroud* v. *Vanzant,* 30 Ark. 89. These are cases where there was no ruling asked from the demurrer and motion to transfer before final determination of the cause, or where the motion to transfer was presented after the submission of the case and announcement of the decree, or where the objection to the jurisdiction was not raised in the court below nor until the case was presented in this court upon appeal. In all those cases it was held that the motion was not raised in apt time and the court did not abuse its discretion in overruling same. No such facts are present in the instant case. Promptly, and contemporaneous with the motion to quash the garnishment, objection to the court's jurisdiction was made with request that the cause be transferred to the circuit court. Appellee mistakenly assumes that the pleading which was called a "demurrer" was an admission of the truth of the allegations of the complaint. It was not a general demurrer, but a special one with prayer that the questions raised by the complaint be submitted for their determination in a forum which appellant believed to be the proper one. This was at the threshold of the case and the authorities cited last, *supra,* are clearly not in point.

It is further argued in behalf of the jurisdiction of the chancery court that the issuance of the writ of garnishment was sufficient to establish such jurisdiction. As we understand the argument, it is briefly this: the "remedy" by garnishment or sequestration has been exercised by courts of chancery from remote times and the statutes empowering courts of law to use the same remedy did not divest equity of ancient jurisdiction. These principles are announced in the cases cited by appellee, namely, *King* v. *Payan,* 18 Ark. 583; *Whitesides* v. *Kershaw & Driggs,* 44 Ark. 377; *Shumard* v. *Phillips,* 53 Ark. 37, 13 S. W. 510; *Vaughan* v. *Hill,* 154 Ark. 528, 242 S. W. 286. But in none of those cases, or elsewhere so far as we are able to determine, has it been held that the mere invocation of the equitable remedy of "seques-

tration" or "garnishment" was ever sufficient to enable a court of equity to reach out and take jurisdiction of a cause of which, otherwise, jurisdiction would vest in a court of law. In fact, the contrary is true. The remedy of equitable garnishment does not of itself confer jurisdiction in the absence of some other and independent ground.

Appellee finally suggests that, if on no other ground, equity has jurisdiction on that of the alleged fraud: "The action of defendant in this case in obtaining money from plaintiff created a constructive trust in favor of the plaintiff which entitles it to the aid of equity in obtaining the relief from the defendant's fraudulent conduct;" and further, says the appellee, "plaintiff * * * is doing no more than attempting to enforce its lien upon money obtained from it by fraud." In support of the contention that thereby equity acquires jurisdiction we are cited to the recent case of *Wadkins* v. *Bank of Vandervoort,* 176 Ark. 1206, 3 S. W. (2d) 696, and our own cases of *Vaughan* v. *Hill,* 154 Ark. 528, 242 S. W. 826; *Arnold* v. *Oliver,* 152 Ark. 47, 237 S. W. 425; *Simms* v. *Hammons,* 152 Ark. 616, 239 S. W. 19; and *Humphreys* v. *Butler,* 51 Ark. 351, 11 S. W. 479. The fundamental difference between those cases and the instant proceeding is this: the specific object alleged to be fraudulently procured was that of the court's pursuit with the purpose of impressing upon it a trust for the benefit of the person wronged, or a specific fund, the subject of an equitable lien, upon which that lien was sought to be fixed by the interposition of a court of chancery. Here, the case is different; the money alleged to be fraudulently procured by the appellant has not been identified and is not the fund upon which a trust is sought to be impressed or a lien fixed, but it is another and wholly independent fund untainted by fraud, real or alleged. As stated by the appellant, it is not "a trust *res* upon which to charge the plaintiff's equity," or a fund upon which there is an equitable lien which the appellee was seeking to enforce, but one which it seeks to newly create and upon a fund wholly unrelated to that said to have been fraudulently procured by the appellant.

In speaking of the fund garnished as independent and apart from the avails of the insurance policies paid by the appellee to the appellant, we do not overlook the argument that, under a proper interpretation of the statute, the fund in the hands of the garnishee is part and parcel of the money paid to appellant by the appellee. As stated by counsel for appellee, "The money in the hands of the Hercules Life Ins. Co. is a part of this fund and the moneys in its hands are in no different position legally from the money already paid over to Mrs. Ponder by the Jefferson Standard Life Insurance Company." We are unable to agree to the correctness of this argument. As we see it, there is no connection between the funds pursued by the garnishment and those paid to appellant. No part of the money overpaid to appellant comprises a portion of the funds garnished; it is not such upon which a lien can be impressed or trust imposed because of any fraudulent over-reaching by appellant of appellee by the means of which she has received more than the sum justly due her.

It follows that the judgment of the trial court will be reversed, and the cause remanded with directions to sustain the demurrer to its jurisdiction and to transfer the cause to the circuit court, as prayed, where the garnishment will be quashed and further proceedings be had, if the parties be so advised, in accordance with law and not inconsistent with this opinion.

SPEARS *v.* STATE.

Crim. 4067

Opinion delivered November 8, 1937.

[redacted]

George H. Holmes and *E. W. Brockman,* for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

McHaney, J. Appellant was indicted on a charge of grand larceny in July, 1933, and thereafter, on July 17, 1934, entered his plea of guilty to said indictment, at which time the court made this order: "Whereupon, the court doth order that the judgment rendered herein be and the same is hereby suspended during good behavior and payment of the court costs in this suit, the court retaining jurisdiction for all purposes until the next term of this court." Appellant was then discharged and no further action was taken against him until July 19, 1937, at which time the prosecuting attorney filed a petition praying that the suspended sentence be set aside and the defendant be sentenced to the penitentiary. There was a hearing on this motion and, on July 20, 1937, the court granted the prayer of the motion, set aside the suspended sentence, and sentenced appellant to the penitentiary. This appeal is from that judgment.

Appellant assigns three reasons or grounds for a reversal of this judgment. The first is that the court, having imposed the limitation in the order of July, 1934, in which he suspended the sentence, that is, "the court retaining jurisdiction for all purposes until the next term of court," is now without jurisdiction to change, alter or modify said order because the next term of court has elapsed. The second ground is that the testimony

offered on behalf of the state failed to show that appellant violated the conditions of said order, even on the question of good behavior. The third ground is that the decision of the court was based upon hearsay and neighborhood rumor, and to deprive one of his liberty on neighborhood rumor would set a dangerous precedent.

Appellant's first contention is based upon language used in *Hartley* v. *State,* 184 Ark. 237, 42 S. W. (2d) 7, where it was said: "It was pleaded, and now argued, that the court lost jurisdiction to impose the sentence by the lapse of time. Not so. Neither the statute in question nor any other statute contains a time limitation. No limitation was fixed in the order. It was clearly a continuing order and remains in force and effect until changed or modified." It is contended here that there was a limitation fixed in the order suspending the sentence, that is, until the next term of court, and that after the next term, the court lost jurisdiction to change the order.

Section 4053 of Pope's Digest confers authority on circuit courts in criminal cases, "if he shall deem it best for the defendant and not harmful to society, to postpone the pronouncement of final sentence and judgment upon such conditions as he shall deem proper and reasonable as to probation of the person convicted, the restitution of the property involved, and the payment of the costs of the case." Section 4054 reads as follows: "Such judge shall have power, at any time the court may be in session, to revoke the suspension and postponement mentioned in § 4053, and to pronounce sentence and enter final judgment in such cause whenever that course shall be deemed for the best interests of society and such convicted person." Section 4055 provides for the collection of costs whether the sentence be suspended or not. It will be noticed that by § 4054 the court has the power at any time that it is in session to revoke the suspension of sentence, and to pronounce sentence and enter final judgment, "whenever that course shall be deemed for the best interests of society and such convicted person." So the court had power to re-

voke the suspended sentence at any time the court was in session. The fact that the court made an order, retaining jurisdiction for all purposes until the next term of court, could not have the effect of abrogating the statute and thereafter depriving the court of the jurisdiction conferred upon it by the statute. That language in the order must be treated as surplusage. In *Denham* v. *State,* 180 Ark. 382, 21 S. W. (2d) 608, this court said: "In *Ketchum* v. *Vansickle,* 171 Ark. 784, 286 S. W. 948, the court held that, where the circuit court, without authority, suspended the execution of a sentence for one year in the penitentiary, to which suspension the defendant consented, the court had authority, more than a year later, to direct that the sentence be enforced. Again, in *Stocks* v. *State,* 171 Ark. 835, 286 S. W. 975, it was held that, where a sentence of imprisonment was suspended in 1910 with the defendant's consent, and was imposed in 1926, the sentence was not barred by the statute of limitations. The court recognized the rule laid down in the Davis case (169 Ark. 932, 277 S. W. 5) that a sentence of imprisonment is satisfied, not by lapse of time after it is pronounced, but by the actual suffering of the sentence imposed by it. The reason is that the time during which a sentence may be carried into execution is not provided by statute, and forms no part of the judgment of the court. The rule applies here in the absence of a statute limiting the time within which the court may revoke the suspended sentence."

The next two grounds urged for a reversal may be considered together as they both challenge the sufficiency of the evidence to sustain the order of revocation. This is a matter coming within the sound discretion of the trial court, *Denham* v. *State, supra.* Of course, such discretion could not be arbitrarily exercised without any basis in fact, but the statute itself confers the authority to revoke the suspension of sentence "whenever that course shall be deemed for the best interests of society and such convicted person." Here, the evidence was sufficient to justify the court in exercising the discretion it did as the evidence on the part

of the state was to the effect that appellant was drunk, was cursing in a public place, and had a fight with one Jack Fulmer. The statute does not provide how the court shall proceed in determining the necessity for the revocation of the suspended sentence. The trial court made a finding in which he recited that, in 1935, there had been a hearing before him of complaints by a number of citizens, asking for the revocation of appellant's suspended sentence, but that on account of the youth of appellant, he gave him another chance and warned him that he would be watched by persons of the court's choosing, and if his conduct was not as it should be, he would be brought back into court and sentenced; that there had been other complaints against him for the excessive use of alcoholic liquors and that the grand jury had indicted him for the crime of assault with intent to kill.

Under these conditions, we are of the opinion that the court was fully justified, and that its judgment should be affirmed.

TUCKER *v.* WYCOUGH.

4-4794

Opinion delivered November 8, 1937.

Dene H. Coleman, R. W. Tucker, S. M. Casey and *Shields M. Goodwin,* for appellants.

John F. Grammer and *J. J. McCaleb,* for appellee.

SMITH, J. Appellees, Ernest A. Wycough and Mrs. Willie Wycough, who are husband and wife, brought this suit against the administrator and heirs-at-law of James

Swaim, deceased, upon the theory that about six years before his death the deceased had entered into an agreement with them to the effect that they should take care of deceased for the remainder of his life, furnish him with a home, including his meals or such as he cared to eat with them, certain other personal services, including his laundry work, and nursing during sickness, and that in consideration therefor deceased, Swaim, should devise appellees all property he might own at his death.

Swaim died October 29, 1936, and R. W. Tucker was appointed administrator of his estate. In the complaint filed in this cause, it was alleged that the administrator was about to make distribution of the assets which had come into his hands. It was prayed that he be enjoined from doing so, and no other relief was prayed against the administrator. The existence and full performance of the above contract was alleged, and it was prayed that its execution be enforced or, if not, that appellees be adjudged to be entitled to the net value of the estate in payment of their services. The complaint of Mrs. Wycough was dismissed, but it was decreed that her husband "should recover upon the said complaint the full net value of the assets of the estate of James Swaim, deceased, the same being the agreed value of the benefits accruing to James Swaim for services rendered him," and from that decree is this appeal.

The effect of this decree is to enforce performance of the alleged contract to make a will. It is this allegation which conferred jurisdiction upon the chancery court to hear the cause, and that chancery courts have jurisdiction to enforce such contracts has been frequently recognized. See *Schwegman* v. *Richards,* 184 Ark. 968, 43 S. W. (2d) 1088, and cases there cited. And that such a contract, having been fully performed, although orally made, will be enforced, was expressly decided in the case of *Speck* v. *Dodson,* 178 Ark. 549, 11 S. W. (2d) 456. See, also, other cases to the same effect there cited.

If there was involved only the question of the value of services rendered deceased, this would be a matter within the jurisdiction of the probate court to be deter-

mined therein upon presentation to the administrator of a claim, or demand against the estate, to be paid, if allowed, in the usual course of administration, unless judgment were recovered in a suit at law upon this demand, which judgment itself would have to be filed for classification, and paid in the usual course of administration. So that the question presented for our review is whether there was a contract for the execution of a will. Before considering this question of fact it may be said that, while such contracts will be enforced in equity, in proper cases, the testimony requiring and permitting that action must be clear and convincing. See *McKie* v. *McClanahan,* 190 Ark. 41, 76 S. W. (2d) 971, and cases there cited.

We proceed to consider whether the testimony meets this requirement. The testimony is voluminous and in irreconcilable conflict, and it must suffice to summarize it. Appellees' case rests chiefly upon their own testimony and that of Felix Headstream, John P. Morrow and Richard Linebarger. Other witnesses testified in appellees' behalf, that testimony being to the effect that Swaim had lived with appellees for about six years before his death; that he was much addicted to drink, and was frequently drunk; that he was reputed to be rich and to have large sums of money, that robbers on one occasion subjected him, without effect, to torture to compel him to disclose the whereabouts of his money, and that he was thereafter afraid to live on the south side of the river near and opposite Batesville, where his farm was located, and that Swaim had stated on numerous occasions that he was living with appellees and intended to fully compensate them, but none of these witnesses stated how he intended to do so.

Headstream testified that Swaim said, in referring to his property: "I have it fixed so the ones that are taking care of me I am taking care of them." He did not say how, nor in what manner, he had done or would do so.

Morrow testified that Swaim told him he was living with appellees, and that he made their house his home and they were taking care of him; but he did not say how

he was going to take care of them. Allen Swaim gave similar testimony, and, when asked, "Did he say how they would be paid," answered, "No, he said they would be paid, would be paid good for their trouble."

Mrs. Wycough testified that she and her husband kept the county jail from January 1, 1931, to March 16, 1931, and Swaim wanted to live with them in the jail for protection, but the sheriff would not consent. They then rented a house from John Parker with the understanding that they would board Parker for the rent. Swaim came to her and said that he needed a home, and he wanted her to take care of him and Parker, and that if she would do so "he would take care of me at his death," and that she accepted his proposition, and did everything she could to make him a good home. She did his laundry, kept his room, waited upon him when he was drunk, as he frequently was, at which times he suffered from sinking spells, and she nursed him when he was sick. Swaim paid practically nothing for these services, and she relied upon his promise to take care of her at his death, and that Swaim told her that he would see that she was taken care of. She and her husband had no children, and they were required to give up their social life to a large extent to care of Swaim. He spent most of his time with them, and could have spent all of his time there had he pleased to do so. Swaim lived with her and her husband as a member of the family.

Wycough's testimony corroborated that of his wife as to their attention to Swaim, whom he had known all his life, and from whom he had frequently borrowed money until about eight years before Swaim's death. He testified that Swaim asked him to rent Parker's house, and that if he would do so and take care of him for the remainder of his life he would give him what he had at his death. The agreement was that they would board Swaim, take care of him during his illness, and do his washing, all of which they performed.

Much testimony was offered as to the state of Swaim's feeling towards his relatives. Swaim was 68 years old when he died without ever having married. It

was shown that a sister, who owned considerable property, died testate, and left him only a hundred dollars, which he refused to accept, and that he was very bitter about this discrimination against him.

Upon the death of Swaim no will was found, and it is not contended that one was ever made. The contention is that it was agreed that one should be made, under which Swaim would devise all of his property to the Wycoughs. No reason is shown why Swaim should not have made a will, had he intended to do so. There was no question about his testamentary capacity until a few days before his death. He was a competent business man and had accumulated an estate worth about thirty thousand dollars, consisting of about sixteen thousand dollars in money and notes secured by mortgages, and a small farm. Swaim was in bad health, and stated to one of his friends that he knew "he wouldn't be here for long." He received nine office treatments from his physician from February 14, 1934, to March 28, 1934, and five such treatments from October 6, 1935, to October 9, 1935, and received daily visits at his home from this doctor from October 3, 1936, to October 29, 1936, the date of his death.

After Swaim's death, Mrs. Wycough filed with the administrator a demand against his estate for $1,530, consisting of two items, one for nursing, 135 days at $6 per day, $810, the other for three years' room and board at $20 per month, $720.

Mrs. Wycough explained that she filed this demand before consulting her attorney, and in the absence of that advice thought she could not recover anything more, as Swaim had not left a will.

Opposed to this testimony was other to the following effect. While a miser and a sponger, Swaim was very careful about his personal obligations, and had the reputation of "always paying as he went." While he was resentful towards his brothers and sisters about the will of the deceased sister, he does not appear to have carried this resentment to his nephews and nieces. They lived near Swaim's farm, and he spent much time with

them and hunted and fished with them. Their testimony was to the effect that Swaim spent "a good half of his time with them." One nephew testified that for the last five or six years of his uncle's life he averaged staying with him one night a week, usually Saturday night. Other relatives testified that during the last years of Swaim's life he had spent half his time with some one of four relatives, and that the wives of one or more of these did much of the laundry work for him. Loyd Allen, a former sheriff, testified that he suggested to Swaim about sixty days before Swaim's death that he should make a will, and offered to assist him in doing so, but the offer was not accepted, but Allen testified that during Swaim's last illness personal laundry work was required, and that he went to the home of a husband of one of Swaim's nieces and got clean laundry for him, and that "they also did this three or four times before that."

Wycough himself made a crop each year, and his wife worked when she could get employment, a part of the time as a deputy of her father, who was the county tax assessor, and at other times as a clerk in a store.

During Swaim's last illness these relatives and others waited upon and sat up with him. One of these testified that a few days before Swaim's death he heard Swaim tell Mrs. Wycough that he would pay her $5 if she would stay with him that day. These relatives testified that Swaim told them they would be paid for their services at his death.

The husband of a niece testified that Swaim told him that three of his relatives would not get any part of the estate, but that the others would, and that Swaim said "I am staying with you, and eating off of you and not paying any board, but it won't be long until you are taken care of." Other relatives testified as to similar promises made them. A sister of Swaim's testified that she was sorry for her brother "because he was not put in equal with the rest of us" in her deceased's sister's will, and on this account she leased him one of the farms, which he operated, without requiring him to pay any rent.

It was shown that while in Batesville Swaim ate many of his meals, including breakfast occasionally, at first one cafe or another.

One of the nephews testified that on the very day of Swaim's funeral Mr. Wycough cautioned him against being awarded a certain tract of land on the division of the estate, for the reason that the title thereto was defective.

Swaim spent a great deal of his time about the courthouse. He had much leisure and passed considerable time there. Sherrill, a former sheriff, testified that he had during recent years frequently taken Swaim to a farm "where we were joint tenants," and on his last trip there he asked Swaim if he had a contract with the Wycoughs, and Swaim answered that he did not, and said he was living with John Parker.

More significant, and of greater weight, is the testimony of John Parker, another eccentric old bachelor, who appears to have been Swaim's boon companion. They had lived and "batched" together, as Parker expressed it. After renting his house to the Wycoughs for his own board, he and Swaim, who had previously occupied separate rooms, were put in the same room, which Swaim occupied until his death. He testified that Swaim was not connected in any way with the deal he made with the Wycoughs. This contradicts the testimony of Wycough that he rented Parker's house at the suggestion of Swaim. Within a year or two of Swaim's death, Parker had heard the Wycoughs talking about buying a farm from Swaim—a very singular thing to do if they were expecting to get this farm, and the remainder of Swaim's property upon his death. Witness had no intimation there was a contract by which Swaim was to give the Wycoughs all his property upon his death; on the contrary, he had heard Swaim say he wanted some of his nephews to have his property.

Jim Shaver was a tenant on a farm owned by Swaim, a portion of which he attempted, without success, to buy. "Last fall" he renewed his proposition, but Swaim told him he could not make a sale, for the reason that he was

on a deal to sell the land to Wycough and his wife for twelve hundred dollars. He had agreed to accept six hundred dollars cash and to give time on the other six hundred. On Labor Day before Swaim's death, Swaim told witness the trade had not been made for the reason that the Wycoughs were unable to raise the six hundred dollars, and he directed witness "to go ahead and stay there."

The administrator testified that about a week after the above-mentioned claim was filed with him, Mrs. Wycough stated that all the claim was not for herself, but a part of it was for Mr. Parker, and that about two weeks after this conversation he had another with Mr. Wycough, in which Wycough stated that Swaim had a lot of money, and that he (Wycough) said he felt he was entitled to as much of it as anybody else, but that Wycough never intimated that he had a contract entitling him to the whole estate. Mrs. Wycough asked witness if a will had been found among Swaim's papers, and when he told her that no will had been found she stated that she was not expecting Swaim to leave a will.

We have given the essence of the substantial testimony. There is other testimony on behalf of both appellants and appellees showing the attention, and the lack thereof, on the part of the Wycoughs to Swaim and the value of these services and the remarks by Swaim as to his intention to compensate the Wycoughs, and also his intention to compensate his nephews and nieces for their services; but, as was said in the beginning of this opinion, we are not concerned with this testimony in this proceeding, except in so far as the testimony tends to establish a contract to make a will, and, upon a consideration of the whole thereof, we have reached the conclusion that it does not carry that conviction of certainty which the law requires to enforce an unexecuted will.

The decree of the court will, therefore, be reversed, and the cause remanded with directions to dismiss the complaint.

WALLACE *v.* DESHA COUNTY.

4-4795

Opinion delivered November 8, 1937.

[redacted]

James Merritt and *J. F. Wallace, Jr.*, for appellant.

BAKER, J. A petition was filed in the Desha county court for the establishment of a road beginning at the southwest corner of section 6, township 12 south, range 2 west, running thence east on section line to the southwest corner of the southeast quarter of the southeast quarter of section 6, to a public road, thence in the public road to the southwest corner of section 5, or the corners of sections 5, 6, 7 and 8, thence east on the section line between sections 5 and 8 to or across a canal, the road being nearly or approximately two miles long. After the filing of this petition the county judge seems to have made a personal examination of the proposed location of the road and having determined that there was some dispute about the section line appointed a surveyor and directed him to make a survey of the line called for in the petition. Finally after the survey, upon hearing, the court established a road fifty feet in width commencing at a point in the southwest quarter of the southwest quarter of section 5, township 12 south, range 2 west, where the Bayou Mason road crosses said section line,

thence south along said fence row to the southwest corner of said field; thence east along said fence 2,650 feet, and the further recital is that said road is within the field of G. W. Stroud upon land that he has had under fence for more than seven years. The field fence is taken as the point from which said fifty feet of roadway shall be measured.

There was an allowance of damages to Stroud, but we are unable to say whether or not these damages were paid. The record is not clear in that regard; however, that could make little or no difference according to our view of this case. From this order of the county court J. F. Wallace who had made himself a party prayed an appeal to the circuit court of Desha county, filed his appeal bond, whereupon supersedeas and notice of appeal were duly issued. The case was tried in the circuit court. The effect of that trial was to affirm the judgment of the county court and, after the rendition of the circuit court judgment, motion for new trial was filed and overruled, appeal prayed and granted to the Supreme Court.

It is conceded that the petition is sufficient in form to invoke the jurisdiction of the county court, and it is also said by appellants that the county judge, having acquainted himself with the facts by personal investigation, the matter of appointment of viewers was deemed unnecessary in view of the law to the effect that a report of the viewers would be merely persuasive as affecting the final action of the court. *Nemier* v. *Bramlett,* 103 Ark. 209, 210, 146 S. W. 486. At any rate, no issue is here made in that respect.

The questions presented upon this appeal arise out of the fact that (1) the road as established by the court's order is indefinite, vague and uncertain, and the location thereof cannot be determined from the description given, and (2) the court's road, as ordered, whatever its description, was only about one-half mile in length whereas the road petitioned for was approximately two miles long and that the order establishing the road does

not show that it was even at or near the location of any part of the proposed road described in the petition.

The law for the location and establishment of roads is not particularly hard to understand or difficult to follow. There should be a petition filed, signed by a requisite number of freeholders. The description of the road to be established should be described by giving the beginning point, any intermediate points that are on the proposed road and the terminus. Section 6944, Pope's Digest.

If the court, under the law, deems it expedient to grant the petition to locate and establish the road, the order shall be made therefor and the road shall be established as described in the petition, or for any part thereof. Sections 6953 and 6955, Pope's Digest.

This does not necessarily mean that in the location or establishment of the road all portions of it shall conform with perfect exactitude to the description called for in the petition. The court may vary from the line to avoid unnecessary inconvenience, unreasonable costs of location or construction or for other reasons justifiable as may be found and determined upon final hearing. Of course, it was never contemplated that if the line petitioned for ran into a bog or morass where it would be impracticable to build a road at such point, the line might not be varied, or if a massive boulder were found in the line or survey that the road might not be turned aside rather than encounter unnecessary expense, but such variations as these are not substantial, but may be said to be, strictly speaking, another method of locating and establishing the road as petitioned for. Section 132, 29 C. J. 457.

(1) In this case the order made by the county court and approved by the circuit court upon appeal is so indefinite as to the description of location of the roadway that it could not be found. The county court had in mind, no doubt, certain natural objects that he as judge, when looking over the situation, had observed and which to his mind were sufficiently marked to determine the location of the road he felt it necessary to build

under the petition. The description of these natural objects, fence rows and land lines, mentioned are uncertain, and we are in serious doubt if the surveyor, who wrote the interesting anabasis of eight days work in surveying, could, himself, locate the road without extraneous investigation and information. On that account the order is void.

(2) Moreover, petitioners asked for a road approximately two miles in length. Whatever else may be said about this road as established by the county court, it was about or maybe a little more than one-half mile in length. This may or may not be erroneous.

There seems to be a controversy as between coterminus owners about the location of certain line between six and seven, or maybe between five and eight, and the court in the order indicated ownership of certain lands held by some of the parties under the statute of limitations. For the establishment of this road, it was not necessary that the county court determine that question. The court could by survey, and we presume properly did, determine the location of the line as petitioned for. There is some proof offered to the effect that the lands along the road petitioned for are much more suitable for the location of the road than at a place in Stroud's field where it would be rather expensive to build and construct a road. This evidence may be the result of the inaccurate description. The witnesses may have in mind a location different from that of the court.

We are asked to locate the road as petitioned for and end the litigation. Were it possible and proper to do this, we would accept the responsibility.

However, in this case we are unable to determine whether, from the evidence presented, the road should be located and constructed substantially as petitioned for. The county court did not determine that matter, but only found that convenience and necessity justified the establishment of a one-half mile of road and this might be construed as a determination that a longer road as petitioned for was denied by the court, but we do not so construe the court's action. Besides these facts

above stated, conditions at this time may have changed, if in no other respect, mayhap in regard to county finances.

We, therefore, hold the petition was proper to invoke the jurisdiction of the county court; that the said court, if it found proper to grant the petition, should have established the road substantially as called for in the petition, or, proof being insufficient to justify the establishment of the said road, to have denied the same. It may be true that only a part of said road may be proper, but if so, that part should be substantially on the section lines described in the petition. Had the record been so made there might not have been any reason for an appeal.

It follows the circuit court and the county court were both in error. The cause, therefore, is remanded to the circuit court with directions to certify the matter to the county court for further action upon the petition not inconsistent with this opinion.

MISSOURI PACIFIC TRANSPORTATION COMPANY *v.* WILLIAMS.

4-4805

Opinion delivered November 8, 1937.

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

BAKER, J. Fred Williams, a resident of Grant county, made a trip by bus to Forrest City. On the return from Forrest City to his home he left the appellant company's bus at Lonoke, after having asked the driver of the bus to excuse him and went to a rest room, said to have been about 100 yards away from the point at which the bus stopped in Lonoke. Upon returning to the point at which he left the bus, he found that it had gone and without any inquiry whatever the appellee set out to walk to Little Rock. This was after 10 o'clock in the forenoon and, according to his statement, he walked a few miles when he was picked up by some one in an automobile and brought to Little Rock. He arrived at the bus station only about thirty minutes after the arrival of the bus upon which he had been a passenger. He at once demanded a return of forty-three cents, which it is admitted was the amount of the fare from Lonoke to Little Rock. He was directed to the proper desk or office to make the claim for the forty-three cents. He made no claim at that time of any injuries suffered on account of the fact that he had been left at Lonoke after he had left the bus at that point. Thereafter, a check was sent to him for the forty-three cents return fare and he had this in his possession, without having cashed it at the time of the trial.

Shortly after receipt of this check he filed suit in the circuit court of Grant county alleging that by reason of the fact he had been left at Lonoke, and that, as he had no money he was forced to walk and attempted to do so in order to make his way to Little Rock; that on account thereof he had suffered from cold and exposure which increased or aggravated his rheumatic pains and blistered his heel. He was then working for $1.60 a day when employed by the WPA; that his employment was only part time, perhaps four or five days of the week.

After the trial had begun plaintiff filed an amendment to his complaint, alleging wrongful conduct on the part of the driver of the bus, or gross negligence in failing to wait for him, a passenger, and prayer was for punitive damages. This amendment was made over ob-

jections and exception of the defendant. Appellant urges this as a reason for a reversal, that is to say it contends that the amendment came too late. We do not agree with this contention, the plaintiff had a right to amend his pleadings at any time, even after progress of the trial had commenced, however, within the sound discretion of the court. If such amendment was of the nature or kind as to cause surprise to the defendant to present an issue, concerning which the defendant could not reasonably be prepared to meet, it would have been proper, upon motion, to have continued the cause in order to enable it then to meet the new issue presented. Here, there is no surprise pleaded nor was any time requested to prepare to meet any facts that might have been offered to support the new issue raised by the amendment. In that respect we see no error. *Beal & Doyle Dry Goods Co.* v. *Barton*, 80 Ark. 326, 330, 97 S. W. 58; *O. L. Gregory Vin. Co.* v. *National Fruit Canning Co.*, 167 Ark. 435, 444, 268 S. W. 598.

Many other interesting citations could be set down, but this is unnecessary. We have chosen these only because of the striking characteristics therein.

However, upon this new pleading the court gave an instruction under which the jury might have found that plaintiff was entitled to some judgment, not by way of compensation for any loss or injury suffered, but purely of a punitive nature. This instruction, objected to by the defendant at the time it was offered permitting the jury to return a verdict for punitive damages, was error. The strongest probative value that may be placed upon the testimony as offered by the appellee in his favor does not tend to show any intentional act on the part of the driver to abandon or leave the passenger, nor is it inferable therefrom that the driver's conduct was so grossly remiss as to impute malicious or wrongful conduct on his part. Negligence alone, however gross, will not justify the imposition of punitive damages.

In fact, the evidence does not disclose that the driver knew the reason or purpose on account of which Williams left the bus or that he left it with the intention of

soon returning and continuing the journey, the strongest conclusions to be reached from such evidence would not justify punitive damages. *St. Louis S. W. Ry. Co.* v. *Owings, Admx.*, 135 Ark. 56, 62, 204 S. W. 1146. Other citations or authorities are unnecessary.

There is little evidence of any injury in this case. Plaintiff was left at the Lonoke station. He voluntarily started out and walked for a short distance. He thinks perhaps seven or eight miles. This evidently was not correct as he was soon picked up by some one and delivered in Little Rock within less than two hours after the bus had left Lonoke and only about thirty minutes after the bus had arrived in Little Rock. There is no evidence of any loss occasioned by this thirty minutes of lost time on the journey.

The plaintiff says that, on account of the fact that he had no money, he undertook to walk this distance from Lonoke to Little Rock, but after arriving in Little Rock and making his claim for the return of the forty-three cents fare he then again undertook to walk to Sheridan or a point near that place and after walking some distance was again picked up and carried to his destination. Of course, he does not contend that the walk in the afternoon added to his inconvenience or contributed to alleged sufferings or injuries. A majority of the members of this court are unwilling to say that under the circumstances the appellee's injuries and consequent damages are not more than nominal. To this conclusion the writer does not agree.

Therefore, since the case must be reversed on account of the error in giving the instruction which would permit a recovery of punitive damages, the judgment is reversed, and the cause remanded.

HELENA WHOLESALE GROCERY COMPANY *v.* MOORE.

4-4801

Opinion delivered November 8, 1937.

A. M. Coates, for appellant.

MEHAFFY, J. The appellant commenced this action in the Phillips circuit court alleging that the appellee, H. D. Moore, executed to it his three promissory notes, dated December 27, 1935, one for the sum of $500 due November 15, 1936, and one for $500 due November 15, 1937, and one for $500 due November 15, 1938, all of said notes bearing interest from maturity until paid at the rate of 6 per cent. per annum; that the promissory notes form a series of three notes in which it was provided that in the event H. D. Moore failed to pay any one of said notes at maturity, the appellant at its option had the privilege of declaring all of said notes due. It was further alleged that when the first note became due the appellee failed and refused to pay, at which time the appellant declared all of said notes due and made demand for payment; that subsequent to the date that said notes were declared due, on December 1, 1936, H. D. Moore paid the first note of $500 due November 15, 1936, leaving two notes of $500 each due November 15, 1937, and November 15, 1938. Plaintiff asked judgment for the amount of the two notes, $1,000, and $20 interest.

The appellee answered admitting the execution of the notes, alleging that one of them had been paid, and denying all the other allegations of the complaint.

Evidence was introduced, instructions given by the court, and the jury returned a verdict for the defendant, upon which judgment was entered, and the case is here on appeal.

It appears that some time prior to December 27, 1935, the appellant claimed that the appellee was indebted to it, and the appellee claimed that the president

and secretary of the appellant was indebted to him more than he owed the appellant. They finally reached a compromise by which appellee paid $4,000 in cash and executed his three notes for $500 each as above set out. One note was paid before suit was brought, being paid a few days after its maturity. The second note was not due until November 15, 1937, and this action was begun March 27, 1937, nearly eight months before the second note was due. When Moore sent his check to the appellant on November 28, 1936, the appellant wrote to appellee the following letter:

"December 10, 1936.

"Mr. H. D. Moore,
"Biscoe St.,
"Helena, Ark.

"Dear Sir: Registered Mail

"This will acknowledge receipt of your check dated November 28th for $500 and same has been applied as partial payment on the $1,500 indebtedness that you owe this company.

"These three notes are a series of notes and failure to pay one of them on due date, brings them all due.

"We wrote you under date of November 21st, stating that these notes were past due. Under the agreement, we have the option of declaring them all due by your failure to pay on due date, and we have declared them all due as of November 15th, 1936.

"We are willing to carry this along a reasonable length of time for the balance of these notes.

"Yours truly,
"President
"HELENA WHOLESALE GROCERY CO."

The appellant company accepted appellee's check in payment of the first note, and stated to him in the letter: "We are willing to carry this along a reasonable length of time for the balance of these notes." This had the effect of canceling the declaration that all of them were due. In addition to this letter, the appellee testified that he had a conversation with the president of the grocery company after the execution of the notes and

advised the president that he had to pay his mortgage off first, having given a mortgage to enable him to cultivate his land that year, and that the president of the company agreed to this. This testimony is not disputed by any one.

The only question in the case is whether the suit was prematurely brought. The appellant had the right to exercise its option and declare all the notes due, but it had the same right, of course, to cancel that declaration, and it did so in this letter. When this declaration exercising its option was canceled, and the appellant told Moore that he would be given a reasonable time on the other notes, the notes would then be due, if there were no other action declaring them all due, on the dates mentioned in the notes.

As we have already said, the first note was due November 15, 1936, which note was paid. The second note was due November 15, 1937, and the suit having been brought before that time, was prematurely brought.

There was considerable evidence introduced, but as the only question in the case is whether the cause of action had accrued when suit was brought, it is not necessary to set out the testimony.

This question was submitted to the jury and its finding in favor of the appellee is conclusive.

The judgment is affirmed.

CLARK *v.* WHITNEY.

4-4793

Opinion delivered November 8, 1937.

Ezra Garner, for appellant.

Hawkins & Keith, for appellees.

MEHAFFY, J. On November 10, 1919, John Radford and Julia Radford, his wife, and Jeff Radford and Annie Radford, his wife, borrowed $2,500 from the Security Mortgage Company of Texarkana, Arkansas, for which sum they executed their promissory note due November 1, 1926, with interest at 6 per cent. per annum, payable semi-annually as evidenced by 14 coupon interest notes attached thereto, one for $70.84 due May 1, 1920, and thirteen for $75 each due November 1 and May 1 thereafter, with interest from maturity at 10 per cent. per annum. To secure the payment of said notes the borrowers executed and delivered to the Security Mortgage Company a mortgage on 240 acres of land in Columbia county, Arkansas.

Jeff Radford died and thereafter, on November 1, 1926, John Radford and Julia Radford, his wife, Annie Radford, widow of Jeff Radford, and Vessie Clark, the only heir of Jeff Radford, deceased, executed and delivered to the Security Mortgage Company, their promissory note for $2,200, which was a renewal of the note and mortgage executed November 10, 1919; said $2,200 was payable as follows: 6 notes in the sum of $300 each due and payable November 1, 1927, November 1, 1928, November 1, 1929, November 1, 1930, November 1, 1931, and November 1, 1932, and the last note for $400 being due and payable November 1, 1933, with interest on said notes from date at 6 per cent. per annum payable annually, being evidenced by coupon interest notes attached to said notes, interest due from maturity at 10 per cent. per annum. To secure the payment of said notes, John Radford and Julia Radford, his wife, Annie Rad-

ford, widow of Jeff Radford, deceased, and Vessie Clark, joined by her husband, Eugene Clark, executed and delivered to the Security Mortgage Company a renewal mortgage on the 240 acres of land.

The notes and mortgage executed November 10, 1919, and the renewal notes and mortgage, executed November 1, 1926, were transferred and assigned by the Security Mortgage Company, to E. L. Harris, of Peoria, Illinois, and by him assigned to the Home Savings & State Bank of Peoria, Illinois, without recourse.

In July, 1930, the Home Savings & State Bank commenced foreclosure proceedings in the Columbia chancery court against John Radford and Annie Radford, the widow of Jeff Radford, deceased. Julia Radford, the wife of John Radford, having died since the execution of the note and mortgage of November 1, 1926, and, also, against other parties.

An affidavit for warning order was made by Newt Spivey that Eugene Clark was a nonresident of the state of Arkansas. Warning order was published for Eugene Clark and others and the unknown heirs of Vessie Clark, deceased.

Personal service was had upon all the parties living in Columbia county at the time, except Jefferson Clark. Jefferson Clark, at the time of the suit, lived in Columbia county, but it was not known that any of Vessie Clark's descendants lived in Columbia county; therefore, Jefferson Clark was not made a party. The court, on July 27, 1931, entered a decree finding an indebtedness against the defendants in that suit of $2,940.70, and declaring a lien on the land in controversy and ordered a sale to pay the judgment. Sale was made by the commissioner, and the Home Savings & State Bank of Peoria, Illinois, bid and offered the sum of $3,052, and the lands were sold to it for that amount. That amount included all the costs, as well as the entire debt.

Commissioner's deed was made, which was approved and confirmed by the court. The bank then, by quitclaim deed, conveyed to E. L. Harris the land, and on August

8, 1932, E. L. Harris, by warranty deed, conveyed said lands to Edgar Whitney, the appellee.

On July 8, 1936, Edgar A. Whitney and the Home Savings & State Bank filed another suit in the Columbia chancery court alleging that Jefferson Clark, as grandson of Jeff Radford, deceased, and as the only heir of Vessie Clark, deceased, was due them the sum of $1,727.82 on notes that had previously been foreclosed, and it was alleged they were merged into the decree. They prayed judgment for said sum and that a lien be declared on the lands. It was alleged that Jefferson Clark was a minor ten years of age. A guardian *ad litem* was appointed for him, answer filed, denying the allegations of the complaint, and alleging that by reason of the foreclosure in 1931 the debt was extinguished, and pleaded estoppel, and that the complaint be dismissed for want of equity, and Jefferson Clark's title be quieted to his half interest in said lands, together with costs.

Evidence was introduced and a decree was rendered on the three notes sued on, which were not barred by the statute of limitations. It appeared from the evidence that the plaintiffs thought they were purchasing the entire interest in the lands and bid the full amount of the judgment, interests and costs; that they did not know of the existence or whereabouts of Jefferson Clark, and that they discovered that he lived in Columbia county. The evidence showed that the amount bid for the land was a fair market price for the entire tract; that Vessie Clark had died and left as her only heir Jefferson Clark.

Of course the sale of the land did not affect the interest of Jefferson Clark because he was not a party to the suit.

It is contended first by the appellant that the matters sought to be litigated in this suit were litigated or could have been litigated in the former suit, and that the former decree is, therefore, *res judicata*.

If the trial court had had jurisdiction of all the parties, including Jefferson Clark, as well as jurisdiction of the subject-matter, the decree would have been

binding on all alike. When an issue of fact or of law has been adjudicated upon the merits, it cannot be again litigated in another suit. It has been said that, to make a matter *res judicata,* there must be the concurrence of the four following conditions; first, identity in the thing sued for; second, identity of the cause of action; third, identity of persons and the parties to the action; fourth, identity of the quality in the person for or against whom the claim is made.

In the instant case, there was no identity of persons and parties. Jefferson Clark was not a party although he owned half interest in the lands involved, and this suit was brought to foreclose the one-half interest of Jefferson Clark on the notes included in the former suit, which were not barred by the statute of limitations.

Jefferson Clark owned one-half interest in this land, and this suit was to foreclose on that one-half interest, which the appellees thought they had acquired in the other suit. The chancery court did not give any judgment or decree against Jefferson Clark personally, but required the plaintiffs in that case to pay all the costs and to pay the minor's attorney's fee and held that the minor's half interest in the land was subject to the claim of plaintiffs.

If the minor had brought suit to recover his half interest in the land he could not have recovered it without paying the amount due, although the debt might have been barred by the statute of limitations, and the minor's remedy was to bring suit to recover his half interest in the land. If this course had been pursued by him, a complete defense to his claim would have been that the mortgage debt had not been paid, and it would have made no difference if the debt had been barred by the statute of limitations.

"The defense of reduction or recoupment which arises out of the same transaction as the note or claim survives as long as the cause of action upon the note or claim exists, although an affirmative action upon the subject of it may be barred by the statute of limitations. But a counter-claim, even where by statute it may con-

sist of any matter arising out of contract or tort, whether it arises out of the contract or transaction sued upon or not, if barred by the statute of limitations, is available only for recoupment, although for that purpose it may be used as long as plaintiff's cause of action exists." 37 C. J. 804-5; *Missouri & No. Ark. Ry. Co.* v. *Bridwell,* 178 Ark. 37, 9 S. W. (2d) 781.

The result would have been the same if this suit had not been brought by plaintiffs and they had waited until the minor began an action to recover his half of the land, because any matter arising out of a contract sued upon, if barred by the statute of limitations, is available only for recoupment, although for that purpose it may be used as long as plaintiff's cause of action exists.

It follows from this that if this suit had not been brought and Jefferson Clark had, at any time in the future, brought suit for his interest in the land, the indebtedness would have been available, although the whole debt might have been barred by the statute of limitations.

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

MILLER *v.* WATKINS.

4-4728

Opinion delivered October 4, 1937.

Golden & Golden, for appellant.

W. W. Grubbs, for appellee.

MEHAFFY, J. Caroline Watkins, one of the appellees, filed suit against Lenwood Watkins, another of the appellees, for unlawful detainer for the recovery of the possession of certain described lands in Chicot county, Arkansas.

Thereafter, the appellant, Odie Miller, filed an intervention and complaint in ejectment against Caroline Watkins, Lenwood Watkins, Claude Watkins, Lester Watkins, Rosie Watkins Howard, Moeast Watkins, individually, and Moeast Watkins, administrator of the estate of Willie Watkins, deceased. He alleged that he was the owner of the lands involved and that the defendants were not entitled to possession; that Caroline Watkins is the widow of Willie Watkins, deceased; that she and the other appellees constitute the sole heirs-at-law of Willie Watkins, deceased, and as such are proper parties defendant herein for the complete adjudication of the rights of the parties to said lands. He alleged that he was the owner and entitled to possession of said property; that the Eudora-Western Drainage District was duly and legally created and organized under and by virtue of the laws of the state of Arkansas, and that said lands were situate in said district and were im-

pressed with a lien securing the payments of certain bonded indebtedness against the lands; that the defendants wholly failed and refused to pay the installments levied on said lands for the years 1923, 1924 and 1925, and that the district caused said lien to be foreclosed in the Chicot chancery court on November 5, 1929, and that the defendants wholly failed and refused to redeem said lands within the time prescribed by law, and the commissioner of the court sold said lands to said improvement district. On April 9, 1935, appellant purchased said lands from the receiver and received a deed conveying said lands to him.

Caroline Watkins filed separate answer. She admitted that she was the widow of Willie Watkins, deceased; that the improvement district was legally created and that the lands involved in this suit are embraced in said district; that said lands were assessed with certain benefits to be paid in annual installments; she admits that the drainage taxes were extended against said lands for the years 1923, 1924 and 1925, and admits that there was a foreclosure in Chicot chancery court and a decree entered and deed made as alleged by appellant; admits that the receiver for the district conveyed the lands to appellant on April 9, 1935; denies that appellant is the owner of said lands or has any interest or right to the possession, and states that the foreclosure decree and sale thereunder and the deed are void for the following reasons: first, that the lands involved were forfeited to the state on June 9, 1924, for the taxes of 1923 and was duly certified to the state on July 31, 1926; that the title remained in the state from that time until July 30, 1931, when the same was purchased by Willie Watkins, her former husband; that at all times mentioned above, the title to said lands was in the state of Arkansas. Appellee then mentions several other reasons why the sale by the district was void. That appellee's husband acquired the lands 35 or 40 years ago, built a home on said lands, and occupied said 40 acres as a homestead continuously until the fall of 1933, when he died, and that appellee has remained in continuous possession

of the land since his death, occupying the same as her homestead.

The evidence shows that the foreclosure suit by the district and the sale and deed to appellant were all during the time the title to the land was in the state of Arkansas. The amount of the taxes for which the land was sold by the district was very small, somewhere between $30 and $40. The appellees had not paid either the state and county taxes, or the improvement district taxes.

It was the duty of Willie Watkins and the appellees to pay the taxes on said land. The parties waived a jury and submitted the case to the court sitting as a jury, and the court found in favor of Caroline Watkins and dismissed the intervention and complaint of the appellant, Odie Miller, and from this judgment appellant prosecutes an appeal.

There is no conflict in the evidence. The facts may be stated briefly as follows: Willie Watkins, 30 or 40 years ago, acquired this land and built his home on it and lived there the rest of his life, and Caroline Watkins, his widow, continued to occupy the place as her homestead, and is still occupying it. The land was forfeited for state and county taxes, and purchased by the state in 1924 for the taxes of 1923. Suit to foreclose by the district was filed April 9, 1927. The suit was to foreclose for the taxes for 1923, 1924 and 1925. The land was sold and the district became the purchaser, and the receiver of the district executed to Odie Miller a deed to the lands on April 9, 1935. The foreclosure decree was dated November 5, 1929, the sale was reported on January 27, 1930. The deed was made by the state to Willie Watkins, husband of appellee, on July 30, 1931.

The appellant, in his intervention and complaint, prayed judgment that he be adjudged the lawful owner of said land and premises, and for possession of the same. He did not testify in the case. The only question involved here is who has the paramount title, the appellant or the appellee, Caroline Watkins.

The court has repeatedly held that when lands are forfeited and sold to the state, that improvement district

taxes are suspended during the time the state has title, but they are not extinguished. As soon as an individual purchases from the state, the lien of the improvement district for assessments attaches. It is undisputed that at the time of the foreclosure by the district, the title to the lands was in the state of Arkansas, and that a deed was received by Watkins from the state in 1931. Under all of our decisions on this question the state had the paramount title, and all liens for assessments were suspended during the time the state had title.

Appellant relies on the case of *Tallman* v. *Board of Commissioners Northern Rd. Imp. Dist. of Ark. County,* 185 Ark. 851, 49 S. W. (2d) 1039. But we quoted with approval in that case the case of *Turley* v. *St. Francis County Rd. Imp. Dist. No. 4,* 171 Ark. 939, 287 S. W. 196, as follows: "Of course, the forfeiture to the state of lands for general taxes necessarily suspends the enforcement of the special tax lien as long as the title remains in the state, but, as the lien, under the terms of the statute, is not extinguished, and continues until the special taxes are paid, the same can be enforced when the land goes back into private ownership. This construction of the statute gives full recognition to the state's paramount right of taxation, and in nowise detracts from the dignity and power of the state as against subordinate governmental agencies."

Another case to the same effect is *Wyatt* v. *Beard,* 179 Ark. 305, 15 S. W. (2d) 990. In the case of *Hooper* v. *Chandler,* 183 Ark. 469, 36 S. W. (2d) 398, we announced the same doctrine. We said in the Tallman case, *supra,* that the lien for assessment taxes was suspended and could be enforced after the lands went back to private ownership, but we announced that this meant a valid sale, and stated that a void sale would not suspend the statute, because if void, it is a nullity, binding on no one.

But, when lands have been sold to the state, the state has a paramount lien, and, if sold, as they were in this case, for improvement district taxes, they are still subject to the paramount right of the state.

One of our latest decisions is in the case of *Stringer v. Conway County Bridge Dist.*, 188 Ark. 481, 65 S. W. (2d) 1071. We there 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."

In the instant case it is conceded that the sale to the state was valid, and, if so, the lien for improvement district assessments was suspended while the state had title; but when purchased by an individual, the lien for the assessment attached.

Willie Watkins was under the duty to pay the taxes and assessments. After the time for redemption expires, where there is a valid sale to the state, the original owner or any other person may purchase from the state; but where the person whose duty it was to pay the taxes, purchases from the state the lien of the improvement district attaches, and while such person is entitled to the premises, the lands are subject to the lien for the improvement district assessments.

In this case, after the time for redemption expired, Willie Watkins, the original owner, purchased from the state. It being his duty to pay the taxes, he could not let it forfeit to the state and then purchase it, and thereby evade the payment of the improvement district taxes. The title of the appellant, Odie Miller, was void because there had been a valid sale to the state. The court cor-

rectly held that Caroline Watkins was entitled to the possession, but the land is subject to the improvement district taxes.

The judgment is affirmed.

SMITH, J., (on rehearing). Upon further consideration of this case we reaffirm the original opinion except in the particular hereinafter stated. The cases cited in the original opinion make a distinction which now appears to be unsound. These cases hold that where lands have been forfeited to the state an improvement district may not sue to enforce its taxes until the land has been redeemed or purchased from the state, and thus returned to private ownership, at which time—and not before—the improvement district may proceed to enforce payment of its delinquent taxes. But these cases hold that this limitation upon the right of the improvement district to enforce, by suit, the payment of taxes due it applies only where the sale to the state was a valid sale, and does not apply if, for any reason, the sale to the state was invalid. In the latter case the improvement district postpones the suit at its peril, and will be barred of its remedy to enforce its taxes if the applicable statute of limitations has run while the title was apparently in the state. There appears no valid reason for this distinction.

This rule requires the improvement district, in each instance, at its peril, to determine the validity of the forfeiture to the state. If the suit is brought and the sale is valid the improvement district is cast in its suit for costs and is denied relief. However, if the sale to the state is invalid, and the suit is not brought before the bar of the statute of limitations has fallen, the right to sue is barred, and the improvement district will lose its taxes, and other property owners in the improvement district who have paid the taxes extended and assessed against their lands will be required to make good the loss of revenue or of having their future taxes increased, subject only to the limitation that they shall not be required to pay anything in excess of their total assessment of benefits. *Arkansas-Louisiana Highway Imp. Dist.* v. *Pickens,* 169 Ark. 603, 276 S. W. 355; *Chicago Mill & Lbr.*

Co. v. *Drainage Dist. No. 17,* 172 Ark. 1059, 291 S. W. 810; *Jefferson Bank of St. Louis* v. *Little Red River Levee Dist.,* 186 Ark. 1048, 57 S. W. (2d) 805; *Watson* v. *Barnett,* 191 Ark. 990, 88 S. W. (2d) 811.

There does not appear to be any valid or just and proper reason for making this distinction. It is an elementary principle in the law of limitations upon causes of action that the statute does not begin to run until the right to sue has accrued. Now we have held, in the cases cited, which the original opinion in this case reaffirms, that an improvement district may not sue where the sale to the state was good. These cases relate to and are based upon the opinion in the case of *Turley* v. *St. Francis Road Imp. Dist. No. 4,* 171 Ark. 939, 287 S. W. 196. That case did not, however, distinguish between good and invalid sales, this distinction being made in later cases. The right to sue was denied because the state's lien for its taxes is the paramount lien, and suit could not be brought against the state to determine whether the sale to it was good or bad, for, even in the case of invalid sales, the title is apparently in the state, its taxes have not been paid, and its lien subsists and remains paramount and would not be divested or discharged by the suit of an improvement district to enforce payment of taxes due it.

Upon these considerations our former opinions are modified to the extent of now holding that the right to sue is suspended where lands or town lots have been sold to the state, and that this suspension is not dependent upon the validity or invalidity of the sale to the state. The right is suspended in either case, as the state cannot be divested of its paramount lien for its taxes, whether the sale was good or bad. It must also follow from this holding that the right of the improvement district to sue is not barred by the statute of limitations through failure to sue while the actual or apparent title is in the state.

Mr. Justice MEHAFFY dissents.

MEHAFFY, J., (dissenting). I cannot agree that this court has the right to amend or suspend the statute of limitations. The opinion on rehearing says: "Upon these considerations our former opinions are modified to the extent of now holding that the right to sue is suspended where lands or town lots have been sold to the state, and that this suspension is not dependent upon the validity or invalidity of the sale to the state. The right is suspended in either case, as the state cannot be divested of its paramount lien for its taxes, whether the sale was good or bad. It must also follow from this holding that the right of the improvement district to sue is not barred by the statute of limitations through failure to sue while the actual or apparent title is in the state."

The statute provides when the suits to collect assessments shall be commenced. If not commenced within the time fixed by the statute the cause of action is barred. Section 12 of Art. 2 of the Constitution provides: "No power of suspending or setting aside the law or laws of the state shall ever be exercised except by the General Assembly." This court in discussing the power of the Governor to remit penalties for delinquencies in the assessment of taxes said: "The manifest design of the framers of the Constitution was to limit the power to pardon for crime and to remit fines and forfeitures to criminal and penal cases after conviction of crime or judgment for the imposition of fine or forfeiture, and not to allow its application to penalties and forfeitures civil, remedial and coercive in their nature. This is clearly indicated in another provision of the Constitution which expressly declares that: 'No power of suspending or setting aside the law or laws of the state shall ever be exercised except by the General Assembly.' Const., Art. 2, § 12. The effect of a general amnesty as was attempted by the proclamation now under review would operate as a suspension of the law and come within the spirit, if not within the letter, of the inhibition of the Constitution just quoted, and when the two provisions of the Constitution are read together it is clear that it was intended to confine the power of the executive, with respect to the remission of fines and forfeitures, strictly to criminal

and penal cases after judgment, and not to remedial and coercive penalties such as a penalty for non-assessments or nonpayments of taxes." *Hutton* v. *McCleskey,* 132 Ark. 391, 199 S. W. 74. This court has also held that a statute providing that no action for the recovery of any land against any person, his heirs or assigns who may hold such lands under a donation deed from the state, shall be maintained, unless it appear that the plaintiff, his ancestor or grantor was seized or possessed of the lands within two years next before the commencement of such suit or action.

This court said: "The statute itself contains no exceptions from its provisions in favor of infants or other persons under disability, and there is nothing in it that implies that the legislature intended that any such exceptions should be made. * * * That such exceptions are commendable, and evince a proper, just, and humane regard for the rights and interests of a large and helpless class of landowners cannot be controverted. But they are within the power of the legislature to grant or withhold, and its exercise of the power cannot be restrained or varied by the courts to subserve principles of justice and humanity." *Sims* v. *Cumby,* 53 Ark. 418, 14 S. W. 623; *Sparks* v. *Farris,* 71 Ark. 117, 71 S. W. 255.

Section 190, 17 R. C. L., Title, Limitations, reads as follows: "As a general rule the courts are without power to read into these statutes exceptions which have not been embodied therein, however reasonable they may seem. It is not for judicial tribunals to extend the law to all cases coming within the reason of it, so long as they are not within the letter. Considerations of apparent inconvenience or hardship will not be allowed to control. The enactment of the law-making power within its legitimate field must not be obstructed by the judicial administration. Such power is ample, if it sees fit, to extinguish any right enforceable by an action, if judicial remedies for such enforcement are not invoked within such reasonable time as it sees fit to name. The possessor of the right may be under disability personally to enforce the same within the prescribed period by reason of infancy, insanity, imprisonment or other cause, and yet the stat-

ute in general terms, not containing any exception to save the right, will extinguish it. The legislature is the judge, and the sole judge in such matters, subject to no judicial review whatever, so long as it acts within the boundaries of reason. It is far better that occasionally one should suffer severely from the enforcement of the law, as the court finds it, than that they should endeavor to bend the law out of its manifest scope to avoid that result. So courts in construing a special statute of limitation will not read another statute into it and thus incorporate exceptions not contained therein, or give it any new or unusual interpretation, but they are to give effect to the object of the law creating the exception which is to prevent the statute from running during the time the claimant is prevented without fault on his part from suing, so that he can have the full benefit of the time allowed him in which to bring his action. In applying the rule it has been held that in absence of a statute making concealment an exception to the statute of limitations, the courts cannot create one, however harsh and inequitable the enforcement of the statute may be. And the courts cannot create an exception where an action was not commenced within the period because of the act of a person in designedly eluding service of process." Citing: *Lewis* v. *Pawnee Bill's Wild West Co.*, 6 Penn. 316, 66 Atl. 471; *Pietsch* v. *Milbrath*, 123 Wis. 647, 101 N. W. 388.

No claims of people need protection more than infants and others under disability, but this court has uniformly held that the power to protect them belongs to the legislature. If the court is powerless to protect infants and others under disability by suspending the statute of limitations, it certainly cannot protect improvement districts and the inhabitants thereof by suspending the statute of limitations. I think the district can and must sue within the time fixed by statute. The action, when brought, if the title is in the state, can either be continued, or if there is a judgment and sale it would be subject to the paramount interest of the state. I respectfully dissent from the holding of the majority that this court has power to suspend the statute of limitations.

Mr. Justice BUTLER agrees with me in the conclusion herein reached.

RENNER *v.* PROGRESSIVE LIFE INSURANCE COMPANY.

4-4735

Opinion delivered October 11, 1937.

[redacted]

John W. Nance, for appellant.

E. M. Arnold and *Duty & Duty,* for appellees.

MEHAFFY, J. This is the third appeal in this case. The last appeal was *Renner* v. *Progressive Life Insurance Company,* 193 Ark. 504, 101 S. W. (2d) 426, decided by this court on January 25, 1937, and the first appeal is *Renner* v. *Progressive Life Insurance Company,* 191 Ark. 836, 88 S. W. (2d) 57. A history of the case and the facts are stated in these two opinions, and it would serve no useful purpose to restate them in this opinion.

In this case, in the Benton circuit court, a demurrer was sustained, and judgment entered against appellant, from which comes this appeal.

It is contended by the appellees that the complaint shows upon its face that the cause of action is barred by the statute of limitations. Appellant contends that § 1189 of Crawford & Moses' Digest sets out the grounds of demurrer, and prescribes the limits of the grounds of demurrer. That section reads as follows:

"The defendant may demur to the complaint where it appears on its face, either:

"First. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or

"Second. That the plaintiff has not legal capacity to sue; or,

"Third. That there is another action pending between the same parties for the same cause; or,

"Fourth. That there is a defect of parties, plaintiff or defendant; or,

"Fifth. That the complaint does not state facts sufficient to constitute a cause of action."

It is conceded by appellant that this court has held in numerous cases that, if the complaint shows upon its face that the cause of action is barred by limitation, that question may be raised by demurrer; but he contends that the Legislature has power to prescribe and limit the grounds of demurrer, and that it has done so in the section above quoted.

This court has frequently said that where the complaint shows on its face that it is barred by the statute of limitations, and no ground of avoidance is shown, this question may be raised by demurrer. In the case of *Smith* v. *Missouri Pacific Rd. Co.,* 175 Ark. 626, 1 S. W. (2d) 48, we said:

"This court has frequently held, and we now hold again, that, where the complaint shows on its face that it is barred by the statute of limitations, and no ground of avoidance is shown, the question may be raised by demurrer." *Rogers* v. *Ogborn,* 116 Ark. 233, 172 S. W. 867; *Ernest* v. *St. Louis, M. & S. E. Ry. Co.,* 87 Ark. 65, 112 S. W. 141; *Flanagan* v. *Ray,* 149 Ark. 411, 232 S. W. 600; *Anthony* v. *St. L. I. M. & S. Ry. Co.,* 108 Ark. 219, 157 S. W. 394; *St. L. I. M. & S. Ry. Co.* v. *Sweet,* 63 Ark. 563, 40 S. W. 463; *Miles* v. *Scales,* 174 Ark. 412, 295 S. W. 375; *Smith* v. *Missouri Pacific Rd. Co.,* 175 Ark. 626, 1 S. W. (2d) 48; *Western Clay Drainage Dist.* v. *Wynn,* 179 Ark. 988, 18 S. W. (2d) 1035.

There are many other decisions of this court to the same effect. The rule is, therefore, well established that if the complaint shows on its face that the cause of action

is barred by the statute of limitations, a demurrer will be sustained.

It is the contention, however, of the appellant that the amendment to his complaint related back to the time of filing the original complaint.

We said in the case of *Love* v. *Couch,* 181 Ark. 994, 28 S. W. (2d) 1067, in deciding the question now before us: "It is insisted by the appellants that the amendment will relate back to the filing of the original complaint, citing *Holland* v. *Rogers,* 33 Ark. 251, and *Western Coal Mining Co.* v. *Corkille,* 96 Ark. 387, 131 S. W. 963, in support of this contention. But those cases are not authority for the contention made in the instant case, for the reason that the amendment of August 4, 1926, was not an amplification of the cause of action set out in the complaint first filed or of any of the amendments thereto, but was an independent and distinct cause of action, and an adverse judgment on the cause of action alleged in the original complaint would not be a bar to recovery on the cause of action stated in the amendment of August 5, 1926." *McDonald* v. *Mueller,* 123 Ark. 226, 183 S. W. 751; *Cottonwood Lbr. Co.* v. *Walker,* 106 Ark. 102, 152 S. W. 1005, 45 L. R. A. (N. S.) 429; *Davis* v. *Chrisp,* 159 Ark. 335, 252 S. W. 606.

In the last case, this court said: "Our cases also hold that where there is an amendment stating a new cause of action or bringing in new parties interested in the controversy, the statute of limitations runs to the date of the amendment and operates as a bar when the statutory period of limitation has already expired."

The original cause of action was an action on contract. The cause of action stated in the amended complaint was in tort. This court, in this case, when it was here on appeal January 25, 1937, expressly held that the cause of action stated in the amendment was in tort. The original complaint being an action on contract, the amendment was not in any sense an amplification of the cause of action stated in the original complaint, but was a new and distinct cause of action in tort. Therefore, the statute of limitations run until the time of filing

the amendment, and at that time the cause of action for the tort was barred by the statute of limitations.

Holding, as we do, that the cause of action was barred by limitations, it is unnecessary to decide the other questions discussed by counsel.

The action was barred by the statute of limitations, and the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, ET AL., *v.* ROSS, ADMINISTRATOR.

4-4760

Opinion delivered October 25, 1937.

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

F. D. Goza and *Ed F. McDonald, Jr.,* for appellee.

GRIFFIN SMITH, C. J. Appellee, as administrator of the estate of his son, Odis Ross, brought this suit in the Hot Spring Circuit Court, alleging that his intestate was killed because of the negligence of appellant.

The principal question involved is whether there was any substantial evidence to sustain the jury's verdict.

Odis Ross was last seen alive on the night of December 19, 1935. His dead body was found at eight o'clock the following morning. It was on the main line of appellant's railroad about two miles south of Donaldson, near Victor's Spur. When the body was found it was lying at the end of the ties parallel with the rails. The track was straight for a long distance in each direction and the roadbed was upon a dump six or eight feet high. There were no signs of footprints near the scene to indicate that Ross had climbed upon the track. It was customary for pedestrians to travel on a dirt road as far south as Victor's Spur, then get on the railroad. Appellant's right-of-way is fenced, and the wagon road is on the outside of the fence. There was a crossing at Victor's Spur, but it was closed with a gate.

The night of December 19-20 was cold, and the ground was frozen on the morning of the 20th. Blood, apparently penetrating the ground to a depth of three or four inches, was found by the body near the end of a crosstie. There was a hole in deceased's head, and an arm was broken. No blood was found other than that near the end of the crosstie, and there was no indication that the body had been dragged.

There is testimony that just before dark on December 19 Ross was at the home of Tom Brown half a mile north of Victor's Spur, and left, saying he was going to Jasper Collins' home, five miles away, near the railroad. He was seen on the dirt road about halfway between Brown's and Victor's Spur. Witnesses who met Ross said that he stepped out of the road to let them pass, as a normal person would have done. There was testimony that, prior to leaving Brown's house, Ross had been drinking.

Appellant's testimony was that a lookout had been maintained as to all trains passing Victor's Spur between five o'clock of the afternoon of December 19 and eight o'clock of the morning of the 20th, and that the headlights on these trains gave proper illumination.

Engineer Bryant testified that he passed Victor's Spur at 5:45 on the evening of December 19. About half-

way between Donaldson and Victor's Spur he saw a man run across the track 300 feet ahead of the engine. Witness looked out of the cab and watched the man cross, then looked down on the right side of the engine and saw a man standing in the ditch near the track. This man had a stick in his hand. Witness did not ring the bell or blow the whistle, because it was not necessary. The testimony of Fireman Kelley was substantially the same as that given by Bryant.

Appellee, for affirmance of the case, relies upon *Missouri Pacific Rd. Co.* v. *Grady*, 188 Ark. 302, 65 S. W. (2d) 539, and *Porter* v. *Scullen, et al.*, 129 Ark. 77, 195 S. W. 17.

In the Porter case it was alleged that "Plaintiff's intestate was walking upon the tracks of the defendant railway company * * * and while thus engaged the defendant company through its agents, servants and employees, negligently and carelessly and without keeping a proper lookout for people upon its said track or right-of-way, ran the train over its said track without ringing its bell or blowing the whistle of the engine, and ran over and so badly injured and wounded the said intestate that he lived only a short time after being struck by the train."

The answer was a denial of negligence. There was a trial before a jury. Trainmen were not called as witnesses. After the evidence was introduced the court directed a verdict in favor of the defendant. The only question considered on appeal was whether the evidence was legally sufficient to warrant a submission to the jury.

It is true, as appellee says in his brief, that in the opinion there is a finding that "The evidence with respect to the situation of the body and the condition it was in warrants the conclusion that the man was struck by the train and killed." This is true in the instant case, although the circumstances are not as strong here as they were in the Porter case. But Chief Justice McCulloch, in his opinion affirming the Porter judgment, said: "We are of the opinion that the evidence was insufficient to make out a case against defendants, and that the court

was correct in giving a peremptory instruction. It devolved upon the plaintiff, in order to make out a case, to show that if the proper lookout had been kept the presence of the deceased in a perilous position on or near the track could have been discovered in time to prevent the killing * * *. The testimony adduced fails to show that the presence of Porter could have been discovered if a lookout had been kept. It fails to show Porter's situation and attitude at the time he was struck by the train."

The opinion is authority for the rule, often announced by this court, that while testimony of an eyewitness is not necessary to prove that a person or property was struck by a train, and circumstantial evidence may establish the fact, yet the finding of an injured body or damaged property in circumstances justifying a belief that such injury or damage was caused by a train, is not sufficient, alone, to fix liability. There must be evidence that if a proper lookout had been kept "The presence of the deceased in a perilous position on or near the track could have been discovered in time to prevent the killing."

In the Grady case the opinion contains an express finding that "All the circumstances indicated that the man who was killed was struck while walking on the track."

A very clear and concise discussion of the lookout statute is found in *Russell* v. *St. Louis S. W. Ry. Co.*, 113 Ark. 353, 168 S. W. 135. After citing *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 107 Ark. 431, 155 S. W. 510; *Burch* v. *St. Louis, I. M. & S. Ry. Co.,* 108 Ark. 396, 158 S. W. 139; *Chicago, R. I. & P. Ry. Co.* v. *Gunn,* 112 Ark. 401, 166 S. W. 568; and *Chicago, R. I. & P. Ry. Co.* v. *Bryant,* 110 Ark. 444, 162 S. W. 51, the opinion says:

"These cases construe the lookout statute to mean that 'upon proof of injury to such person by the operation of its trains under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided, if a lookout had been kept, that a *prima facie* case has been made.' But there

must be some evidence, and not mere conjecture or speculation, which would reasonably warrant the inference to be drawn by the jury, that the presence of the person injured upon the track could and would have been discovered by the operatives of the train by keeping a constant lookout, and that had such lookout been kept the injury could have been averted by the exercise of reasonable care thereafter; and if the jury finds the facts so to be, a recovery of damages will not be defeated on account of the contributory negligence of the party injured. But this presumption and right to recovery do not arise upon mere proof of injury; but, upon the contrary, there must be proof sufficient to warrant the finding that the presence of the party injured could and would have been known to the operatives of the train and the injury to him averted by the keeping of this lookout, and the exercise of care after discovering his presence. Here there is nothing but conjecture as to the manner in which deceased was killed by the train, and various theories are offered in explanation of that occurrence; but the only positive evidence is that the engineer and fireman were keeping a lookout as the train approached from the west, but neither of them saw the deceased nor was aware that they had struck him; and the evidence upon the part of citizens standing at the depot that they observed the train's approach to the station and did not see anyone upon the track in front of the train. Under these circumstances it would be mere conjecture to say that deceased could have been seen had a lookout been kept, and that the injury could have been averted by the exercise of care after discovering his presence on the track. But conjecture and speculation, however plausible, can not be permitted to supply the place of proof. *St. Louis, I. M. & S. Ry. Co.* v. *Hempfling,* 107 Ark. 476, 156 S. W. 171, and cases there cited."

There is no circumstance in the instant case to shed substantial light upon the principal unknown fact: That is, what position, or attitude, or condition, was Ross in when the tragedy occurred?

We are asked to say (1) that when the body was found as related by witnesses, the conclusion necessarily

followed that Ross was killed by a train; and (2) that attending circumstances were sufficient to satisfy the rule that every verdict must be sustained by some substantial evidence, either direct or circumstantial. If this be conceded, still the question remains unanswered, Upon what testimony did the jury predicate a finding that the statutory duty of care was disregarded? The track in each direction was straight for several miles. All firemen and engineers swore that lookouts were being kept. This testimony is not disputed by any of the witnesses—and headlights were sufficient. If, with the lookout being maintained, physical surroundings and attending conditions were such as to negative any explanation of the tragedy other than the supposition that Ross was walking on or near the track, then we might say the jury was justified in disregarding testimony of appellant's agents as to the measure of care, and such action would not be arbitrary. But no such case has been made out. To admit this would be to say that there is a conclusive presumption that Ross was walking on or near the track, in the glare of a brilliant headlight, and that negligence alone was responsible for the fact that his presence in such place of peril was not discovered. There is no such conclusive presumption. Such a rule would exclude every other reasonable means which might have caused the tragedy. As was said in the Russell case, "Conjecture and speculation, however, plausible, cannot be permitted to supply the place of proof." Neither may a jury capriciously disregard the reasonable testimony of witnesses in order to give substance to a fanciful theory, for in *St. Louis-S. F. R. Co.* v. *Williams,* 180 Ark. 413, 21 S. W. (2d) 611, we said: "As there was no fact or circumstance in evidence substantially contradicting the testimony of the engineer, it was an arbitrary act on the part of the jury to disregard it."

In *St. Louis-San Francisco Railway Co.* v. *Pace,* 193 Ark. 484, 101 S. W. (2d) 447, a case very similar to the one now being considered, we said:

"There was no personal testimony as to any negligence. On the contrary, appellant's servants consistent-

ly insisted that no one was on the track. The circumstances opposing these assertions is that the headlights were sufficiently powerful to have disclosed the presence of a man in time for effective application of the brakes, if he had been standing or walking.

"In order to sustain the verdict, it would be necessary to wholly disregard the testimony of appellant's servants and to hold that the mere finding of a mangled body on a track over which trains had been recently operated, coupled with the admission by appellant that it maintained efficient headlights, would establish a *prima facie* showing which could not be overcome by the reasonable testimony of men who controlled the train. The testimony of one of appellee's own witnesses that Pace was 'tipsy' shortly before leaving Bono, and the showing in physical facts that no parts of the body were between the rails, are circumstances from which it might be inferred that the unfortunate man was sitting or reclining on the outside of the rails, and that reasonable diligence upon the part of the engineer would not have disclosed his presence.

"Whatever the facts may have been as to the situation of appellee's intestate at the time he was struck, there was not sufficient evidence upon which to predicate a finding of negligence without arbitrarily disregarding testimony of witnesses in favor of a theory equally hypothetical. We conclude, therefore, that the *prima facie* showing made by appellee was overcome by the testimony of appellant's servants, which was contradicted only by inferences based upon speculation."

Under the rule in *Porter* v. *Scullen, et al.*, *Russell* v. *St. Louis S. W. Ry. Co.*, and *St. Louis-San Francisco Ry. Co.* v. *Pace, supra,* and others of similar import, the judgment in the appeal now before us is reversed and the cause dismissed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HENDERSON.

4-4755

Opinion delivered November 1, 1937.

[redacted]

Daggett & Daggett, for appellants.

Hugh U. Williamson and *Tom W. Campbell,* for appellees.

BUTLER, J. The plaintiffs, Henderson and Stanfill, brought an action in the Poinsett circuit court to recover damages for injuries alleged to have been occasioned by the joint and concurrent negligence of de-

fendant company and N. B. Pyle and A. M. Lambertus, engineer and fireman in charge of the operation of a locomotive, tender and water-tank attached, the property of said company. The injuries received by plaintiffs occurred at a public crossing in the city of Newport and was occasioned by a collision between the water tank, which was being backed toward and across the crossing, and an automobile in which plaintiffs were riding as the guests of one, Ingram. The defense was a general denial of the allegations of negligence, and the affirmative defense that plaintiffs were guilty of contributory negligence to an extent that would bar recovery. The trial resulted in a verdict and judgment for the plaintiffs against the defendant company, plaintiff Henderson being awarded the sum of $20,000 and plaintiff Stanfill $5,000. No verdict was returned by the jury against the employees of the defendant company, the verdict being silent as to them.

On appeal the appellant company seeks a reversal of the judgment (1) on the ground that there is no substantial testimony to support the verdict; (2) that the evidence is insufficient to sustain the finding of the jury that the negligence of the corporate defendant equaled or exceeded in degree the negligence of the plaintiffs; (3) that the verdicts are excessive and palpably the result of passion and prejudice; (4) for error in the admission of incompetent testimony; (5) and (6) for errors in declarations of law; (7) for errors in instructions on the measure of damages.

The point at which the accident occurred is in the town of Newport where one of its main streets crosses the railroad from west to east at approximately right angles, the tracks of said railroad running, at that point, approximately due north and south. The automobile in which plaintiffs were riding was approaching the crossing from the west. At the crossing the railroad consisted of three tracks. The center track is called the southbound main track. As the automobile approached the crossing, part of the train, consisting of a locomotive, tender and water tank, was south of the crossing and in the act of backing north to pass over the crossing. Just

to the north, on one of the tracks, a number of cars were standing. The collision occurred just as the automobile was crossing the main, or center, track of the railroad.

The testimony tending to establish the contentions of the plaintiffs as to the negligence of defendants and their own freedom from negligence was given by themselves, Ingram, the driver of the automobile who was not a party to the suit, and John Moore, who, just before, and at the time of, the collision, was walking north along the railroad track a short distance south of the crossing. The locomotive had passed Moore, and he was about fifty or seventy-five feet south of the crossing at the time of the impact of the water tank and the automobile.

With respect to the negligence of the defendants in the operation of the locomotive, the testimony given by the above witnesses is to the effect that no warning of any kind was given of the approach of the locomotive, that no lookout was kept either on the water tank or on the ground at the crossing, and that the locomotive was approaching at an estimated speed of approximately twenty miles an hour. With respect to the due care exercised by Ingram in the operation of the automobile, the testimony is to the effect that he was approaching the crossing at a moderate rate of speed; that all three of the occupants of the automobile observed the red light, and knew that this indicated a train in the "block"; that their view was obscured to the south, but that they could, and did, look to the north as they approached and saw a string of box cars standing to the north of the crossing within the block, the presence of which they thought was the cause of the showing of the red light; that they apprehended no danger as these cars were standing still and continued to move toward the crossing. On their right, and to the south, there were a number of small houses fronting on the street. Back of these, still further south, were other small houses fronting toward the railroad tracks. Between the two groups of houses and the railroad tracks were some small trees or bushes, all of which obscured the view to the right until they were passed, which distance from the tracks was variously estimated to be from forty-five feet to within

a few feet of the west track of the railway. It was a summer day and the windows of the automobile were open. The occupants of the car, who were duly sober, testified that they heard no noise and saw no signal of an approaching train; that when it was first observed the automobile had reached the west track, and Henderson exclaimed, "Lookout!" The train was then about thirty-five or forty feet away, too close for the driver of the automobile to back out. He tried to go across, and the automobile was struck just before it had cleared the main or center track. The three travelers were seated on the front seat of the automobile.

Opposed to this testimony is that of a dozen or more witnesses who stated that the locomotive was giving the customary signals and backing from the south toward the crossing at from ten to twelve miles an hour with a brakeman standing upon the water tank keeping a lookout in the direction of the crossing. The testimony was further to the effect that the occupants of the automobile were under the influence of intoxicating liquor, a number of witnesses stating that they were drunk and staggering, and, that although warned by some of the bystanders that a train was backing from the south toward the crossing, they drove directly on the track in front of the train from a point where they could have seen, had they looked, the danger to be apprehended.

In this state of the case, eminent counsel for appellants argue that the weight of the evidence is so manifestly contrary to the finding of the jury that this court should disregard the verdict and reverse the judgment of the lower court. Counsel insist that our decision in the case of *Chalfant* v. *Haralson,* 176 Ark. 375, 3 S. W. (2d) 38, where upon the contention that a case was presented in which the verdict was so clearly against the weight of the evidence as to shock the sense of justice of a reasonable person and to call for a reversal, the court denied that contention and this action, it is argued, was a departure from our former decisions and added to the verdicts of juries a sanctity that did not before obtain. We do not think that case susceptible to the interpretation placed upon it by learned counsel, but rather that it

restated the law in conformity with our previous decisions except for certain language used in the case of *Oliver* v. *State,* 34 Ark. 632, and in *Singer Mfg. Co.* v. *Rogers,* 70 Ark. 385, 67 S. W. 75, 68 S. W. 153. The rule is, and has always been, when stripped of unnecessary phrases, that where there is any evidence of a substantial nature, which, by positive statements or reasonable inference, when given its strongest probative value, tends to support the finding of the jury, that finding will be sustained, although, from the record presented to this court, it might seem to be against the preponderance of the credible evidence. We are of the opinion that our decisions upon which appellants rely, *Howell* v. *Webb,* 2 Ark. 360; *Vandever* v. *Wilson,* 5 Ark. 407; *Hazen* v. *Henry,* 6 Ark. 86; *Drennen* v. *Brown,* 10 Ark. 138; *Oliver* v. *State* and *Singer Mfg. Co.* v. *Rogers, supra,* when the facts of each case and points decided are considered, are not sufficient to sustain the contention now made. In fact, the language used in those decisions which might seem to give support to counsel's position in the case at bar is *dicta* and is so recognized in *Chalfant* v. *Haralson, supra.*

In one of our recent cases, *Missouri Pacific Transportation Co.* v. *Sharp, ante* p. 405, 108 S. W. (2d) 579, appellant was represented by counsel of such high standing and learning we thought fit to notice his argument in line with that of eminent counsel for appellants in the instant case, and to cite authorities which supported the rule above stated. In that case, however, the contention was not that this court had departed from rules anciently laid down, but that "because of modern trend, this court would be justified in disregarding them where it appears that the preponderance of the testimony is against the verdict, or the supporting testimony is improbable and unreasonable." There counsel said: "There is no excuse for the highest courts of the country following a blind and unreasonable precedent." Here the argument is that we have departed from precedent, and in these later years have substituted a doctrine new and strange which gives to the verdicts of juries absolute sanctity in any event. This is not so: we have not hesitated in many instances to overturn verdicts where the

evidence was insubstantial, based upon conjecture, or violative of established physical laws. In the case at bar, there is no doubt but that the evidence adduced by the appellees, if true, is substantial in its nature and abundantly sufficient to support the verdict relating to the negligence of the appellants. The sole question is, was that evidence true? The jury found the testimony given for appellees was true, and this finding, when fortified by the conclusion of the trial court, is conclusive of the issue. *Missouri Pacific Transportation Co.* v. *Sharp, supra.*

We pass to the second contention for reversal which presents one of greater difficulty than that first considered. The appellees, Henderson and Stanfill, were invited guests, they had no control over the movement of the automobile in which they were riding, and Ingram's negligence, however gross, cannot be imputed to them. Therefore, we must look to the evidence only as it relates to their failure to exercise ordinary care for their own safety. It is admitted that no one could see to the south of the crossing until a point was reached not more than forty-five feet from the edge of the west track. The evidence is in conflict, in some degree at least, as to the obstruction of the view by the presence of shrubs and telephone posts at that distance from the west track. A picture was introduced in evidence showing a clear and unobstructed view toward the south from a point on the highway about forty-five feet from the crossing. There is testimony which questions the accuracy of this picture as it related to the view of a person approaching the crossing, and there are other circumstances which indicate that, however, correct the picture may be from the point at which it was taken, it would not portray the view of one approaching the crossing from the west. The picture, after all, is only to be considered as other evidence in the case.

In considering the degree of care to be exercised by the appellees, the jury had a right to consider all of the circumstances. One circumstance which tended to show negligence upon the part of the appellees was their admission that they saw the signal lights warning of dan-

ger at a time when the automobile was being driven by Ingram without pause toward the crossing. But their failure to at once admonish the driver of this fact and to require him to stop the car, or to take other precautions, does not convict them of gross negligence *per se,* but is a circumstance, only, to be considered on that question in view of the explanation they made regarding it. The situation presented to appellees is comparable to that in the case of *M. P. Rd. Co.* v. *Huffman, ante* p. 456, 108 S. W. (2d) 479. In that case, another train was within the block, as in this case, which would cause the crossing lights to flash and which was supposed by the witnesses to be the cause of the lights' flashing and not the approach of a train which they did not discover, and which, in fact, caused the injury.

The necessary effect of the verdict exonerating the individual defendants from liability was to convict the appellees of negligence contributing to their injuries; likewise, the verdict fixing liability upon the corporate appellant, necessarily imports a finding that the negligence of the appellees was not as great as that of the appellant. This was the situation in the case of *Miss. River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. (2d) 255.

A number of recent cases holding the plaintiffs claiming damages for injuries received could not recover, because their negligence was the proximate cause of their injuries are cited by the appellant. Without reviewing those cases, we deem it sufficient to say that in each a state of facts is presented which readily distinguishes it from the case at bar.

A number of cases parallel to the instant case are cited by the appellees in which it is held that the evidence was sufficient to submit to the jury the question of appellee's negligence as the sole or contributing factor to his injury. We deem it unnecessary to review these cases, for it would serve no useful purpose and unduly lengthen this opinion.

Suffice it to say that under all the circumstances, a case was presented for the jury both as to the negligence of the appellees and its degree, and that we cannot say as a matter of law that their negligence equaled that of

the appellant. Primarily, it was Ingram's duty to operate the car so as not to endanger appellees and, in the exercise of ordinary care, they had the right to rely on the assumption that he would perform this duty. It cannot be said that ordinary care would require the exercise of same attention to the route on their part as was required of Ingram; in fact, it would not be unreasonable to say that passengers in an automobile trust largely, if not wholly, to the skill and care of the driver for their safety.

Counsel call attention to our cases where attention has been called to the noise of an approaching train as being sufficient in itself to give notice of its approach. But in those cases the trains were moving rapidly with a string of cars attached, while in the instant case the locomotive was moving slowly, estimated by appellants at about twelve miles an hour and by appellees at twenty, with only two cars attached. It is obvious that in the case at bar the train and its cars made much less noise than those in the former cases, and it might have been reasonable to believe that the sound of its movement was not sufficiently loud to be heard above the noise of the automobile in which appellees were riding. They had a right to rely to some extent upon warnings of the approach of a train, and, while the jury has found they were negligent in not observing the approach of the train despite the lack of warning, its conclusion that such negligence was not as great as that of the appellant cannot be said to be without substantial evidence to support it.

We pretermit a discussion of the third ground urged for reversal, namely, the excessiveness of the verdict, and pass to a mention of the points contained in the fourth, fifth, sixth and seventh grounds. Objection was made to the introduction of evidence relating to the fact that no watchman was stationed at the crossing and to the mentioning of that fact in instructions Nos. 1 and 4. These instructions, when impartially analyzed, simply informed the jury that if the evidence, by its preponderance, should satisfy the jury that the defendant failed to

keep an efficient lookout, while moving its train, for persons being, or going upon, the crossing, and if the jury found that such failure existed and that this was the proximate cause of the injuries at a time when the persons injured were not guilty of contributory negligence, then defendant would be liable. It is not tenable to say that the effect of the instructions was to impose liability upon the appellant if no watchman was kept at the crossing where an efficient lookout was otherwise maintained and signals given of the approach of the locomotive.

The appellant objected to the giving of the instruction on the measure of damages on the specific ground that it did not instruct the jury, in finding damages for loss of earning power, to reduce the amount of the recovery allowed to its present cash value. Accordingly, the trial court modified the instruction to meet with the objection. Afterward, a specific objection was made to the instruction as modified because it contained no rule by which the present value of future earnings might be ascertained, and further, that the instruction was objectionable in allowing recovery for mental anguish because there was no testimony in the record from which the jury might find that any mental anguish had been suffered. On the last objection to the instruction, while there is no direct testimony on the part of the appellees as to mental anguish endured, there are circumstances from which it might be inferred and which are sufficient for the jury to consider that element of damage. As an arithmetical proposition there is no difficulty in determining the present value of a given sum of money payable in the future, or the income which a fixed sum would buy through a period of years where the investment is sure and the interest per annum fixed and certain. Where these elements do not obtain, however, it is difficult to formulate a rule by which the present worth of future earnings can be ascertained. Ordinarily, and in some cases it is of controlling importance, in considering the present value of future income, to determine what a given sum of money put out at interest will earn that income. But, local conditions must

also be considered and that the amount of interest to be earned would vary from time to time. The method by which the present value of future earnings are to be determined in cases like the one before us, varies and would appear to be more a matter of argument than one of law and doubtless the attorneys for the respective litigants argued this very question before the jury. However, be that as it may, we are not prepared now to say that the trial court erred in refusing the request of the appellants, especially as no instruction was prepared in which the table and rule requested were formulated.

Lastly, we consider the third ground for reversal. The jury awarded the appellee Stanfill $5,000. The correctness of this award rests solely upon the testimony of Stanfill and one other witness who had employed him to drive a truck. This witness testified that Stanfill had worked for him "off and on for ten years" driving a truck; that he did not now want Stanfill to drive a truck at night "because his eyesight is bad" and witness had noticed Stanfill couldn't work if he got hot. In the daytime he could drive a truck as well as any one.

At the time of the accident Stanfill was not considered seriously injured. He left the scene of the accident unaided and walked alone in search of telephone and, while so engaged, was picked up by the ambulance in which Henderson was being carried and taken to Tuckerman for treatment. The only physical evidence that he had been injured were some minor lacerations and bruises. After the accident he started to work for his father who operates a transfer business and worked for him a year and a half. Stanfill stated that his injuries impaired his ability to work at times in hot weather; that when he gets real hot he has a dizziness in the head and turns blind and sick. He estimated that his earning capacity had been reduced by half. Except for the testimony of the corroborating witness, noted above, there is no corroboration of Stanfill's statement regarding his disability. He has consulted no physician nor been under the treatment of any. The accident occurred in August, 1933. Stanfill admitted that in two weeks thereafter he

began work with his father and continued for a year and a half; that he worked with the J. C. Kennedy Construction Company from April until the work was finished June 29th; that he was paid at the same rate as the other men on the job doing the same kind of work; that the following winter he worked for the Ragsdale Construction Company and received the same pay as others engaged in similar work and, having finished with the contractors, he helped his father to haul freight and other things around Tuckerman.

We find no evidence, except that relating to Stanfill's defective vision and dizziness when he became overheated, tending to reflect upon a decrease in earning power; we find no evidence relating to the extent and permanency of his injury or the regularity of any employment he had before the accident, what he earned, or anything else to indicate any certain income he might have reasonably expected to earn in the future. We gather from the nature of work he did that he is a semi-skilled laborer earning from 25 to 45 cents per hour when he works and we are compelled, therefore, to conclude that the amount of the verdict is excessive, being based largely upon speculation.

The testimony is almost conclusive that the appellee, Henderson, is permanently disabled; that the effects of the accident as to him were so severe as to render him unconscious for a considerable period of time during which he hemorrhaged from the mouth and nose. It is also evident that for a time he suffered great pain. Several of his ribs on both sides were broken and he suffered severe injuries to other parts of his body, especially to his back, from which he continues to suffer in some degree whenever he undertakes to do any work requiring considerable physical exertion. His injuries are permanent and so serious as to work a great impairment in his ability to work and earn money. At the time of the injury he was forty-one years old, strong and vigorous, earning his living by physical labor; he was an able and willing worker, some of his employers testifying that when he was able to work he was the best

man on the job. It appears further, with reasonable certainty, that he worked at anything there was to do whether as a farm laborer, or in "public work." He earned, beginning in 1926 or 1927, seventy-five cents to a dollar and a quarter a day. Later, he worked during the ginning season at a cotton gin and received approximately sixty dollars per month. He worked on the highway with a construction company receiving 37½ cents an hour for a ten-hour day and just before his accident he had a job which paid him 20 cents per hour and expected to begin work on a bridge job within a few days after the day on which he was injured. Henderson estimated that for a number of years preceding his injuries, he had been making $100 a month.

The jury awarded Henderson the sum of $20,000 for his damages. In view of the testimony, we think this sum excessive. Henderson estimated his earnings had aggregated $100 per month or $1,200 per year. This estimate, however, is not proof, and the circumstances upon which that estimate can be based affirmatively show that it is in excess of the sums he really earned. In the first place, it is clearly inferable from the evidence that Henderson had no certain line of work, or that he was working regularly, but on the contrary that his jobs were intermittent—working here and there as opportunity offered. It is established by the testimony of his own witnesses that his earnings, on an average, did not exceed $2.50 for a ten-hour day. It appears, therefore, that no reasonable basis was established for his conclusion that he made $100 per month for every month during the year. On the contrary, without indulging in speculation as to the regularity of his work, he must have earned much less. It must also be remembered that the necessary conclusion to be drawn from the jury's verdicts is that appellees were negligent and that this was a contributing cause to their injuries. Under the law, the damage for such injuries must be diminished in the proportion such negligence bears to the negligence of appellant.

Appellees insist that a large proportion of the sum awarded Henderson was for physical pain and cite us to

cases where large verdicts were approved based on that element of damage. Of course, there are cases where the pain and suffering are intense and to be endured through the remaining years of life in which a large amount is deemed just compensation. There are cases, also, where the pain and suffering are not endured for a great length of time when a large sum is properly awarded, but in those cases the physical anguish is of an extraordinary nature to the very limit to be endured, and with this there is mental anguish caused by the conscious certainty of the imminency of death. In the case at bar, there is no question of mental anguish save that which comes to one who is conscious of his physical deterioration and the natural anxiety which follows. There is no testimony to lead to the reasonable belief that Henderson will continue to endure any considerable pain. Therefore, the large awards for pain and suffering approved in the cases cited are not justified by the evidence in the case before us.

Without analyzing the evidence further, it seems to sufficiently appear that, in any view of the case, the damages awarded are excessive in any amount exceeding $15,000 for Henderson and $2,000 for Stanfill. We perceive no prejudicial error except as to the amount of the verdicts. The appellees Henderson and Stanfill having entered a remittitur in the sum of $5,000 and $3,000, the judgment is affirmed for Henderson in the sum of $15,000 and for Stanfill in the sum of $2,000.

PERNOT *v.* KING.

4-4777

Opinion delivered November 1, 1937.

Pigford & Key and *R. S. Wilson,* for appellants.

J. B. Perrymore, O. D. Thompson, Matlock & Matlock and *Partain & Agee,* for appellee.

GRIFFIN SMITH, C. J. A jury in the Crawford circuit court found, from voluminous testimony and under instructions which are questioned by appellants, that Col. H. P. King did not possess the mental capacity to dispose of his property by will on March 27, 1930, at which time he executed a writing now before us.

At the time the testamentary expressions were subscribed to and witnessed, Col. King was 92 years of age. He died six years later. After directing payment of funeral and other expenses, and that all just debts be paid as expeditiously as possible, the will contains the following provisions: "I give and devise unto Rome Peevy, Isaac Peevy, George Peevy and Jesse Peevy, children of Mat Peevy and Mary Peevy, the sum of

$1,000 each, said sum to be paid to each of them by my executor immediately or as soon after my death as may be done. My adopted son, Charles T. King, has given me such trouble by violating the law and has caused me great expense. I therefore give and devise unto him the sum of $10 as his full share of my estate. The residue of my estate, real, personal and mixed, I devise and bequeath unto the Cumberland Presbyterian Church, in the United States, for the following purposes: Fifty per cent. of said bequest to the Cumberland Presbyterian Educational Endowment Commission, a corporation of the state of Tennessee, the interest on said fund to be used by said Commission for the support and maintenance of Bethel College and the Theological School at McKenzie, Tennessee. Twenty-five per cent. to the Board of Missions and Church Erection of the Cumberland Presbyterian Church, for Home Missions. Twenty-five per cent. to the Board of Ministerial Relief of the Cumberland Presbyterian Church, for the support and maintenance of Orphans' and Old Ministers' Home. I hereby nominate, constitute and appoint Sidney A. Pernot, of Van Buren, Arkansas, to be sole executor of this my last will and testament, and request and direct that he, as such executor, shall not be required to file any accounts current, or to do or perform any other act in the probate court touching the administration of my estate, other than to probate my last will and testament, giving to my said executor full authority, without order of court, to sell and dispose of any property, real, personal or mixed, of which I may die seized and possessed, which he may deem expedient to sell in order to pay the bequests herein made, or straighten up the affairs of my estate without undue delay. I give and devise unto the said Sidney A. Pernot the sum of $2,000 as and for his compensation for the work he shall do as executor of my estate, and direct that he withhold said sum from my estate for said purpose."

This will was admitted to probate in common form February 26, 1936. On September 29, 1936, Charles Thomas King, who is identified in the will as an adopted

son, filed his affidavit in the probate court of Crawford county praying an appeal from the order admitting the will to probate, and setting up as grounds of attack that undue influence was exercised by the principal beneficiaries in procuring execution of the will.

On October 29, 1936, Charles King filed a supplemental affidavit for appeal, charging (in addition to the previous allegation of undue influence) that at the time the will was signed H. P. King was insane; that the testator "Was not possessed of testamentary capacity and was not mentally competent to make and execute a will."

On November 2, 1936, the probate court granted the appeal, and notice was duly served upon Rome Peevy, Jesse Peevy, Sybil Peevy Rye, and Sidney A. Pernot. S. A. Pernot, as executor, and Cumberland Presbyterian Educational Endowment Commission, Board of Missions, and Church Erection of the Cumberland Presbyterian Church, and Board of Ministerial Relief of the Cumberland Presbyterian Church, beneficiaries under the will in question, filed their written response denying all allegations contained in the affidavits, except the allegations as to bequests in favor of such beneficiaries, and specifically denying the existence of insanity, or that undue influence was exercised.

The definition of "testamentary capacity" adopted by James A. Ballentine for use in his new law dictionary is: "The essential mental qualifications for the making of one's will, that is, a disposing mind and memory, which is one in which the testator had a full and intelligent consciousness of the nature of the act he was engaged in; a knowledge of the property he possessed, and an understanding of the disposition he wished to make of it by his will, and of the persons and objects he desired to participate in his bounty, or a knowledge of the natural objects of his bounty. This includes a recollection of the persons related to him by ties of blood and affection, and of the nature of the claims of those who are excluded from participating in his estate."

To the same effect, although differently phrased, are definitions adopted by this court. "The testator must have capacity to retain in memory, without prompting, the extent and condition of his property, and comprehend to whom he was giving it, and be capable of appreciating the deserts and relations to him of others whom he excluded from participation in the estate." *McCullough* v. *Campbell*, 49 Ark. 367, 5 S. W. 590; *Ouachita Baptist College* v. *Scott*, 64 Ark. 349, 42 S. W. 536; *Taylor* v. *McClintock*, 87 Ark. 243, 112 S. W. 405.

In the contest now before us it is shown that about the year 1900, H. P. King moved to the city of Van Buren, having, prior to that time, been a citizen of Crawford county, in which Van Buren is situated. Through close application to business, and in consequence of industry and economy, he had accumulated property of considerable value, and was regarded by his associates as a man of exceptional ability. During the period of participation by the United States in the World War—1917 and 1918—he converted most of his assets into cash and government bonds, and thereafter his activities embraced such duties as were incident to the investment of his funds.

His wife, Mrs. R. E. King, owned a separate estate worth approximately $30,000, acquired as a gift from her husband. After deducting this gift from the H. P. King estate, then valued at $115,000, it was estimated that the remainder, on March 27, 1930, amounted to $85,000.

Mrs. King, who died in 1928, left a will, in which her husband was named as sole executor. To sustain their contention that H. P. King was not wanting in testamentary capacity, appellants introduced evidence of the efficient manner in which he administered Mrs. King's estate. The total of these transactions amounted to more than $34,000.

The sixth paragraph of Mrs. King's will reads as follows: "I give and bequeath unto my dear adopted son, Charles Thomas King, $6,000, $5,000 of which shall be deposited in the bank at whatever rate of interest

the bank may be paying for money on time deposit, this deposit to remain in the bank at interest until my said son shall have arrived at the age of 35 years, and then paid to him absolutely. Of the remaining $1,000 I desire that $500 be paid to Gertha King, his wife, for her to use in getting him home and preparing a way for them to live until he finds work. Of the remaining $500 and interest derived from said deposit in bank, I desire that my adopted son be paid not to exceed $200 per year until he arrives at the age of 35 years. Should my said adopted son not live to be 35 years of age, then it is my will that the sum of $1,000 be paid to his wife, Gertha King, and the remainder of all funds bequeathed to him revert to and become a part of my estate, and be paid to Mabel Oney, Bettie Lee Mantooth and Wallace Mason Miller, heirs of William Mason Miller, deceased, share and share alike."

Evidence on behalf of the contestants, condensed and not literally quoted, is substantially as follows:

J. A. Wetzell had been closely associated with Col. King for twenty years. Mrs. King was Wetzell's mother's youngest sister. King had pneumonia and influenza in 1929, and again in 1930. For two or three weeks during these periods of illness a nurse was employed. After Mrs. King's death, Charley King's wife was in attendance, and following her was Mrs. Raub who came in 1929 and remained eight years. Witness did not notice any change in Col. King until after an attack of pneumonia in 1929. Before that time King did not call witness to help with anything in connection with the business, but following the attack of pneumonia in 1929, witness was frequently requested to add figures and make calculations, the remark having been made by King that "I'm not fit to do business." Continuing, the witness said: "Sometimes he would not know me when I came into the room. He would talk about the Bible and ask me what I thought about a rich man going to Heaven. He was bothered about the Scriptures, where they say that 'It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the

Kingdom of God.' He also talked about the rich young ruler, and about Lazarus and Dives. Sometimes a man from Cumberland College Home in Nashville would come to see him. He would say they were after him for more money. I went up there one morning and Uncle Henry told me that they said if he would give them all his money they would take him and keep him as long as he lived. He would frequently have the window shades drawn. He said it made it warmer and he was afraid of being kidnapped by Charley King, who was in Oklahoma. He was not 'right,' and that is my honest opinion. In 1935, he deeded me half of a lot. I sometimes borrowed money from him. He kept a set of books and kept down all of his expenses. I don't think he was able to attend to his property, but would not say that he was crazy on the day he made his will, or that anybody influenced him when he was making his will that day. I was not present. I would not have accepted the property he deeded me if I had thought he was crazy, although he was 'off' some of the time. Agents of the church had been going to see him for about twenty years. He was an elder in the church at Van Buren at the time the Cumberland Church united with the Presbyterian Church, U. S. A. After that he withdrew his membership at Van Buren and placed it at Dripping Springs. Charley had given quite a bit of trouble, but Mr. King was the cause of it."

Mrs. J. A. Wetzell testified: "Mr. King was 98 years old on the 17th day of December, and died on the 22nd day of February. He was about 92 years old at the time he made his will. He had a sick spell in 1927, and after that he was 'off' quite a bit. We couldn't keep him in bed and he would cuss. He quarreled about burning up electricity. He didn't know what he was doing. He would keep the shades drawn and said it would keep him warm."

In response to a hypothetical question, Mrs. Wetzell expressed the opinion that Mr. King did not possess the mental capacity to make a will in 1930. However, she did not think he was mentally deficient on March 23,

1932, when he deeded property to her and her husband. Asked on cross-examination if she had any recollection as to King's condition on March 27, 1930, she replied: "He was in his right mind." Q. "And you were guessing when you told the court that he was not in his right mind when he made the will?" A. "I don't know." Witness further stated that after making the will, King expressed fear of being kidnapped by his adopted son.

Mrs. Raub was with Mr. King when he died. "When I went there he had bad spells and weak spells and was never well. He would have pneumonia every winter. My employment began July 11, 1929, and his wife died in September, 1928. Sometimes he would get mad and wouldn't talk for two or three days. If the grocery bill ran over $10 a month he would quit the store. He would say they were trying to cheat him, and he wouldn't pay it. He would tell me that he could not support me any more and that I would have to help him; that if I didn't, he would be on the poor farm. Brother Fooks and Brother Walton of the Cumberland Presbyterian Church visited him during these years. The last time Mr. Fooks was there he told Mr. King that if he would make his will to them they would take care of him and pay him five per cent. interest. Mr. King's condition was bad at that time. It was necessary to talk loud to him. They talked to him about the disposition of his money and it worried him nearly to death. He would make me get up and talk to him about it. He was afraid if he did not give that money to the church he would not go to Heaven. After they would be there he would talk about the church and how he and Mrs. King lived. Sometimes he would not recognize people when they came to see him. He was mighty feeble as a whole and it was easy for people to talk him into doing things. There was something the matter with his mind."

On cross-examination Mrs. Raub said: "I worked for Mr. King seven years and tried to get him to raise my wages, but he tried to cut them. He wouldn't be influenced along that line. I filed a claim against his estate for a thousand dollars and was allowed $846. About a

year before Mr. King died he made arrangements for payment to me of $1,000 at his death. He kept an accurate account of all his expenditures. He knew who all of his relatives were. He gave his nephews $1,000 apiece and had given them money prior to that time. The time Mr. Fooks and Mr. Walton visited him was about a year ago."

Miss Ola Benson served as a nurse in the King home for six weeks in 1928, attending Mrs. King, but left before Mrs. King died. She testified: "I had occasion to notice Mr. King. I could not see that he ever did anything out of the ordinary, but he was very close and awfully childish. I think it was his age. He complained about providing food for his wife. He told me that between me and the doctor he was going to spend his last days in the poor house. He complained about the doctor's prescriptions, and did all the grocery buying himself, and would never buy enough. He tried to cut my wages and said that he wasn't able to pay. I would not think that he was competent to make a will in March, 1930. He was suffering in 1928, and I don't think he was himself."

On cross-examination Miss Benson testified: "Mr. King agreed to pay me $4 a day, but asked me once to work for less. He wanted his wife to have everything that she needed, but said it was foolishness. He followed the doctor's advice until the finish."

W. R. Willis testified: "I am in the real estate business and knew Henry P. King for twenty-four years. I had an opportunity to observe him during the last few years of his life. He was gradually getting weaker in mind and body. I would sometimes stop and bring him to town. He said he would save a nickle by riding with me. This was prior to 1930. The last thing I remember about him was on one occasion in front of my office when he walked up to me and asked me where the bank was. The bank was about a block and a half from my office and had been located there many years. Mr. King had been president of the bank at one time. I do not

think that he was competent in March, 1930, to make a will."

On cross-examination Mr. Willis testified that, in 1936, he took Mr. King's acknowledgment to a deed, but that his duties as notary public did not require him to test the competency of a person. "I think he knew what he was doing when he executed the deed to which I took the acknowledgment. He was not competent for the last seven years. He was competent some of the time. He knew what he was doing some days."

Luther Buel, who had been police judge in Van Buren for 3½ years, and constable for 16 years, testified that he had known Mr. King for fifty years. "I often came in contact with him on the street. Once he asked me where the bank had been moved to and I said, 'The bank is where it has always been.' One time he asked me where the post office was. He was about one block away when he asked me about the bank. It was the Crawford County Bank of which he had at one time been an officer. The post office had been in its present location about 20 years. About four or five years ago I saw him in front of Scott's barber shop crying, and took him inside and called Dr. Savery. I thought he was acting kinda queer. Really, I do not think he was competent to make a will in March, 1930; but I don't know what his mental condition was at that time."

Hugh Miller, who had served as jailer, assessor, chief of police, and county treasurer, and had known H. P. King all his life, testified: "During the last six or seven years it seemed to me he was getting weak in mind and strength. I was in the bank for 12 years and he had a lock box there and kept his valuable papers there, and he would visit there very often. He would get the box out and spread the things on the table and just get up and walk off and leave them, and we would have to gather the things up for him and put them away. The last few years he was quite a bit weaker. I have ridden on the street cars and buses with him several times. The motorman would have to tell him where he was. He did not have the mental capacity to make a will in March,

1930. When talking to me he mentioned about his property, and said he knew what he was doing, and that he did not want some of the folks to have anything."

Joe Simpson testified: "In 1929 I tried to make a deal with Mr. King to paint his house, but I never could deal with him. In 1930 I met him on the street in front of the shoe store and he wanted to know where the bank was. He was about 150 feet away from it at the time. At another time he was standing across the street in front of the bank and I took him over to it. I don't know about Mr. King's mental condition on March 27, 1930."

Claud Peevy testified that H. P. King was his great uncle; that he had known Mr. King all of his life; that Mr. King had a spell of pneumonia in 1929, and after that he was quite different. "At times when I would go in up there he wouldn't know me. He would say, 'I am going crazy,' and would sit and talk about his money and complain about the noise. On January 23, 1936, he deeded me his home place, but his mind was bad at that time. I let him make the deed because I felt I was entitled to the property. I did some figuring for Mr. King. His eyesight was bad during his later years. He would call on me because he couldn't see how to do the work."

Dr. John M. Steward, 50 years of age, and a graduate of Vanderbilt University, had been practicing medicine for 25 years. He was called to wait upon Mr. King in 1930. "I found him suffering from neuritis in the arm, and his mental condition was extremely poor. He couldn't give me intelligent answers to questions. He wouldn't do what I told him to. I attributed that to age and hardening of the blood vessels, which tends to decay and poor drainage. Mr. King was 98 years old when he died. Senile dementia is a condition that often occurs after the age of 60 and appears more commonly between 60 and 70. It may be caused from illness or from worry. A person will get forgetful. He may become violent. It affects a person so he will have ideas as to his financial condition. A man with money may decide it is getting away from him, or that he will be sent to the poor house. There are other hallucinations. You feel like sometimes

you will come to bodily harm, and one feels like his friends will try to take what he has. I have heard the statements made here as to what the law is for testing the capacity of a person in disposing of property and in making a will, and based upon my observations and my examination of Mr. King, and in view of my experience and training in handling mental cases, it is my opinion that Mr. King was in no condition in 1930, and up to the time of his death, to dispose of $100,000 in any way and it be square."

Dr. Stewart later explained that his reference to $100,000 was merely by illustration, and that the amount involved in the will was not controlling. Asked if his opinion would be altered if it should be shown by competent testimony that Mr. King, as executor of his wife's estate, had handled receipts and disbursements amounting to more than $30,000 and had kept accurate accounts and made proper reports, the doctor replied, "I have no 'if.' I said that in my opinion Colonel King was not mentally able to dispose of his property. If he had been in the habit of keeping records for ninety years he would continue that as a habit. That is a characteristic of one in his condition."

Dr. H. C. Drosey, a graduate of Tulane University who had done post-graduate work in New York and was connected with the Holt-Krock Clinic and the Sparks Memorial Hospital and St. Edward's Hospital of Fort Smith, said that he had had a great deal of practice in connection with diseases of the mind, and that it was scientifically recognized that senile dementia affects the mental character after the age of 70, 75, and 80, being more pronounced after the age of 80. "Sometimes people become very forgetful, irritable, and set in their minds, and friendship often turns to hatred. They often turn against their own folks."

In response to a hypothetical question, he stated that, in his opinion, Mr. King was not able to make a will "as it should have been." He had never seen Mr. King and knew nothing of his mental or physical con-

dition except what he had heard from witnesses in the court room.

Dr. S. D. Kirkland had known Mr. King, but had never treated him. The effect of his testimony was to substantiate scientific conclusions given by his fellow-physicians.

Dr. Kirkland would not be convinced that Mr. King had kept administrative records of his wife's estate in a proper manner. He said: "Even if the testimony shows that he kept an accurate account of all the expenditures, and kept an accurate set of books of the assets and real estate, and filed all of his reports in his own handwriting—even if all that is shown in evidence, I would still testify that he was incompetent, and it will never be shown to my satisfaction."

The allegations of undue influence are bolstered by unsubstantial testimony. There are comments and allusions by witnesses for appellee that from time to time representatives of the church called upon Mr. King, but no specific act is pointed to which in itself sheds light upon the charge.

Col. King, for many years, and his wife, had been members of the Presbyterian Church. If its ministers and business agents are shown to have visited the Van Buren capitalist, that is not evidence of a sinister plan to overreach his better judgment.

Can it be said that one whose material activities have responded to the touch of fortune should draw the blinds and close his doors to men of the church, or that he must spend the sunset of life in a situation removed from the society of those who labor for the objectives here disclosed?

Appellants' energies are also directed to the allegation of mental incapacity. But here, again, a stumbling block is reached, for, subject only to such limitations as the statutes have imposed, "The law leaves everything to the unfettered discretion of a testator, on the assumption that, though in some instances caprice and passion, or the power of new ties, may lead to the neglect of claims that ought to be attended to * * * nothing short

of mental unsoundness * * * will avoid a will. Moral, or what the books term 'medical,' insanity—a perversion of the sentiments and affections—manifested in jealousy, anger, hate, or resentment, however violent and unnatural, will not defeat a will unless the emanation of a delusion." *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405.

What is the proof that H. P. King was insane?

It is not that his neighbors or friends, prior to execution of the will, or thereafter—or, for that matter, at any time—were apprehensive as to his status. Self-willed, independent, aggressive, frugal, conservative and careful, he met the requirements of all emergencies until partial blindness and illness intervened. Then, occasionally—but not always—he called on others for assistance. He inquired as to the location of a bank with which he had formerly been identified; but no significance attached to this manifestation until restrospective speculation found value in its use.

In 1929, and again in 1930, Col. King had pneumonia, and influenza. So have multitudes. He thought and bluntly told attendants that the physician was incompetent. He didn't want to pay a nurse. Sometimes he would not know when J. A. Wetzell entered the room. Is it evidence of insanity that a man with failing sight may urge economy, or seek to employ a nurse at a price cheaper than was asked, or decline to have his house painted, or ask a relative to assist with mathematical problems? Is it suggestively unnatural that, after making a will disinheriting an adopted son who had forged checks, served in the reform school, and done "time" in the penitentiary, it should have occurred to this old man that information as to the contents of his will might be carried to Charlie King, and that rage and desperation at such knowledge might prompt retaliation? It is a matter of common knowledge that men have been kidnapped for less than $85,000.

Mrs. Raub says it was necessary to speak loudly to Mr. King, and this is urged as a circumstance in favor of insanity. They also talked to him about the disposi-

tion of his money, and this occasioned worry. One witness testified that "sometimes he would not recognize people when they came to see him." Another witness, who thought that Col. King was incompetent in 1930, took the Colonel's acknowledgment to a deed in 1936, but failed to notice any abnormality. And so, on and on.

In almost every instance where a witness testified to mental incapacity, a qualifying explanation, or a disarming admission on cross-examination, or circumstance incidental to observations, or the time fixed as a basis, was such as to negative allegations of continuous incapacity. Where one witness (naming a time and fixing a place) would give evidence of some action or transaction which, in connection with other testimony and circumstances might have had probative value, the continuity of such evidence was broken by testimony as to perfectly rational conduct—conduct of such a natural character that at best appellees can only claim that there were intervals in the closing years of Col. King's career when he labored under stress of sickness, or when the infirmities of age slowed his pace and dimmed his vision, or affected his hearing. It is likewise inferable that his memory was less acute than it had been in former days.

Mere age is not necessarily inconsistent with testamentary capacity. "Indeed, the mental faculties may be weakened and impaired by old age without destroying such capacity. The mere fact that an aged testator's memory is failing, or that his judgment is vacillating, or that he is becoming eccentric, or that his mind is not as active as formerly—these things do not invalidate his will if it was fairly made and he was free from undue influence. While age is not of itself a disqualification, yet it excites vigilance to see if it is accompanied with capacity."—Thompson on Wills, § 62, pp. 88-89.

In *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. (2d) 695, in holding that the evidence was not sufficient to sustain the judgment setting the will aside, we said: "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 rela-

tive situation to him, the terms upon which he stood with them, may be inquired into in determining the testator's capacity * * *. Neither feebleness of intellect nor physical suffering is sufficient to render a will void unless so great as to render the testator unable to appreciate the consequences of his acts."

Again, in the same opinion, it was said: "If the witnesses testify that the testator is insane, but give as a basis for such opinions facts which do not justify them, their evidence on this point is worthless, and cannot support a verdict in favor of a contestant." See, also, *Huffaker* v. *Beers,* 95 Ark. 158, 128 S. W. 1040; *Boone* v. *Boone,* 114 Ark. 69, 169 S. W. 779; *Mehaffey* v. *Mehaffey,* 174 Ark. 1153, 298 S. W. 492.

From these opinions, and from the holdings in others of similar purport, we conclude that, in considering testamentary capacity of a man 92 years of age whose will it is sought to avoid by evidence showing (a) insufficient vision, (b) curtailed hearing, (c) diminishing memory, (d) so-called "childishness," (e) failure at times to recognize old friends or to locate familiar places, (f) a marked tendency toward economy to a point approaching penuriousness, (g) and kindred actions, it is of paramount importance, as was said in *Puryear* v. *Puryear,* to consider such testator's family and connections, their condition and relative situation to him, and the terms upon which he stood with them.

Applying these rules to the instant case, what results do we attain? It is shown by appellants that while Chancellor C. M. Wofford was practicing law in Van Buren, Col. King employed him to draft his will. This was in 1926, a period prior to which no witness has testified to any fact or circumstance indicating that Henry P. King lacked testamentary capacity. No effort was made, in preparing this record, to question the Colonel's mentality in 1926, even though a wide range of latitude was open to the introduction of testimony. Judge Wofford's testimony follows:

"I am chancellor of the Tenth district of this state and have been for six years. I have also been county

clerk, prosecuting attorney, and city attorney of Van Buren. I first knew H. P. King about 1903 or 1904. I became his attorney some time in 1924 or 1925 and looked after his legal business from that time until I was elected chancellor. I wrote his will two different times—the first time in the fall of 1926, the second time in 1930. I do not have a copy of the 1926 will. It is lost. In the 1926 will he gave some property to his wife. She was living then and it was his purpose to give her money while she was living. He gave her some lots, and gave some distant relatives $500 each. He gave his adopted son a very small amount, $10 I believe. It may have been $100. He said that he and Mrs. King didn't have a son and they adopted this boy and had become much attached to him, but as he grew older he became wild and violated the law and that he had been to the reform school; and he discussed the trouble that he had been into and said he didn't seem to have any idea what money was for; and he said, if I go and leave that boy a lot of money he will waste it and spend it; and he requested that I write his will. He made a bequest to the Cumberland Presbyterian Church, to the School and the Board of Missions.

"I asked him why he didn't give some of his estate to the schools and churches here in Van Buren or locally. He and I had been on intimate terms for years, and he said there was a split in the church and we were attached to one wing and they had thought about these things and he stated that they went along for a while and that he had always paid his taxes and he stated that the Lord had given him what he had and he intended to use it for Him. He said that he and his wife had talked it over and decided what they wanted.

"At the time I wrote his will, he recalled in his memory without prompting the condition of his property and so stated to me. In my opinion, he was fully aware of the bequests that he made. I am a judge and have been a lawyer for a long time and recognize the requirements for testamentary capacity, and in my opinion Mr. King certainly met those requirements. The wit-

nesses to Mr. King's 1926 will were Edgar Covey and Johnson Moore. At that time Col. King was a depositor, stockholder, and director in the bank.

"In the will which I wrote for Mr. King March 27, 1930, there were no material changes from the provisions of the 1926 will except the names of the institutions of the Cumberland Presbyterian Church. He came to my office with a representative of the church and said they had incorporated the names later, the names that he had given me when I wrote the first will, and the will was rewritten. The second will was the correction of the corporate names of the institutions mentioned in the 1926 will. I handled other legal business for Mr. King and I think I wrote Mrs. King's will two different times. Mr. King was executor of her will * * *. I know for a fact that Col. King was rather strong physically up until the last two or three years of his life. Up until that time he would discuss business with me. He was converting his estate into bonds and cash. He realized that he was getting older and wanted to leave it in liquid form. He handled his business as well as ever and I am sure in my mind that at the time he made his will he was just as capable of executing a will as any man sitting around this table. In discussing his church relationship he spoke of a split or division of the church and said his wing got the worst of it and needed help, and that it was his duty to give what he had. I had occasional social contacts with him and never noticed anything to indicate a lack of testamentary capacity."

On cross-examination Judge Wofford testified as follows:

"When I wrote the first will in 1926, as I recall, no one was present but my stenographer. I had taken down a list of data and wrote the will later. When he came in 1930 and requested the will to be rewritten, some representatives of the Cumberland Presbyterian Church came with him. The man who came with him gave me the correct names of the institutions of the church and I wrote them down and Col. King ordered every change that I made and he ordered me to make one or two

changes from his former will. In his former will he gave $500 to each of his relatives and in his later will he gave them $1,000, and there was maybe one smaller change in it. The percentage of the bequests in the first will was carried into the last will. As a matter of fact, the only change in the second will was as to the names of the institutions of the Cumberland Presbyterian Church that he made the bequests to, and also to increase the bequests to some of his relatives. I think he gave Charles T. King the sum of $10 in each will. He said he did this because he had violated the law and caused him a great deal of expense. It is my recollection that the boy had been in trouble over quite a number of years. I was counsel for Col. King about five years. I ceased to be his attorney when I was elected chancellor."

Other witnesses testified to the sanity, normal conduct, and naturalness of Mr. King before and after 1930. Among the witnesses so testifying for appellants were the witnesses to the will. But enough has been quoted to meet the requirements of this opinion.

The relationship and situation of Charlie King to his benefactor were unsatisfactory. Ties of affection had been broken, and in Col. King's mind there was a definite purpose to disinherit. This intent was formed prior to 1926, and it was re-expressed in the will of 1930. On the personal side, the testator was visibly worried over the problem of his soul's salvation. Others have been likewise baffled and perturbed. Indeed, "There was a certain rich man, which was clothed in purple and fine linen, and fared sumptuously every day: And there was a certain beggar named Lazarus, which was laid at his gate full of sores, and desiring to be fed with the crumbs which fell from the rich man's table: moreover the dogs came and licked his sores. And it came to pass that the beggar died, and was carried by the angels into Abraham's bosom: the rich man also died, and was buried; and in hell he lifted up his eyes, being in torments, and seeth Abraham afar off, and Lazarus in his bosom. And he cried and said, Father Abraham, have

mercy on me, and send Lazarus, that he may dip the tip of his finger in water, and cool my tongue; for I am tormented in this flame. But Abraham said, Son, remember that thou in thy lifetime receivedst thy good things, and likewise Lazarus evil things: but now he is comforted, and thou art tormented."

Perhaps some memory of these words may have agitated the mind of Henry P. King as the shadows began to gather. It is a propitious thought, and often becomes the accompaniment of advancing years and declining health; yet it cannot take the place of substantial evidence of insanity. Nor does the 19th chapter of St. Matthew, quoted by appellee's witnesses as having puzzled Col. King, bolster appellee's argument. With an estate of $85,000 in liquid form, and without children of his own, it is not strange that Mr. King should have given earnest thought to the formulae of eternal life. "And, behold, one came and said unto him, Good Master, what good thing shall I do, that I may have eternal life? And he said unto him, Why callest thou me good? There is none good but one, that is, God: but if thou wilt enter into life, keep the commandments. He said unto him, Which? Jesus said, thou shalt do no murder, thou shalt not commit adultery, thou shalt not steal, thou shalt not bear false witness; honor thy father and thy mother: and, thou shalt love thy neighbor as thyself. The young man said unto him, all these things have I kept from my youth up: what lack I yet? Jesus said unto him, If thou will be perfect, go and sell that thou hast, and give to the poor, and thou shalt have treasure in heaven: and come and follow me."

Though situated somewhat differently, and conducting his worldly affairs in an atmosphere more than two thousand years removed from the coasts of Judea beyond the Jordan, Col. King seems to have substantially followed the advice of One whose teachings have never been successfully urged as an evidence of insanity. Therefore, we are not willing to say, in the circumstances reflected by this appeal, that when Col. King selected the church as an object of his bounty in preference to an

adopted son who had harassed and humiliated him, such testamentary conduct, when viewed with other evidence, was sufficient to import the bewildering spectre so graphically portrayed by assisting experts as the handmaidens of senility.

> "Though now this grained face of mine be hid
> In sap-consuming winter's drizzled snow,
> And all the conduits of my blood froze up,
> Yet hath my night of life some memory."

The judgment is reversed, and the cause remanded with directions to reinstate the will.

GENTRY *v.* HARRISON.

4-4786

Opinion delivered November 1, 1937.

W. G. Riddick, J. H. Carmichael and *Harry J. Lemley,* for appellant.

Jack Holt, Attorney General, *John P. Streepey,* Assistant, *Henry Donham, A. F. House* and *Trieber & Pope,* for appellee.

MEHAFFY, J. Appellant filed suit in the Pulaski circuit court alleging that on March 6, 1933, he was appointed Insurance Commissioner and Fire Marshal of the state of Arkansas for a term of six years, his appointment being confirmed by the Senate; that he duly qualified and since the date above mentioned has been the duly appointed and acting Insurance Commissioner and Fire Marshal of the state of Arkansas.

That by act No. 2, approved January 15, 1937, the General Assembly attempted to abolish the office of Insurance Commissioner and Fire Marshal, and create the office of Insurance Commissioner; that pursuant to said act the Governor appointed M. J. Harrison, the defendant, Insurance Commissioner on January 15, 1937; the appointment was confirmed by the Senate, and the said Harrison, without the consent of plaintiff, took possession of the office of Insurance Commissioner and State Fire Marshal on January 19, 1937, and has exercised the authority and functions of the office since that time.

It is alleged that act No. 2 did not abolish the office of Insurance Commissioner and State Fire Marshal; that no substantial changes in the governmental agency were made by the act, only the name of the office being affected; that the act is invalid because it is merely an ouster of plaintiff from the office to make way for the appointment of a successor, denying the plaintiff the salary to which he is entitled, in violation of § 8 of art. 2 of the Constitution, and because the attempted removal was without cause and without hearing, in violation of art. 15 of the Constitution.

Plaintiff further alleged that if act 2 is valid, it did not become effective until 90 days after the adjournment of the legislature, because no fact is stated constituting the emergency, and that no emergency existed. It is alleged that the defendant was receiving, under the law, $350 a month. That being a usurper and without right in office, the defendant is liable to plaintiff for salary received by him up until date of judgment.

The prayer was for judgment for the salary. An amendment to the complaint alleged that act No. 2 was a special act.

A demurrer was filed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, appellant declined to plead further, and the complaint and amendment were dismissed. The case is here on appeal.

It is conceded that appellant has no property right in the office as against the state, nor to the salary provided for the Insurance Commissioner. It is conceded that the legislature has power to abolish any office which it has created. Appellant concedes that he is without remedy if the state abolishes the office or discontinues the department; but it is contended that the office is intangible and consists in the duties of the office, and that while those duties are continued, the office is continued, and that under a proper interpretation of the act in question, it did not abolish either the office of Insurance Commissioner, or the State Department of Insurance, but that it only had the effect of abolishing the officer, which it is contended the legislature had no power to do.

In 1917, the legislature passed an act to raise the tax of insurance companies and to create the office of Insurance Commissioner and State Fire Marshal. Acts of 1917, p. 1038.

In 1925, an act was passed by the legislature to abolish the office of Insurance Commissioner and State Fire Marshal and create the office of Commissioner of Insurance and Revenues. The act prescribed the duties and powers of said office. Acts of 1925, p. 260.

In 1927, an act was passed by the legislature to create the Department of Insurance Commissioner and State

Fire Marshal and define the duties thereof. Acts of 1927, p. 340.

Section No. 1 of act 115 of the Acts of 1927 created and established the office of Insurance Commissioner and State Fire Marshal.

Section 1 of act 2 of the Acts of 1937 repealed § 1 of act 115 above mentioned, and abolished the office of Insurance Commissioner and State Fire Marshal. Section 2 of act 2 of 1937 created the office as the State Insurance Department. Act 2 repealed § 4 of act 115 of 1927. The other provisions of act 115 of 1927 were not repealed or amended.

The General Assembly has the right to repeal any law enacted by it, and to abolish any office created by it, but the person elected or appointed to office does not hold the office under contract, but under the law, and there is no contract between the state and the officer appointed which is within the protection of the constitution forbidding the impairment of the obligation of a contract.

"Those who take such temporary offices as may be created by the legislature do so with notice of the insecure tenure and the acceptance of the office creates no contract with the state." *Greer* v. *Merchants & Mechanics Bank*, 114 Ark. 212, 169 S. W. 802.

Section 1 of act 2 of 1937 repealed the act under which appellant was appointed, and abolished the office of Insurance Commissioner and State Fire Marshal as then constituted. That the legislature had the power to do this, there, of course, can be no question. The only serious contention is that act 2 was passed to abolish the officer and not the office; but it does, in express terms, abolish the office held by appellant and repeals the act under which he was holding office.

Section 2 of act 2 of 1937 creates an office to be known as State Insurance Department, and § 3 authorizes the Governor, by and with the advice and consent of the Senate, to appoint the Insurance Commissioner.

We think the legislature had the power to do this, and all doubts as to the constitutionality of any statute must be resolved in favor of the validity of the statute.

There is some conflict in the authorities as to the right of the legislature to abolish the office, and we do not review or discuss these authorities. We think the rule is well established in this state that the legislature may repeal any law it enacts and may abolish any office created by it, and the motive or reason for the legislative action cannot be inquired into by the court.

Our conclusion is that the legislature had a right to enact the law and under it the Governor had a right to appoint the Insurance Commissioner.

But it is contended that if the law is valid and had the effect of ousting the appellant, still the act did not go into effect until 90 days after the adjournment of the General Assembly.

The emergency clause in that act reads as follows: "It is hereby found and declared that the regulation of the business of insurance is a function of the state government and necessary for the preservation of the public peace, health and safety, and that therefore an emergency exists, and this act shall take effect immediately upon its passage and approval."

The constitution provides that it shall be necessary to state the fact which constitutes such emergency. Certainly no one can claim that any fact is stated in § 6 of act 2 which constitutes an emergency. It simply states that the regulation of the business of insurance is a function of the state government. This certainly could not be an emergency, and yet this is the only fact stated in the section to constitute the emergency.

Appellee calls attention to the case of *Jumper* v. *McCollum*, 179 Ark. 837, 18 S. W. (2d) 359. In that case, referred to and relied on, the court said:

"It is not sufficient, under this last amendment, for the legislation merely to declare that an emergency exists, but it is necessary to state the fact which constitutes such emergency. If therefore an act is passed which does not contain an emergency clause in which the fact is stated constituting the emergency, the act does not become effective until ninety days after the adjournment of the session of the General Assembly at which it was enacted."

The court, also, said in the above case: "Of course, an emergency clause which did not state the fact constituting the emergency would not suffice; nor would a recited fact which was so obviously and demonstrably inefficacious to constitute an emergency that all fair-minded and reasonably intelligent men would say to the contrary."

The case of *Hanson* v. *Hodges,* 109 Ark. 479, 160 S. W. 392, was decided prior to the adoption of the present Initiative and Referendum Amendment to the constitution. Prior to the adoption of this amendment, it is common knowledge that the emergency clause was attached to almost all laws enacted, and this court has said to prevent this practice, the people inserted in the constitution the sentence: "It shall be necessary, however, to state the fact which constitutes such emergency."

If the legislature stated a fact or facts about which fair-minded men might differ, then the legislative decision would be conclusive, but, as said by this court in *Jumper* v. *McCollum, supra*: "Of course an emergency clause which did not state the fact constituting the emergency would not suffice; nor would a recited fact which was so obviously and demonstrably inefficacious to constitute an emergency that all fair-minded and reasonably intelligent men would say to the contrary."

This emergency clause says that the regulation of the business of insurance is a function of the state government. Of course that does not state any facts constituting emergency.

To hold that the legislature could state a fact as constituting an emergency, which obviously did not constitute an emergency, and which no one would believe constituted an emergency would simply abolish the amendment adopted by the people.

The appellee says that it is evident that the legislature manifested in every possible way its deliberate purpose of making the act immediately effective. We agree with the appellee.

The constitutional provision was adopted by the people of the state. By it, the legislature and the courts are bound, and this provision in the constitution, as well

as all others, should be enforced. If the question is doubtful as to whether the facts constitute an emergency, the legislature's determination would be conclusive, but if they state a fact that has no relation whatever to an emergency, this would not make the law go into effect at once.

There are many decisions collected in Words and Phrases, on what constitutes an emergency; but since there are no facts stated in act No. 2 in the emergency clause that constitute an emergency, we deem it unnecessary to discuss these authorities, because all must agree that to state that the insurance business is a function of the state government does not state facts constituting an emergency. Our conclusion is that the law is valid, but it did not take effect until 90 days after the adjournment of the General Assembly.

The judgment holding the law valid is, therefore, affirmed, but that part of the judgment holding that the law went into effect immediately is reversed, and the cause remanded with directions to ascertain the amount of salary due appellant from the time he was deprived of the office, until 90 days after the adjournment of the General Assembly, and enter judgment for this amount.

MEHAFFY, J., (on rehearing). Appellee files petition asking that the judgment of the court be modified and the cause remanded to the circuit court, and alleges that he is entitled to offset the judgment sought to be recovered with any amount which appellant has earned during the period in question. The appellee says that he is entitled to raise the question of whether appellant is estopped to claim compensation.

In ordinary cases, where a party is employed under a contract and is discharged and sues for damages, the employer is entitled to show what the discharged employee earned during the time, from the discharge to the expiration of the contract. This is true because the suit is for damages, and if the employee has had other employment, or could have had other employment and earned money, his damages, of course, would be reduced by the amount he had earned or could have earned. But

appellant did not hold this office by contract, and he was not entitled to the salary by contract; he was entitled to it by law.

"Ordinarily it is immaterial whether a public officer illegally deprived of his office was able to earn money in some other employment. When a public officer is wrongfully excluded from his office and is restored, and meanwhile has received compensation from other sources for services rendered during the period of his illegal suspension or exclusion from office, he is not required to credit such compensation on his claim for back salary due him. But this view is not accepted universally and sometimes public officers restored to office are awarded their salaries less the amounts which they have meanwhile earned from other sources. For example where a person entitled to preferential employment by the government under a veteran's preference law brings suit for breach of the contract of employment the measure of damages is the pay which the plaintiff would have earned under his contract less what he has actually earned elsewhere, or which in the exercise of proper diligence he might have earned in some other employment." 22 R. C. L. 547.

There is some conflict in the authorities where there is no statute. The New York court held that the rule, in cases where there was a suit for damages for a breach of contract, had no application in the suit of an officer who had been wrongfully deprived of his office, and said:

"But this rule of damages has no application to the case of an officer suing for his salary, and for the obvious reason that there is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the state or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so he is entitled to its amount, not by force of any contract, but because the law attached it to the office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown." *Fitz-*

simmons v. *City of Brooklyn,* 102 N. Y. 536, 7 N. E. 787, 55 Amer. Rep. 835.

The rule applicable to damage cases has no application to the case of an officer suing for his salary for the reason that, in the latter case, liability is not upon contract. The salary is an incident of the office and, if he is wrongfully excluded from the office, he may recover the salary without crediting his earnings thereon. *Reising* v. *City of Portland,* 57 Ore. 295, 111 Pac. 377, Ann. Cas. 1912D, 895.

While there are some courts holding contrary to this rule, still we know of no court where there is a statute like ours, that has held contrary to the New York and Oregon courts.

Our statute reads as follows: "Where the usurper has received fees and emoluments arising from the office or franchise, he shall be liable therefor to the person entitled thereto, who may claim the same in the action brought to deprive him of the office or franchise, or in a separate action. If no one be entitled to the office or franchise, the same may be recovered by the state and paid into the public treasury." Section 14331, Pope's Digest.

Any person elected or appointed to an office is entitled to the salary fixed by law. Whoever deprives one wrongfully of an office is liable to the party that is deprived for the full salary, and if there is no other person entitled to the salary, then the amount received by the person not entitled may be recovered by the state.

The salary is fixed by law and not by contract. Therefore the appellant is entitled to recover from the appellee the amount of salary he would have received from the time he was deprived of his office until 90 days after the adjournment of the General Assembly, when the new law became effective.

GANTT *v.* ARKANSAS POWER & LIGHT COMPANY.

4-4767

Opinion delivered November 1, 1937.

Marsh & Marsh and *Whitley & Utley,* for appellants.

C. W. McKay, H. Wade Kitchens, House, Moses & Holmes and *Eugene R. Warren,* for appellees.

HUMPHREYS, J. This is the second appeal of this case to this court. The first appeal appears under the same style as this appeal, and is reported in 189 Ark.

449, 74 S. W. (2d) 232. The first appeal involved the correctness of the ruling of the chancery court to the effect that on demurrer, which admitted the truth of the allegations in the complaint, a cause of action was not stated.

This court reversed the decree of the chancery court, holding the complaint stated a cause of action, and remanded the case with directions to overrule the demurrer and to proceed consistent with the opinion.

In the opinion on the first appeal this court set out the complaint, or the material parts thereof, and instead of setting it out again in this opinion reference is made to the report of the case in 189 Ark. 449, 74 S. W. (2d) 232, where the complaint will be found.

Accepting the allegations of the complaint as true this court ruled on the first appeal that appellants herein, who were and are taxpayers in Waterworks Improvement District No. 1 had a right to institute and maintain this suit to recover the money due the district, when its commissioners failed or refused to do so; also that the contract entered into by the commissioners of said district and the Consumers Ice & Light Co., and the subsequent ratification of the contract by the city council or the subsequent proceedings under the contract were void because made in violation of § 5711 of Crawford & Moses' Digest, which is as follows:

"It shall be unlawful for any board of improvement, or any member thereof, in any city or town in this state, to be interested either directly or indirectly in any contract made by the board for or on behalf of any improvement district;" also that the Arkansas Power & Light Co., who became the assignee of the contract between said Consumers Ice & Light Co., and the Board of Commissioners of the district acquired no rights by virtue of the assignment which might be enforced in law or equity, specifically holding that the position of the Arkansas Power & Light Co., rises no higher than that of the assignor; also, that since the contract had been performed by the parties in good faith, compensation might be retained out of the proceeds received by said

companies for the reasonable cost of the operation thereof. On the face of the complaint this court on the first appeal also ruled that the contract was void from its inception, notwithstanding the ratification of the contract by the city council, and that no rights accrued to the Arkansas Power & Light Company under said contract or any subsequent proceedings growing out of the contract, except to retain a reasonable compensation for operating the waterworks plant.

Upon the remand of the cause appellants herein amended their complaint so as to allege that neither the Consumers Ice & Light Company nor the Arkansas Power & Light Company had any franchise to lease or operate a system of waterworks in the city of Magnolia at the time the lease contract was entered into or since that time, and that all subsequent proceedings thereunder were in violation of act 322 of the Acts of 1923, as follows:

"* * *; and provided further that no lease shall be made except to persons, firms or corporations holding a franchise to operate a system of water works, gas or electric plants in the city or town in which the plant or system to be leased is situated. No plant shall be taken over for operation under the provisions hereof unless and until lessee files with the town, city or district an approved bond, in such sum as the council or board of commissioners may require, for the faithful fulfillment of the terms of the lease."

Appellees herein filed an answer to the complaint denying all the material allegations therein and, as additional defenses pleaded laches and estoppel on the part of the appellants.

The following stipulation also appears in the record:

"Defendants admit the above allegation of plaintiffs' complaint, and hereby state that neither company operating the waterworks system in the city of Magnolia, Arkansas, operated under any other authority than that given it by Waterworks Improvement District No. One and the city council of the city of Magnolia, Arkansas." The cause was submitted to the court upon the plead-

ings and evidence, including all the exhibits, which resulted in a finding by the court that the contract was void under the decision of the Supreme Court of Arkansas on the former appeal, but that appellants are estopped by their acts and barred by laches, and for that reason an accounting is unnecessary, and a decree dismissing appellants' complaint at appellants' cost.

The record of the evidence including exhibits is voluminous, and to set out even the substance of the testimony of each witness would take many typewritten pages and extend this opinion to great length.

We agree with the finding of the chancery court that the allegations of the complaint relative to the invalidity of the contract are sustained by the weight of the evidence, but we can not agree with his finding that appellants were estopped to institute and maintain this suit or that they are barred by laches.

The contract was void from its inception because one of the commissioners owned stock in his own name and the other two owned stock in the name of their respective wives in the Consumers Ice & Light Company when they entered into the contract, and also because most of the members of the city council owned stock in said company when they ratified the contract. The law of this case declared on the first appeal is that the contract was void from its inception if at the time of making the contract they owned stock in said company.

This court also held that if at the time of the ratification of the contract members of the city council were stockholders in the Consumers Ice & Light Company that the ratification thereof was void under § 7520 of Crawford & Moses' Digest, which inhibits any member of the city council from being interested either directly or indirectly in any contract or job or services to be performed by the corporation. The evidence sustains the allegations of the complaint, hence the law declared by this court is the law of this case. This court also said that if the contract is void from its inception because inhibited by statute it can not be vitalized by subsequent acts of parties thereto or thereunder, and that declara-

tion of the law under the evidence adduced has become and is the law of this case. This court also held on the first appeal that if the contract was void from its inception on account of being made in violation of a constitutional statute, but that the statute did not in terms declare the contract to be null and void, that the parties to it having performed the contract in good faith might retain out of the proceeds received from the operation thereof the reasonable value of the services rendered; and since the evidence in this case reflects that the contract was void from its inception, and that the ratification thereof was void and that all their acts subsequent thereto were void this declaration of law has become and is the law of this case.

From the time this plant was leased by the Consumers Ice & Light Company, and during the time its assignee, the Arkansas Power & Light Company, has operated same both companies became and still are trustees for said district in the operation of the plant. Under the facts adduced at the trial of this cause this relation of trusteeship still exists and has existed all the time. As long as such relationship exists appellees could not and can not interpose the defense of laches and estoppel to the demand by the *cestuis* for an accounting. Under the rule announced on the first appeal of this case they are entitled to compensation for operating said plant measured by the reasonable value of such services.

In the case of *Shorman* v. *Eakin,* 47 Ark. 351, 1 S. W. 559, Mr. Justice Battle said in writing the opinion: "No one, as a rule, can estop himself from taking advantage of that which is contrary to public policy. Contracts, as a general rule, can not vest in parties any rights in contravention of law or public policy."

Again appellants have pleaded in this case that appellees have never had a franchise from the city of Magnolia to lease and operate a waterworks system. The evidence in this case shows that they have never obtained a franchise. They argue that the contract entered into with the commissioners of the district, and ratified by the city council was tantamount to giving them a fran-

chise. This contract was void from its inception, and at the time it was ratified and all the proceedings thereunder were void because they were prohibited from making such a lease with either the city or the commissioners of the district to operate said plant. Certainly a void contract and void proceedings thereunder can not become a franchise.

On account of the error in dismissing appellant's complaint, and refusing to state an account between them or to appoint a master to state the account between these parties the judgment is reversed with directions to reinstate the complaint and to state an account between these parties taking as a basis therefor the amount they have received in operating the plant, and deducting therefrom a reasonable compensation for operating same, and to render a judgment in favor of appellants for any balance that may be due them, and to return the plant to the city and commissioners of the water district.

GRIFFIN SMITH, C. J., SMITH and MCHANEY, JJ., dissent.

TISDALE *v.* GUNTER.

4-4783

Opinion delivered November 8, 1937.

Miles, Armstrong & Young, for appellant.
Franklin Wilder, for appellee.

SMITH, J. Mrs. Grace Gunter was awarded a decree of divorce from her husband December 24, 1930. By the decree she was given one-third of her husband's personalty absolutely, and one-third of his real estate for life. The personal property was sold and the proceeds divided in accordance with the terms of the decree. Pending the division of the real estate, Charles Myers was appointed receiver with directions to collect the rents on Gunter's property. He was appointed receiver November 10, 1930, and continued to serve in that capacity until February 9, 1932. Commissioners were appointed to make partition of the lands owned by Gunter, but it does not appear when the partition was made, and the receivership continued after the partition had been made.

The receiver made several reports of his collections. These showed the rents collected on the lands assigned to Mrs. Gunter. They were for small amounts, the largest being for $77. The reports also showed rents collected on Mr. Gunter's lands. These reports were all approved, and disbursing orders were made, which directed Myers to pay the rents to Mrs. Gunter which had been collected on her lands. The receiver was directed to pay the costs incident to the receivership out of Mr. Gunter's rents, and also to pay certain sums to Mrs. Gunter's attorney out of Mr. Gunter's rents. It is undisputed that Mrs. Gunter received the gross sum of all the rents collected on her lands. None of these reports disclosed to the court that Mrs. Gunter's lands had been sold for the nonpayment of the taxes due thereon.

The two lots of land here in question, which are not all of the lands assigned to Mrs. Gunter, were sold for the nonpayment of the 1929 general taxes, and upon the expiration of the period of redemption, not having been redeemed, were duly certified to the state. The special taxes due Sebastian Bridge District for the years 1931 and 1932 became delinquent, and on November

18, 1932, a decree of the chancery court was rendered directing the sale thereof to enforce the demand. The lots were sold pursuant to this decree on December 24, 1932, to Myers, who had previously been discharged as receiver. After the expiration of the period of redemption, Myers received, on May 23, 1935, a deed from the commissioner who had made the sale. On August 18, 1932, which was slightly over six months after the discharge of Myers as receiver, he purchased the lots here in litigation from the state and received a deed executed by the state land commissioner of that date. On November 19, 1935, Myers sold the lots to John Tisdale for the consideration of $240.

On July 1, 1936, Mrs. Gunter filed this suit against both Myers and Tisdale, praying "that the defendants be made constructive trustees," and that the deeds to Myers and from him to Tisdale be canceled and that title to said lots be confirmed in her for life, free from any claim of said parties.

Before the trial of the cause both Tisdale and his wife died and the cause was revived against their children as their heirs-at-law. The relief prayed was granted, without requiring Mrs. Gunter to pay the taxes for the nonpayment of which the lots had been sold, and from that decree is this appeal.

The record before us contains the court proceedings in the divorce case and the report of the commissioners making partition and the reports of Myers as receiver and the orders of court directing the disbursement of the rents collected. Myers was the only witness who testified in the case, and, as has been said, Tisdale died before the submission of the case.

Myers testified that he was a newcomer in Fort Smith and knew nothing of the bridge taxes until after his discharge as receiver, but that he did know of the delinquency for the 1929 general taxes. He testified that he spoke to Mrs. Gunter about these taxes on several occasions and suggested that they be paid, but Mrs. Gunter would not consent. He also discussed the matter with the attorney representing Mrs. Gunter, "and he

told me it was all under mortgage, and he told me to get as much money as I could for her." The attorney referred to had examined Myers as a witness and did not deny the truth of this statement, nor did he ask any questions calculated to contradict it. Myers stated that he did not pay the general taxes, of which he had knowledge, because Mrs. Gunter said she required the money for her living expenses and to pay the taxes on the property where she lived, which she was trying to save.

The lots here in question had been appraised at $800, and were sold to Tisdale for $240, but there was an incumbrance on them, the amount of which was not disclosed. Myers testified that he tried without success to sell the property for $300, and that he negotiated for six months with Tisdale before selling to him for less. Tisdale estimated the value of the property at $300, but figured it might cost him as much as $100 to defend an attack on the validity of the title, as it was based upon a tax sale. It may be said, in this connection, that, while the complaint alleged the invalidity of the tax sale, no attempt was made to establish that fact. It stands, therefore, as presumptively valid. Now, while it is undisputed that Tisdale knew the title proposed to be conveyed was based upon a tax sale, and was conveyed by a quitclaim deed, there appears to be no other fact or circumstance in the record to put him upon inquiry as to the validity of Myers' title.

We abstract all the testimony tending to impute knowledge to Tisdale of the existence of a trust or to put him on notice of any defect in the title. The sale under the decree foreclosing the lien for the bridge improvement district tax occurred December 24, 1932, and Myers was the purchaser. He had then been discharged as receiver, and testified that he had no knowledge prior to his discharge of the delinquency for the improvement taxes or that there were such taxes. Upon the expiration of the period of redemption from this sale, Myers received a deed from the commissioner based thereon dated May 23, 1935, and on November 19, 1935, he executed to Tisdale a second deed, this latter being a war-

ranty deed. Myers' control of the property had ceased upon his discharge as receiver in February, 1932. No abstract of the title was asked or furnished when the quitclaim deed was executed and delivered. This suit was filed July 1, 1936, and Tisdale died August 30, 1936. An answer was filed by Mrs. Tisdale alleging that her husband was an innocent purchaser, but she, too, died before the submission of the cause.

Myers told Tisdale that he had only a tax title and endeavored, without success, for six months, to induce Tisdale to pay $300 for a deed. He turned his deeds over to Tisdale. Myers being asked if Tisdale knew he, Myers, had defrauded Mrs. Gunter, answered that he had not defrauded her. Myers knew when he was appointed receiver that all the property had gone delinquent for the nonpayment of the general taxes and was under mortgage, but he testified that "I couldn't have gotten money enough to pay all the taxes, and I couldn't pick out one certain piece and pay on it," and he did not redeem any of the lands, because Mrs. Gunter demanded that the rents be paid her. It is undisputed that he paid her all the rents collected by him on the property assigned her by the commissioners upon the partition of Gunter's estate. When asked the direct question why he had not paid the taxes, Myers answered: "Because she wanted the money to live on, and she was trying to save the place she lived in—and she never said anything about this here until she lost those places."

Upon the question of Tisdale's knowledge, Myers testified as follows: "Q. We want to know whether or not Mr. John Tisdale had notice of the fact that you were ever receiver of this property? A. No, I didn't tell him that. Q. Did he have notice of the fact, or know anything about your having any dealings with this property at all? A. If he did—I don't remember ever telling him anything about it. Q. Then Mr. Tisdale didn't have any notice of the fact that you were receiver of this property? A. No, sir. I didn't ever tell him anything about it. * * * Q. Did not Mr. Tisdale tell you that he

couldn't give you $300 for the property because some lawyer would bring suit for Mrs. Gunter and he would need the $50 to fight the suit? A. Yes, sir."

But the testimony in its entirety furnishes no basis for the assumption that this precaution as to the price Tisdale could pay for the lots was based upon any knowledge that Myers had ever had control of the property as receiver, but was apparently based upon the common knowledge that most tax sales are attacked when title is asserted under them.

If it be conceded that Myers should have devoted the rents collected to the redemption of the lots notwithstanding Mrs. Gunter's demand that they be paid to her, and should have disclosed the tax delinquency to the court when the disbursing orders were obtained from the court, and that his failure to do so operated to create a constructive trust when he later purchased the lots, there is yet lacking any testimony charging Tisdale with knowledge of this fact which operated to divest him of his character as an innocent purchaser.

The fact that Tisdale first acquired title through a quitclaim deed does not have that effect. This is a mere circumstance to be considered in connection with all the other facts and circumstances in determining whether Tisdale was an innocent purchaser. That one may be an innocent purchaser of a title acquired through a quitclaim deed is definitely settled by numerous decisions of this court, among others the following: *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373; *Moore* v. *Morris,* 118 Ark. 516, 177 S. W. 6; *The Henry Wrape Co.* v. *Cox,* 122 Ark. 445, 183 S. W. 955; *Bell* v. *South Ark. Land Co.,* 129 Ark. 305, 196 S. W. 117; *Cramer* v. *Remmel,* 132 Ark. 158, 200 S. W. 811; *Staggs* v. *Joseph,* 158 Ark. 133, 249 S. W. 566.

It is argued that Tisdale was not an innocent purchaser because the receivership proceeding was in his chain of title. It was held in the case of *Green* v. *Maddox,* 97 Ark. 397, 134 S. W. 931, that "Every purchaser who holds under a conveyance through which he must trace his title is bound by whatever is contained in it. It is his imperative duty to obtain and examine all the

instruments which constitute essential links in his chain of title, and he is conclusively presumed to know all the recitals and matters contained therein affecting the title or the estate, whether they are recorded or not." Among other cases to the same effect are the following: *Stroud* v. *Pace,* 35 Ark. 100; *Gaines* v. *Summers (Saunders),* 50 Ark. 322, 7 S. W. 301; *Turman* v. *Sanford,* 69 Ark. 95, 61 S. W. 167; *Thompson* v. *Bowen,* 87 Ark. 490, 113 S. W. 26; *Burel* v. *Baker,* 89 Ark. 168, 116 S. W. 181; *White* v. *Moffett,* 108 Ark. 490, 158 S. W. 505; *Moore* v. *Morris,* 118 Ark. 516, 177 S. W. 6; *The Elk Horn Bank & Trust Co.* v. *Spraggins,* 182 Ark. 27, 30 S. W. (2d) 858; *Etchison* v. *Dail,* 182 Ark. 350, 31 S. W. (2d) 426.

But these cases are not applicable here for the reason that the divorce decree and the proceedings thereunder were not a link in Tisdale's chain of title. To constitute a deed or a decree a link in a chain of title, of which a subsequent purchaser is affected with notice, it must be a part of the title, a thing to be shown to establish title. If one, to prove his title, must rely upon and make proof of a deed or decree to establish title, then it is a link in the chain of title, and he is affected with notice thereof, whether he has knowledge or not and regardless of the fact that it may not be of record. If to establish a title it is not essential to prove and rely upon a deed or record, it is not a link in the chain of title, and in these circumstances one is not bound by the recitals of a deed or decree, unless he has actual knowledge thereof. See cases last cited.

If the tax sale was in fact good and valid, a purchaser thereat under no duty as a trustee, acquired title when it was certified to and sold by the state after the expiration of the period of redemption, subject only to the right of redemption given certain persons because of their disability. The tax sale here in question is not attacked, and no right of redemption is asserted. It is sought to enforce a trust, which cannot be done if Tisdale was in fact an innocent purchaser, as the undisputed testimony shows him to have been.

The case of *St. Louis & Ark. Lbr. & Mfg. Co.* v. *Godwin,* 85 Ark. 372, 108 S. W. 516, is decisive of this question. There Godwin was the original owner of lands, which were sold to Reynolds under a decree of the chancery court in an overdue tax proceeding. The deed of the commissioner in that proceeding was executed and delivered to Reynolds without the examination and approval of the court. It was said that if this omission rendered the deed ineffectual to convey the legal title, the sale and the confirmation passed the equitable title to the purchaser; and that having this equitable title, the purchaser or his grantee could assert it as a defense to a suit brought to recover the lands. It was there said: "There is evidence tending to show that Reynolds, who died before the commencement of this suit, was the agent of Godwin, and had funds in his hands with which to pay the taxes. It is, however, affirmatively shown that appellant purchased the lands and paid a valuable consideration therefor without any notice of Reynold's agency or of any other defect in the title. Appellant was charged with notice of the alleged defect in the deed which was in his chain of title, but not of matters *in pais,* which affected the validity of the sale. Appellant was therefore an innocent purchaser, and its title cannot be defeated by proof of improper conduct of his grantor toward the original holder of the title. An innocent purchaser takes title free from such equities." In other words, Reynolds' vendee was affected with notice of the fact that Reynolds had the equitable—but not the legal—title, because the proceeding showing that fact was in the chain of title. But Reynolds' vendee was not charged with knowledge of the fact that Reynolds had funds in his hands with which to pay the taxes, this being a matter *in pais.* So, here, Myers' receivership not being a link in the chain of Tisdale's title it is a matter *in pais,* with which Tisdale was not chargeable in the absence of notice.

It has been suggested in our consultation, although the point is not made in the briefs, that Mrs. Gunter's possession was itself notice to Tisdale of the trust. Many

cases hold that one who purchases land in another's possession takes with notice of whatever right, title or equity the occupant may possess; but there is no showing that there was an occupant in possession when Tisdale purchased. It is shown only that when Myers was discharged as receiver in February, 1932, he surrendered possession to Mrs. Gunter of all the lands assigned to her of which he had control, and it is affirmatively shown that Mrs. Gunter was not personally in possession, as she resided on other property. *Scott* v. *Carnes,* 183 Ark. 650, 37 S. W. (2d) 876.

We conclude, therefore, that the court was in error in holding that Tisdale was not an innocent purchaser, and that decree is reversed, and the cause will be remanded with directions to enter a decree conforming to this opinion.

HUMPHREYS and MEHAFFY, JJ., dissent.

MISSOURI PACIFIC RAILROAD COMPANY, ET AL., v. MAXWELL.

4-4797

Opinion delivered November 8, 1937.

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

Glover & Glover, for appellee.

HUMPHREYS, J. Appellee, R. L. Maxwell, father of Charles Ray Maxwell, brought suit in the circuit court of Grant county against appellants to recover damages in the sum of $15,000 for himself and as administrator of the estate of his son, alleging that on April 16, 1935, through the negligent operation of one of the passenger trains of the Missouri Pacific Railroad Company his son, who was eighteen months of age, was run over and killed about 2:30 o'clock P. M., three-fourths of a mile south of Kirkland.

The specific negligence alleged was that the employees of said railroad company in operating the train failed to keep a lookout for persons on or dangerously near its tracks and that they failed to ring the bell, blow the whistle, or give any other sound of alarm until within a few feet of the child and ran over and killed him, resulting in suffering and death.

Appellants filed separate answers, denying any negligence in the operation of the train and pleading in bar of the action negligence on the part of R. L. Maxwell in allowing the child to go upon the track.

The cause was submitted to a jury on the pleadings, evidence adduced by the respective parties and instruc-

tions of the court, resulting in a judgment in favor of appellee for $5,000, from which is this appeal.

The facts, revealed by the record, stated in the most favorable light to appellee, are, in substance, as follows:

Appellee resided with his family about four hundred feet east of the track. His home was enclosed with a fence. There was a gate on the west side which fastened with a latch. There was a pathway leading by his home to and across the track to the highway on the west side of and parallel to said track, which pathway was used by the public. The track was straight and level from this private crossing north to Kirkland. There were no obstructions of any kind between the private crossing and Kirkland to prevent the engineer and fireman from seeing anyone on the track at or near the crossing. The day the child was killed by the railroad company was a clear and bright day. About ten minutes before the train ran over the child, it was watching its father build a fence in the back yard. Its mother came out and took it in the house, but it went out into the front yard and from there to the railroad track and had gone about twenty feet on the track toward Kirkland when it was caught by the train and dragged for about forty feet to the place it was supposed to have been killed. At that point, blood was discovered and when the child was picked up there was a hole in its head. After the train ran over and killed the child, it ran about five hundred to eight hundred feet before it stopped. The record does not reflect whether some part of the train struck the child on the head or whether at that point its head hit a tie. At that particular point a few ties were higher than the others. When picked up the child was dead. The train ran over the child before its parents discovered it had left the house and gone over to the railroad track. This was the first time it had gotten out of the yard and gone to the railroad track. Appellee was still working on the fence when informed that the train had run over the child. He thought it was still in the house with its mother.

According to the testimony of S. A. Jones, the engineer who was operating the train, the train was moving at a speed of about forty-five miles an hour, and the engi-

neer observed an object on the track one thousand or twelve hundred feet in front of the train and, thinking it was a piece of paper, the engineer paid little attention to it until within five hundred or six hundred feet of it, at which time he discovered it was a child and immediately applied the emergency brakes and blew short blasts of the whistle, but was unable to stop the train before running over the child. He stated that had he realized it was a child when he first observed the object he could have stopped the train and avoided killing it.

Several of the witnesses testified that when the engineer blew the short blasts of the whistle the train was right upon the child. One witness testified that he was plowing within three hundred feet of the child and that the engineer waived his hand at him and gave him what is called a "high-ball" in passing. An examination of the track indicated that the emergency brakes were first applied when the train was within about 75 feet of the child. One witness testified that her attention was attracted by the short blasts of the whistle and that just as she turned her head the train ran over the child. The testimony of the engineer taken in the federal court on motion to remand the cause to the state court was to the effect that when he discovered the object was the child he was six hundred or seven hundred feet from it. His testimony in the two courts conflicted in other material respects. The court admitted a picture of the child taken two or three months before its death in evidence over the objection of appellant.

Attorneys for the railroad company argue that the court erred in submitting to the jury the question of its liability on the lookout statute, contending that the undisputed evidence reflects that it kept an efficient lookout and discovered the child on the track as soon as it reasonably could under all the facts and circumstances, and that after discovering the child all was done that could have been reasonably done to avoid killing it. The lookout statute is as follows:

"It shall be the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and

all railroads, and if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril, and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed." Crawford & Moses' Dig., § 8568.

In construing the lookout statute quoted above our court is committed to the rule that in order for one to recover damages under the statute he must prove facts and circumstances from which the jury might reasonably infer that the danger might have been discovered and the injury avoided if an efficient lookout had been kept, and that the burden to make such proof rests upon the party seeking to recover. *St. Louis-San Francisco Ry. Co.* v. *Sheppard, ante p.* 619, 109 S. W. (2d) 109.

We think the facts and circumstances detailed above were sufficient to warrant a jury in finding that appellant might have discovered the danger and avoided killing the child had the engineer kept an efficient lookout. The track was straight and level for more than a quarter of a mile. The day was clear and bright. The child was eighteen months old and, according to its picture, was of average size. According to the evidence introduced by appellee, the child was not discovered by the engineer until the train was within about seventy-five feet of the child. At least nothing was done to prevent the injury until the train was practically upon the child. The train could have been stopped, according to the engineer's evidence, within one thousand or twelve hundred feet. According to one witness, the engineer waived to him out in a field when only a short distance from the child. We think it a reasonable inference from all facts and circumstances

that if the engineer had been keeping a constant lookout he could have discovered the child and avoided killing it by stopping the train. At least there are facts and circumstances in the evidence tending to show that he could have done so.

This issue was submitted to the jury under correct instructions given at the request of both appellant and appellee. We have read the instructions and they conform to the rule laid down by this court in interpreting the lookout statute.

Appellant, also, argues that the court should have given a peremptory instruction in its favor because the undisputed evidence reflects that appellee was negligent in allowing his child to go upon the track. We think there is little or no evidence tending to show any negligence on the part of appellee in this regard, but, to say the least of it, the evidence might be regarded as conflicting and the court submitted this issue to the jury under correct instructions. There is substantial evidence in the record to support the finding of the jury to the effect that appellee was not negligent in allowing his child to go upon the track.

Appellant also contends that the court erroneously admitted the picture of the child in evidence. The size of the child was in question and the picture had been taken only a short time before the child was killed; so, for that purpose, it was admissible.

Appellant also contends that over its objection the attorney for appellee was permitted to state to the jury that the mother loved her child and that she would continue to suffer mental anguish and to compare the love for his own child with the love of the mother for her child and that the judgment should be reversed for this reason. When objection was interposed to the argument by appellants' attorney the court said to the jury:

"Gentlemen of the jury, the only purpose of the argument made by counsel to the jury is to refresh your memory as to what the testimony of the witnesses was. If any lawyer argues anything that is not supported by the testimony you will disregard that part of the argument." Appellee had sued for $15,000 and recovered

only $5,000. We think the amount of the recovery indicates very clearly that the minds of the jury were not influenced or inflamed by the argument, and in reaching their verdict they did not consider the argument, but followed the advice of the court to disregard any argument made by an attorney that was not supported by the testimony. Of course, the argument was improper and should not have been made, but in view of the amount of the recovery as compared with the amount sued for we cannot say that the improper argument in any way prejudiced appellants' rights.

Appellant contends that the court erred in giving instruction number ten, which is as follows:

"You are instructed that where damages are claimed for the death of a child incapable of earning anything or rendering services of any value, the value of its probable future service to the parent during its minority is a matter of conjecture and may be determined by the jury without the testimony of witnesses," and in giving instruction number eleven, which is as follows: "You are instructed that a father in his own right is entitled to recover for the negligent killing of his son, whatever sum the son would have earned until he was twenty-one years of age, less his reasonable expenses."

We think these two instructions are correct declarations of law as applied to the facts in this case. There is no way to prove the earning capacity of a child of this age, but there can be no question that the services of a boy child for nineteen or twenty years would amount to a considerable sum and that a father should receive a reasonable compensation for the loss of its services less the reasonable expenses of rearing the child. The funeral expenses amounted to about $250, and there is some evidence in the case that the child was not immediately killed and the jury would have been warranted under the evidence in finding that the child was dragged some forty feet before he was killed, in which event its suffering must have been great. We do not think $5,000 an exorbitant amount or that the amount is excessive.

Appellant, also, contends that the judgment should be reversed because the attorney of appellee read the

instructions prepared by him and approved by the court to the jury. It is the better practice for the court to read the instructions to the jury himself, but the jury certainly understood that the instructions which were read were instructions given by the court. It does not appear that appellant was prejudiced by any particular emphasis placed upon the instruction by the attorney for appellee in reading them. The practice of permitting attorneys to read the instructions should be discontinued and the trial court should read them to the jury himself.

Appellant objected to a great many of the instructions given by the court at the request of appellee, and, has argued his objections extensively and also excepted to the refusal of the court to give certain instructions asked by appellant and has argued these exceptions extensively. We have carefully read the instructions given and refused by the court and find no inherent and prejudicial errors in the instructions given. We think the court correctly refused to give certain instructions asked by appellant. After carefully reading the evidence and the instructions, we think the law as declared by the trial court was correctly declared, and that appellant has received a fair and impartial trial in the case.

No error appearing, the judgment is affirmed.

SMITH and BAKER, JJ., dissent.

PHILLIPS *v.* ROTHROCK.

4-4776

Opinion delivered November 8, 1937.

C. D. Atkinson and *G. T. Sullins,* for appellant.

J. W. Trimble, Maupin Cummings, O. E. Williams and *Earl N. Williams,* for appellees.

SMITH, J. Appellant brought suit as a citizen and taxpayer of Washington county against the public officials of that county to enjoin the disbursement of the public revenues of the county pursuant to the provisions of "Initiative Act No. 1 of Washington county, Arkansas." The suit questioned the existence of the act as valid legislation upon various grounds, and from a decree dismissing the suit is this appeal.

This decree was based upon the finding contained therein that "The suit was not filed within the time prescribed by law, and this court has no jurisdiction to hear and determine the questions."

Much testimony was heard upon the various allegations of the complaint, all of which has been incorporated in the transcript before us, but we shall review only so much thereof as is required to elucidate the questions upon which we base our decision. We will first consider the two grounds above stated upon which the action of the court was based.

The declaration that "The suit was not filed within the time prescribed by law" is based upon § 13 of act No. 4 of the Acts of 1935, p. 8. This act is entitled "An act to facilitate the exercise of the right of the initiative as to county acts and measures, and for other purposes." This act was passed pursuant to the direction of the initiative and referendum amendment to the Constitution that "General laws shall be enacted providing for the exercise of the initiative and referendum as to counties." Section 13 of this act provides that "The right to contest the returns and certification of the vote cast upon any proposed county act or measure is hereby expressly conferred upon any ten qualified electors and taxpayers of the county. Said contest shall be brought in the chancery court, and shall be conducted under statutes and procedure for contesting the election of county officers, except the complaint shall be filed within sixty days after the certification of said vote, and no bond shall be required of the contestants." The instant suit was not filed by ten electors and taxpayers of the county, and was not filed within sixty days after the certification of the vote upon the measure.

The provisions above quoted do not apply to this suit. It was not brought to contest the returns of the election, or the certification of the vote upon the proposed measure. It is conceded that a large majority was cast in favor of the measure and that the returns of this vote were properly certified. The objection made, among others, is that the submission of the question at the election was unauthorized under amendment No. 7 (the initiative and referendum amendment) and the enabling act No. 4, *supra,* passed pursuant thereto, and that act No. 1, therefore, did not become a law notwithstanding the favorable vote thereon.

That such suits are not election contests has been recognized in all the similar cases which have come before this court, and that any citizen and taxpayer may institute a proper suit to prevent unauthorized and illegal diversion of public funds is a proposition of law which this court has frequently announced, and the right of the individual citizen to be thus heard has always been enforced. Upon the right of the individual citizen to maintain such a suit the late case of *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. (2d) 485, is authoritative. That case states the existence of such a right to be beyond question. Innumerable other cases decided by this court are to the same effect. If the present suit is not such a suit as § 13 of act No. 4, *supra,* authorizes and limits as to time, then this time limitation does not apply. That it is not so regarded is concluded by the following cases which will be briefly discussed.

Webb v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617, was a suit brought in the Pike chancery court attacking the validity of a local law alleged to have been enacted by a majority vote of the citizens of that county. The election held in that county was not questioned. The contention was that the local act had not been enacted notwithstanding the majority vote favoring its adoption for the reason that the act of the General Assembly pursuant to which the election was held was void as being a local law. There were three opinions in that case, one the original majority opinion, another a majority opinion overruling a petition for rehearing. The third was a vigorous dissenting opinion, in which three justices concurred. But in none of these opinions was it suggested that the proceeding was one to contest an election.

In the case of *Tindall* v. *Searan,* 192 Ark. 173, 90 S. W. (2d) 476, suit was brought in the chancery court against the officers of Arkansas county for the purpose of having the salary act, affirmatively voted upon in that county, declared void and ineffective. Suit was brought by an individual citizen as a taxpayer, as was done in the instant case. The suit was not commenced until October 7, 1935, although the salary act had been voted upon at the election previously held November 6, 1934.

Other citizens later intervened in that case and the questions there raised touching the validity of the act were considered and decided by the presiding chancellor, and upon the appeal therefrom the decree of the chancery court holding the act invalid was reversed; but there was no suggestion in the exhaustive briefs filed in that case, or in the opinion of this court, which discussed the questions at length, that there was any lack of jurisdiction on the part of the chancery court, or that the suit was one to contest an election. See also *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. (2d) 248.

We conclude, therefore, that the instant case is not an election contest, but is one which any citizen and taxpayer may institute to prevent the alleged wrongful diversion of public funds, and that, therefore, the sixty-day limitation upon the right to contest the returns and certification of the vote does not apply, and further that the chancery court was not without jurisdiction to hear and determine the case.

The opinion in the case of *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. (2d) 68, is not in contravention of this view. That was an election contest. The relief prayed was that the board of election commissioners be required to "count and certify all such votes (cast at the election), same as if the ballot title had in fact been printed on said ballots, that said proposed initiative act be declared duly adopted and enforceable." The relief prayed was denied for the reason stated in a headnote of that case that "Equity has no jurisdiction to try election contests." Here, as has been stated, there is no contest of the election itself. It was, also, decided in that case that the sufficiency of a petition for initiating local laws was a moot question after the election was held. The statement that after the question is submitted to and affirmatively voted upon by the people the sufficiency of the petition calling the election is of no importance was reaffirmed in the second appeal of the Faulkner county salary act case (*Beene* v. *Hutto,* 192 Ark. 848, 854, 96 S. W. (2d) 485), which is cited above upon another proposition. Upon the application of this statement to the instant case more will be presently said.

Appellant contends there is no authority in fact for the initiating of county salary acts. To put this question definitely at rest it may be said that the right of the qualified electors of any particular county to enact a salary act, applicable to that county, was expressly affirmed and the source of that authority was pointed out in the case of *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. (2d) 779, and need not be repeated. It will suffice to say that we reaffirmed that holding in the cases of *Tindall* v. *Searan,* 192 Ark. 173, 90 S. W. (2d) 476, and *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. (2d) 72. Other cases recognizing the validity of local legislation relating to salary acts are: *County Board of Education* v. *Austin,* 169 Ark. 436, 276 S. W. 2; *Benton* v. *Thompson,* 187 Ark. 208, 58 S. W. (2d) 924; *Smith* v. *Cole* (and *Brown* v. *Pennix*), 187 Ark. 471, 61 S. W. (2d) 55; *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. (2d) 248; *Blocker* v. *Sewell,* 189 Ark. 924, 75 S. W. (2d) 658; *Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. (2d) 68; *Clay County* v. *Ruff,* 192 Ark. 150, 90 S. W. (2d) 474; *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. (2d) 485; *Priest* v. *Mack, ante* p. 788, 109 S. W. (2d) 665.

The chief insistence of appellant is that there was no legal authorization for the submission of the salary act to the electors, for the reason that the petitions praying that the election be held were not filed with the county court clerk within the time required by amendment No. 7. There appear to have been thirty-four petitions filed. One of these was filed September 22, 1936. Two were filed September 30, 1936. The others were filed October 1, 1936. The election was held November 3, 1936. It is, therefore, obvious that none of them was filed for as much as sixty days before the election. Amendment No. 7 provides that "General laws shall be enacted providing for the exercise of the initiative and referendum as to counties," but that "In municipalities and counties the time for filing the initiative petition shall not be fixed at less than sixty days nor more than ninety days before the election at which it is to be voted upon." Enabling act No. 4, *supra,* does not otherwise provide.

The amendment prescribes the time within which petitions for initiative measures must be filed. It is essen-

tial, therefore, to confer authority to hold an election upon an initiated county measure that the petitions therefor be filed not less than sixty nor more than ninety days before the election "at which it is to be voted upon." It would hardly be contended that an election could be held if there were no petitions therefor. It is mandatory that petitions should be filed, and it is equally so that they be filed not less than sixty days before the date of the election. Lacking this prerequisite there is no authority to hold the election upon the initiative measure, and no majority—however large—can adopt a measure which was submitted without constitutional authorization.

Although the county clerk, through his deputies, did receive and file the petitions on the days above stated, he appears thereafter to have ignored them and to have neglected or failed to comply with any of the duties enjoined by act No. 4, *supra,* and he wholly failed to give notice as provided by that act. No attempt was made by mandamus or otherwise to compel him to act. His inaction was ignored. He may have entertained the view that there was no authority for filing the petitions at the time they were deposited in his office.

In the case of *Townsend* v. *McDonald,* 184 Ark. 273, 42 S. W. (2d) 410, the Secretary of State took the position that petitions for a referendum upon an act of the General Assembly, which were tendered him for filing, did not conform to the requirements of amendment No. 7 and the enabling acts passed pursuant thereto. It was sought by mandamus to compel the Secretary of State to file the petitions. It was there held that the petitions presented to the Secretary of State did not comply with the requirements of the Constitution, and the writ of mandamus was denied for that reason. In other words, there was no authority for filing petitions which did not conform to the requirements of the Constitution. The opinion in this case of *Townsend* v. *McDonald, supra,* discussed the enabling acts which had been passed to make the constitutional amendment effective, and in holding the enabling acts mandatory said: "In determining whether the words of a statute shall have a mandatory or directory effect ascribed to them, the purposes of the act, the

end to be accomplished, the consequences that may result from one meaning or the other, and the context are to be considered. The statute relates to the limits of the power of the Secretary of State to file the petition, which was not in compliance with the requirements of the statute, and does not relate to the manner in which the power is to be exercised. *Phillips* v. *State,* 162 Ark. 541, 258 S. W. 403."

That opinion further said that the enabling acts had not been passed as a mere matter of convenience or direction, but had been passed as a safeguard to the rights of the voters, and that "This is a right of great benefit to the voters, and we do not think the requirement should be regarded as merely directory, but that it is a substantial right which is of a mandatory character, and must be complied with or the proceeding will be void."

Here, the provisions of the amendment itself regarding the time within which petitions may be filed relate to the power of the clerk to receive petitions for filing, and he may, therefore, receive them within the time limited for that purpose, and not at a later time.

The case of *Texarkana Special School District* v. *Consolidated Special School District No. 2,* 185 Ark. 213, 46 S. W. (2d) 631, involved a petition addressed to the county board of education to change the boundaries of certain school districts. The applicable statutes were construed as requiring petitioners to give thirty days' notice of the intention to present the petitions before the meeting of the board. It was held that the notice must be given before the petitions were filed, and that posting the notice after filing and before the hearing did not give the board jurisdiction. The reason assigned for this holding was that the posting of the notice would apprise the electorate of the pendency of the proposal and would afford opportunity for investigation and discussion, as to whether the petitions should be signed.

The argument is made that the affirmative vote concludes all objections that could have been urged before the vote was taken. In support of this argument, cases are cited sustaining the text found in 9 R. C. L., page 1173, of the chapter on elections, that "all provisions of

the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void."

We think this case comes not within the general rule stated, but within one or more of the exceptions thereto above stated.

The latest case cited in support of the above-stated contention is that of *Johnston* v. *Brambett,* 193 Ark. 71, 97 S. W. (2d) 631, which quoted from the case of *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. (2d) 485, as follows: "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 will be observed that the question put beyond review, after an affirmative vote has been had, is that of the sufficiency of the petition. This question has not been raised and is not involved in this litigation.

It is argued that, to hold the initiative act here under review was not adopted, notwithstanding the favorable vote thereon, is to place it in the power of officers having duties to perform in this behalf to defeat legislation by mere inaction. Several answers may be made to this contention.

It was said in the case of *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. (2d) 779, that when any duty is required of a public officer, unless there is something to indicate the contrary, it will be presumed that he performed the duty according to law. The presumption is also that the officer will perform his official duty. The

enabling act (act No. 4) provides that the performance of duties enjoined may be enforced by mandamus. This enabling act further provides that if the county clerk, the board of election commissioners, or any election judge or clerk, "shall knowingly and wilfully fail or refuse to perform any such duty, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than $100 nor more than $500, and shall be removed from office."

The argument that we should give conclusive effect to an affirmative vote, although neither the amendment itself nor the enabling act so provides, except only as to the sufficiency of the petition, for fear that a recalcitrant official might defeat the public will, may be met by other arguments equally as persuasive to the contrary.

For instance, it was held in the three cases affecting the Faulkner county salary act (*Hutto* v. *Rogers,* 191 Ark. 787, 88 S. W. (2d) 68; *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. (2d) 485, and *Benne* v. *Hutto, ante* p. 107, 105 S. W. (2d) 530) that electors might vote upon an act even though it had not been placed on the ballot when it should have been placed thereon, and that an affirmative vote would adopt the act although it had been omitted from the ballot. It may be said that three members of the court dissented from that view. Now, a majority of all the votes cast at the election is not an essential to the adoption of a law. A majority of those voting on the subject suffices. A single vote—if it were the only one—would be a majority. There is no limitation as to the number of acts which may be submitted at an election, nor is there any limitation as to the number of acts dealing with the same subject which may be submitted. The enabling act and the amendment itself contain provisions dealing with this very contingency. Stock laws appear to have primacy in the matter of number as to questions voted upon in these local elections.

It is undisputed that the county clerk did not publish the notice required by law, and if that was not essential here, it will not be in other cases. It is true there were news comments in three newspapers published in Washington county, and one of these gave what purported to

be a synopsis of the entire act. But newspaper reports are not always accurate, and this is not the publicity which the law requires. There might be an election in which there was not even news comment in the county papers, and that omission, or lack of information, would be unimportant, as it is not required. If filing petitions sixty days before the election is not mandatory, there is no reason why petitions might not be filed ten days before the election, or within even a shorter time. If the sixty-day provision does not govern and is not mandatory, there is no other provision as to the time of filing which does. It must, therefore, be apparent that, if the beneficent purposes of the amendment are to be realized and much expense and hopeless confusion avoided, there must be some uniformity and certainty in its administration. This *ad hominem* argument, just made, may be excused only by saying that it is in answer to another of similar character. The point decided in this case is that the failure to file petitions prior to a date, which is as much as sixty days before the election, renders the election nugatory.

The state of Oregon was a pioneer in I. & R. legislation, and we are accustomed to look to the decisions of the Supreme Court of that state for the proper construction of legislation which has been borrowed from it. The case of *Marsden* v. *Harlocker,* 48 Ore. 90, 85 Pac. 328, decided by the Supreme Court of Oregon, goes further than we are required to go to hold mandatory the provision that the petitions must be filed within the time required by the Constitution. That case involved the validity of a local act which had received an affirmative vote, and it was there held (to quote a portion of a headnote) that "it is the duty of the county court, and not the clerk, to inspect the petition for an election and examine its records to ascertain whether it complies with §§ 1, 12, 14 and, if so, to order an election, which order is a condition precedent to a valid election, and there was no valid election where the members of the court did not meet, nor assemble, and make the proper investigations, but merely signed a memorandum purporting to authorize an election." A reluctance to unduly extend this opinion pre-

vents a review of the reasoning by which that conclusion was reached.

The case of *Board of Greeley County Commissioners* v. *Davis, Auditor,* 99 Kans. 1, 160 Pac. 581, involved the validity of a local act which had received an affirmative vote. The Supreme Court of Kansas held that the petition calling for the election was insufficient, a question which our own amendment precludes after a favorable vote. But absent that provision, in the laws of the state of Kansas, the Supreme Court of that state said: "No such petition was submitted, consequently the statutory basis on which the county board called the election was wanting. The election was therefore called without lawful authority, and its result is void." It was there further said: "We have sought diligently, but without avail, to escape this conclusion," as the necessity of a petition meeting the statutory requirements was a condition precedent to calling the election.

Appellees dismiss the case of *Southern Cities Distributing Co.* v. *Carter,* 184 Ark. 4, originally published in 41 S. W. (2d) 1085, republished in 44 S. W. (2d) 362, with the statement that "This case, like others cited by appellant, is not in point." We agree with this statement, and might, for the reason stated by counsel for appellees, omit comment upon it were we certain that all others reading it would reach the same conclusion. We, therefore, distinguish it in so far as it may be thought applicable to the instant case. That case arose upon a petition for a referendum on a resolution of a city council relating to rates to be charged by a utility company. The resolution in question was passed by the city council on May 30, 1930. Petition for a referendum was filed June 27, 1930, which was within thirty days after the passage of the resolution. The I. & R. amendment provides "* * * for a referendum petition at not less than thirty (30) nor more than ninety (90) days after the passage of such measure by a municipal council." Justice Kirby, speaking for the court, said: "This does not mean, of course, that the petition for a referendum cannot be filed less than 30 days after the passage of the measure sought to be referred, but only that the city must

allow at least 30 days after the passage of the measure for the filing of a referendum petition thereon, and cannot allow more than 90 days."

The city clerk, with whom the petition was filed, was not called to pass upon, and did not pass upon, the petition until "on the 31st day after the passage of the resolution as containing sufficient signatures of qualified electors to authorize the referendum, petitioned for." There, the petition remained and was on file on the 31st day after the passage of the resolution. It was there said: "Although filed before the expiration of the 30 days allowed, they remained on file with the proper officer, who duly certified the sufficiency thereof after examination made on the 31st day from the passage of the resolution, and were therefore in all respects as valid and effective as though they had been filed on the 30th day thereafter. It may be that, after the signing of the petition, and before the expiration of the 30 days allowed for the filing thereof, any person who chose to do so could have insisted upon his signature being withdrawn therefrom; but where such petition was filed on time, and after its sufficiency was duly certified by the proper officer, any such signature could not be withdrawn as a matter of personal preference, nor without a sufficient showing that such signature had been fraudulently obtained. It then became a matter of public concern and part of the procedure necessary to invoke the referendum * * *." In other words, the petitioners did not lose control of the petition until thirty days after the passage of the resolution, and any signer who chose to do so could withdraw his signature therefrom, but if he did not do so before the thirty days expired he could not thereafter change his mind and withdraw his signature except upon a showing that it had been fraudulently obtained. The filing was then final, and was so regarded by the city clerk, who did not attempt to pass upon the petition until the 31st day after the passage of the resolution. The reason for so holding was that a petitioner might desire to withdraw his signature, a right he could not exercise after the filing had become final on the 31st day after the passage of the resolution. It appears, therefore, that the provision

of the amendment, as to time for filing petition, was not considered as directory merely, but was regarded as having been complied with.

The proposition there involved is the converse of the question here at issue. Here, the petitions were not filed with the county clerk until within less than sixty days of the date of the election, and could not, therefore, be treated as filed until they had actually been deposited with their legal custodian. It may be said, in passing, that in this case of *Southern Cities Distributing Co.* v. *Carter, supra,* a referendum was compelled by mandamus.

The General Assembly, by act No. 4, *supra,* passed an enabling act to facilitate the operation of the amendment, as the amendment directed should be done. It contemplated the possibility of a contest of the submission of an act, and provided the time and manner in which this should be conducted, and time was allowed therefor by giving as much as sixty days before the election. This time was given by requiring the petitions to be filed not less than sixty days before the election. The act provides that the clerk shall have ten days in which to pass upon the sufficiency of the petitions. If he finds them insufficient, he shall give the petitioners ten days in which to amend or correct them. Thereafter the clerk has five days in which to determine their sufficiency after amendment and correction. Thereafter, any taxpayer has fifteen days in which to attack the petitions in the chancery court, and the chancellor has ten days in which to call a term of court to hear the case. In the remaining ten days the court passes upon the questions raised, and the ballots are prepared if the court holds the petition sufficient. In the meantime the county clerk is required to "give notice by publication for two weeks in some weekly newspaper in the county of *bona fide* circulation therein, that such act or measure will be submitted to the people at said election for adoption or rejection," and it is required that the notice shall "include a full text of the act and the ballot title." Expedition in these matters is contemplated within the respective periods of time limited, and it is, therefore, provided that 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 vote of the people."

It is, no doubt, true that cases may arise, and have arisen, in which the sufficiency of the petition may not be determined within sixty days after the petitions have been filed, in which event an affirmative vote adopts the act notwithstanding the fact that the petitions may have been insufficient.

This is not a case in which any presumption can be indulged to supply the omission to file the petitions not less than sixty days before the election. In this respect it is not unlike the case of *Booe* v. *Road Imp. Dist. No. 4 of Prairie County,* 141 Ark. 140, 216 S. W. 500. That case involved the validity of local acts passed at the special session of the General Assembly. The Constitution required—at the time when local bills might be passed by the General Assembly—that at least thirty days' notice be given of the intention to apply for passage of a bill of that character, and this provision was held to be mandatory. It has been consistently held, however, since the case of *Davis* v. *Gaines,* 48 Ark. 370, 3 S. W. 184, that a presumption should always be indulged in favor of the legality of legislative proceedings, and when the legislative records, of which the courts can take judicial notice, do not show to the contrary, the passage of a local act is conclusively presumed to have been in accordance with the constitutional requirement as to notice. On September 15, 1919, the Governor issued a proclamation calling the General Assembly to meet in extraordinary session on the 22nd day of September, 1919. The records of the General Assembly showed that it convened on that day and adjourned on the 1st day of October, 1919. At this extraordinary session local bills were passed, which were attacked as having been enacted without notice given as required by the Constitution. In defense of these acts it was insisted that the question, whether notice had been given, was one for the determination of the General Assembly itself, and that the passage of the acts concluded all inquiry into that subject, under the presumption that

the General Assembly had discharged its duty by ascertaining that the notice had been given. That contention was not sustained for the reason that it was a physical impossibility to have given thirty days' notice between the date of the proclamation convening the General Assembly in extraordinary session and the adjournment thereof.

So, here, the filing dates show the petitions were filed less than sixty days before the election and there can, therefore, be no presumption that the public had the notice of the proceeding which the Constitution contemplated and required. We conclude, therefore, that there was no authority for holding the election, and it is, therefore, a nullity.

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

GRIFFIN SMITH, C. J., HUMPHREYS and MEHAFFY, JJ., dissent.

GRIFFIN SMITH, C. J., (dissenting). This suit was brought in the Washington chancery court by appellant as "A resident, qualified elector, taxpayer, and patron of the schools." By the suit it is sought to enjoin county officers from carrying into effect Washington County Initiated Act No. 1, certified by the election commissioners as having been adopted by a vote of 3664 to 660.

It is alleged in the complaint and urged in appellant's brief that the act as proposed did not come within the purview of Amendment No. 7 to the Constitution of Arkansas because of certain claimed irregularities attending its initiation, the charges being (1) that the petitions of voters were not filed a maximum of sixty days before the general election of November 3, 1936; (2) that the petitions actually filed were not examined by the county clerk nor their sufficiency certified; (3) that the text of the measure was not published; (4) that no record of the adopted act was ever made by the county clerk; (5) that the election commissioners wrongfully placed the proposed act on the official ballots, and (6) even though it should be held that the act was legally adopted, it is in many specified respects violative of the state Con-

stitution, and is in conflict with general laws to such an extent as to render impracticable its enforcement with respect to those sections which may not be fatally out of harmony with general laws and the Constitution.

The following points are raised by appellant:

(1) Section 2 of the initiated act directs that the county and probate judge shall receive a salary of $3,000 per annum, inclusive of compensation for his services as road commissioner, one-half of which shall be payable from the county general fund, and one-half from the county road or highway fund. Appellant says these provisions are contrary to act 133 of 1931 which fixes the salaries of all the county judges in the state. By said act 133 the salary of the county judge of Washington county is fixed at $2,000 per year. It is also alleged that effect of the initiated act is to misappropriate county road funds received from the state by virtue of act 65 of 1929, as amended by act 63 of 1931, and as further amended by act 48 of 1933, by virtue of which the so-called county turnback fund was created. Appellants refer to act 280 of 1935, which appropriated the sum of $1,000,000 as county turnback funds for each year of the biennium ending July 1, 1937, contending that application of any of this money to payment of a part of the salary of the Washington county judge constitutes an unlawful diversion.

(2) It is next insisted that § 5 of the initiated act is an effort to amend § 4587 of Crawford & Moses' Digest, now § 5673 of Pope's Digest. The digest sections refer to an act of the General Assembly of 1875 fixing fees of sheriffs throughout the state.

(3) Other alleged irregularities are: § 6, fixing the salary of the sheriff as $2,000 per year and mileage of 5 cents per circular miles; actual expenses while on official business out of the state, and the further sum of one-half of all other fees as provided for in § 5 thereof; also $1,500 for a deputy;

Section 7 of the initiated act, fixing the salary of the tax collector at 1½ per cent. of collections, and ½ of 1 per cent. of penalties and fees attaching upon nonpayment of personal and property taxes, and making it man-

datory that security of $50,000 be given by a bonding company; section 8, limiting the salary of the tax assessor to $1,800 per year, with a deputy at $600 per year, and providing that funds received from the state on account of the assessor's salary should be credited to the county salary fund; section 9, fixing compensation of the county treasurer at $1,800 per year, with provisions for a bond of $50,000 to be executed by a bonding company; section 9, prohibiting employment by county officers of deputies related to such officers within the fourth degree of affinity or consanguinity; sections 12 and 13, directing the circuit clerk and the chancery clerk to make "flat" charges of $5 for filing suits; section 14, directing all county officers whose salaries are fixed by the act (except those receiving no fees) to charge and collect for the use and benefit of the county the same fees, costs, commissions, bequests and compensation "now or hereafter permitted by law to be charged by such officers for such services," and declaring all sums so earned to be a county fund; section 16, requiring county officers to keep public records as specified in the act and to make reports; section 18, allocating one-half of the net county salary fund ("except the *pro rata* proportions of the treasurer's and collector's offices taken from the school districts") to be transferred to the common school fund for apportionment and the remaining one-half to be transferred to the county general fund. These sections, it is contended by appellant, are all in conflict with the Constitution or with general laws of the state.

It is urged that § 7 attempts to amend act 85 of 1927, as amended by act 198 of 1928; that § 8 violates act 330 of 1935, which sets up certain classifications by grouping counties and thereby fixing salaries [In this classification Washington county is in group 7, whereby the assessor's salary is fixed at $2,400 per annum, with an allowance of $600 per year for one deputy]; and that § 9 is violative of act 85 of 1927, as amended by act 198 of 1929, creating a state board charged with the duty of passing upon the sufficiency of the bonds of county officers. Also, it is argued that § 10 violates the following sections of Crawford & Moses' Digest: Section 1370, authorizing circuit

clerks to appoint deputies; § 1402, authorizing county clerks to appoint deputies; § 1910, authorizing county treasurers to appoint deputies; § 1952, relating to the duty of county courts' purchase of land upon which to erect houses of correction; and § 10027, authorizing collectors to appoint deputies; that § 12 attempts to amend § 4573, Crawford & Moses' Digest, as amended by act 157 of 1933, fixing the fees of clerks of circuit courts; that § 13 seeks to amend § 4575, Crawford & Moses' Digest, as amended by act 157 of 1933, fixing fees of chancery clerks; that § 16 seeks to amend §§ 4633 and 4639, Crawford & Moses' Digest, the former relating to the keeping of records, and the latter relating to incomes.

The chancellor found that the proceedings were in the nature of an election contest; that as such the complaint was not filed within the time prescribed by law, and should be dismissed. He further found, however, that the requirement in § 2 that one-half of the salary of the county judge should be paid from the highway fund was void, and ordered such portion to be paid from the county general fund, or from the county salary fund.

The majority opinion quotes from *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. (2d) 485, where it was said: "It, therefore, appears that after a question has been 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." The opinion then contains this statement: "It will be observed that the question put beyond review after an affirmative vote has been had is that of the sufficiency of the petition. This question has not been raised, and is not involved in this litigation."

With this last sentence issue is taken. The majority opinion sets out the ground upon which the cause is reversed, saying: "This suit was not brought to contest the returns of the election or the certification of the vote upon the proposed measure. It is conceded that a large majority was cast in favor of the measure and that the

returns of this vote were properly certified. The objection made, among others, is that the submission of the question at the election was unauthorized * * * and that act No. 1, therefore, did not become a law, notwithstanding the favorable vote thereon."

The opinion then closes with this expression: "The filing dates show the petitions were filed less than sixty days before the election, and there can, therefore, be no presumption that the public had the notice of the proceedings as the Constitution contemplated and required. We conclude, therefore, that there was no authority for holding the election, and it is, therefore, a nullity."

Two propositions, and two only, are recognized in the majority opinion as authority for holding the act invalid: one, that the petitions were not filed within the time prescribed by law, and the other that there was not sufficient publication.

Admittedly the petitions, as filed, contained the requisite number of names of qualified voters. It is not insisted that the petitions would have been deficient if filed in a timely manner. There is no contention that the voters did not know what legislation was contemplated by the petitions, nor can it be said that there was any uncertainty as to the subject-matter. No complaint is made that publicity was not ample in so far as publicity related to the purpose to be served—that is, public information. It is only argued that there was a technical deviation from the letter of the law; and now, more than a year after submission of the issue and its adoption by a vote of 3,664 to 660—a majority of 3,004—the beneficent provisions of the act must be swept aside because of the conception that certain rights guaranteed under the Constitution, and by legislation enacted in aid thereof, have been denied.

But have these rights in fact been denied?

Amendment No. 7 to the Constitution provides that the sufficiency of a petition affecting county matters shall be decided in the first instance by the county clerk, subject to review by the chancery court, and "If the sufficiency of any petition is challenged, such cause shall be a preference cause and shall be tried at once, but 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. * * * All measures submitted to a vote of the people by petition under the provisions of this section shall be published as is now, or hereafter may be provided by law."

This amendment provides, also, that if the county clerk shall decide that any petition is insufficient, "He shall without delay notify the sponsors of such petition." Act No. 4 of the General Assembly of 1935, fixes a penalty to which the county clerk is subject if he fails to perform his duties with respect to initiated petitions. It also provides that the county clerk shall, within ten days, examine initiated petitions, "and if they are sufficient, he shall notify the election commissioners." It will be observed that the Constitution requires the clerk to immediately notify the sponsors of petitions if he finds them *insufficient*, while the legislative act provides that he shall notify the election commissioners if he finds them *sufficient*.

The record in the instant case does not show that the clerk, at any time, notified proponents of initiated act No. 1 that the petitions were insufficient. On the contrary, he seems to have ignored the entire transaction, both as to notification and as to publicity.

While it is true, as appellants contend, that amendment No. 7 contains a declaration that its provisions shall be treated as mandatory, it is equally true that the very situation with which we are now dealing was anticipated when the amendment was written, for the following wise provision was incorporated in the amendment: "If the sufficiency of any petition is challenged * * * failure of the courts to decide prior to the election as to the sufficiency of such petition shall not * * * militate against the validity of such measure if it shall have been approved by the people."

As far back as 1887—thirteen years after the Constitution of 1874 was adopted—this court held that "the

voice of the people is not to be rejected for a defect or want of notice, if they have in truth been called upon and have spoken." *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161. In that case the appellee had been elected in a special election to the office of circuit clerk of Lafayette county, and his right to take office was questioned. The law provided that notice of such election should be published in a newspaper in the county, and this was not done. The opinion says: "When a special election to fill a vacancy is ordered there is no presumption that the voters know the date fixed by the writ of election, and they must be informed of it. But the established rule is that the particular form and manner pointed out by the statute for giving notice is not essential. Actual notice to the great body of voters is sufficient. The question in such case is, whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise, to change the result of the election. * * * If the law were otherwise it would always be in the power of a ministerial officer by his malfeasance to prevent a legal election. When the election is legally ordered, and the electors are actually apprised of the time and place appointed for holding it, the misfeasance or nonfeasance of the officer upon whom the statute devolves the duty of giving the election notice, cannot deprive the electors of the right to express their will through the ballots. * * * It does not appear that any one was misled or deprived of his privilege of voting his choice through ignorance of the date of the election. The number of votes cast is as great in proportion to the aggregate vote as that ordinarily polled at special elections. No evidence suggesting even that a different result might have been reached was offered. Elections are not to be lightly set aside, though the law has not been strictly complied with. It is of the utmost importance that the public should have confidence in the administration of the election laws, and to know that the will of the majority, when fairly expressed, will be respected."

One of the contentions made in *Hildreth* v. *Taylor,* 117 Ark. 465, 175 S. W. 40, was that proposed amendment No. 14 to the Constitution was not legally adopted,

the proof being that notice of submission had not been given by advertisement in newspapers as provided by statute. The existing law required that the secretary of state should cause to be published in one newspaper in each county * * * for thirty days a true copy of the title and text of each measure to be submitted.

In an opinion written by Chief Justice McCulloch, this court said: "It is conceded that the terms of the statute were not literally complied with in this instance; that the secretary of state did not mail out the copies for publication until May 25, 1914, and that only in two counties were the publications made before the first Monday in June, in the other counties the publication being from three to thirteen days late. * * * This court is committed to the rule, which is in accordance with the great weight of authority, that, so far as concerns election of officers, the failure to perform any duty, such as giving notice, does not deprive the electors of the right to choose their public officials. * * * A literal compliance is not required, and a failure to publish the notice within the time specified does not of itself prevent the people from adopting a measure at an election as specified in the Constitution. In order to defeat the submission, it must at least be shown that the omission to publish amounted to such a radical disregard of the requirements imposed by the legislature that it probably affected the result of the election. * * * It would be disastrous to hold that a statute or amendment to the Constitution could be defeated by showing that the publication in fact was not made in accordance with the specified terms."

In *Shephard* v. *McDonald,* 188 Ark. 124, 64 S. W. (2d) 559, it was said: "The action of the secretary of state in passing upon the sufficiency of a petition may be reviewed at any time, but if the sufficiency of such petition is being reviewed at the time the ballot is being prepared, the secretary of state shall place the measure on the ballot, and no subsequent decision shall invalidate such measure if it is at such election approved by a majority of the votes cast thereon. That is, no subsequent decision of the court reviewing the action of the secretary of state in passing upon the sufficiency of the petition

shall invalidate the measure. When approved by the electors, it becomes a law, subject to the same rules of construction and interpretation as an act of the legislature." The opinion further held that if it should be determined that the petition and ballot title are insufficient, the secretary of state could be restrained from certifying out to the election officials of the several counties of the state such defective ballot title.

In *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. (2d) 248, in considering an initiated county salary act, we said: "The amendment provides for advertisement or publication—that 'all measures submitted to the vote of the people by petition under the provisions of this section shall be published as is now or hereafter may be provided by law.' But it was not intended that the officer to whom the petition was submitted should have entire or exclusive control of the petition, but remedies were provided whereby such petitions could be brought before the electors of the next general election. Having in mind these and other provisions of amendment No. 7, it becomes apparent that a liberal construction, or interpretation in order to make effectual the purposes intended, is required."

Hutto v. *Rogers,* 191 Ark. 787, 88 S. W. (2d) 68, is in point. There it was held that the chancery court did not have jurisdiction to try a suit instituted after an election to determine whether a locally initiated measure relative to salaries of county officers had been legally adopted, "since amendment No. 7 to the Constitution confers jurisdiction on the chancery court only to review the action of the county clerk in determining the sufficiency of a petition for initiating a local law." The court further said: "It is true that it is alleged that the first certificate issued by the county clerk was valid and his second certificate was void. Had the latter certificate been challenged before the election, the chancery court would have had jurisdiction to review the action of the county clerk relative thereto. * * * The sufficiency of the petition was a moot question when the suit was filed."

The same controversy involved in *Hutto* v. *Rogers,* referred to *supra,* was up for consideration in June, 1936,

in a cause entitled *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. (2d) 485. After quoting that part of amendment No. 7 which provides that failure of the court to decide prior to an election as to the sufficiency of any such petition shall not prevent the question from being placed on the ballot, nor militate against the validity of such measure if it shall have been approved by a vote of the people, this unequivocal declaration of the law is found:

"It, therefore, appears that after a question has been 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."

It is insisted, however, that sufficiency of the petition has not been raised, and is not involved in the litigation. With due respect to the view so expressed, I must plead my utter inability to comprehend how this can be said, when the result is a holding that the act is void because there was no authority for its submission. To reach this conclusion it is necessary to prove such lack of authority by a showing that the petitions were ineffectual because filed too late, and because the text of the act was not published on order of the county clerk.

There is a maxim in geometry that things equal to the same thing are equal to each other. It is pertinent to this discussion. If there were no authority for holding the election, as the majority opinion holds, the lack of authority arose through tardiness in filing the petitions, and through failure to publish the text of the initiated measure. That amendment No. 7 provides that after a proposed law has been voted upon and adopted by the people, petition irregularities are of no importance, and shall not militate against validity of the act, is not open to contradiction or further construction, under previous decisions of this court. In effect, the majority opinion holds that the words "sufficiency of the petition," as used in amendment No. 7, have reference only to the number of persons signing such petition, or the legal status of the signators; and that other vices, such as procrastination with respect to time of filing, or

irregularities in publication, do not go to the sufficiency of the petition, but are separate and distinct transactions which must be summarily dealt with in the sense that they are mandatory and cannot be cured by a purging at the polls. But the amendment in no sense distinguishes between irregularities which may be reached by mandamus or injunction before an election, but which, if ignored, may be sifted from other and more serious deficiencies and treated as directory, the omission to respect which would not render the adopted measure invalid.

The suggestion may be reasonably advanced that no such classification was made in the amendment, for the reason that "sufficiency of the petition" is a term broad enough to embrace all matters of irregularity susceptible of affecting the petition, such as the number of persons who subscribed thereto, the legal status of such signators, the time the petition was filed, action of the county clerk thereon, publication, and certification to the election commissioners. Any attempt by judicial interpretation to differentiate between these several transactions which, prior to adoption of a measure by vote of the people would have been conditions precedent and therefore mandatory, is foreclosed by former decisions of this court. Any argument that a petition filed by less than the requisite number of voters would be valid after a favorable submission, while an otherwise valid petition filed less than sixty days prior to an election would be a nullity, even though the measure should be overwhelmingly adopted, is obviously untenable. Such an involved and complicated theory would appeal only to minds so highly developed and so technically trained in word analysis and constitutional construction as to suggest the possibility that philosophy had been mistaken for logic to the utter annihilation of the latter.

The majority opinion correctly holds that the county salary act, if it had been submitted and adopted, would not be defective because of provisions in conflict with compensation laws passed by the General Assembly. That objection has been answered in other cases.

If there were any contention that the salary act voted on by the people of Washington county differed in any

material respect from the text of the measure as reflected by the petition, then there might be some ground for the objections urged by appellant. But that is not the case. If it had been charged that the people were taken unaware, and that by connivance and deceit a vicious law had been fraudulently foisted upon the county, the appellant would have been entitled to relief for the benefit of all taxpayers. But when a majority of more than three thousand voters show by their actions that they thoroughly understood the nature of the business in hand and so overwhelmingly enact a law designed to put the county on a cash basis by savings amounting to thousands of dollars annually, it is farcical to even suggest by way of courteous conversation that this is a suit to restrain the defendants as county officers from diverting public funds and exacting illegal fees. Rather, the suit should have been entitled, "A legal move to defeat the will of the people of Washington county by destroying an economy measure and restoring extravagant and chaotic conditions heretofore existing, and in pursuance of such purpose to emasculate amendment No. 7."

I am authorized to say that Justices HUMPHREYS and MEHAFFY agree to this dissenting opinion.

ABRAMSON *v.* FRANKS.

4-4800

Opinion delivered November 8, 1937.

Lee & Moore, for appellants.

Hal P. Smith and *K. T. Sutton,* for appellees.

GRIFFIN SMITH, C. J. About 1923 the First National Bank of Holly Grove was chartered. It functioned successfully under federal supervision until January 8, 1931, with Rue Abramson, one of the appellants herein, as its president and largest individual stockholder. On January 9, 1931, the bank failed to open. Its affairs were thereupon administered by John M. Riley as receiver until June 16, 1931. It then reopened under authority of the comptroller of the currency and continued to function until March, 1933, at which time President Roosevelt proclaimed a moratorium. Thereafter its business was liquidated under federal administration.

Although appellees' suits were filed against Rue Abramson, and R. Abramson & Co., Incorporated, the evidence is not sufficiently clear to distinguish between the financial interests of Rue Abramson and the appellant corporation. It is shown, however, that prior to the time the bank closed in 1931, Abramson and the corporation and the immediate members of Abramson's family owned $17,500 of the $25,000 capital stock of the bank.

During the receivership period from January 9 to June 16, 1931, Abramson took the initiative in working out plans for reorganization. He seems to have had the full co-operation of John M. Riley, for it is apparent that the receiver, after familiarizing himself with the bank's affairs, came to the conclusion that its impairment did not exceed the capital stock plus $12,500 in questionable notes, or a total of $37,500.

Stockholders of the bank, in pursuance of the plan to reorganize, submitted to a voluntary assessment equal to the face value of their stock holdings, and of this

amount so paid in appellants accounted for $17,500. In addition, they absorbed and paid to the bank $9,750 of the $12,500 in charged-off notes. Abramson testified that he made further payments of $3,000, or a total of $30,250. Other stockholders met voluntary assessments sufficient to bring the total of new money up to $37,500. In view of this showing the comptroller of the currency ordered or permitted the bank to resume business. In the meantime, and as a condition precedent to approval by the comptroller, depositors had executed written agreements to accept payment of their balances in four installments of 25 per cent. each, without interest, the first payment to be made when the bank opened, and the other installments in 6, 12 and 18 months.

Sale of the notes aggregating $12,500 was made upon order of Chancellor A. L. Hutchins, acting in consequence of a petition filed by the receiver.

Among the officers and directors of the bank who receipted the receiver for assets when the reorganization was consummated were Rue Abramson, president, and P. M. Dearing, cashier. Dearing served as conservator under the receiver, and was re-elected cashier when the rehabilitated bank resumed business.

On August 24, 1935, G. L. Franks, one of the appellees herein, filed suit against appellants, alleging that by reason of the fraudulent representations made by the appellant Rue Abramson, he had been induced to buy two shares of stock in the First National Bank of Holly Grove, such shares being of the par value of $100; also, that J. B. Johnson, who similarly purchased four shares of stock; A. B. Walls, Jr., who purchased one share; and Cornelius Archer, who purchased three shares, had, prior to the filing of suit, and for a valuable consideration, assigned to him all of their interests for damages arising out of such fraudulent transactions with Abramson. It was alleged by way of damages that each had been assessed an amount equal to the face value of the stock so held, amounting in the aggregate to $1,000, and in addition they suffered loss of the purchase price of the stock. Appellees Franks and Archer

alleged that they had borrowed the sums of $200 and $300, respectively, from Rue Abramson with which to purchase the stock, and had executed to Abramson their promissory notes at eight per cent. with the stock attached as collateral. Of the $200 so borrowed by Franks, he alleged that $57.20 had been repaid, and that a payment of $18 in interest had been made. He also had paid the assessment of $200. Archer had paid an assessment of $300, but had not paid his note or the interest, nor is it shown that assessments levied against Johnson and Walls had been paid. Bonner paid his assessment, with interest of $18.33. He also had borrowed $1,000 from Abramson with which to purchase ten shares of stock, and had executed his note at 8 per cent. Two interest payments had been met, one for $80, and one for $160. Bonner's damages were laid at $1,258.33. With respect to each appellee, there was a prayer that the notes given Abramson be canceled. The assignments alleged to have been executed by Archer, Walls, and Johnson, in favor of Franks, were dated August 20, 1935. Bonner's complaint was filed October 26, 1935.

T. W. Bonner testified that he began doing business with the First National Bank in 1926, by borrowing $3,000; that in 1929 he borrowed $7,000, and repaid it, but when the bank failed in 1931 he owed a note of $2,000. In substance, Mr. Bonner said: "Because of my dealings with Mr. Abramson, I had implicit confidence in him, in his honesty and integrity. In the spring of 1931 he approached me on the proposition of selling me some bank stock. P. M. Dearing, cashier, also talked with me on the same subject. Mr. Abramson told me they had a new bank and wanted to get some new stockholders. They wanted me to take some stock, and said they would make me a director in the bank—said they would make a big man out of me. They made a trip over to my store at Blackton to see me about it. Mr. Abramson told me the bank had good money in it and that they could pay the depositors any time they walked up and wanted their money. They told me they were issu-

ing new stock. He did not tell me that they were going to cancel out the old stock and issue new stock. What he said was that it was a new bank and had plenty of money in it. I did not know until six months ago that a chancery court order had been issued for the purpose of rehabilitating the bank. I agreed to purchase $1,000 of stock in the new bank—the stock he wanted to sell me. I told him I didn't have any money, and he told me I didn't need any; that he would put up the money and hold the stock as security on my note. He kept the stock about six months, and one day I got it. It wasn't signed, so I signed it and sent it back to him. I have not paid the note, but did make two interest payments, one of $80 on December 19, 1931, and one of $160 on December 3, 1932. Later, when the bank failed, I was sued on a stock assessment, and paid the receiver $1,018.33, which included interest. Altogether, I paid out $1,258.33."

The appellee, G. L. Franks, testifying in his own behalf, told of conversations with Rue Abramson, saying: "He told me that the bank had made several thousand dollars, and that he would like to sell me a little bank stock to open up a new bank, and was going to do new business, and wanted to get new members and start a new outfit. I told him that I didn't have the money to put in the bank, that it would take all I had to carry on my business. He said, 'Don't worry about that—just give me your note and pay it when you feel like it; you can pay me eight per cent.' I told him I wasn't able to do that, and he named over several people who were going to buy some stock. He said: 'I will take your note, and any time you feel like you can't pay it off, I will take it over and cancel it.' About six months later I got notice that $16 was due in interest on the note for $200 I gave him, and I paid it. Later I got another notice, and I paid that. Then, later on, I went to him and told him I wasn't able to carry the debt, and he said 'all right,' so I thought he was supposed to cancel it like he said he would do. He went over and did something about the books and I did not think

any more about it until the bank closed and they notified me that I was one of the stockholders. I did not attend any meetings and did not qualify as a stockholder. I asked them what they meant, so he kinda laughed and said, 'That's some old stock they are trying to put off on you.' I did not receive any stock or anything from the bank. I paid the interest twice, and that's all I know about it. I signed the stub at the bank receipting for the stock certificate."

C. Archer, one of the appellees, testified substantially as follows: "I live seven miles southeast of Holly Grove, and did business with the First National Bank prior to 1931. I made a deal with Mr. Abramson to purchase some bank stock—it was supposed to have been stock in a new bank. I purchased $300 worth of the stock. Mr. Abramson and Mr. Dearing both talked with me about it. Mr. Abramson said they wanted a lot of small stockholders; wanted them scattered over a large area; said he didn't want the bank controlled by large stockholders. I told him I wasn't able to pay and he told me not to worry about the money, that he would lend it to me, take my note, and sell me the stock in this bank—a new bank. He told me that the officers would all be new officers, and that it would be a new bank. I gave him my note and he kept the stock as security. The note has never been presented to me, and I have not paid it. He has never made any effort to collect it. I bought the stock upon his representations, and was sued on an assessment."

Although on direct examination Archer testified that after executing and delivering his note to Abramson no further communication on the subject was ever had, he admitted, on cross-examination, that he did receive a notice from Abramson dated December 1, 1931. It was returned to Abramson with a letter in which he said: "This inclosed statement: I can't see how I can raise this amount at all. I will not get out of debt, and have some notes that I can't meet at all. If it will be possible, I wish you would get some one else to take this, as I can't possibly see my way out of debt." On January

5, 1932, in response to this letter, Abramson testified that he wrote: "I received your letter some days ago regarding the bank stock, and it will be satisfactory to carry the amount for you until a later date. All we ask is that you send us a check for the interest figured below." Archer also testified: "I told Abramson when I gave him the note that I couldn't tell about it until I saw what my crop would do. I told him if I didn't make any crop I wouldn't be able to take care of it. He said, 'That will be all right; I will take it off your hands if you can't take care of it.' He said he would get it transferred to some one else if he didn't get it [the bank] back on foot."

Testimony given by Abramson was in direct conflict with the material statements made by appellees. He denied having gone to Blackton to see Bonner; denied soliciting Bonner or either of the other appellees to purchase stock, and denied that he told either of them that the certificates sold to them represented stock in a new bank. He contended that the appellees knew, as everyone else in the neighborhood knew, that the Old First National Bank was being and had been reorganized.

J. W. Watson, now receiver for the bank, testified that he was sure that when liquidation was completed, depositors would have received 100 per cent. of the amounts due them, without interest.

It was shown by testimony, and by admissions of appellees, that with respect to deposits in the bank standing to their several credits prior to January 9, 1931, each had signed an agreement that time of payment should be extended. Franks was in the grocery business in Holly Grove, located near the bank. He stated on cross-examination that the only fraudulent representation made to him by Abramson was that it was a new bank, and Abramson wanted to take in some new members—young folks. This is also the gravamen of the charges made by Archer and Bonner. There is the added allegation by Franks that Abramson agreed, if so requested, to take the stock back and surrender the note. On the question of fraud, however, each charge is founded upon

the allegation that appellees were not familiar with the banking business; that they had no information with reference to the condition of the First National Bank; that they had known Abramson for many years; that his reputation for honesty and integrity was good; that because of his reputation and their knowledge of him as a man, they fully trusted him, to their injury.

Four separate fraudulent charges are urged by appellees, as follows:

(1) That Rue Abramson falsely represented to T. W. Bonner, G. L. Franks and C. Archer that a new bank was being organized, when as a matter of fact he merely sold them old stock, which he had owned many years, in an old institution, which had been forced to suspend business a very short time prior thereto; (2) That he falsely represented to them that there would be new officers and a "new outfit;" (3) That he falsely represented to them that the new bank had resources sufficient to pay all depositors "any time they wanted their money;" (4) That he fraudulently and deceitfully concealed from appellees that it was merely a rehabilitated bank in which he was selling them some of his old stock.

The allegation that appellant Abramson represented to appellees that there would be new officers in the bank, and that the new bank had resources sufficient to pay all depositors at any time they wanted their money, may be summarily dismissed. Abramson did not guarantee the election of new officers. The most that can be said of this statement is that it was the expression of an opinion, or a belief, as to something contemplated in the future. Furthermore, it is not in evidence that appellees suffered any injury through failure of the bank to elect new officers. That the bank closed by order of the President of the United States more than twenty months after opening, and that it was not subsequently able to function, is no proof that under a different management the unfortunate situation would have been avoided. In fact, all national banks closed in response to a similar order, irrespective of their solvency or insolvency.

Whether the Holly Grove bank, new or reorganized, had sufficient resources to pay all depositors "any time they wanted their money" is a question not now susceptible of determination. Proof cannot be supplied to show at what period, between June 16, 1931, and March 3, 1933, any particular depositor who had money in the bank on June 16, 1931, would have failed on demand to have received it, and it will not be presumed that Mr. Abramson meant, by his statement, to warrant that the bank's affairs were sufficiently liquid to permit every depositor to walk up to the cashier, row on row, and receipt for all balances.

Bonner's stock was bought July 7, 1931. Franks acquired his certificate June 15, 1931, and Archer's purchase was made August 22, 1931. With respect to the dates of the purchases made by Bonner and Archer, the bank had been opened and was in operation. Franks' certificate was acquired the day before the bank opened.

In a small community, such as Holly Grove, where personal contacts are frequent and important news makes its round or circuit by word of mouth in a comparatively short period of time, it is incredible that anyone could or would believe, after executing written agreements permitting the old First National Bank to reopen on a basis which promised repayment of deposits over a period of eighteen months, and after such bank had reopened and had become a going concern, that there were two First National Banks in Holly Grove, one in an insolvent or quasi-insolvent condition, benefiting by the indulgence of time given on the old deposits, and the other a new institution, wholly disassociated from the former organization, with new capital—an entity unto itself. Admitting that Rue Abramson did say that a new bank was being organized; allowing that he said new officers would be elected and new stockholders would appear; granting that he represented that cash resources of the new bank were sufficient to pay all depositors as demanded; still, these statements had reference to the time the bank opened for business on June 16. Appellees will be charged with notice that, with but slight

changes in personnel, the same official group continued to operate the bank, and they are bound to have known that the bank's business was done in the same building, with the same stationery and checks, just as business had been done in the past. Successively, statements were required to be published in one newspaper in the county on call of the comptroller of the currency, and condition of the bank was publicized.

After acquiring their stock, these appellees had a right to examine the bank's books, and were afforded opportunity to inform themselves as to conditions. Indeed, Bonner was made a director, and his name appears as one appointed to make an annual audit by counting the cash, listing the notes, and in other respects compiling information as to the bank's condition and subscribing to his findings. He became one of the agents of the bank whose business it was to pass upon loans, and it was his duty to be informed as to all material transactions.

The "Argus" and the Monroe County "Sun," published at Brinkley, and the "Commercial," published at Pine Bluff, contained news accounts of the bank's reorganization. Rehabilitation of the institution was referred to as "one of the outstanding pieces of bank financing of the year in Arkansas," and Abramson was praised for the work he had done. These news items stated that the bank had reopened under its old charter, and that during the first day the ratio of deposits to withdrawals was six to one in favor of deposits; also, that over a three-day period deposits exceeded withdrawals by ten to one.

Appellees testified that in spite of their acts in signing extension agreements as to their deposits; in spite of the publicity given the reorganized bank; in spite of the fact that they signed receipts for the stock certificates and reassigned the certificates to Abramson; in spite of all the acts and dealings and transactions and circumstances showing a reorganization of the old First National Bank, they still relied upon the statements made by Abramson before and near the date of open-

ing that the bank would be new, with new officers and a younger personnel.

It is possible they did not, at the time the deals were consummated, in June, 1931, fully understand the nature of the business, and their beliefs may have been that a new bank was being organized, or had been created. But after they had applied to this same bank for first payments on their deposits, and after waiting six months and receiving a second dividend, they were then charged with notice of the true situation, and should have proceeded, in a timely manner, to assert their several grievances. Yet when a presidential proclamation has intervened to affect the status of the bank; after control of its affairs has been taken from appellants by processes over which they had no control; after its stability suffered destruction because of the unfortunate instability of those to whom its resources had been loaned, these appellees will not be heard to say that they are not charged with a knowledge they must have possessed. It is a knowledge which the nature of their transactions, the situation of appellees, and their relation to the bank, must have imparted. It is a knowledge with which they will be constructively charged, even though they may now insist, after four years, that they were not conscious of it.

Although Archer's stock was purchased August 22, 1931—two months and four days after the bank had reopened as a reorganized institution—this appellee, in the complaint filed four years later by Franks on authority of the assignment of the same date, says that he knew nothing of the reorganization, and that he relied upon Abramson's representations that stock was being issued in a new bank. This allegation is contradicted by Archer's own statement that Abramson promised to take the stock back "If he didn't get it back on its feet." "It," as used by Archer, could have reference only to the bank, and such testimony shows conclusively that Archer knew, as early as January 5, 1932, that the so-called new bank was a myth.

Cross-complaints were filed by appellants against Bonner, Franks, and Archer, with prayers for judgments on the several notes. The jury found for appellees in the following sums: G. L. Franks, $258.12; T. W. Bonner, $1,120; C. Archer, $300. Verdicts on the cross-complaint were in favor of appellees. Judgments were rendered for appellees for the amounts indicated by the verdicts, and the court ordered the notes surrendered for cancellation.

The judgments are reversed on the ground that more than three years elapsed between the time the alleged frauds were discovered and the filing of the complaints.

The cause of action alleged by appellees by reason of payments made on stock assessments or liabilities thereon are dismissed. Judgment is given here against the appellee Archer on the note executed by him for $300, with interest from date. As to the appellees Bonner and Franks, the causes alleged in the cross-complaints are remanded with directions that proper credits be ascertained and given, and that upon such determination appellants have judgments for the amounts so found to be due.

SOUTHWESTERN TRANSPORTATION COMPANY *v.* POYE.

4-4812

Opinion delivered November 15, 1937.

Gaughan, Sifford, Godwin & Gaughan, for appellant.

U. J. Cone, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant, a common carrier, to recover $291.50, the value of baggage delivered by him to appellant, on July 23, 1932, for transportation from Pine Bluff to New York City, alleging that appellant failed to deliver the baggage to him upon his arrival in New York or thereafter; that a baggage check was issued to him by the agent of appellant at Pine Bluff when he purchased a ticket from appellant for transportation as a passenger on its bus line and connecting carrier lines from Pine Bluff to New York City.

Appellant filed an answer denying the allegations of the complaint and pleading as additional defenses that the ticket was purchased at a reduced rate and subject to restrictions exempting it from liability if the baggage was lost by a connecting carrier; and, if lost by appellant, to a sum under its contract and under Rule 8 of the Corporation Commission of Arkansas not exceeding $25, and in any event, under Rule 12 of said Corporation Commission in a sum not to exceed $225.

The cause was submitted to the court sitting as a jury with the result that judgment was rendered against appellant in favor of appellee for the sum of $285.50 with interest at 6 per cent. per annum from August 1, 1932, aggregating $365.50.

Sections 924 and 969-70 of Crawford & Moses' Digest provide that common carriers receiving property to be transported from place to place within or without the state and, who issue bills of lading or receipts therefor in this state, shall be liable for any loss or damage or in-

jury to said property, caused by its negligence or the negligence of any other common carrier to which any of such property may pass, and shall have recourse on the carrier causing the loss, and requires carriers of passengers in this state to transport and carry the baggage of said passengers and deliver same in good condition with due diligence to such passengers' destination, and in case of a failure to do so, that such carrier shall be liable for the actual damages.

The facts in the instant case are undisputed and are as follows: Appellant issued to the appellee a through bus ticket from Pine Bluff to New York City, and at the same time issued to him a check for his baggage through from Pine Bluff to New York City. His baggage was delivered by appellant to a connecting carrier at Memphis, Tennessee, and all trace of it was lost after it left Bristol, Virginia, and was never delivered to appellee. The actual value of the baggage was $285.50. There was a provision printed in the ticket that appellant was acting as agent only of connecting carriers, and also a printed provision in the ticket and on the back of the baggage check limiting the liability of appellant in case of loss to $25. The Corporation Commission of the state of Arkansas adopted a rule limiting the liability of carriers to $25 in case of loss and in no event for more than $225. There also appeared in the ticket the words "reduced rate." The agent selling the ticket testified that everyone buying tickets paid the same rate and that appellant sold no tickets at reduced rates. He, also, testified that he did not call appellee's attention to the provisions limiting appellant's liabilities nor to the rules promulgated by the Corporation Commission. Appellee testified that he did not read the provisions in the ticket or on the back of the baggage check and had no knowledge of the rules promulgated by the Corporation Commission.

Prior to the passage of the sections of Crawford & Moses' Digest referred to above, which statutes were made the basis of this suit, this court adopted the English doctrine making the initial carrier liable to destina-

tion in the absence of an express contract to the contrary in the case of *K. C., Ft. S. & Memphis R. Co.* v. *Washington,* 74 Ark. 9, 85 S. W. 406, 69 L. R. A. 65, 109 Am. St. Rep. 61. This doctrine was reiterated and approved in the case of *Little Rock & H. S. W. R. Co.* v. *Record,* 74 Ark. 125, 85 S. W. 421, 109 Am. St. Rep. 67, wherein it was said:

"In the absence of an express contract to the contrary the initial carrier is liable to a passenger for the loss of baggage if the carrier sold the passenger a through ticket and checked his baggage through to the point of destination, although the loss occurred on the line of some connecting carrier."

"An express contract is one where the intention of the parties and the terms of the agreement are declared or expressed by the parties, in writing or orally, at the time it is entered into." 13 C. J. 240.

Even before the adoption of the statutes under which this suit was brought, appellant could not limit its statutory liability as to damages, or as an initial carrier even by an express contract unless supported by a consideration such as a reduction in the fare. There was no reduction in the fare to appellee. He paid the full fare and only fare in existence for the transportation of himself and his baggage from Pine Bluff to New York City. If there had been two fares in existence, one without limitations as to liability, and a reduced fare with limitations as to liability the carrier would have been compelled to show then that it gave an option to the passenger to accept either the one or the other and that the passenger accepted the contract containing the limitations as to liability which provided for a reduced rate. Appellant did not do this for the evidence shows that it did not have any tickets to sell at a reduced rate. This court said in the case of *Railway Co.* v. *Cravens*, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230, that (quoting syllabus):

"A carrier cannot by special contract limit its common law liability for losses not occasioned by its negligence where it does not afford the shipper an opportu-

nity to contract for the service required without such restriction; and it is immaterial that the shipper knowingly accepted a bill of lading containing such restriction, without demanding a different contract, if he knew that the carrier's agent had no authority to make any other contract with him," and also said in the case of *Railway Co.* v. *Spann,* 57 Ark. 127, 20 S. W. 914, that (quoting syllabus number 1):

"Limitations upon the common law liability of a carrier, contained in a bill of lading for the shipment of live stock, are unreasonable and void, notwithstanding it is recited therein that the limitations were agreed to by the shipper in consideration of a reduced rate, if the carrier's rules, printed upon the bill of lading, would not have permitted the live stock to be shipped unless the shipper accepted the bill of lading with its limitations" and we also said in the case of *St. Louis & San Francisco Ry. Co.* v. *Wells,* 81 Ark. 469, 99 S. W. 534, that (quoting syllabus number 1):

"A carrier cannot by special contract limit its common law liability for losses not occasioned by its own negligence where it does not afford the shipper an opportunity to contract for the services required without such restriction."

The statutes under which this suit was brought reenacted the rule at common law relative to initial and connecting carriers.

Appellant contends that it is relieved of liability on account of the rule adopted by the Corporation Commission of the state restricting its liability, but this is not true for the reason that it has no power or authority to change the statutory rule fixing the carrier's liability at the actual value of the baggage.

No error appearing, the judgment is affirmed.

PYRAMID LIFE INSURANCE COMPANY *v.* PATTEN.

4-4804

Opinion delivered November 15, 1937.

H. B. Stubblefield and *Verne McMillen,* for appellants.

E. F. McFaddin, for appellees.

BUTLER, J. This appeal comes from a judgment of the Hempstead county circuit court in the sum of $1,000 in favor of the appellees, beneficiaries in a policy of insurance for that amount issued to Albert B. Patten, Jr., who died March 11, 1936. The appellant, in its answer, pleaded the provision of the policy to the effect that premiums might be paid in semi-annual or quarterly installments in advance, but that the payment of any premium or installment thereof should not maintain the policy in force beyond the date when the next premium or installment became payable, and that a grace of thirty-one days is granted from the payment of every premium or installment thereof after the first premium, during which the policy is in force; and, upon the further provision that upon a default in the payment of any premium the policy shall be null and void. The appellant alleged as a defense that the insured did not pay the annual pre-

mium at the time the policy was issued, but elected to pay it in quarterly installments; that he paid the first quarterly premium, but failed and refused to pay any premium thereafter, and that said policy lapsed for nonpayment of premiums thirty-one days after the 13th day of July, 1935.

The case was submitted upon the policy, certain stipulations, and the evidence of A. B. Patten, one of the beneficiaries, Miss Dove Knott and Jack Clark, and certain letters and documents. At the close of the evidence both sides asked for a directed verdict. The trial court directed the jury to return a verdict for the plaintiff for the face of the policy and to assess a twelve per cent. penalty, $150 attorney's fee and costs. As both litigants asked for an instructed verdict, the action of the lower court in directing a verdict for the plaintiff will be sustained if there appears to be any substantial evidence to support it.

The evidence, viewed in the light most favorable to the appellee, with the reasonable inferences to be drawn therefrom, presents the following state of case: Jack Clark was the general agent of the appellant company for several counties in southwestern Arkansas, including Hempstead, wherein this transaction occurred. Miss Dove Knott was a special or sub-agent employed by Clark to solicit insurance and take applications for policies. On April 5, 1935, the said general and special agents solicited and took the application of Albert B. Patten, Jr., son of appellees, for an insurance policy. In this application the method for the payment of the premiums in quarterly installments of $5.85 each was selected. It was signed by Albert B. Patten, Jr., and attested by the general agent, Clark, and the sub-agent, Miss Knott. Eighty-five per cent. of the premium for the first year was due by the company to the agents as their commission, seventy per cent. to the soliciting agent and fifteen per cent. to the general agent. At the time the application was taken it was agreed that the first quarterly premium payment, or so much thereof as was necessary, would be paid to the insurance company less agents commission for the net sum due it for the first year, and that the insured might

discharge the remainder of the premium in services rendered by assisting the agents in procuring other policies.

The policy applied for was issued under date of April 18, 1935. It was delivered to the insured by Clark, the general agent, who received from the insured the sum of $5.85 and of this sum transmitted to the appellant company a sum sufficient to cover its net annual due on this policy. The result of this agreement and transaction was to pay to the appellant company the entire amount of the premium due it for a full year from April 18, 1935, which, the appellees contend, gave full force and effect to the policy at the time of the death of the insured on March 11, 1936.

The appellant first contends that the oral agreement violated the provisions of § 10 of act No. 493 of the Acts of 1921 and avoided the policy and relies on the case of *United Order of Good Samaritans* v. *Meekins*, 155 Ark. 407, 244 S. W. 439, to support this view. The act, in substance, provides that it shall be unlawful for any life insurance company to discriminate between individuals of the same class in the amount of payment of premiums, etc., or to make any contract except as plainly expressed in the policy of insurance, or for any company or agent thereof to pay, or offer to pay directly or indirectly as an inducement to insurance, any rebate of premiums on the policy of insurance or any other thing of value not specified in the policy contract. As a penalty for the violation of the statute, it is provided that the company or agent offending shall be deemed guilty of a misdemeanor and, upon conviction, be fined in a sum named, and that the Commissioner of Insurance shall cancel the right of the company, if the act of its officer or agent was authorized, to transact business in this state for a period of one year.

The statute, *supra*, does not appear to be aimed at those receiving life insurance policies, but rather against companies and their agents. It does not prohibit any person from receiving a rebate, and it does not declare any policy to be void where a rebate is given or accepted. It does prescribe the penalty for the violation of the law, and, under ordinary rules of construction, such penalty

is exclusive. To give to the statute the effect contended for by appellant would be to enable it to take advantage of its own wrong. As pointed out by the Supreme Court of Alabama in *Meridian Life Ins. Co.* v. *Dean,* 182 Ala. 127, 62 So. 92, "It (the insurance company) can collect the premiums on policies for years, less whatever rebate it sees fit to allow, being careful not to allow the same rebate to all, keep all the premiums paid, and escape all liability for loss by setting up that it had violated the law."

In Couch's Ency. of Insurance Law, § 586, it is stated: "* * * the great weight of authority is to the effect that the insurance company itself cannot be heard to say that the contract of insurance is void because of a violation of the anti-rebate statute, for the purpose of defeating the insured, and thus taking advantage of its own wrong."

Unless a statute prohibits the insured from receiving a rebate and denounces a penalty for its violation, it clearly appears that such statute is designed to regulate insurance companies and not to punish the public who deals with them. In the statute under consideration, no reference is made to the insured, no provision is made for avoiding the policy, and it is clearly not the legislative intent that violations of the rebate law do more than inflict the punishment named therein. The case of *United Order of Good Samaritans* v. *Meekins, supra,* dealt with an entirely different and unrelated act. (Crawford & Moses' Digest, § 6075.) This is a part of the law relating to fraternal benefit societies and prescribes the ages of persons who may be admitted for beneficial membership therein. The effect of this was to limit the power of the society and necessarily any exercise of power beyond that permitted would be void. This is what the court held in the case cited. In the instant case, no question of the power of the insurance company is involved, but only a regulation as to how that power shall be exercised, and a penalty for the unlawful exercise of power is expressed in the statute. It will be seen, therefore, that the Meekin case is not applicable to the question now before us.

It is next insisted that the oral agreement, if any, was not authorized, and that there is no evidence that Jack Clark helped to make any agreement with the insured or that he knew anything about such agreement prior to the time the policy was delivered. It must be conceded that a portion of the testimony of Clark, standing alone, supports this contention, but the testimony of Miss Knott is in conflict with that of Clark. The reasonable inference to be drawn from her testimony is that Clark was with her when the application was taken and the agreement made, and, from his own testimony when considered as a whole, it appears that if he were not present and taking part in the agreement as to how the premiums were to be discharged, he knew about it and assented thereto and informed the beneficiaries after the death of the insured that the policy was in force. A letter was identified by Clark as one received from the appellant company and read in evidence. This letter is so indefinite as to be almost unintelligible, but seems to indicate that the company was expecting to receive the "annual net" due on the policy and was charging the general agent, Clark, with the balance which it had not received.

To sustain the contention that the agreement was unauthorized and not binding on the appellant company, many cases from our court are cited. It would be unprofitable to review those cases in detail in distinguishing them from the case at bar. It is sufficient to say that they deal with the authority of soliciting agents and the appellant confuses the authority of Miss Knott with that of Jack Clark. The cases cited would apply if the agreement had been solely between Miss Knott, the soliciting agent, and the insured without the participation of the general agent, Clark, or his knowledge and assent thereto.

The appellant contends that the evidence is not sufficient to show any general authority in Clark except to appoint sub-agents. We do not so interpret the evidence. He was designated by the appellant company as its general agent, he was paid a commission as such in addition to that paid the soliciting agents, and that the specific power to employ sub-agents was given him does not im-

ply that his general powers were limited to those specific acts. The appellant introduced no testimony to the effect that Clark was not its general agent and we think a clear preponderance of the testimony establishes that he was. That being the case, with respect to the insured, he had the power to waive any condition inserted in the policy for the benefit of the company even to the extent of waiving premiums and admitting liability. *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, 124 S. W. 764; *Reserve Loan Life Ins. Co.* v. *Compton,* 190 Ark. 1039, 82 S. W. (2d) 537.

In connection with the cases cited in appellant's brief, its reply brief cites the case of *National Life Insurance Co.* v. *Ballentine,* 190 Ark. 108, 77 S. W. (2d) 799; but the court, in that case, as in the others, was dealing with the power of a soliciting agent to waive a cash premium. As heretofore pointed out, there is a marked difference between the powers of a general agent and those of a local agent with respect to waiver of the conditions of a policy. So, in the final contention that the oral agreement contradicts the written terms of the application and policy, the powers of the general agent must be considered. Here, there was no attempt to alter the terms of the policy, but a waiver by one having that authority.

From the views expressed it follows that the evidence was of a substantial nature tending to establish the power of the agents to make the agreement and that it was, in fact, made. The judgment of the trial court will, therefore, be affirmed.

JONESBORO COCA-COLA BOTTLING COMPANY *v.* HOLT.

4-4813

Opinion delivered November 15, 1937.

W. P. Smith and *Arthur L. Adams,* for appellant.

J. L. Merrell, for appellee.

MEHAFFY, J. The appellee, Houston Holt, began this action in the Lawrence circuit court against the appellant, Jonesboro Coca-Cola Bottling Company, to recover damages for personal injuries alleged to have been caused by the negligence of the appellant. He alleged that while he was crossing Main street, in the town of Hoxie, Arkansas, at a regular street crossing, he was knocked down by the defendant's truck driven by an employee of said defendant, in a careless, negligent and reckless manner, without due regard to the safety of plaintiff, by suddenly and without warning backing said truck against plaintiff, striking him, inflicting serious and permanent injuries. He prayed judgment for $3,000.

The appellant filed motion to quash service, which was overruled by the court, and thereafter filed its answer, alleging that if appellee was injured in any manner, that it was caused wholly and entirely from causes other than those alleged in the complaint, and that if he was injured as alleged in the complaint, such injury

was caused solely and entirely by the negligence of the appellee.

Houston Holt, the appellee, testified that he lived at Hoxie, is 30 years of age, has a family and is a common laborer; he named some of the people for whom he had worked; that his wages would be about $40 or $50 a month; he was injured in Hoxie about June 8, 1936; was going across the railroad in front of P. W. Woodyard's store; was going west and the Coca-Cola truck was on the west side of the street headed north; witness was on the regular street crossing; he was about a foot from the truck when it started backwards, and the back end of the truck hit him, it knocked the breath out of him; O. L. Davis helped him up, and he rode with Davis to Alicia; he suffered pain on the way and spit up a little blood; went to a doctor the next day; the doctor took witness to Newport for an X-ray; after he returned from Newport he was sick and confined to his bed about a week; Dr. Felts had him under treatment until he left and went to Texas; he was in Texas two months; had fever and had a hemorrhage; witness was in the hospital two or three days; he had been injured in accidents before; as he crossed the street he saw no car coming, and walked pretty fast to get across; did not hear the motor of the truck start, the driver of the truck shot it back two or three feet; as he crossed the street he did not notice whether anyone was in the truck.

Appellee's testimony was corroborated as to the truck's striking him and the manner in which it struck him, by other witnesses. Physicians testified as to his injuries.

There was conflict in the evidence as to manner in which he was struck by the truck and also as to the extent of his injuries.

There was a jury trial, a verdict and judgment for $3,000 and the case is here on appeal.

It would serve no useful purpose to set out the testimony in detail. While appellant insists that the evidence is not sufficient to sustain the verdict, it bases

this argument on the fact, as it alleges, that the evidence of appellee's witnesses is unworthy of belief.

It is argued that O. L. Davis, one of the witnesses for appellee, is wholly unworthy of belief because, it says, he is a murderer, and that he should now be in the penitentiary. The evidence shows that Davis was convicted of murder and sentenced for life, but after he had served a little more than eight months he was pardoned by the Governor, and after he went back home was elected justice of the peace. It is argued that another witness for appellee, Jake Stephens, was a thief and undertook to get money from appellant for making a statement.

The credibility of these witnesses and the weight to be given to their testimony were questions for the jury. If they believed this testimony, it was ample to sustain the verdict. Besides, the appellee himself testified that he was crossing the street and that the truck, without warning, suddenly backed against him and injured him.

Appellant cites the case of *Magnolia Petroleum Co.* v. *Saunders,* 193 Ark. 1080, 104 S. W. (2d) 1062, and says that on the authority of this case the testimony of Jake Stephens should be wholly disregarded.

The court in that case said: "When testimony of witnesses is out of harmony, and the explanations they make are contradictory, such controversy is properly referable to a jury, and determination of a fact in this manner, if submitted under correct instructions, will not be disturbed on appeal. But where personal testimony is at variance with physical facts, and such repugnance is material, and is also self-evident, improbable conclusions drawn in favor of a party litigant through the sanction of a jury's verdict will not, on appeal, be looked upon as inviolate if in conflict with recognized elements of time, mathematics, and the accepted law of physics."

It appears, therefore, under the case relied on, that the credibility of witnesses and the weight to be given their testimony in this case were to be determined by the jury. It was not at variance with physical facts, and the

argument made by appellant is on the credibility of the witnesses and the weight to be given to their testimony. This court, in a long line of decisions, has held that these are questions for the jury.

It is, also, contended by appellant that the appellee is not entitled to recover because he has undertaken to prove more than he has alleged in his complaint, and it calls attention first to *Sevier* v. *Holliday*, 2 Ark. 512. In that case the court said: "It is certainly true, as has been argued by the counsel, that every legal inference and presumption will be indulged in by this court which the pleadings and proof will warrant in favor of the verdict and judgment below. But where there is no basis to rest such presumptions upon, they are wholly inadmissible."

In the case of *Snow* v. *Grace*, 25 Ark. 570, relied on by appellant, the court said: "Upon this claim or indebtedness of $2,500 the jury assessed the damages and returned a verdict for $10,000. This being an action of *assumpsit* for goods sold, an ordinary suit on a contract, where the claim is defined, and the damages recoverable upon it, readily computed, we are unable to ascertain, even by the utmost stretch of the imagination, on what grounds, or upon what principle, the jury could return such an excessive verdict."

In the case just cited, there was a suit for $2,500, and a default judgment taken for $10,000.

Attention is, also, called to the case of *Payne-Huntington Company* v. *Flournoy*, 29 Ark. 500. The court said in that case: "Admit all that Payne says to be true, and that the new firm have succeeded to the assets of the late firm of Payne & Harrison, this fact can avail nothing because there are no averments in the complaint to that effect, and the evidence consequently has no application to the case as made by the pleadings."

Attention is, also, called to the case of *Hackney* v. *Butts*, 41 Ark. 393. The court said in that case: "Hickey's name not being mentioned either in the body of the deed, or in the attestation of it, the deed has no operation against him; and parol evidence of an intention

to bind him is not admissible. * * * There was no averment in the answer that Butts, in purchasing, acted as Hackney's agent, and proof without allegation is as bad as allegation without proof."

We are of opinion that these cases have no application to the facts in this case. It is the settled rule of this court that, in cases where evidence is admitted without objection, the complaint will be considered amended to conform to the proof. If there is objection made to the evidence, the trial judge may admit the evidence, and if necessary, give the adverse party an opportunity to prepare to meet it.

It is conceded that the jury is not required to return separate amounts for pain and suffering, and loss of earnings, but as contended by appellant, in considering this question, this court will consider the question of whether the verdict was excessive.

The court gave numerous instructions, none of which were objected to by the appellant, and the court covered every feature of the case in the instructions given, and there was no error in the court's refusal to give the instructions requested by appellant.

After the jury had considered the case for some time, they returned to the court and reported they were unable to agree, and one of the jurors asked the court if the jury would have the right to disregard the whole of any witness' testimony. The court then told the jury that they should weigh the testimony under the rules which the court had given them, and they would have the right to disregard the whole or any part of any witness' testimony if they felt like they had not told the truth.

The appellant objected to this instruction because it said this instruction of the court was to cause the jury wholly to disregard the testimony of Panneck, and also that Panneck's evidence was supported by physical facts and the testimony of White and Woodyard.

There is nothing in the record indicating that the court or the jurors made any reference to Panneck's testimony, but the court told them in effect that they

were at liberty to disregard the whole or any part of a witness' testimony if they thought it was false. Of course, they could not disregard either the whole or any part of any witness' testimony which they thought to be true, and the jury evidently understood this.

The court gave instruction No. 10, which reads as follows:

"I instruct you, gentlemen, that a witness may be impeached by showing that his general reputation in the community where he resides for truth and morality is bad, or that he has made statements or testified out of court contrary to his testimony given on the witness stand in the trial of this cause. Although, gentlemen, you may believe that any witness has been successfully impeached here in either of those manners, still if you believe that the witness has testified the truth in this case, you have a right to believe the whole or any part of his testimony or to disregard the whole or any part of it."

Appellant says, in his objection to the court's answering the jury's question, that instruction No. 10, just quoted, was clearly pointed at Jake Stephens, and that instructions 10 and 11 are not a complete statement of the rule. Appellant made no objection to either of these instructions when requested and no suggestion of any error in them was made until it was made in appellant's brief.

There was no error in the court's permitting the jury to separate.

Appellant's motion to quash service was properly overruled. Act No. 70 of the Acts of 1935; *Yocum* v. *Okla. Tire & Supply Co.*, 191 Ark. 1126, 89 S. W. (2d) 919.

Appellant contends very earnestly that the evidence of appellee's witnesses is unworthy of belief. This court does not pass on the credibility of witnesses or the weight of their testimony. This is a matter entirely within the province of the jury. It is its duty alone to pass on such questions. The fact that this court might believe that the evidence was unworthy of belief, or that the verdict was against the preponderance of the evidence, does not justify the court in disturbing the verdict or setting it aside.

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

"The verdict of a jury cannot properly be disturbed on appeal merely because of its appearing to be against the clear weight of the evidence, or because, if we were to pass upon the matter as seen in the printed record, we might find differently than the jury did. If the verdict has any credible evidence to support it; any which the jury could in reason have believed, leaving all mere conflicting evidence, evidence short of matter of common knowledge, conceded or unquestionably established facts and physical situations, it is proof against attack on appeal, and that must be applied so strictly, on account of superior advantages of court and jury for weighing the evidence, that the judgment of the latter approved by the former is due to prevail, unless it appears so radically wrong as to have no reasonable probabilities in its favor after giving the legitimate effect to the presumption in its favor and the makeweights reasonably presumed to have been rightly afforded below which do not appear, and could not be made to appear, of record." *Barlow* v. *Foster,* 149 Wis. 613, 136 N. W. 822; *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. (2d) 689; *Mathis* v. *Magers,* 191 Ark. 373, 86 S. W. (2d) 171; *Smith* v. *Arkansas Power & Light Co.,* 191 Ark. 389, 86 S. W. (2d) 411; *George* v. *George,* 191 Ark. 799, 88 S. W. (2d) 71.

The questions of the negligence of appellant and contributory negligence of appellee were submitted to the jury under proper instructions of the court, and instructions not objected to by the appellant. Its verdict is conclusive.

We find no error, and the judgment is affirmed.

GRIFFIN SMITH, C. J., dissents.

HIGH *v.* LONOKE COUNTY.

4-4815

Opinion delivered November 15, 1937.

[redacted]

Chas. A. Walls, for appellant.

George F. Hartje, for appellees.

BUTLER, J. The appellant, Roy High, was employed by Lonoke county in 1927 as supervisor of the county roads, bridges and machinery, and was so employed when J. V. Crutcher was elected county judge of that county and took office in 1933. Thereafter the appellant was continued in his employment at a salary of $110 per month until later, when, because of increased duties on account of the illness of Judge Crutcher, his salary was increased to $125 per month. This salary was paid out of the county road funds. Appellant's work required him to go over all parts of the county for which he furnished his own car and operated it at his own expense. During the course of his employment, the county became financially embarrassed and, although there was a sufficient amount in the road improvement fund to pay his salary, at the suggestion of Judge Crutcher he deferred demanding it in order that the fund might be used for other much needed purposes. The result was that in August, 1936, there was due him on his salary the sum of $1,087.50. In October, 1935, the Works Progress Administration began to aid the county in the improvement of its roads, co-ordinating its work with that of the county and paying appellant $65 per month to assist in that work. A Mr. Harmon was in charge of WPA in Lonoke county. At this time Judge Crutcher was unable, on account of his illness, to go over the details of the proposed projects and would refer the WPA administrator to the appellant, who would

attend to the business for him. The county furnished the road machinery of which appellant had charge. In addition to the work on the roads, the appellant worked on levies and drainage ditches for the county and in this character of work the WPA, as for road projects, furnished the labor and certain materials.

On the 13th day of August, 1936, appellant filed his claim in the county court. At this time Judge Crutcher was confined to his home. Accordingly, appellant and other claimants went to his residence, where the judge allowed the claims as of August 10, 1936, the last day upon which the court was presumably open. Because appellant had doubts as to the method and manner of the allowance, he refiled his claim with the clerk of the county court. After this, because of his continued ill health, Judge Crutcher resigned and J. M. Malone was appointed as his successor. Judge Malone refused to act upon appellant's claim and mandamus was sued out of the circuit court. In obedience to its order, Judge Malone proceeded to act on the claim, disallowing it. Appeal was taken to the circuit court where the claim was allowed in the sum of $470, the court finding that the claim, as filed against the county, should be credited with the sum of $617.50, the amount received by appellant from the WPA as compensation for services rendered it while he was in the employment of Lonoke county.

From so much of the judgment of the lower court which credits the amount of appellant's claim with the sum of $617.50, the appellant prayed and perfected his appeal to this court. No appeal has been prosecuted by the county. Therefore, the only matter before us is the correctness of the judgment in diminishing appellant's claim in the amount he had received from the WPA. For that reason, we cannot consider the points raised by counsel for the county in his brief challenging the legality of appellant's demand.

The majority of the court is of the opinion, to which Justices Smith, Baker and the writer do not agree, that the credit allowed appellant in favor of the county is proper because the services rendered the WPA by him were those which he had already been employed by the

county to perform, that the time used in discharging his work for the WPA was the county's time and whatever sums he received from the WPA belonged in fact to the county.

Judgment affirmed.

ARKANSAS POWER & LIGHT COMPANY *v.* BAUER, POGUE & COMPANY, INC.

4-4811

Opinion delivered November 15, 1937.

House, Moses & Holmes and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Ashley Cockrill and *John W. Newman,* for appellees.

HUMPHREYS, J. This suit was brought on the 10th day of December, 1935, in the chancery court of Pulaski county, Arkansas, by appellees against appellant to compel appellant to replace their name on appellant's books as the owners of 185 shares of 7 per cent. preferred stock evidenced by certificates No. NY—1263 for 100 shares and No. NYO—10017 for 85 shares, alleging that the

shares were issued to appellees in the name of Bauer-Pogue & Company, a partnership, on the 14th day of June, 1934; and that said certificates of stock were transferable on the books of appellant only by written authority from one of said parties, and that without their knowledge, and without negligence on their part got out of their possession and into the possession of appellant and that it erroneously stamped said certificates canceled, removed the name of the partnership from its books as a stockholder, and refused to pay appellees any dividends, and declined to recognize appellees as holders of said shares of stock.

After the purchase of the stock the partnership incorporated under the laws of New Jersey. Appellant is an Arkansas corporation.

Appellant interposed a number of defenses to the action none of which were sustained by the chancery court under the evidence developed on the trial of the case, whereupon the court rendered a decree ordering appellant, within thirty days, to execute and deliver to appellees, Bauer-Pogue & Company, Inc., 185 shares of 7 per cent. preferred stock, and that it, within thirty days, render a statement of all dividends paid upon said stock since October 26, 1934, together with interest and thereupon to pay the total amount thereof to appellees with its costs from which is this appeal.

The facts developed by the evidence are, in the main, as follows: 185 shares of 7 per cent. preferred stock, which had no voting privileges, were issued to appellees on June 14, 1934. These two certificates of stock were not indorsed in blank by appellees and were kept in its safety deposit box in the same building in which its office is situated, with about a quarter of a million dollars of other securities, some of which were indorsed by appellees in blank and others not so indorsed. Humbert Valenti was employed in 1933 by appellees in the capacity of manager and cashier and was given free access to the safety deposit box. He had worked for appellees during the years 1926, 1927, 1928 and 1932 in a minor capacity. On June 16, 1934, Valenti stole the

two certificates, forged the name of Bauer-Pogue & Company to the assignments which were a part of the certificates and forged the name of a witness to the certificates, and caused the signature to be guaranteed by the Hudson County National Bank and pledged the certificates to some brokers as collateral security. Just before the annual audit of appellees' affairs in July, 1934, Valenti obtained the possession of the certificates from the brokers and returned them to the safety deposit box. It was the custom of appellees to have an audit of their affairs annually and at the time of the audit these two certificates were in the safe with the forged indorsement upon them together with the forged signature of the witness to the indorsement. Some time after the audit, Valenti again stole the certificates which were finally delivered to Prentice & Slepack who were acting as brokers for other parties and Prentice & Slepack sent the certificates to the Union National Bank of Little Rock, Arkansas, for transfer and cancellation, said bank being the transfer agent of appellant. Said bank without any knowledge of the theft or forgery canceled the two certificates and issued new certificates therefor to the persons and firms they had been directed by Prentice & Slepack to issue them to. Neither appellant, Prentice & Slepack, nor the subsequent holders had any knowledge or notice of the theft or forgery. On May 1, 1935, which was one day before another audit was to be made, Valenti confessed to Mr. Bauer that he had stolen these certificates together with other securities, all of them being valued at $67,000. No effort was made by appellees or their bondsman to trace and follow the securities, but after many intervening conferences the appellees set up an account on their books with Valenti, charging him with $67,000, representing the market value of the stolen securities at the time of the theft and also charging him with dividends on stolen stock and interest on stolen bonds. In addition to the assignment of certain stocks and bonds an arrangement was made with the Lex Corporation, in which Valenti owned stock and was an officer, that it would pay to Herbert Meyer, Val-

enti's nominee, one-half of all its income to be paid by Meyer to appellees less 10 per cent. for his services. This arrangement was participated in by appellees and the attorney for the bonding company although the contract itself was made between the Lex Corporation and Valenti. Appellees received direct payments on the $67,000 indebtedness set up against him in the books of appellee between $13,000 and $15,000 in cash and received $25,000 from the bonding company which was credited on the books against the $67,000 charged and deposited to appellees' credit and mixed and mingled with their general funds and checked upon as their own. The total amount received by appellees by virtue of the arrangements made was about $40,000. Practically all of this money was received under the arrangements made by appellees after the confession made by Valenti that he had stolen the certificates. Appellees did not discover the forgery until sometime in September, 1935, at which time they wrote appellant and appellant's transfer agent demanding the issuance to them of 185 shares of 7 per cent. preferred stock in lieu of the certificates which had been stolen from them, canceled and transferred.

Although many defenses have been interposed to this action and elaborately and ably argued pro and con by learned counsel, we deem it unnecessary to discuss any of them except the one to the effect that appellees, under all the facts and circumstances in the case, through the negligent transaction of their business, made it possible for their employee, Humbert Valenti, to steal and forge their names to the indorsements of said stocks to others, invoking the doctrine that where one of two innocent persons must suffer, the loss should fall upon the one who made it possible for the loss to occur. This doctrine is so universal that we deem it unnecessary to cite many cases supporting the doctrine. The case of *National Safe Deposit Co.* v. *Hibbs,* 229 U. S. 391, is one of the many cases supporting the doctrine and the rule there announced is applicable, in the main, to the facts in and surrounding the instant case. It does not strike us with much force that appellees were reasonably care-

ful in the operation of their business. We think it a species of unpardonable negligence for them to have allowed an employee to enter their lock box at will where they were keeping a quarter million dollars or more of securities many of which were indorsed in blank and others not, who had been in their employment in the responsible position of cashier and manager for only a short time. Especially is this so in view of the fact that they only placed him under an annual audit. It seems to us that reasonable care would have suggested that a man handling securities of this amount and which were constantly changing that an audit should have been frequently made, but, be this as it may, the undisputed evidence is to the effect that an audit was made after the forgery had been committed by Valenti and the certificates replaced in the safety deposit box. Appellees argue that the only purpose of accountants making an audit was to count and see whether the securities were in the box; but this, is indeed, a very narrow view of what an audit should really be. It, at least, ought to include or ascertain whether the securities had been indorsed in blank and what number of securities had not been indorsed in blank. This audit should have disclosed whether these two particular certificates of stock had been indorsed in blank. If the audit had disclosed that fact and appellees knew they, themselves, had not indorsed them in blank, they could have then discovered that the indorsement in blank was a forgery. We think they are bound in good conscience and equity to have known at all times whether their securities were indorsed in blank. At least, care on their part would have revealed when the audit was made that the securities were indorsed in blank and had they done so the loss would not have occurred. No other conclusion can be reasonably drawn from this evidence that appellees were negligent at the time the audit was made and should be charged with whatever loss resulted on account of such negligence. Equity does not relieve one from the consequences of his own negligence and carelessness. On the other hand appellant made the cancellation and reissue

of the stock to others in the due course of business not knowing, and not having had an opportunity to discover, that the certificates had been stolen and the indorsements forged. The signatures to the indorsements were guaranteed in the usual way; and, so far as we are able to see, appellant was not guilty of carelessness and negligence. Certainly, when stock was presented to it duly indorsed with the signatures guaranteed, it was not called upon to make an investigation as to whether such stock had been stolen and the indorsements forged. If that burden rested upon a corporation that had issued a large amount of stock every time a certificate was presented duly indorsed for cancellation and reissue, it would indeed be a great and unjustifiable burden and one that would require them to spend large sums of money. We do not think, in the due course of business, it was required to go to the expense of making these investigations every time a certificate was presented for cancellation and reissue. Regarding both appellant and appellees as innocent parties appellees were to blame for this loss in the first instance and the loss should fall upon them.

On account of the error indicated the decree is reversed, and appellee's complaint is dismissed.

SMITH, J., concurs.

MANGRUM *v.* BENTON.

4-4806

Opinion delivered November 15, 1937.

J. C. Young and *Eugene Sloan,* for appellants.

H. L. Methvin and *J. G. Waskom,* for appellees.

BAKER, J. Fred Mangrum was appointed administrator of the estate of Jake Pfeifer, deceased. At the time of his appointment he named several parties, appellants here, as the only heirs at law of the said Jacob Pfeifer. Within due time thereafter, on September 1, 1936, Thelma Benton filed a petition in the probate court alleging that she was the daughter and only heir of Jacob Pfeifer.

Upon a hearing had in the probate court on November 2, 1936, Thelma Benton's petition was dismissed. She prayed an appeal to the circuit court. Upon this appeal, before the court sitting as a jury, the court found that Thelma Benton was the daughter of Jacob Pfeifer, born in wedlock and, therefore, entitled to inherit his estate. It is from this judgment of the circuit court that this appeal comes. Appellants say that the question to be determined upon this appeal is whether Thelma Benton is the child of Jacob Pfeifer, and that no other question presents itself except in an incidental manner.

Since the circuit court has already determined this particular question, the matter presented for our consideration necessarily is to determine whether the circuit court decided the case upon substantial testimony when that testimony is considered in the light most favorable to the appellee. Strong and forceful arguments are made which, if we were trying the case anew, would be entirely proper. The court's finding of fact does have the same effect as the verdict of the jury. See *Bridges* v. *Shapleigh Hardware Co.,* 186 Ark. 993, 998, 57 S. W. (2d) 405. The authorities there cited are conclusive.

The appellants contend that, although the mother of Thelma Benton was undivorced from Jacob Pfeifer at the time Thelma, her daughter, was born, she was living apart from her husband and at the period when, in the natural course of nature, said child might have been begotten she was then residing with Berry Mangrum at a point about 200 miles distant in the state of Tennessee, and that, on that account, we should find that it was not

possible for Pfeifer to have been the father of this child. Several witnesses testified in support of that contention presented by the appellants and their testimony was such that, if it had been found to be true by the court, it must be said that the testimony was substantial and would have supported the court's findings. There is no reason for a statement of this testimony further than to say that their contention was that during the months of October, November, December, January and February, prior to the birth of this child, in August, her mother, then Hattie Pfeifer, was living with L. B. Mangrum, at the home of a Mr. Hill, who then resided in Tennessee. A daughter of Hill's testified to that effect and other witnesses gave substantially the same testimony. In contradiction of that testimony, however, Hattie, the mother of Thelma Benton, testified that during this particular time she was living with Jacob Pfeifer and in his home, that she had not separated from him. A sister of hers testified to the same effect. William Craddock, a citizen well known in Craighead county and whose word would be taken by anyone who knows him, gave his recollection by saying substantially: "It runs in my mind that Mangrum at the particular time was still residing in the Mangrum neighborhood and looking after one of my farms." Hill, the man at whose home Mangrum and the mother of the child were said to have lived, denied that Mangrum had lived in his home with this woman or any other woman. There was other testimony offered by the parties unnecessary to quote or set out.

It must be said that the testimony offered by the appellants was in hopeless conflict with that offered by the appellees. The trial court determined the facts as such, and not from an archaic presumption, and we are bound by that determination since it is supported by substantial testimony.

After the trial the appellants filed a motion for a new trial, and, among other things, they set up newly discovered testimony. To establish the fact that they had newly-discovered evidence, they brought witnesses before the court, some of whom came from Tennessee and who were former neighbors of Hill when he resided there.

These witnesses, whose testimony was not presented by affidavit attached to the motion for new trial, as would have been perhaps the better practice, came before the court and without objection testified. They were there examined and cross-examined, and it appears to us that the effect of this proceeding was really such as to give to the appellants a new trial upon this evidence. The court, after hearing this testimony, announced his conclusions as being unchanged. The court need not have heard this testimony as presented by bringing witnesses into court. The law under which appellants were presenting their motion is § 1536, 7th subdivision, Pope's Digest. This court has held that the newly-discovered evidence must or should be presented by affidavits, that is, affidavits stating the substance of what the party expects to prove. *Jones* v. *Gaines,* 92 Ark. 519, 521, 123 S. W. 667.

No point, however, is made by the appellees on this manner of presentation, and the court did not overrule the motion by reason of any informality or irregularity in the matter of proceedings, the result being in effect to give the appellants another trial upon this issue by reopening the case to that extent.

The whole law of this case as presented upon appeal is determined by a finding which is also an admission on the part of the appellants that the trial court's judgment is supported by substantial evidence. True, appellants argue we should not believe this testimony. If we did not believe it, in this case at law, the result would be the same, for we may not, as in matters in equity, try the case *de novo.*

There being no error, the judgment is affirmed.

RIDDICK *v.* WHITE.

4-4764

Opinion delivered November 15, 1937.

H. H. Honnell and *Granville Farrar,* for appellants.

Wils Davis and *John A. Fogleman,* for appellees.

GRIFFIN SMITH, C. J. The defense interposed to a complaint filed by appellees, who asked judgment for $5,064 on a series of notes executed by appellants, was that there had been a novation whereby $500 was to be accepted in lieu of the original obligation.

The judgment recites that the court, after hearing opening statements of counsel for the respective parties and certain evidence, directed the jury to return a verdict for the plaintiffs.

It is urged (1) that the court committed error in directing a verdict at the close of plaintiff's proof, based on the statement of plaintiff's counsel in open court that plaintiffs admitted the allegations and averments of the answer, and waived the introduction of proof of same by defendants; and (2) that the court erred in holding that the facts admitted by the plaintiffs did not constitute in law a novation and discharge and release of the notes sued on.

We are of the opinion that the court properly directed a verdict for plaintiffs. There was no question as to the ownership of the notes, or the right to sue on them, but for the transactions and circumstances which appellants construe as having constituted a novation.

Of an original series of 43 notes executed by appellants in 1932, seven had been paid, and at the time suit was filed all of the remaining 36 were past due. Although the last of the series did not mature until January, 1935, settlement negotiations were begun in July, 1934, when appellee's attorney wrote appellants, asking if they would be interested in making a bid for the notes.

Upon receipt of this letter, appellants met the attorney, who offered to settle for $1,000. After further negotiations, the attorney agreed, conditioned upon his ability to procure a necessary order from the Shelby county probate court, to accept $500.

A third party, from whom appellants expected to procure funds with which to make the payment, died. In February, 1936, appellees' attorney wrote, advising that it would be necessary to make other arrangements for a court order, in view of the death of the party who was to make the payment, and who, ostensibly, was to be the purchaser of the notes. It is contended that appellees' attorney was advised that a substituted party had agreed to act in making such purchase.

On January 6, 1936, the attorney wrote: "If you will let me have your check for $500, payable to the executors, I will try to get the court order through immediately, authorizing the sale of this mortgage for that amount." Between January 6 and March 7, when the subsequent letter was written, plans of appellants were interfered with through death of the nominal purchaser, but the remittance, or tender, was never made. On March 18, 1936, the attorney wrote appellants: "I am directed by the executors to withdraw any previous tentative agreement of settlement." In response to this letter appellants went immediately to the attorney and remonstrated, contending that he at no time agreed to such cancellation; but, rather, that he insisted the terms of the novation be carried out. In their answer appellants said: "Defendants say that they are now ready and willing to pay into the hands of the clerk of this court, under proper order of the court, the sum of $500, with interest thereon, and they have at all times been ready and willing to carry out their agreement."

The definition of novation, approved in *Elkins* v. *Henry Vogt Mch. Co.*, 125 Ark. 6, 187 S. W. 663, is: "Novation is the substitution by mutual agreement of one debtor, or of one creditor, for another, whereby the old debt is extinguished, or the substitution of a new debt

or obligation for an existing one, which is thereby extinguished." In *Cockrill* v. *Johnson*, 28 Ark. 193, there is this declaration of the law: "In the substitution of a new debt or obligation for an old one, which is denominated in the civil law a novation, the intention of the parties to that effect should be positively declared; or at least in whatever manner expressed, it should be so evident as not to admit of doubt: in other words, a novation is not to be presumed unless the intention to that effect evidently appears." See, also, *Brewer* v. *Winston,* 46 Ark. 163; *Hanson* v. *Louisiana Oil Refining Corporation,* 186 Ark. 331, 53 S. W. (2d) 430.

In the instant case negotiations in favor of settlement at a very large discount were suggested by appellees in July, 1934. Appellants, upon receipt of the letter written at that time went to the attorney representing appellees, and the latter offered to take $1,000 for the notes * * *. "Then, several months later, the offer was reduced to $750." It is then claimed that appellants made the offer of $500 and named a party who would pay that amount. There appears this statement: "Your defendant did not hear anything further from the attorney until he received a letter from him dated January 6, 1936." This letter has already been referred to.

These negotiations did not contemplate the substitution of one debt for another, but a sale of the notes for the agreed price of $500, and this was conditioned upon court approval, and receipt of check. If it should be admitted that court approval was a mere formality, still appellants do not show that they made a tender of the purchase price until after the offer had been withdrawn and suit had been filed.

The judgment of the circuit court is affirmed.

SELF *v.* KIRKPATRICK.

4-4789

Opinion delivered November 15, 1937.

[redacted]

Ezra Garner and *Donham & Fulk,* for appellant.

McKay & McKay, for appellee.

MEHAFFY, J. This action was commenced by the appellee to recover for the death of a child four years old, who was struck and killed by an automobile. The father of the child, as administrator of the estate,

brought suit to recover for the benefit of the estate, in the sum of $400, and to recover in his own right, for loss of services and funeral expenses, in the sum of $2,600.

There was a jury trial and verdict and judgment for $2,600 for the father, and there was nothing awarded to the estate. The case is here on appeal.

On February 4, 1935, the appellant, a traveling salesman, was driving from Texarkana, Arkansas, to Homer, Louisiana, and his route took him through the city of Magnolia, Arkansas. He left Texarkana about one o'clock in the afternoon, and the accident occurred about three-fifteen as he was approaching Magnolia on highway No. 82.

The appellant's answer denied all the material allegations of the complaint as to his negligence, and alleged that the appellee was guilty of contributory negligence in permitting his child to play and run about the public highway, and to run in, upon and across the same, without exercising proper care and caution for the protection and safety of such child.

Eugene Kirkpatrick, father of the child, testified in substance as follows: That he was the father of Edgar Martin Kirkpatrick and administrator of his estate; that for the past three years he had lived one mile out on the Waldo highway; when he moved there he built a fence on the south side and a gate, but did not put a lock on the gate; he made these improvements to keep his children in the yard; at the time he had seven children, the oldest being twenty-one years of age, and the youngest four years and three months. He was not present when the child was hurt; the child that was killed was four years old; he went to the hospital immediately after being notified of the accident, saw the child and he was waving his arms and seemed to be in great pain; later on he examined the highway; it is twenty-one steps from where appellee's driveway joins the highway to the filling station pumps; it is possibly 200 yards from the driveway back on the other side of Cochran's house; the highway is straight on to the railroad, and anyone could see at least 400 yards; he examined the tracks; the main road

was dry and graveled; there was a pole thirty-seven steps from his driveway to where appellant turned across the highway where the child was hit and knocked fourteen steps into the ditch. A person coming from Waldo to Magnolia would pass appellee's driveway on the left; you could easily see 200 yards; the burial expense of the child was $100. This is a public highway and there is lots of traffic there; the accident happened about three-thirty in the afternoon; witness saw where Mr. Self struck the gravel, which was about ten feet from where he hit the child; when he got to the hospital the child was on the table and he stayed there until they took him into the operating room, about forty minutes. He examined the tracks; the fence is thirty-nine inches high. His older children could open the gate; he never allowed them to play there; they played back of the house; he frequently sent his older children across the road to Harriman's store, but never allowed his younger children to go; the skidding of appellant's car was a gradual skid not from throwing on the brakes; the back end swung around east and then south; he never allowed his children to play there; his wife looks after things at the house; the child was very healthy and bright.

Ralph Harriman testified in substance that he lived at the cotton mill directly across the street from a garage; had lived there eight years; saw the car strike the child; he was standing in front of his station and the child was also there; saw the car coming down the road when it was about 185 or 186 steps away; does not know how fast it was going; but it was going very fast and above the average; when the child started across the road the appellant's car was about 185 steps up the road; the child went directly across the highway and never did turn back; cannot say whether appellant slowed up until he hit the child; he was coming down the center of the road, and when about 34 or 35 steps back, he turned to the extreme left side of the road toward Kirkpatrick's house; when the child was struck he was on the extreme left shoulder; the child was not in the habit of crossing the highway. Witness stepped the distance the child

was thrown after being struck by the automobile; there were other children on the other side of the automobile. The child was by the north pump even with the curb; he called his attention to the car which was coming, but did not try to stop him because he did not think he was in any immediate danger; he was about ten feet from the child; when he called the child's attention to the car, he was half way across the street; does not remember what appellant said when witness picked the child up; the car was about 40 degrees angle across the road headed east; the children on the other side of the road were about seven to twelve years old.

Miss Gibland Cochran testified in substance that she lived north of where Kirkpatrick lived; was at home in the house at the time of the accident; noticed the car when it passed; it was going about fifty miles an hour; it was going at such a rate that it attracted her attention; she did not see the accident.

Fred Dean testified that he went to the hospital and the child was groaning and tossing his arms acting like he was in great pain.

J. M. Self, appellant, testified in substance that he is a salesman twenty-nine years old, and lives at Jackson, Mississippi; the accident happened on February 20, 1935; he was alone driving a 1934 Chevrolet coach, which was about nine months old; the car was in perfect condition; he left Texarkana that day about one o'clock in the afternoon going to Homer, Louisiana; it is about 60 miles from Texarkana to Magnolia; the accident occurred at about three-fifteen as he was coming into Magnolia; was driving 20, 25 and 30 miles an hour; when he approached the Harriman filling station about 150 yards away, he was driving 35 or 40 miles an hour; at the top of the incline he saw these children at the left of the road and began to check the speed of his car and blow the horn; there were weeds on the side of the road and he could not see the filling station; as he got to where he could see the station he further checked the speed of his car; did not see the little boy; if he had seen the

child about 30 yards from him as he came around 35 or 40 miles, he would have checked his speed; when he first saw the child he was standing there by one of the pumps; also saw Mr. Harriman standing at the pump; at that time there was no indication that the child was going to run into the road; when he got close to the station the child darted out into the road and he immediately turned his car to the right toward the station, and when the child left the center of the road he turned to the right and then to the left; there was no possible way to turn to the right to avoid striking the child; he put on the brakes and when he struck the child was going 5 or 10 miles an hour; he knocked the child about 5 feet; the accident was unavoidable; he was not going 60 miles an hour; the child was taken to the hospital and was not conscious at any time; it breathed some, but gave no indication of consciousness; stayed at the hospital about an hour and a half; the child died at 8:15 that night; stayed in Magnolia that night; the sheriff sent for him and he went to the sheriff's office; the sheriff told him to stay in Magnolia that night, and the next morning told him he could leave; when 150 yards away from the place of the accident he was driving 35 or 40 miles and checked his speed to 20 or 25 miles; noticed the child playing there; drove about 25 miles an hour until he was within thirty steps of the station; applied his brakes when he was about 15 or 20 yards away at the time the child started across the road; the child was confused and had he gone straight across the road there would have been no accident; the child was on the left side of the highway, but not on the shoulder; made a statement to the sheriff; there were two other men there; but did not make the statement that he was going 60 miles an hour and continued that speed until he got too close to stop.

Dr. Joe Rushton testified that the child was brought to the hospital and Mr. Self was with him; the boy was bloody from head to foot; shocked and severe lacerations of the head; compound fracture of the skull; numerous bruises about the body and a fractured leg; he

was not conscious; he lived until about eight o'clock and did not regain consciousness.

S. J. McCollum testified that he was sheriff of Columbia county at the time of the accident; knows Mr. Self; called him into the office and got a statement, at which time Clarence Duhond and Mr. Raiford were present; Mr. Self said at the time, when he saw the children he was too close, going about 60 miles an hour.

Clarence Duhond and Mr. Raiford testified to substantially the same facts as the sheriff.

In support of the motion for a new trial, Ezra Garner testified that while Judge Britt was instructing the jury, Mrs. Eugene Kirkpatrick, mother of the boy that was killed, arose back in the court room, clapping her hands and shouting and mumbling something about her boy; the judge requested the lady be removed from the court room. Eugene Kirkpatrick went back into the court room and assisted in carrying his wife out of the room; she was screaming and clapping her hands; she was about fifty feet from the jury; the court instructed the jury to disregard the incident and not let it have anything to do with the verdict; the court ordered the clerk to call the jurors who tried the case and only two of them knew who the woman was; the others did not know her, and each of them testified that the action of Mrs. Kirkpatrick did not influence them.

Appellant contends that the accident was unavoidable. It appears from appellant's own testimony that he was driving 25 or 30 miles an hour and saw the children, and made no effort to apply the brakes or check the speed of his car until he was within 30 yards of the children. There is sufficient evidence set out above to justify the submission to the jury the question of appellant's negligence.

While there is some conflict in the evidence, the question of the negligence of the appellant was for the jury, and not for this court.

There is evidence to the effect that the child started across the street a sufficient distance ahead of the automobile to have gotten across the street in safety, and

the evidence on the part of the appellee, also, showed that the child went straight across the street, did not stop or turn back.

Persons operating an automobile and seeing children ahead of them must exercise such care as a man of ordinary prudence would exercise under the circumstances, and whether appellant did that was a question of fact in this case, and there was substantial evidence tending to show that he did not exercise such care.

Appellant calls attention to *Morel* v. *Lee*, 182 Ark. 985, 33 S. W. (2d) 1110. The court said in that case: "Ordinary care, however, is a relative term, its interpretation depending upon the facts and circumstances of each particular case; and, although drivers of automobiles and pedestrians both have the right to the use of the streets, the former must anticipate the presence of the latter and exercise reasonable care to avoid injuring them, care commensurate with the danger reasonably to be anticipated."

Drivers of automobiles and pedestrians both have a right to use the street, but the former must anticipate the presence of the latter, and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated. What is ordinary care is a relative term, dependent upon the facts and circumstances of each particular case. *Murphy* v. *Clayton*, 179 Ark. 225, 15 S. W. (2d) 391.

It is next contended that appellee was guilty of contributory negligence. Appellant relies on and quotes from *St. Louis, Iron Mt. & So. Ry. Co.* v. *Freeman*, 36 Ark. 41. In that case the court held that the circumstances under which the child was left, the conduct of the parents, the speed of the train, the watchfulness of employees, and measures taken to avert danger were all questions for the jury. In that case the railroad company asked the following instruction: "If the child was under the age of discretion, and was on the railroad, where trains were frequently passing, without a proper attendant, this was negligence on the part of plaintiff, which would preclude his recovery." The court

said: "This instruction was properly refused. It made the facts conclusive of negligence. It was for the jury to determine from all the facts whether such explanation of the unfortunate exposure appeared, as would repel the presumption of negligence on the part of the parents."

In this case there was sufficient evidence to submit to the jury the question of the contributory negligence of the appellee. This question was submitted to the jury under proper instructions. *Gates* v. *Plummer,* 173 Ark. 27, 291 S. W. 816.

Appellant, however, calls attention to the case of *St. Louis, Iron M. & So. Ry. Co.* v. *Colum,* 72 Ark. 1, 77 S. W. 596. In that case the evidence shows that Robert Colum drove to the railroad station and carried his son with him, who was at that time about eight years old. The father drove away, leaving his son at the station unattended, and while there, a locomotive switching cars from one track to another shoved a car against, and struck the boy. The evidence was in conflict, and the court said "obscure." One witness testified that the boy was attempting to crawl under the car when he was injured. The testimony of appellant's witnesses was to the effect that the boy stepped upon the railroad track in front of one of the cars while it was from three to six feet from him, and it was impossible to avoid the injury. The court held that the boy was entitled to recover because he was too young to be guilty of contributory negligence, but that the father, in leaving the boy at the station when the engines were switching, was guilty of contributory negligence.

In the case of *St. Louis, Iron M. & So. Ry. Co.* v. *Dawson,* 68 Ark. 1, 56 S. W. 46, a girl between six and seven years of age was run over and killed by the train as she had started on a visit to some companions on the other side of the railroad from her home. The trial court in that case refused to instruct the jury that the father could not recover for loss of services if it was shown that he was guilty of contributory negligence, contribut-

ing to the injury. The case was reversed and remanded for a new trial.

The court, in the instant case, told the jury as to the cause of action in appellee's own right, that even though they might find from the evidence that the defendant was guilty of negligence which resulted in the death of the child, the plaintiff could not recover if he was, himself, guilty of contributory negligence, and further told them that it was the duty of a parent to exercise ordinary care for the safety of a child, and if he failed to do so, and such failure caused the injury or death, then the parent was guilty of contributory negligence.

Negligence is the failure to do something which a person of ordinary prudence would do under the circumstances, or the doing of something that a person of ordinary prudence would not do under the circumstances. And if there is any substantial evidence tending to show either negligence or contributory negligence, the question, under the well settled rules of this court, is for the jury.

Appellant objects to instructions Nos. 5 and 7 given at the request of appellee, but we think these instructions were correct. No. 5 simply told the jury that the burden of proof was upon the defendant to show contributory negligence, and No. 7 stated to the jury that if the plaintiff exercised such care as an ordinarily prudent person would, under similar circumstances, he was not guilty of negligence. There is no error in either of these instructions.

It is next urged that the case should be reversed because of misconduct in the presence of the jury. It appears from the evidence that while the court was instructing the jury, the mother of the deceased child arose in the court room and clapped her hands and mumbled something about her boy. The court immediately directed her to be taken from the court room and instructed the jury that they should not be influenced by what had occurred. We do not think there was any error in this.

Appellant contends that the verdict is excessive, and calls attention to the case of *Interurban Ry. Co.* v. *Trainer,* 150 Ark. 19, 233 S. W. 816. In that case there was a verdict for $5,000, and the court reduced it to $2,500. The girl who was killed was eleven years old, and the $5,000 verdict and judgment was for loss of services.

The child killed in the instant case was four years old and the judgment was for $2,600. In all the cases relied on by appellant, as tending to support the contention that the verdict in this case is excessive, the verdicts were substantially the same as in this case; that is, where they were larger they were reduced to something like $2,500.

We find no error, and the judgment is affirmed.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* DYESS.

4-4814

Opinion delivered November 15, 1937.

Alexander & Green and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Owens, Ehrman & McHaney and *Paul B. Martin, Jr.,* for appellee.

McHaney, J. On June 19, 1930, appellant issued and delivered to William R. Dyess, husband of appellee, its two policies of life insurance, one in the sum of $10,000, and the other in the sum of $5,000. The two policies are identical except for the face amount. Each policy provided for double indemnity in case of accidental death, and defines accident as follows: "Death from accident means death resulting solely from bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means and ensuing within 90 days of such injuries, but does not include death resulting from or caused directly or indirectly by self-destruction, sane or insane, disease or illness of any kind, physical or mental infirmity, military or naval service in time of war, *engaging as a passenger or otherwise in submarine or aeronautic expeditions or operations,* or by the insured's violation of any law. * * *." The italicized portion of the above-quoted clause forms the basis of the principal contention made in this lawsuit. Under the options contained in the policies, the beneficiary named therein, appellee, elected to have the net sum due thereunder applied under option No. 1, which provides that the proceeds may be paid as follows: "1. Deposit Option: Left on deposit with the society at in-

terest guaranteed at the rate of 3 per cent. per annum, with such excess interest dividend, as may be declared."

It was agreed by the parties that appellant held on deposit for appellee the sum of $10,036.55, under the first policy above mentioned, being the face amount of said policy with interest, without prejudice to the rights of appellee to claim under the double indemnity clause of the policy. Under option No. 1, above quoted, appellant agreed to pay the beneficiary monthly installments at the rate of 3 per cent. per annum, plus such excess dividends as might be declared by it. The monthly installments under the terms of said policy, including the excess interest thereon, amount to $27.83 per month and the complaint alleged that the appellant was in default for four monthly payments, aggregating $111.32. Prayer was for judgment in that sum plus the additional sum of $27.83 for each month up to and including the date of final judgment, together with interest, a 12 per cent. penalty and attorneys' fees. Similar allegations were made as to the $5,000 policy, the monthly payments being alleged to be $13.91 per month, four of which were in default and for which a like prayer was made.

Appellant filed a petition and bond for removal to the federal court which was denied, and it then answered, admitting its liability for the face amount of each policy, but denying liability under the double indemnity provisions of said policies. It is conceded that on January 14, 1936, the insured was killed while a passenger on an American Airlines plane from Washington, D. C., to Little Rock, when the plane on which he was a passenger crashed near Goodwin, Arkansas. Appellant's only defense was that the insured's death resulted from engaging as a *passenger in aeronautic expeditions or operations.* Appellant, also, amended its answer, setting up numerous trips from and to Washington, from and to Little Rock, prior to his death in the airplane. Appellee, also, amended her complaint by alleging that since its filing she had learned that appellant pays a smaller rate of excess interest when payments are demanded monthly than on an annual basis, and that the excess interest rate

on the monthly basis amounts to 25 per cent.; that she is entitled, as of the date of the amendment, to fourteen monthly installments of $27.08 under the first policy, and fourteen such installments of $13.54 under the second policy, and she offered to accept said amounts in full settlement of her claims for interest from the amount left with appellant under said policies. It was later stipulated that the complaint might be so amended, and that the amounts set forth were correct. The above facts were all stipulated, and in addition, that the insured had no connection with the American Airlines, Inc., and that he had no direction or control over the operation of said airplane. Trial to the court, sitting as a jury, resulted in a judgment in appellee's favor for the monthly benefits sued for, which included, also, the benefits providing for double indemnity. The court also entered judgment for a 12 per cent. penalty and allowed attorneys the sum of $1,250 for attorneys' fees.

For a reversal of the judgment, it is first argued that the court erred in refusing to remove the case to the federal court. The basis of this argument is that since appellant is contingently liable for more than the jurisdictional amount of $3,000, that amount ought to control the jurisdictional question instead of the sum sued for, which is the aggregate amount of the monthly installments due at the time of trial. We think appellant is precluded on this issue in cases both in this and the Supreme Court of the United States, cited by appellant, which it attempts to distinguish from the case at bar. The cases referred to are *Mutual Life Insurance Company* v. *Wright,* 276 U. S. 602, 48 S. Ct. 323, 72 L. Ed. 726, affirming *Wright* v. *Mutual Life Insurance Co.,* 19 Fed. (2d) 117; *Standard Life Insurance Company* v. *Robbs,* 177 Ark. 275, 6 S. W. (2d) 520, and *Pacific Mutual Life Insurance Company* v. *McCombs,* 188 Ark. 52, 64 S. W. (2d) 333. The effect of these decisions is that the contingent effect of the judgment is not the test of jurisdiction, that is, that in the future the effect of the judgment rendered is to create a liability in excess of the jurisdictional amount, but that jurisdiction depends upon the amount demanded in the particular controversy before

the court. As said in the Wright case, *supra*: " 'The matter in controversy' was the amount for which appellant could recover judgment. That amount, which could not exceed $420, was much less than is required to confer jurisdiction on a federal district court. It is true that in this action the question was involved whether appellee was liable for double indemnity on past-due installments, and that a decision upon that question would work an estoppel as to the liability for future installments in an aggregate amount which would exceed the jurisdictional amount of $3,000." The court, therefore, correctly held that the case was not subject to removal because the amount demanded was less than $3,000.

Passing now to the principal contention made on this appeal, and that is that the exception in the double indemnity clause above quoted, that death from accidental means does not include death resulting from "* * * engaging as a passenger, or otherwise in * * * aeronautic expeditions or operations * * *," it is undisputed that appellant was a passenger in an airplane on a journey from Washington to Little Rock at the time he was killed. The question is, Was he engaged as a passenger in an aeronautic expedition or operation? If appellant meant to exclude liability for double indemnity while riding as a passenger or otherwise in any kind of aircraft, why did it not say so in such plain language that a wayfaring man, though a fool, might not be deceived thereby? It would appear a simple thing for a great institution, such as appellant, to write a clause in its policies exempting itself from such liability in plain and simple language. The word "aeronautic" here used, is an adjective and used in the sense of pertaining to aeronautics, and Webster defines the word "aeronautics" to be "the science that treats of the operation of aircraft; also the art or science of operating aircraft." The word "expeditions" as here used, means something more than a journey or a trip by airplane. Webster defines it as follows: "2. A sending forth or setting forth for the execution of some object of consequence; Progress. 3. An important journey or excursion for a specific purpose; as, a military or

exploring expedition; also, the body of persons making such an excursion."

We do not appear to have had the exact language here used under consideration heretofore, but we have had somewhat similar language, and other courts have had occasion to construe the exact language. In *Benham* v. *American Central Life Insurance Company,* 140 Ark. 612, 217 S. W. 462, the clause in the policy excepted "death while engaged in military service in time of war," and it was held that the exemption applied only in case of death while performing some duty in military service. The court said: "That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected with the military service, in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service." In *Benefit Association Railway Employees* v. *Hayden,* 175 Ark. 565, 299 S. W. 995, 57 A. L. R. 622, it was held that a telegraph operator, killed while a passenger in an airplane, was not "engaged in aeronautics" within the meaning of the exemption clause in the policy. In *Missouri State Life Insurance Company* v. *Martin,* 188 Ark. 907, 69 S. W. (2d) 1081, we had before us the phrase in the policy, attempting to exempt the company, "participating in aviation or submarine operations." The court there held that the word "aviation" was used in its adjective sense and limited or modified the word "operations." In that case the court intimated that the language used in cases cited, that is, "participating as a passenger or otherwise in aviation or aeronautics," might be sufficient to exempt the insurance company from liability for death of a passenger while in an airplane. This language is merely suggestive and it is dicta in that case as it was not necessary to a decision thereof. Moreover, it was there held that the word "operations" "can only mean the management and control of the airplane," and the same thing is true in the case at bar. Appellant contends that the insertion of the word "passenger" in the clause now under consideration must be considered and that a person may engage as a passenger in aeronautic operations only by riding in an airplane. We do

not think the word "passenger" is affected by the word "operations." In other words, that a passenger does not engage in the operation of an airplane, no more than a passenger on a railway train engages in the operation of a train or a passenger in an automobile engages in the operation thereof. We think the word "otherwise" in the clause under consideration has reference to the word "operations." The language is: "Engaging as a passenger, or otherwise, in * * * aeronautic expeditions or operations." This language is intended to cover passengers and others, passengers who engage in "aeronautic expeditions" and others who may engage in the "operations" of the aircraft.

Now, as to whether the insured was engaged as a passenger in an aeronautic expedition, two very well-reasoned cases are cited, which, to us, are very convincing. In the case of *Day* v. *Equitable Life Assurance Society,* 83 Fed. (2d) 147, the language in the policy issued by this same appellant was, "by engaging as a passenger, or otherwise, in submarine or aeronautic expeditions." There, the late Judge McDermott, speaking for the Tenth Circuit Court of Appeals, said: "Even if an ordinary airplane trip is an event fraught with hazard, it does not seem to follow that it is necessarily an expedition. All expeditions may be hazardous events, but all hazardous events are not expeditions. If a novitiate boarded an unbroken mustang, it would doubtless prove to be a hazardous event, but would not be accurately spoken of as an expedition. The New York court assumed that passengers never went on expeditions; that in order to reconcile the use by the insurance company of 'passenger' and 'expedition' in the same clause, some meaning should be given to 'expedition' which will reconcile it with the word 'passenger.' We doubt the assumption of fact. Wiley Post's lamented exploratory trip to the remote regions of the north was an expedition in its accepted sense, and Will Rogers was, as we understand, a passenger. Expeditions are sometimes accompanied by those who have no part in planning or executing the exploration, but who go as passengers or guests simply for the adventure. But even if there be a conflict in the

ordinary meaning of these two words selected by the insurance company in writing its policy, the rule in this jurisdiction is to resolve the ambiguity against the party selecting the words. *Graham* v. *Business Men's Assur. Co. of America,* (C.C.A. 10) 43 F. (2d) 673; *East & West Ins. Co.* v. *Fidel,* (C.C.A. 10) 49 F. (2d) 35; *Chase* v. *Business Men's Assur. Co. of America,* (C.C.A. 10) 51 F. (2d) 34; *Aschenbrenner* v. *U. S. F. & G. Co.,* 292 U. S. 80, 54 S. Ct. 590, 593, 78 L. Ed. 1137. Although entertaining the highest respect for the Court of Appeals of New York, we do not agree that there is a necessary ambiguity or conflict in a clause embracing passengers on expeditions; but if there were, the rule in this jurisdiction would be to resolve that conflict against the insurer rather than to extend the meaning of 'expedition' to reconcile it with the word 'passenger.'

"In the Aschenbrenner case, *supra,* the Supreme Court adhered to the established and wholesome rule that in construing contracts words 'will be given the meaning that common speech imports.' We do not believe any one, in common speech, would ever refer to an ordinary short trip in a plane as an 'expedition.' In any event reasonable men might differ on the point; and if so, then the ambiguous phrase should be resolved in favor of the customer who purchased the policy and not in favor of the company which drafted it."

The other case is one involving this same appellant and is *Provident Trust Company of Philadelphia* v. *Equitable Life Assurance Society,* 316 Pa. 121, 172 Atl. 701. The language under consideration was identical with that in the Day case, *supra.* The court said: "There is no difficulty in understanding many forms of activity that would be included in the words 'engaging * * * in submarine or aeronautic expeditions'; but traveling as a passenger would not, at first sight, seem to be such an engagement, and, where the question has arisen, it has been decided that an airplane passenger is not considered to be so 'engaged.' *Benefit Ass'n Ry. Employees* v. *Hayden,* 175 Ark. 565, 299 S. W. 995, 57 A. L. R. 622; *Peters* v. *Prudential Ins. Co.,* 133 Misc. 780, 233 N. Y. S. 500; *Masonic Accident Ins. Co.* v. *Jackson,* 200 Ind. 472,

164 N. E. 628, 61 A. L. R. 840; *Gits* v. *New York Life Ins. Co.,* (C.C.A.) 32 F. (2d) 7; *Price* v. *Prudential Ins. Co.,* 98 Fla. 1044, 124 So. 817; *Flanders* v. *Benefit Ass'n,* 226 Mo. App. 143, 42 S. W. (2d) 973.

"Appellant agrees that the phrases 'engaged in aviation' and 'engaged in aeronautics,' and similar expressions, have been held not to include one who was a passenger; but the brief suggests that: The words 'as a passenger' were inserted (in the policy) therefore to remove this doubt; but by adding the words 'or otherwise,' the expression became equivalent to 'anybody or everybody.' It may first be asked, if the purpose was to except passengers, why a clause simply except accident while a passenger in an aeroplane was not inserted? The difficulty is not so much with the words 'passenger or otherwise' as with the equivocal context 'engaging * * * in submarine or aeronautic expeditions.' The insured, when killed, was no more engaged in an expedition, in the common or normal sense of the word, than if he had been a passenger on a train or bus. A passenger engaged in an aeronautic expedition would seem to be one having some part in the conduct and operation of the expedition. On the other hand, if 'engaging as a passenger' was intended merely to describe persons who would be regarded as passengers within the ordinary meaning of that word, without having any part in the conduct of the aeronautic expedition, the phrase was not well chosen. Certainly, as the word is generally defined, a passenger takes no part in the operation of the vehicle in which he is carried. So far as appears, the parties used the words in their commonly understood sense and so intended them to measure their obligation."

Appellant cites and relies upon *Goldsmith* v. *New York Life Insurance Co.,* 69 Fed. (2d) 273; *Mayer* v. *New York Life Insurance Company,* 74 Fed. (2d) 118, 99 A. L. R. 155; and *Cristen* v. *New York Life Insurance Company,* 19 Fed. Sup. 440. In all of these cases, the language was, "engaging as a passenger or otherwise in aeronautic expeditions." The first two cases were from the Eighth and Sixth Circuit Courts of Appeals, respec-

tively, while the last case is from a district court of Illinois. It must be conceded that these cases support appellant's theory, but we think they are out of line with the better reasoned cases herein cited.

The result of our views is that the insured was engaged neither as a passenger or otherwise in an aeronautic expedition, nor in an aeronautic operation, and that the judgment of the circuit court is correct, and must be affirmed. It is so ordered.

ELLSWORTH *v.* ARKANSAS NATIONAL BANK, TRUSTEE.

4-4817

Opinion delivered November 15, 1937.

Coleman & Riddick, for appellant.

Chas. Jacobson and *Murphy & Wood,* for appellees.

SMITH, J. The decision of this case turns upon the proper construction of the will of Mrs. Alice Kempner Blumenstiel, who died in March, 1935, and that duty will be performed when we have ascertained the testatrix's intention in making it. The will reads as follows:

"I, Alice K. Blumenstiel of the city of Hot Springs, and state of Arkansas, hereby make, publish and declare this my last will and testament.

"1st. I direct that all my just debts and funeral expenses be paid as soon as it can be conveniently done after my decease.

"2nd. I give and bequeath to my daughter my home in Hot Springs, Arkansas, subject to the right of my husband to occupy said home so long as he shall desire to do so.

"I also give my daughter Ruth all my jewelry, linens.

"3rd. Ruth and Alfred are to share and share alike in the money and securities I may own at the time of my death.

"4th. I give to my grandsons, E. C. Ellsworth and Jim Ellsworth, and my great grandson, Bobby Ellsworth, the sum of $5 each.

"5. I give all my real estate wherever situated to the Arkansas Bank of Hot Springs, Arkansas, as trustee, in trust for the beneficial use of my children, Alfred

and Ruth Blumenstiel, subject to a life estate therein for the use and benefit of my daughter, Leah Ellsworth.

"In event said Alfred or Ruth should die without having issue then I direct that the interest of the child dying without issue shall pass to the survivor, but if either Alfred or Ruth shall die having a child or children that interest shall pass to said child or children of said deceased.

"6. I nominate and appoint the Arkansas National Bank of Hot Springs as trustee, which said trustee is to have the care and control of all my real estate and collect rents and pay the taxes and upkeep of the property as it shall deem necessary and proper, including fire protection, and in the event of loss or damage by fire to use its judgment in repairing or restoring as the case may be, and keeping the property rented, and shall have the same authority with reference to property I may own jointly with others.

"Said trustee shall set aside from the income of said property such sum as in its judgment may be necessary for taxes and insurance and repairs, and should there be any excess of the same year, said excess shall be equally divided between my children, Leah, Alfred and Ruth, or survivors should either of my children die.

"7. I also nominate and appoint said Arkansas National Bank of Hot Springs, Arkansas, to be sole executor of this my last will and testament.

"It is my desire that the trust therein created shall continue for a period of 20 years.

"That should executors deem it wise to sell any or all of my real estate, it shall invest the proceeds in such manner as shall be to the best interest of the trust estate, and at the end of said trust period the same is to be divided equally between Alfred and Ruth subject to a sum paid Leah, a sum of money equal to what a life estate in said property if unsold would amount to, and all subject to the conditions and terms hereinafter set out.

"Should this will ever be contested by Leah, it is my desire that the court should find it was my inten-

tion to leave my real estate to Alfred and Ruth and their children, if any, should either have children and that Leah receive only a sum equal to a life interest in one-third of said property.

"9. Before my bequest is paid I desire that the sum of $300 be set aside from my estate, the interest therefrom to be used each year for the care and upkeep of my lot in the Jewish Cemetery located in Hot Springs, Arkansas.

"Alice Kempner Blumenstiel,
"Sept. 25th, 1933."

The statement of Lord Eldon that "Generally speaking, you must construe instruments by what is found in their four corners," has been frequently followed and approved by this court, and for that reason we copy the will *in extenso*.

In the decree from which this appeal comes the court found that the trust estate created by the will was for the equal benefit of Ruth Blumenstiel and Alfred Blumenstiel, subject to a life estate in one-third of the net income in Leah Ellsworth. The court found that under the sixth clause of the will the net income of the trust estate should be divided equally among the three children of the testatrix, one-third to each of them; that the provision of clause 7 of the will provided for a sum of money to be paid to Leah Ellsworth equal to a life estate, as made, subject to the conditions and terms of clause 6, and means that if the property should be sold Leah Ellsworth should be paid a sum equal to a life estate in one-third of the property. The court further found that the last sentence of clause 7 is not a penalty clause, but a construction clause, and means that if Leah Ellsworth should ever, in any proceeding, bring in question the meaning of the will, the testatrix herself construed the will as found in the decree.

Appellant contends that this construction contravenes clause 5, which all parties concede is the section which disposes of the bulk of the estate. In clause 2 the testatrix devises her home "to my daughter," but "subject to the right of my husband to occupy said home so

long as he shall desire to do so." This sentence does not indicate to which daughter the devise was made, but the sentence following removes this doubt. It reads: "I also give my daughter Ruth all my jewelry, linens." Clause 3 devises to Ruth and Alfred the money and securities owned by the testatrix at her death. The inventory and appraisement made by the executor shows the value of the jewelry to be $593.50, and that the testatrix had cash on hand on deposit in a bank in the sum of $1,199.91 at her death. There were no securities except stock in a defunct bank, against which there was a stockholder's assessment of $1,000. The debts, if any, are not recited, but the final bequest is one for $300 for the upkeep of the testatrix's lot in the cemetery where she anticipated her burial. It may, therefore, be said, as both parties concede, that it is clause 5 which disposes of what might be called the corpus of the estate, and it was this property which was devised subject to the trust created. The property consisted of Little Rock real estate, including business property on Main Street, nine dwelling-houses and lots, and seven vacant lots in the city of Hot Springs, and 217 acres of land in Garland county.

For the reversal of the decree it is contended that appellant took a life estate in all the real estate conveyed in trust by the will, and that there are no ambiguities or conflicting provisions in other paragraphs to justify any other construction. It is argued that the seventh clause of the will reaffirms the fifth and provides a penalty in case of a contest of the will. It is argued, also, that certain inadmissible testimony was admitted which should not be considered.

We dispose of this last stated contention first, as it involves the attitude to be assumed, or viewpoint which must be taken, in construing the will.

There was testimony—which appears to be undisputed that an estrangement had grown up between Mrs. Blumenstiel and her daughter Leah, and the competency of that testimony does not appear to be disputed, but the husband of the testatrix, the father of appellant, was

permitted to testify that his wife had made a former will in which appellant was practically excluded from participation in the estate, and that at his insistence his wife had destroyed that will and had executed the one here to be construed. It may be conceded that the testimony as to this former will was incompetent, as it had been destroyed, but, even so, it was competent for Mr. Blumenstiel to testify as to the hostility existing between his wife and daughter.

Other testimony was to the effect that Ruth was 31 years of age at the time of her mother's death, and was unmarried, and had no income of her own. Alfred was 37 years old at the time of his mother's death, and he had never married. He had no income of his own. Both Ruth and Alfred were, and for several years prior to their mother's death had been, in poor health. Leah was 43 years old at her mother's death, was married, in good health, had a husband able to support her, and had an income of her own. Leah had two children, and a grandchild and to each of these a devise of $5 was made. The will contains no other direct provision for the benefit of these children and grandchild.

Both parties to this appeal agree that the case of *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, 1199, correctly announced the rule to be applied in construing this testimony. This case is to the effect that while extrinsic evidence may be admitted to interpret a will, it will not be admitted to show what the testator meant, as distinguished from what the words of the will express, but only for the purpose of showing the meaning of the words used. It was there further said: "We must look to the will to determine the testator's intention, but in getting this view we should place ourselves where he stood, and should consider the facts which were before him in deciding what he intended by the language which he employed. If the rule were otherwise, the making of wills would be so difficult that the very purpose of permitting this method of disposition of property would frequently be defeated."

We will, therefore, view the will from the arm chair of the testatrix, as some cases express it, not to determine what she intended to do, but to properly interpret the language which she employed. In this connection, it may be said that the will, as interpreted by appellant's counsel, gives her a most decided preference. Appellees make calculations based upon Dr. Wigglesworth's annuity tables; found in Scribner on Dower, showing that under appellant's contention she would be given 60 9/10ths per cent. of the whole estate, when calculated on earnings at 5 per cent., and an even larger per cent. of the whole if the income from the property was calculated at 6 per cent. This would result in Ruth—indisputably the favorite child—and Alfred, the only son, receiving about one-third of the estate, while appellant would be given twice as much as both of them combined. Does the will, when read from its four corners, require or permit that construction? If appellant took a life estate in all the property conveyed in trust by the will, Ruth's and Alfred's interests are postponed for twenty years, or until the termination of the trust, and if they should die within that time Leah, if she should survive them, or her children, if she should predecease them, would take the entire estate. *Horseley* v. *Hilburn*, 44 Ark. 458. This notwithstanding the fact that Leah's interest in whatever portion of the property she may take was expressly limited to a life estate, and no provision was made for the children and grandchild except to leave them $5 each.

It is clause 5 which creates the trust, and this is done by a devise to the bank "as trustee, in trust for the beneficial use of my children, Alfred and Ruth Blumenstiel, subject to a life estate therein for the use and benefit of my daughter, Leah Ellsworth." The beneficial use for Ruth and Alfred could not be effective, during the life of Leah, if the trust created was for Leah's exclusive benefit during her life.

The testatrix is presumed to have known, and no doubt knew, that if she died intestate her children would share equally; but the one thing certain about this will

is that this was the very thing the testatrix did not want done, and to effectuate that intention she created a trust "for the beneficial use of my children, Alfred and Ruth," in which Leah, however, was permitted to share for the period of her lifetime. There was no other devise to Leah. The concluding sentence of this clause 5 clearly indicates that the fee was devised to Alfred and Ruth, subject, however, to a trust created for the joint benefit of all the children, in which Leah should participate during her life. There is no express grant to Leah. There is simply reserved for her use and benefit, during her life, what she would have taken in fee as an heir if the will had not been made. That this is the correct construction of clause 5 becomes more apparent when it is considered in connection with other provisions of the will, which we are required to do in determining the meaning of the will when considered in its entirety.

By clause 6 the trustee is to have care and control of "all my real estate," and is charged with the duty of collecting rents, and paying taxes, and of keeping the property insured, and is given the discretion to use its judgment "in repairing or restoring" the property in case of fire. After the income had been collected and the expenses above-mentioned paid, the last sentence of clause 6 provides that "should there be any excess of the same year, said excess shall be equally divided between my children, Leah, Alfred and Ruth or survivors should either of my children die." The word "excess," here employed, can mean only the balance of income remaining after expenses are paid. This clause does not contemplate that the children should make contributions to meet deficits; it imports a distribution to them. If this were not true the will would have provided that a deficit should be borne, rather than that the excess should be divided.

It is also argued by appellees—and we think with equal force and reason—that if all the income from the real estate had been given Leah for her life, the trust could not become operative until after her death, and that contention is not made by any one.

The purpose expressed in clause 6 is reaffirmed in clause 7, which confers authority upon the executor, if deemed wise, to sell the lands covered by the trust, and to reinvest the proceeds of sale, but without destroying the trust, which is to be continued for the full twenty-year period. Anticipating that Leah might survive the twenty-year trust period, paragraph 7 provides, without changing the interest given Leah in paragraph 5, that "at the end of said trust period the same is to be divided equally between Alfred and Ruth subject to a sum paid Leah, a sum of money equal to what a life estate in said property if unsold would amount to, and all subject to the conditions and terms hereinabove set out." This clause 7 appears to mean that the testatrix intended Leah to receive the income from only a one-third interest in the real estate for her life, or the then value of the life estate, if the trust property were sold.

There appears to be no paragraph of the will numbered 8, but it is argued that the last subdivision of paragraph 7 reaffirms the intention to give Leah all the rents from the trust estate, and provides a penalty if she should contest the will. The chancellor was not of that opinion; nor are we. If the will gave Leah two-thirds of the value of the estate, why should she contest that disposition? She would have much to lose and nothing to gain by doing so. Appellant argues that this is not a contest of the will, and it is not. It is rather just such a suit as the testatrix probably contemplated when she wrote the provision relating to a contest. It imposes no penalty, and does not undertake to deprive Leah of anything previously devised her. It neither enlarges nor diminishes the interest given her.

The word contest is defined in Webster's New International Dictionary as follows: "4. Law. To make a subject of litigation; to dispute or resist by course of law; to defend, as a suit; to controvert. Syn.—Dispute, controvert, debate, litigate, oppose, argue, contend."

The testatrix probably realized when she had written the will, which was not as clear as it might and

should have been, that she had discriminated—not for, but against—her daughter Leah, by devising her only a life estate, when the shares given her other two children were not thus limited, and that for this reason Leah might seek to have the will otherwise construed. She, therefore, directed the construction to be placed upon what she had previously written, which was "to leave my real estate to Alfred and Ruth and their children, if any, should either have children, and that Leah receive only a sum equal to a life interest in one-third of said property."

It is argued that this clause of the will should be excluded, because it never became effective, inasmuch as there has been no contest of the will. But we think there has been, and that the instant case is one of the character contemplated by the testatrix, and that we cannot ignore the construction which she directed should be placed upon the will in that event. This conclusion is reinforced by the fact that the will contains no intimation that Leah should have a certain interest if she did not contest or bring litigation involving the construction of the will, or another, or less, or different, interest if she did so. There is no change of intention in the one case as distinguished from the other. There would have been no litigation if there had been no difference in construction, and this is the very contingency against which the testatrix sought to provide. She wanted her own construction of the will adopted, and she stated what that construction was.

The decree accords with these views, and it is, therefore, affirmed.

SMITH AND PARKER *v.* STATE.

Criminal 4066.

Opinion delivered November 22, 1937.

Booker & Booker, for appellants.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

BAKER, J. Appellants were charged by information and tried for the robbery of one John Joshua in the Osceola district of Mississippi county. The jury found both guilty and fixed their respective terms in the penitentiary at twenty-one years.

The record upon which this appeal is presented consists of a copy of the information filed and of the judgment and sentence of the defendants, with affidavits of the prosecuting attorney, Bruce Ivy, Joe Rhodes, who was appointed to defend and did defend, the appellants upon the trial and also an affidavit of Mrs. Buford Murray, the court reporter. These affidavits perhaps supply, in a measure, a part of the history of the case. The defendants were tried at a special or adjourned term of court. Prior to the opening of the court the prosecuting attorney talked with the defendants, advised them to get counsel and have their witnesses ready. When, finally, they were not able, or did not employ counsel, he advised Joe Rhodes that he, the prosecuting attorney, would ask the court to appoint an attorney and he thought it probable that Rhodes would be appointed and asked Rhodes to get the cases ready for trial. Rhodes, believing he would be appointed, conferred with the defendants, had sub-

poenas issued for such witnesses as they desired and upon the cases being reached for trial, he was duly appointed and defended under that appointment.

Not a word of testimony is brought forward by the bill of exceptions or otherwise, but it is stated by Mr. Rhodes' affidavit, at least, that he found the cases must be determined upon questions of fact; that the defendants knew this and that at the time the trial was begun, the court reporter was present, ready to take the testimony, but that he waived for his clients the taking of this proof by the official reporter, that this was done in their presence and with their consent. It was probably not in contemplation of the parties that the ultimate result would be a conviction with a heavy penalty.

Only two matters are argued for the reversal upon the joint information charging both of them with the same offense and upon which they were tried together without objection, convicted at the same time; and raised identical questions upon appeal.

Appellants argue the illegality of prosecution by information and insist that they could not have been legally tried except upon an indictment by a grand jury. This question has just been disposed of in *Penton* v. *State, ante* p. 503, 109 S. W. (2d) 131. It is shown therein that the proceedings were authorized under amendment No. 21 to the Constitution, under act No. 160 of the Acts of 1937, approved March 1, 1937, and also under initiated act No. 3. There is no reason at this time to re-examine and restate our conclusions reached in the case mentioned. That opinion is controlling on this appeal.

In connection with that issue the appellants argue that inasmuch as the information was filed on June 28, and they were brought to trial on Tuesday, June 29, they did not have forty-eight hours before arraignment and before proceeding to trial. This forty-eight hour period is applicable to those charged with a capital offense. Section 3878, Pope's Digest. There is no record, as above stated, in regard to the formal arraignment or whether the same was waived, nor do counsel for appel-

lants even assert or intimate that the appellants objected to going to trial at the time or that they desired any time for preparation, nor is it intimated that they did not waive formal arraignment. They certainly cannot proceed upon a presumption that it was error to put them to trial. Besides they cite § 3128 of Crawford & Moses' Digest, now § 3964, Pope's Digest, as follows:

"All prosecutions shall stand for trial on the day to which they are docketed where the defendant is in custody, or on bail, or has been summoned three (3) days before commencement of the term."

The affidavits, at least, show these defendants to have been in jail. They were not summoned or brought in by any process served; they were in custody, willing and ready to go to trial. We will not presume error.

The only other question urged is that the court reporter did not report the evidence in the case so that the bill of exceptions might be prepared. It is stated by the affidavits, and we think virtually conceded by appellants, that the right, if it were one, to have the evidence reported was waived by the appellants. They certainly could not waive this right, go to trial and, if disappointed in the result, then insist upon the right thereafter.

Questions upon appeal are apt to receive more favorable consideration if made and presented with consistent good faith.

It is also argued that the sentence of twenty-one years is oppressive. Beyond a mere statement to that effect there is nothing to support that conclusion. The statute fixes the penalty for robbery at from three to twenty-one years. Sections 3035, 3036, Pope's Digest. This wide range within which penalties might be fixed doubtless contemplated that conditions proved would establish extremely malicious or diabolical conduct in some cases calling for severer penalties than in others.

We know nothing of the facts in this case. It may be of a character so aggravated in its nature as to call for the severest possible penalty. If the jury thought so, then the trial court, wherein all the evidence was heard, must have determined that the verdict, severe as it was,

was justified. We cannot presume otherwise. Besides, this court possesses no power inherent in the office of the chief executive, permitting us to pardon or remit penalties, although we may reduce extreme penalties when not supported by the evidence. Judgments must be presumed to be supported by substantial evidence until a contrary condition is affirmatively shown.

There is no suggestion here of insufficient proof.

Affirmed.

NEW FURNITURE & UNDERTAKING COMPANY *v.* TRI-COUNTY BURIAL CLUB.

4-4686

Opinion delivered October 18, 1937.

Fred M. Pickens, for appellant.

Lamb & Barrett, for appellee.

GRIFFIN SMITH, C. J. Appellee is a burial society of Newport, Arkansas, operated by the Farmers Union

Undertaking Company of Jonesboro, Arkansas. Its "B" class burial certificate was issued in favor of Orval Harris on an application signed by Will Harris. In the application there is the recitation that the party requesting membership is in good health, not suffering from any chronic disease, nor under the care of any doctor. These statements are made warranties, and there is a provision that if the age or health condition of the applicant is misrepresented, all club benefits shall be forfeited.

Three weeks after the burial certificate was issued, Orval Harris died. Investigations, and the death certificate signed by the attending physician, disclosed that since 1929 Harris had been suffering from a chronic disease which caused his death.

In effect appellant admitted that the application contained warranties as to the member's health, and that death resulted from a disease from which the member was suffering when he applied for burial benefits, but offered to prove by Jesse Outlaw, the deceased's uncle by marriage, that he (Outlaw) was present when the application was executed; that appellee's agent, Albert Duck, knew that Harris was sick, and in spite of this knowledge accepted the application.

The trial court, sitting as a jury, held that the application was void on account of a breach of warranties, and refused to hear testimony as to the agent's knowledge of existing facts.

It is true that a breach of warranty as to any fact material to the risk will avoid a policy of insurance when that defense is interposed, or when the insurer undertakes by proper proceedings in chancery to set the contract aside. The question presented in the instant case is whether the warranty was waived or became inoperative, in view of the alleged knowledge of the agent. Knowledge of the physical condition of the applicant which comes to the agent of the insurance company while he is performing the duties of his agency in receiving applications for insurance and delivering policies becomes the knowledge of the company; and the insurance company is bound thereby, where the agent who solicited the business was charged with the duty of ascertaining

physical condition. *Bankers Reserve Life Insurance Company* v. *Crowley,* 171 Ark. 135, 284 S. W. 4. This rule is firmly established by decisions of this court. If the agent incorrectly or fraudulently transmits the answers of the applicant, that would not defeat the policy if it would have been valid and binding on the answers actually given. This is true whether the answers, under the terms of the policy, are merely representations, or are warranties. But this question is not involved in this case. It follows, therefore, that in those cases where statements are declared to be warranties, and the agent is authorized to determine the materiality of the answers or statements, recovery will not be defeated, if the authority is exceeded, or if the warranties or representations are waived by substitution of the agent's own answers or his interpretation of the applicant's answers, unless the applicant conspires with the agent to materially mislead the insurer.

In *Bankers Reserve Life Insurance Company* v. *Crowley,* referred to *supra,* Chief Justice HART, in referring to another decision of this court, said: "It was also held that if an agent, in collusion with the applicant, even though acting within the apparent scope of his authority, perpetrates a fraud upon the insurance company by making false and fraudulent representations upon which the insurance is obtained, such fraud will vitiate the policy." To the same effect is a holding in *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450, 196 S. W. 792, where it was said: "It is well settled that if the agent, in collusion with the applicant for membership, even though acting within the apparent scope of his authority, perpetrates a fraud upon the society by making false and fraudulent representations upon which the insurance is obtained, such fraud will vitiate the policy."

In a comparatively recent case, *The Maccabees* v. *Gann,* 182 Ark. 1141, 34 S. W. (2d) 456, we said: "Whether the answers were representations or warranties is immaterial in this case because the evidence shows that the agent of the insurance company was advised that she had consulted a doctor about injury and hemorrhage." Also, in *Brotherhood of Railroad Trainmen*

v. *Long,* 186 Ark. 320, 53 S. W. (2d) 433, this sentence appears: "As we understand the rule laid down [in *Providence Life Assurance Society* v. *Reutlinger,* 58 Ark. 528, 25 S. W. 835], it is merely to the effect that, if a false answer is knowingly made by the insured with knowledge of the agent of the company, and the two collude to defraud the company by means of the false answer, the policy of insurance is void."

In *Brotherhood of Railroad Trainmen* v. *Long,* 186 Ark. 320, 53 S. W. (2d) 433, the court quoted with approval *Clemans* v. *Supreme Assembly,* 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33, as follows: "If the insurer's agent, after being informed fully as to the facts incorrectly states them in the application, the insurer is estopped to take advantage of the error to avoid liability on the policy. * * * If the statements in the application relied upon as breaches of warranty are inserted by the agent of the insurer, without collusion or fraud upon the part of the insured, the insurer is estopped to set up this error or falsity."

In the case now under consideration, it is not alleged by appellee that there was fraud or collusion between the agent, Albert Duck, and the assured's agent. In the absence of such collusion, appellee would be charged with knowledge of its agent if the agent had authority to investigate the elements of risk specified in the application.

In these circumstances, if it should be established that the agent was charged with the duty of investigation, evidence would be admissible to show what information the agent actually had affecting the applicant's insurability, or what statements were made to him.

The cause is reversed and remanded with directions that, on retrial, the testimony offered and excluded be received if a proper foundation is laid.

WOFFORD *v.* JACKSON.

4-4750

Opinion delivered October 25, 1937.

R. V. Wheeler and *Kenneth Rayner,* for appellant.

A. B. Shafer and *E. C. Gathings,* for appellee.

HUMPHREYS, J. This suit was brought by appellant in the chancery court of Crittenden county against appellee to charge her as a constructive trustee holding the legal title to the N½ NE¼ of section 4, township 5 north, range 7 east, in Crittenden county, Arkansas.

Appellee filed an answer denying that she holds the legal title of said land in trust for the benefit of appellant, but, on the contrary, alleges that she holds the legal title thereto as purchaser thereof for her own benefit at a foreclosure sale of a mortgage executed by appellant

and Frances Wofford, his stepmother, to J. L. Mercer & Co.

The cause was submitted to the court upon the pleadings and testimony adduced by the parties, which resulted in a decree dismissing appellant's complaint, from which is this appeal.

The record reflects by undisputed evidence that J. F. Wofford died intestate in December, 1922, owning the NE¼ of said section of land, and leaving as his only heirs appellant and appellee who were adults and his widow, Frances Wofford. Frances Wofford was the stepmother of appellant and appellee. Prior to the death of J. F. Wofford he and his wife, in 1918, executed a mortgage on the 160-acre tract of land to the Federal Land Bank for $2,000 which has never been paid. At the time of the death of J. F. Wofford, appellee was residing with her husband in Kentucky and appellant was residing with his father and stepmother on the 160-acre tract and was managing the farm. After his father's death he continued to reside on the land with his stepmother and he continued to manage the farm. On February 5, 1925, appellant, appellee and Frances Wofford executed a partition deed of the lands allocating the north 80 acres to appellant and the south 80 acres to appellee subject to the dower rights of Frances Wofford. Frances Wofford was assigned dower in each of the 80-acre tracts so that the land assigned to her was in a body. In the operation of the farm, appellant and his stepmother were compelled to borrow $676 from J. L. Mercer & Co., and for that and further advances, they executed a mortgage on their interests in the land to secure same. Some time after the debt secured by the mortgage became due, Mercer demanded payment, and upon failure to pay him he foreclosed this mortgage subject to the mortgage to the Federal Land Bank and Young purchased the interest of appellant and his stepmother for $1,314.13, that being the amount due Mercer on the mortgage at that time including the additional advances. Appellant employed lawyers to oppose the confirmation of the sale to Young, but they were unsuccessful. Later appellant employed

lawyers, Fisher & Raynor, to bring suit to set aside the sale. Appellee agreed to pay a part of the fee to these lawyers because in the foreclosure there was some doubt as to whether the 80 acres allocated to her was included in the description and she wanted her 80-acre tract disentangled from the interest of appellant. Appellant lost the suit in the chancery court and appealed the case to the Supreme Court and prevailed. This case is styled *Wofford* v. *Young,* and is reported in 173 Ark. 802, 293 S. W. 725. Appellee was not a party of record to the Mercer foreclosure suit, nor to the petition to set aside the sale to Young under it. When the sale was set aside appellant was unable to raise the money to redeem from the Mercer mortgage or from Young who had bought it and there was a resale of the property of the interest of appellant and his stepmother to satisfy the mortgage. After Young purchased the land at the first mortgage sale, he took possession of the north 80-acre tract and the dower interest of Frances Wofford and ousted appellant from the possession thereof and he, appellant, moved to Memphis. Appellant was unable to pay the attorney's fee and court costs incurred in getting the sale set aside and in procuring a resale of the property. Appellee obligated herself to pay the court cost, some of which she had advanced, and the attorney's fee of $1,500. In order to help her brother, she offered to raise a part of the money if he would raise the rest of it to redeem the land from the Mercer mortgage, but he failed to do that. The resale of the land was made on January 5, 1928, and, through the advice of attorney, Fisher, appellee purchased same, procured a commissioner's deed and went into possession of the land. She then executed a mortgage thereon to secure the attorney's fee of $1,500 and afterwards paid it all except about $500 or $600 which she still owes. Appellee continued to reside upon the land and took care of her stepmother until her stepmother died in 1930. In January, 1932, she received a letter from appellant stating that he was in financial straits, unable to get work and that his wife was sick.

Appellee testified that she bought the property for her benefit to protect herself against the amount she had paid out and the obligation she had incurred and not in trust for appellant; that all she had done in the matter was to help her brother as far as she could to redeem his land from the Mercer & Co. mortgage; that after receiving the letter from him she went to Memphis and brought him back and rented him 20 acres of land on the north side of the place as a share-cropper; that she furnished him during the year 1932 during which year he made a crop; that he remained during the year 1933 and obtained his supplies from A. C. Oliver on a waiver from her; that she authorized Oliver to furnish appellant $85 to make his crop; that appellant made two bales of cotton and 1,075 pounds of seed cotton and came out $22.80 ahead of his account, which amount she authorized Oliver to pay to appellant so that he might have something to live on; that during the year 1934 appellant rented the land from her and was furnished by A. C. Oliver who required him to obtain a waiver from her; that at the close of the year Oliver paid appellee $96 rent and paid appellant $122.81 in cash after settling his account; that appellant had never claimed the property or any interest therein after she bought it at the foreclosure sale and had rented a part of it from her and recognized her as his landlord until he brought this suit.

A. C. Oliver testified that in 1933 appellant applied to him for supplies to make a crop and told him that the land on which he was living belonged to his sister, appellee, that he was unable to redeem it from the Mercer & Co. mortgage or from Young who had bought it at the first sale, and that rather than have some third party buy it in at the mortgage sale he preferred for appellee, his sister, to get it; that based upon this information he required appellant to get a waiver from appellee before he would furnish him; that he got the written waiver and brought it to him and the waiver appears in this record; that in 1934 he furnished appellant again, but before doing so required him to get a written waiver from appellee; that out of the crop that year appellant paid

appellee $96 for rent and, after settling his account, witness paid appellant $122.81 in cash; that in the spring of 1935 appellant again requested him to advance him supplies on the crop and when he asked appellant for a waiver from appellee he said he did not have to get a waiver because he owned an interest in the land; that witness said to him, "It's funny you coming up here now and claiming an interest in the place when you never claimed it before"; that appellant stated that one of the attorneys who had theretofore prosecuted the suit had told him, appellant, he could get an interest in the place; that appellant failed to bring the waiver and witness refused to furnish him that year.

Appellant testified that after employing Mr. Fisher and Mr. Raynor to get the first mortgage sale set aside appellee took charge of the lawsuit and told him she would treat him right and that he made no effort to get up the money to redeem the land or pay the attorney's fee, but just left it all to appellee trusting that she would pay off the Mercer mortgage or the purchaser at the first sale and the attorney's fee and after repaying herself out of the rents and profits would turn the land over to him; that he did not know the land had been resold, but thought appellee had redeemed it from Young, who had bought it at the first sale; that he was dispossessed by Mr. Young and then left the place and went to Memphis where he remained until appellee brought him back in 1932; that after he came back appellee handled his cotton and put the money in her pocket; that she furnished him, but would only give him his meat and bread and no money. Appellant admitted that Oliver furnished him, but denied that he had paid him rent for appellee or that he, himself, had paid appellee rent on the land and stated that when he discovered that appellee had bought the land in her own name at the second foreclosure sale he brought this suit.

Mr. Fisher testified in the case corroborating appellee's testimony relative to appellant's failing to pay his attorney's fee and failing to get up the money or any part of it to redeem the land, and also to the effect that

he advised appellee to buy the land at the second foreclosure sale in order to protect herself; also that after she bought it in she mortgaged the land to him to secure his fee and afterwards paid the larger part of it.

Appellant does not contend that he is entitled to recover on any written or oral contract to the effect that appellee was to buy the land in at the second foreclosure sale for his benefit. He contends that under all the circumstances surrounding the transaction equity should declare under the doctrine of constructive trusts that she holds the legal title to the land by virtue of her purchase for his benefit. In defining what a constructive trust is, this court in the case of *Haskell* v. *Patterson,* 165 Ark. 65, 262 S. W. 1002, quoted as follows from Pomeroy's Equity Jurisprudence:

"Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and, in most cases, contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed trusts in *invitum;* and this phrase furnished a criterion, generally accurate and sufficient, for determining what trusts are truly 'constructive.' An exhaustive analysis would show, I think, that all instances of constructive trusts, properly so-called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source."

And, again, in *Edlin* v. *Moser* in 176 Ark. 1107, 5 S. W. (2d) 923, quoted from Pomeroy as follows:

"If one party obtains the legal title to property not only by fraud, or by violation of confidence or of the fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

Relative to the character of evidence necessary to establish a constructive trust this court said, in substance, in *Tillar* v. *Henry,* 75 Ark. 446, 88 S. W. 573, and in *Eason* v. *Wheeler,* 167 Ark. 320, 268 S. W. 29, that it is not only necessary to show that such a trust exists by a preponderance of the evidence, but by evidence that is full, clear and convincing.

Keeping in mind this rule of evidence and this definition of constructive trusts announced in the cases referred to we are unable to say that appellee's purchase of said land at the second mortgage foreclosure sale was for the benefit of appellant. At the time of the purchase, appellee occupied no fiduciary relationship toward appellant. Long before this the land had been divided by a partition deed and she was not his cotenant. Her statement that she was trying to help her brother redeem his 80-acre tract is not enough to show that she intended to go to the extent of buying it in for his benefit. Her payment of the costs and the attorney's fee can be attributed to her sisterly interest in him. According to the weight of the evidence he abandoned the whole thing and left the burden upon appellee. He refused to pay the attorney's fee or to get up any part of the money to redeem his land or to buy it in at the second foreclosure sale. Several years thereafter, he wrote an appealing letter to his sister to the effect that he was in financial straits, unable to get a job and that his wife was sick. According to the weight of the evidence she went to Memphis and got him and his wife and rented them a portion of the land for the year 1932 and furnished him during the crop season; that he remained on the land as her

tenant during the years 1933 and 1934 and in 1934 paid her $96 rent out of the crop. Appellant's statement to Oliver, who was a disinterested witness, reflects that he knew all about the transaction and that he preferred for his sister to buy in the land as her own and for her own benefit than have some third party to do so. We do not think there is anything in the record tending to establish a constructive trust in appellant's favor.

Appellant cites and relies upon the case of *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. (2d) 88, as a case on all fours with this case and controlling here; but in that case the evidence was clear, satisfactory and convincing that the brothers and sisters of Monroe Armstrong conveyed him the land in controversy in order that he might secure money to pay the existing indebtedness against the land and for the purpose of managing the land and paying whatever indebtedness he might thus incur out of the rents and profits and that when that purpose was accomplished all the brothers and sisters with him should become owners of the land, share and share alike. The evidence in the instant case does not preponderate in favor of appellant in his contention that appellee holds the legal title as a constructive trustee for him. To our minds the evidence is clear, satisfactory and convincing that appellee bought in the land for her own benefit and not for his.

Apppellant contends even though the evidence fails to show that appellee purchased the land at the second foreclosure sale for the benefit of appellant under the doctrine of constructive trusts, that having joined in the partition deed of the 160-acre tract on February 5, 1925, allocating 80 acres thereof to appellant, her purchase at the second mortgage sale was an after acquired title and redounded to appellant's benefit as a matter of law. We cannot agree that this was the effect of the partition deed. Appellant acquired his title to an undivided interest in the 160 acres from his father, and not from appellee. The purpose of the partition deed was to segregate or allocate the north 80-acre tract to appellant and the south 80-acre tract to appellee. The legal effect of such deeds

is correctly announced in R. C. L., Vol. 20, p. 53, as follows: "It is generally held that a partition of land creates no new title to the shares set off to the parties to be held in severalty, whether the partition be made by act of the parties or by a judgment or decree of the court. While its effect is to allocate the share of each in his allotted parcel of the land, and extinguish his interest in all of the others, the title by which he holds his divided share is the same as that by which his undivided interest in the estate in common was held. * * *."

No error appearing, the decree is affirmed.

STATE *v.* HUTCHINSON.

Criminal 4071.

Opinion delivered November 22, 1937.

Jack Holt, Attorney General, *Bruce Ivy* and *John States,* for appellant.

Bon McCourtney, for appellees.

HUMPHREYS, J. This is a prosecution by the state of Arkansas against appellees for selling intoxicating liquors in a pool room operated by them in the Jonesboro district of Craighead county contrary to clause (e) of § 26 of act 158 of the Acts of 1931 which is as follows:

"To sell, barter, furnish, or possess in such billiard room or in any place appurtenant thereto, any intoxicating liquors, or to permit any such acts to be done, or * * *."

Appellees pleaded not guilty in the municipal court at Jonesboro and were tried separately, convicted and fined from which they prosecuted appeals to the circuit court.

In the circuit court their cases were consolidated by consent for the purpose of trial and were submitted to the judge thereof sitting as a jury upon an agreed statement of facts where they were acquitted and discharged, from which judgment of acquittal the state has appealed to this court.

The agreed statement of facts is to the effect that each appellee owns and operates a pool room in said district and has a license to do so, and that each sells 5 per cent. beer therein under license from the state to sell beer.

Said act 158 is a general act regulating the operation of billiard and pool rooms in the state and requiring persons who do so to pay a privilege tax for the benefit of the indigent blind. In the operation of the rooms, the licensees are prohibited from doing many things under said act, one of which is the sale of intoxicating liquors therein. The purposes of the prohibitions contained in the act, such as not allowing the sale of intoxicating liquors, etc., was to prevent pool and billiard rooms from becoming saloons, dives or disorderly places of resort. It is contended, however, that since the passage of act 108 of the Acts of 1935, 5 per cent. beer is no longer an intoxicating liquor in Arkansas and that the effect of said act 108 was to repeal clause (e) of § 26 of act 158 of the Acts of 1931, which prohibited the sale of intoxicating liquors in pool rooms. We are unable to find in act 108 of the Acts of 1935 any provision saying 5 per cent. beer is not an intoxicating liquor. It does say in the latter part of § 6 thereof that "beer containing not more than five (5%) per centum of alcohol by weight and all other malt beverages containing not more

than five (5%) per centum of alcohol by weight are not defined as malt liquors, and are excepted from each and every provision of this act." This is far from saying that 5 per cent. beer is not an intoxicating liquor. The effect of the words quoted above are that said act 108 excludes from its taxation and regulation malt and vinous beverages containing more than 3.2 per cent. of alcohol and not more than 5 per cent. of alcohol and further specifically provides as follows:

"It is further provided that malt and vinous beverages containing more than 3.2 per cent. of alcohol by weight and not more than 5 per cent. of alcohol by weight shall be taxed and regulated as provided for malt and vinous beverages containing not more than 3.2 per cent. alcohol by weight under the provisions of act No. 7 of the Acts of the Extraordinary Session of the General Assembly of 1933, approved August 24, 1933." Turning to act 7 of the Acts of 1933, § 2, we find that "intoxicating liquor" means vinous, ardent, malt, fermented liquor or distilled spirits, with an alcoholic content in excess of 3.2 per cent. by weight. We are not willing to construe these acts as saying that the Legislature passing them intended to say that 5 per cent. beer was non-intoxicating liquor. Such a declaration on the part of the Legislature would be arbitrary and contrary to what everybody knows. Just as well say black is white as to say 5 per cent. beer is non-intoxicating liquor, and, of course, no Legislature would declare black is white. Appellees admit they are selling 5 per cent. beer in their several pool rooms. This is a violation of clause (e), § 26, of act 158 of the Acts of 1931, because neither act 7 of the Acts of 1933 nor act 108 of the Acts of 1935 defined 5 per cent. beer as non-intoxicating. The last two acts do not expressly repeal clause (e), § 26, of act 158 of the Acts of 1931. There is no repeal by them of clause (e) of § 26 of act 158 of the Acts of 1931 by implication as there is no conflict between them and clause (e) of act 158 of the Acts of 1931. In fact there is nothing in either act 7 of the Acts of 1933 or act 108 of the Acts of 1935 which deals with the regulation of pool or

billiard halls. It was said by this court in *Martels* v. *Wyss,* 123 Ark. 184, 184 S. W. 845, that:

"Repeals by implication are not favored, and when two statutes covering the whole, or any part, of the same subject-matter are not absolutely irreconcilable, effect should be given, if possible, to both. It is only where two statutes relating to the same subject are so repugnant to each other that both cannot be enforced, that the last one enacted will supersede the former and repeal it by implication."

Act 158 of the Acts of 1931 regulates the operation of pool and billiard halls and act 7 of the Acts of 1933 and act 108 of the Acts of 1935 regulate the sale of intoxicating liquors containing more than 5 per cent. of alcoholic content. The acts operate in entirely different fields and there is no repugnancy whatever between them. In regulating the sale of intoxicating liquors in Arkansas certainly the Legislature did not intend to say that persons procuring a license to sell them might sell them in pool and billiard rooms or that licenses might be issued to them by the Commissioner of Revenues to sell intoxicating liquors in pool or billiard rooms in the face of an act which forbids the sale of such liquors in pool and billiard rooms.

On account of the error indicated the judgment of acquittal and discharge of appellees is reversed, and the cases are remanded for further proceedings.

SMITH and BUTLER, JJ., dissent.

STEELE *v.* JACKSON.

4-4826

Opinion delivered November 22, 1937.

W. F. Denman and *W. J. Kirby,* for appellant.

McRae & Tompkins, for appellees.

HUMPHREYS, J. This suit was brought on November 13, 1936, in the chancery court of Nevada county by appellant against Leodis Jackson and others to cancel certain conveyances alleged to be clouds upon his title to a one-half interest in the south one-half of the northeast one-fourth, section 9, township 14 south, range 20 west, in said county which appellant claimed under a deed from Kate Dalrymple, Sula Dalrymple Peer and Wade Dalrymple, Jr., widow and heirs of Wade Dalrymple.

Appellees, the Jackson heirs and their grantees to whom they had made timber deeds, royalty deeds, oil leases, etc., filed answers denying that appellant acquired any interest in said 80-acre tract of land under his deed from Kate Dalrymple, Sula Dalrymple Peer and Wade Dalrymple, Jr., alleging that Wade Dalrymple, Sr., the husband of Kate Dalrymple and father of Sula Dalrymple Peer and Wade Dalrymple, Jr., conveyed his one-half interest therein to J. B. Dalrymple prior to his death in 1904, and that in 1920 J. B. Dalrymple entered

into a contract to sell said 40-acre tract to W. D. Jackson for $800 and that pursuant to said contract he went into possession thereof and that in 1922 he conveyed the 80-acre tract by warranty deed to W. D. Jackson; that since the date of the contract in 1920 the wife and children of W. D. Jackson have been in the undisputed possession thereof and are still in possession thereof claiming title thereto and that during said time they executed a mortgage thereon to J. P. Weaver for $1,451.60 and to other parties timber deeds, royalty deeds and oil leases. Appellees interposed the additional defenses of limitations and laches.

The chancery court, after hearing the evidence, dismissed appellant's complaint for the want of equity, and from the decree dismissing his complaint appellant has duly prosecuted an appeal to this court.

The evidence reflected by the record, in so far as material to a determination of the issues involved on this appeal, is as follows: W. H. Dalrymple died in 1883 owning the 80-acre tract of land in controversy which descended in equal parts to his three children, Wade Dalrymple, Milton Dalrymple and J. B. Dalrymple. Milton Dalrymple died in 1895 without heirs and his interest in said land was inherited by his two brothers, Wade and J. B. Dalrymple. J. B. Dalrymple testified that Wade Dalrymple conveyed his undivided one-half interest in said land to him upon payment by him of Milton's debts; that the deed was lost and never recorded; that he took immediate possession of the land and occupied it thereafter as his own and paid the taxes thereon until he contracted to sell it to W. D. Jackson in 1920; that W. D. Jackson went into immediate possession thereof, assessed it in his own name and paid the taxes thereon until 1928 at which time he died and that thereafter the taxes were paid by the wife and children of W. D. Jackson; that at the time he conveyed the land to W. D. Jackson, Duncan McRae examined the title and took an affidavit relative to the execution by Wade Dalrymple to him and the loss of same without having been put upon the record, but suggested that in order to perfect

the record title he should procure a deed from Kate Dalrymple, widow of Wade Dalrymple and her daughter Sula Dalrymple Peer and her son Wade Dalrymple, Jr.; that he directed Duncan McRae to prepare and mail a quitclaim deed to them at Pine Bluff for execution and return; that Duncan McRae prepared such a deed and mailed it to Kate Dalrymple at Pine Bluff, but received no answer from her; that about the same time he wrote her a letter explaining that he had sold the land to W. D. Jackson and requesting her to execute the deed and return to him, but that she did not answer his letter.

The deed which Mr. McRae mailed to her was introduced by her in evidence and is as follows:

"Quitclaim Deed

"Know all men by these presents:

"That whereas, W. H. Dalrymple died in Nevada county, Arkansas, without a will about forty years ago, seized and possessed of the following described lands, to-wit:

"North half (N½) of the northeast quarter (NE¼) of section nine (9) township fourteen (14) south, range twenty (20) west, and,

"Whereas, he left him surviving his wife, Angie Dalrymple, who died within a year after his death, and the following named children as his only heirs-at-law, to-wit:

"Wade Dalrymple, J. B. Dalrymple and Milton Dalrymple, and

"Whereas, the said Milton Dalrymple died about 21 years ago without a will and single and unmarried, without issue and shortly after his death the said Wade Dalrymple quitclaimed all his right, title and interest in and to said lands to J. B. Dalrymple, but said deed has been misplaced, lost or destroyed without being recorded, and,

"Whereas, the said Wade Dalrymple died at Illmo, Missouri, on or about the 3rd day of April, 1904, without a will, and left him surviving his wife, Kate Dalrymple, and the following named children as his only heirs-at-law, to-wit:

"Wade Dalrymple and Sula Dalrymple, and

"Whereas, the said Sula Dalrymple is now Sula Peer by marriage,

"Now, therefore, witnesseth: That we, Kate Dalrymple, Wade Dalrymple, a single person, and Sula Peer (born Dalrymple) for and in consideration of the sum of one dollar to us paid by J. B. Dalrymple, the receipt of which is hereby acknowledged, and for the purpose of perfecting title, do hereby grant, sell and quitclaim unto the said J. B. Dalrymple and unto his heirs and assigns, forever, the following lands lying in the county of Nevada and state of Arkansas, to-wit:

"North half of the northeast quarter of section nine, township fourteen south, range twenty west,

"To have and to hold the same unto the said J. B. Dalrymple and unto his heirs and assigns, forever, with all appurtenances thereunto, belonging. And I, Kate Dalrymple, widow of the said Wade Dalrymple, deceased, for and in consideration of the said sum of money and of the premises, do hereby release and relinquish unto the said J. B. Dalrymple all my right of dower and homestead in and to the said lands.

"Witness our hands on this, the 21st day of November, 1922."

The dates and the names of some of Wade's children were left blank in the deed, but at the request of Kate Dalrymple, Sula Dalrymple Peer filled in the blanks in her own handwriting. Kate Dalrymple read the deed when she received it. Kate Dalrymple kept the deed in the house and did not sign or execute it and testified that she was busy and did not have time to do so. Kate Dalrymple, also, testified that a letter which she received at the time from J. B. Dalrymple stated that he had a buyer for the land. In 1928, W. D. Jackson died, and in 1929 the mortgage he and his wife had executed was foreclosed and Weaver, the mortgagee, purchased the land at the commissioner's sale and after confirmation on December 2, 1929, he received a deed thereto from the commissioner. After J. P. Weaver received the commissioner's deed, he did not take possession of the land, but

subsequently, on March 1, 1930, conveyed the 80-acre tract by warranty deed to Mary Jackson, widow of W. D. Jackson, and she immediately recorded the deed. Mary Jackson died in 1933 leaving seven children and one grandchild and they remained in possession thereof, and they together with their grantees of oil and gas leases were made the defendants in appellant's suit and are the appellees herein. Kate Dalrymple testified that after her husband, Wade Dalrymple, died, J. B. Dalrymple continued to occupy the land holding same for her and her children and paying the taxes thereon for the use thereof and that she did not know he had sold it to W. D. Jackson until 1936 or about the time she and her son and daughter conveyed it to appellant a short time before the suit was instituted.

The evidence is undisputed that prior to the death of Wade Dalrymple, J. B. Dalrymple took possession of the 80-acre tract, rented it out, assessed it in his own name and paid the taxes thereon until 1920 and that after he contracted to sell it to W. D. Jackson, W. D. Jackson took possession thereof, assessed it in his own name and paid the taxes thereon until his death in 1928, and that after his death, Mary, his widow, paid the taxes thereon until she died and that her heirs paid the taxes thereafter until this suit was brought. It is, also, undisputed that W. D. Jackson and his widow and children have been in the actual possession of the land since 1920 and that his heirs, some of the appellees herein, are still in the actual possession thereof. It is, also, undisputed that neither J. B. Dalrymple nor W. D. Jackson ever accounted to Kate Dalrymple, her son and daughter for rents, or that an accounting for rents was ever demanded by her from them, or from the heirs of W. D. Jackson. It also appears from the record, without dispute, that before appellant purchased the one-half interest in the land from Kate Dalrymple, her son and daughter, oil had been discovered near the land and that on that account the land had become very valuable. Appellant paid Kate Dalrymple, her son and daughter $750 for the one-half interest in the land. He testified that he had ob-

tained an oil lease on the land from the Jackson heirs, thinking that they owned the fee title to the entire 80-acre tract, but that when the abstract was made he discovered that there was no deed of record showing that Wade Dalrymple had ever made a deed of his one-half interest to J. B. Dalrymple, and that in order to protect his lease he bought the undivided one-half interest from Kate Dalrymple, her son and daughter. A large number of conveyances of timber, gas and oil leases had been made by the Jackson heirs to other parties during their occupancy of the land, and in making them had warranted the title to the whole 80-acre tract. The holders of these leases were made parties defendant in this suit and are appellees herein.

There was much testimony tending to show that Jackson, his widow and heirs, had held the property claiming title to the entire 80 acres from 1920 until the suit was brought and also testimony to the effect that W. D. Jackson and his wife, Mary, had stated to others that he had bought the land thinking he was getting the title to the whole 80 acres, but that he had only gotten a deed to an undivided one-half interest therein and that he only claimed one-half interest in said land. They had both died when the suit was brought and appellees did not have the benefit of their testimony. Duncan McRae had, also, died in the meantime. J. B. Dalrymple gave a statement to appellant's attorney which indicated that prior to his sale of the land to W. D. Jackson he had held the one-half interest therein for the benefit of the widow and heirs of Wade Dalrymple and in that statement made no mention of having received a deed from Wade Dalrymple which had been lost and not recorded. His explanation as to why he had not referred to the lost deed was that the attorney left that part of the statement out saying it would not help his title.

According to the evidence detailed above appellant's right to recover a one-half interest in the 80-acre tract is dependent upon whether Kate Dalrymple, Sula Dalrymple Peer and Wade Dalrymple, Jr., his grantors, were barred from recovering same by the seven-year

statute of limitations or by laches. Even if they did not know that J. B. Dalrymple was claiming to be the sole owner of the land under a deed from Wade Dalrymple prior to J. B. Dalrymple's sale thereof to W. D. Jackson and were laboring under the impression that he was their co-tenant, they were informed definitely to the contrary by the quitclaim deed sent to them by Duncan McRae in 1922, which Kate Dalrymple read and in which blanks were filled in by Sula Dalrymple Peer at the instance of Kate Dalrymple. In that deed they were informed that J. B. Dalrymple was claiming the title to the entire 80 acres under a quitclaim deed from Wade Dalrymple. The quitclaim deed contained the following clause:

"Whereas, the said Milton Dalrymple died about 21 years ago without a will and single and unmarried, without issue and shortly after his death the said Wade Dalrymple quitclaimed all his right, title and interest in and to said lands to J. B. Dalrymple, but said deed has been misplaced, lost or destroyed without being recorded, and, * * *." This was actual notice to them that J. B. Dalrymple was claiming the land absolutely and not holding same or any interest therein as their co-tenant or for their benefit. They made no inquiry concerning the matter and no effort whatever to have the interest they claim in said land set aside to them after receiving said notice. Prior to that time they had never claimed any rents from J. B. Dalrymple or any accounting to them for the rents. They paid no attention to the deed nor the letter they received from J. B. Dalrymple and Kate Dalrymple made no explanation for not doing so except that she was busy and that she did not think J. B. Dalrymple could dispose of and convey the land without her signature. Had they made any investigation they could have ascertained that J. B. Dalrymple conveyed the land by warranty deed to W. D. Jackson in 1922. W. D. Jackson recorded the deed he received immediately. They sat quietly by and allowed Jackson to assess the property in his own name, pay the taxes thereon and make conveyances carrying timber, oil

and gas leases to third parties from 1922 until 1935, or a period of about 14 years. During that period W. D. Jackson died, his wife died and Duncan McRae died. By the delay in asserting any claim to the land appellees have been deprived of the testimony of W. D. Jackson, Mary Jackson and Duncan McRae and the testimony of these parties would necessarily have shed much light upon the question of appellant's title. Appellant's grantors sat silently by without making any claim against the land during which time W. D. Jackson executed a mortgage thereon with warranty of title to J. P. Weaver which mortgage was afterwards foreclosed and later executed an oil and gas lease covering a part of the land to Warmack and Boswell and warranted the title thereto and after the death of W. D. Jackson and his wife his seven children and grandchild executed a great many conveyances all of which were filed for record and all of which carried covenants of warranty. Appellant's grantors really paid no attention to the land for about thirty-three years and took no steps for about fourteen years to recover or have their interest allotted to them after they knew that J. B. Dalrymple was claiming title to the entire 80-acre tract. Appellees have pleaded equitable estoppel as a defense to appellant's cause of action and we think the evidence is sufficient to sustain this plea. The rule of laches was well stated in the case of *Osceola Land Company* v. *Henderson*, 81 Ark. 432, 100 S. W. 896. It is as follows:

"Laches in legal significance is not mere delay, but delay that works disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly within the limits allowed by law. But when, knowing his rights, he takes no steps to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. This disadvantage may come from loss of evidence, change of title, intervention of equities and other causes: For,

where the court sees negligence on one side and injury therefrom on the other, it is a ground for denial and relief."

The doctrine announced above was reannounced and approved in the case of *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970, and also in *Langston* v. *Hughes,* 170 Ark. 272, 280 S. W. 374. The facts in the case of *Avera* v. *Banks, supra,* are very similar to the facts in the case at bar. Under these authorities and the facts in the instant case we think the claim of appellant is stale and that the trial court, under the doctrine of laches, was correct in dismissing appellant's complaint.

The decree is, therefore, affirmed.

PRESLEY *v.* SCHENEBECK.

4-4828

Opinion delivered November 22, 1937.

Chas. A. Walls, for appellant.

W. P. Beard, for appellee.

McHaney, J. Appellant brought this action against appellee to recover damages which he sustained when the car in which he was riding as a guest collided with a truck owned by appellee and operated by his servant, at a time when said truck was parked on U. S. highway No. 70, near Carlisle, Arkansas, on November 4, 1935. Appellant was riding in a 1925 or 1926 Dodge coupe with the owner, H. E. Pinson, and two other persons, one of whom was the driver, from North Little Rock to his home in Prairie county. There was only one seat in the car and all four persons were riding on said seat, appellant sitting in the lap of said Pinson. The time of the accident is not definitely fixed in the testimony although appellant says at one place it was dark and at another place it was between sundown and dark and at another place, between 6:30 and 7:30 p. m., on said date. The truck was parked on the right-hand side of the highway heading east and was so parked because either one or both of the tires on the right rear dual wheels were flat. It was not moved over on the shoulder off of the highway because the driver of the truck testified that it was raining, that the flats occurred on a high dump, that the shoulder of the road was soft, and that had he parked on the shoulder, he would have been unable to jack up the truck so as to take off the tires. The tire repair man testified that he went out and got the tires about 4:30 in the afternoon on receiving word from the driver regarding the condition of his tires, took them back to Carlisle, repaired them and that it was about 5:30 when he brought the tires back—between sundown and dark, and that it was raining. Appellant and his witnesses testified that they did not see the parked truck until they were right on it, because, as they approached the truck, they were blinded by the lights of another car going west. Appellant's complaint charged negligence against appellee in that his servant parked said truck on said highway in the main line of traffic at night without tail lights, flares, or other signal to warn approaching traffic or without stationing a watchman with a lantern to warn traffic moving in the same direction of the danger. Appellee answered with

a general denial of the material allegations of the complaint and the further defense that he was injured through his own negligence and the negligence of the driver of the car in which he was riding. Trial to a jury resulted in a verdict and judgment in appellee's favor and the case is here on appeal.

The court, at the request of both parties fully instructed the jury regarding the rules and regulations governing traffic upon the highways of this state, regarding the period for displaying lights, the number of lights, lights on parked or standing vehicles and that "it is unlawful to park or leave any vehicle standing upon a public highway, whether attended or unattended, at any of the following places:" * * * (6) "At any place where there is not a clear and unobstructed width of not less than 15 feet opposite the vehicle upon the main traveled portion of the highway for the free passage of other vehicles; or (7) At any place where there is not a clear view for a distance of 200 feet in each direction upon the highway." Appellee asked and was given instructions 1 and 2, which were based upon a portion of § 24, act 223 of 1927, and the rules of the Highway Commission adopted pursuant thereto, as follows: "No person shall park or leave standing a vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of 200 feet in each direction upon such highway. * * * The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent

that it is impossible to avoid stopping and temporarily leaving such vehicle in such position."

Appellant first contends that the trial court should have granted his motion for a new trial on the ground, as we understand appellant's contention, that the great preponderance of the evidence was in appellant's favor, and the case of *Blackwood* v. *Eads,* 98 Ark. 304, 135 S. W. 922, is cited to sustain the contention. It was there said: "Trial courts have large discretion in the matter of granting new trials, especially upon the weight of the evidence, and this court will not interfere with such discretion unless it be made to appear that it was improvidently exercised. 'Improvidently exercised,' as used above, means thoughtlessly exercised or without due consideration. Webster, New Int. Dict.: 'Improvidently.'" It has been frequently held by this court and was again stated in the case cited, that where there is a decided conflict in the evidence, it is the duty of the trial court to determine where the preponderance lies when passing on a motion for a new trial, and that this court will not reverse his action in failing to grant a new trial, although we may differ with him on the question where the preponderance lies.

In this connection, it is pointed out that though the undisputed proof is that the highway at the point of the accident is only 20 feet wide, and that the truck occupied at least six and one-half or seven feet of the highway, that the physical facts show that appellee and his witnesses were mistaken when they testified that they measured the distance between the point where the truck was standing and the opposite edge of the road the next morning, and found it to be 15 feet and 2 inches. While this is true, it is also true that the question of the disability of the truck was presented, that is, that the tires were flat on the right rear wheels, that the truck was heavily loaded, that the shoulder of the road was soft and that the truck would bog down, making it impossible to jack up the wheels and remove the tires therefrom in order to be repaired. We think this situation made a

question for the jury and that the court properly submitted same.

It is next insisted that instructions 1, 2, 3, 4, 5, and 6, requested by appellee and given by the court, are inconsistent and erroneous and not applicable to the issues submitted to the jury. We have carefully examined these instructions and do not think they are open to the objections made. We do not set them out as it would unduly extend this opinion. Instruction No. 3 was to the effect that if the jury should find from the evidence that the plaintiff himself was guilty of negligence, either of omission or commission, and that said negligence contributed to his injuries, then their verdict should be for the defendant. As to this instruction, appellant insists that it is clearly erroneous because of the absence of any testimony whatsoever to show that appellant was guilty of negligence, either of omission or commission, or that any negligence of his contributed to his injuries. We disagree with appellant. While we do not say, as a matter of law, that he was guilty of negligence, we think the facts and circumstances were sufficient to justify the jury in finding negligence on his part. For instance, four of them were riding in a one-seated automobile, all sitting in one seat, he upon the lap of the owner of the car. He it was who made this crowded condition in this car, being a self-invited guest therein, and it may be that this crowded condition interfered with the driver in the proper handling of the car. Moreover, it was shown that it was raining at the time and that the windshield wiper on the car in which he was riding, was not in working order, or at least several witnesses so testified, and that the windshield itself was clouded and dirty. So, it may be, that the jury found appellee's servant guilty of negligence in the parking of said truck on the highway, under the circumstances, but also that appellant, himself, was guilty of contributory negligence in riding in said car under the circumstances stated. While it is true that appellant was seriously and grievously injured, and that had we been on the jury we might have returned a different verdict, still we are unable to say that the verdict of the jury is

not supported by substantial evidence. We think the court fairly and fully submitted the question to the jury, and that the judgment must be affirmed. It is so ordered.

[redacted]

CATHEY *v.* STATE.

Crim. 4069.

Opinion delivered November 22, 1937.

[redacted]

George H. Holmes, Hendrix Rowell and *Jay W. Dickey,* for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

GRIFFIN SMITH, C. J. Appellant was convicted of the crime of voluntary manslaughter and sentenced to serve four years in the penitentiary. All assignments of errors brought forward in the motion for a new trial are abandoned except No. 4, that "The court erred in overruling defendant's motion for a continuance, over the objections and exceptions of the defendant."

Appellant was one of a group of young men who engaged in a carousal in front of the home of Will Franklin, near the little town of New Edinburg, early in the evening of July 16, 1937. Lamar Reeves was cut, and

died several hours later at Franklin's home, where he had been carried immediately following the affray.

Appellant was arrested the following morning, and on July 22 was arraigned on a charge of first degree murder. The case was called for trial on July 28, and after the state had announced ready the defendant moved for a continuance on the ground that Dr. E. B. Dunman, a material witness, was temporarily without the jurisdiction of the court, and that, without fault of the defendant, he could not be subpoenaed. Dr. Dunman had gone to California for a short vacation.

The motion for continuance was made orally, one of the attorneys for the defendant having stated what facts could be proved by the absent witness. The court ruled that the oral motion might be reduced to written form during the progress of the trial and filed as a part of the record. The motion was thereupon overruled and the trial proceeded, the defendant having saved his exceptions.

On July 29, the second day of the trial, after witness in chief for the state had testified and had been cross-examined, the written motion for continuance was presented. The court found that certain statements as to facts which it was claimed Dr. Dunman would testify to had not been mentioned in the oral motion, and ruled that all matters presented in the oral motion might be read to the jury as the evidence of Dr. Dunman, but that alleged facts to which the doctor would testify which were not incorporated in the oral statements should be excluded, and to the exclusion of such statements the defendant saved exceptions.

We are of the opinion that if the motion, as finally written, had been presented to the court when the case was called, the facts alleged therein would have been sufficient to require a continuance, provided the defendant had affirmed his belief in the truth of such allegations. See § 1494, Pope's Digest, where it is provided that "The affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of

such facts in evidence, that the affiant himself believes them to be true," etc.

The affidavit as submitted was deficient in that appellant did not say that he, himself, believed to be true the testimony it was claimed Dr. Dunman would give. While the attestation of appellant contains a recitation that "I have read the foregoing motion for a continuance and the matters and facts and statements therein set forth are true and correct," this is merely an affirmance of appellant's belief that if Dr. Dunman were present he would testify as set out in the motion. It does not carry the expression of personal belief which the statute requires as an essential of the motion.

In *Lynch* v. *State,* 188 Ark. 831, 67 S. W. (2d) 1011, it was said: "No error was committed in overruling the motion for a continuance because of the absence of a witness, the motion not being in statutory form, the appellant not stating therein that he believed the testimony of the absent witness to be true." In *Estes* v. *State,* 180 Ark. 656, 22 S. W. (2d) 172, there is this declaration of the law: "A motion for a continuance was filed to obtain the presence and testimony of witnesses which would tend to establish the defense of the alibi which appellant interposed. The substance of the testimony of the witnesses was set out, and, while its materiality may be conceded, the motion did not recite, as the statute requires, §§ 1270 and 3130, Crawford & Moses' Digest, that the appellant believed this testimony to be true. There was, therefore, no error in overruling it, as it did not conform to the statute." See, also, *Weaver* v. *State,* 185 Ark. 147, 46 S. W. (2d) 37.

The judgment is affirmed.

CHANEY *v.* DUNCAN.

4-4827

Opinion delivered November 22, 1937.

Chas. A. Walls, for appellant.

W. P. Beard, Carl F. Jaggers and *P. A. Lasley,* for appellee.

MEHAFFY, J. This action was begun in the Lonoke circuit court by J. B. Duncan and General Exchange Insurance Corporation against the appellant, W. S. Chaney, to recover damages for injury to Duncan's car, alleged to have been caused by the negligence of the appellant. J. B. Duncan's car was being driven by Ambrose Hudson, and appellant's truck was driven by Ray Chaney, son of W. S. Chaney, who was 27 years of age.

The General Exchange Insurance Corporation had insured Duncan's car, but under the terms of the policy the first $50 of the damage was payable by J. B. Duncan and the balance by the company. The insurance company had the car repaired at a cost of $284.22, of which amount Duncan paid $50, and Duncan gave an assignment of his interest in the cause of action to the insurance company, and this suit was brought to recover the sum of $284.22.

The appellant, W. S. Chaney, filed answer denying all the material allegations in the complaint, and also pleaded that the subrogation agreement was not binding on appellant; that the settlement made between the parties did not apply for the reason that there was no liability on W. S. Chaney for the acts of his son, and that the insurance company was not entitled to be subrogated in whole or in part for the payments made. An amended complaint was filed alleging Ray Chaney was a careless and reckless driver and this was known to appellant.

There was a verdict and judgment for $284.22, and this appeal is prosecuted to reverse said judgment.

The appellant filed a cross-complaint seeking a judgment for damages to his truck in the sum of $396. The substance of the evidence is as follows:

Ambrose Hudson testified that he lived at England, Arkansas, and on the night of July 5, 1935, was driving a Chevrolet, 1934, sedan owned by Mr. J. B. Duncan; had been to Coy and was going west toward England between seven and eight o'clock p. m.; his lights were burning, and on his return to England had a collision with a car driven by the Chaney boy; the appellant's boy was driving the car; they were coming back from Coy; it was getting dark, and he turned his lights on about three miles from town, and the other car ran into the car witness was driving, about 200 yards east of the bridge; witness was over as far as he could get; could not have pulled any further over without going into a ditch; he was on the right side of the road, and Chaney came along and hit the car witness was driving on the right side of the highway; Chaney got out of his car and came back to witness; Chaney walked like he was drunk and wanted to

have a fight with witness; he did not smell liquor on his breath, but he walked like he was drunk; Chaney went on to England and witness stayed there with the car; Chaney came back with another fellow named Fisher and when they got back the Chaney boy had passed out and was lying up in the cab; this was about 30 minutes after the accident; when asked what he meant by being passed out, he said he was drunk; Fisher was driving when they came back and the Chaney boy was asleep; at the time of the accident Mrs. Duncan and witness were in the car; he was driving; there was no one in the truck with the Chaney boy; the car driven by Chaney hit the side of the witness' car and tore the left front wheel off; he swerved his car right into witness' car; saw the car next day and the left front wheel was torn completely off and it had knee-action and the whole thing was torn off, and the whole right-hand side where it had turned over on the top, was smashed.

A picture of the car was introduced, over the objection of the appellant. Another picture of the car was introduced which witness stated represented the condition of the Duncan car after the collision occurred; both cars turned over. After the Chaney truck struck witness' car, it ran about 200 feet; the truck was in the ditch; witness' car was across the highway after the accident, but still on the highway; witness was never in a serious accident before. Witness was driving about 35 miles an hour. Mrs. Duncan was present at the time of the accident, and Chaney did not say anything directly to her, but his remarks and attitude were insulting.

W. E. Gott, an adjuster for the insurance corporation, testified that he made a thorough examination of the car before it was repaired; the amount of damages was $284.22; he also testified about the expiration of the policy; witness also testified about the subrogation agreement and the payment to Duncan of $235, Duncan being required, under the terms of the policy, to pay $50 of the damages.

J. T. Dupree testified that he lived in the vicinity where the accident occurred; it was about a half mile east

of his home; he went down after the accident occurred; Chaney appeared to have been drinking; had the reputation of being a reckless driver, and has had many accidents; he noticed the place where the collision occurred; there was loose gravel and both cars appeared to be too near the center of the highway.

J. B. Duncan testified that his sedan was damaged in the collision; that he carried insurance on his car with a deductible clause of $50; testified about the subrogation agreement; the total damages to witness' car was $285; he received $235 from the insurance corporation.

W. P. Wilbanks testified that he was a peace officer at England and acquainted with Ray Chaney; arrested him once for reckless driving, and heard about Chaney running into a cow and killing it; was present when Chaney was convicted for reckless driving; Chaney has the reputation of being a careless and reckless driver, and of driving a car while drunk.

Judge J. M. Malone testified that he was county judge of Lonoke county and in 1935 was a justice of the peace, and that Ray Chaney was before him on a charge of reckless driving and driving while intoxicated, and he revoked Chaney's license; Chaney's license was revoked for 30 days, and at the end of that time he started driving a car again.

J. B. Duncan also testified that Chaney had the reputation of being a careless and reckless driver.

W. S. Chaney, the owner of the truck, testified that he lived at Coy, Lonoke county, is a farmer and ginner, and the father of Ray Chaney; he did not give his son, Ray Chaney, permission to use the truck and did not know that he came to the house and got it; did not send Ray Chaney on a mission and did not know that he was in England that day; did not learn this until the next morning; he kept the keys to his truck at his home, usually on the mantle; any one in the home could come along and pick them up; Ray had previously driven the truck, as well as other members of the family; witness knew nothing about the casing being taken to England to be repaired; the truck was the only car witness owned; the

keys were on the mantle and any Chaney could come and get them; he recalled the instance when Ray Chaney ran into and killed a cow and his driving license was revoked for 30 days; witness did not know the details of other accidents in which his son was involved.

Ray Chaney testified that he was the son of W. S. Chaney, is 27 years old, and lives at Coy, Lonoke county, Arkansas; on July 5, 1935, witness had gone to one of his brothers to see about taking their sister to Little Rock; when he got back he had a flat, could not get the extra tire off, broke the lock and took it off, and took his father's truck in order to take it to town for repairs; he first used his brother's car and then his father's truck; the truck was in the garage at his father's home; he did not get anyone's permission to use the truck, just went in there and got it; the road had been graded that day and there was a ridge of dirt and in order to be on his side of the road, Hudson would have to travel on the loose gravel; when the cars collided Hudson was on witness' side of the highway; witness did not realize anything was going to happen until after it happened; Hudson was going very fast; witness' car traveled about 150 feet after it was hit; did not say anything insulting to Mrs. Duncan; heard Hudson make a remark about being afraid to hit the loose gravel, and that was why he was on witness' side of the road; witness admitted that he had had a drink before he left England; witness bought one pint of liquor after he got to England and invited a friend to drink with him and they took two small drinks; the bottle was not empty when they left England; he had been arrested once in England for drunkenness; he had been locked up once for being drunk; does not get drunk often; he took the keys to his father's truck off the mantle; he got the keys whenever he wanted to use the truck; his father might have refused to let him have the truck once or twice, but not much more than that; he drove it frequently; after the accident he went to England and took some more drinks, but was not drunk when he came back 45 minutes later; witness had been in about 9 or 10 accidents; his father did not know about all of them.

Marvin Cantrell testified that he heard Hudson telling Ray about some loose gravel, and it seemed like he was afraid to take the loose gravel; Chaney was not drunk at that time.

Charlie Jackson testified that he saw Chaney about dark on the day of the accident, and he was not drunk and did not appear to have been drinking; he has known Chaney 8 or 10 years and they are good friends.

Joe Jackson testified that he was in the service station when Chaney came in a little after dark, and did not see any indication that Chaney was intoxicated.

Appellant insists that the case should be reversed and dismissed, first, because the testimony is undisputed that Chaney was not on a mission for his father. If Chaney was on a mission for his father, or was acting as the agent or servant of his father in driving the truck, his father would, of course, be liable for his negligence in operating the truck. But, regardless of whether he was his father's agent or on a mission for him, if the father, knowing of his habit of recklessness and incompetency because of drunkenness, permitted the son to drive the truck, and any injury occurred as a result of the son's negligence, the father would be liable.

The rule as to the liability of a person in trusting his automobile to an incompetent person is stated in Berry on Automobiles, Seventh Edition, Vol. 4, p. 710 *et seq.*, as follows:

"Aside from the relation of master and servant, the owner of an automobile may be rendered liable for injuries inflicted by its operation by one whom he has permitted to drive the same on the ground that such person, by reason of his want of age or experience, or his physical or mental condition, or his known habit of recklessness, is incompetent to safely operate the machine.

"An automobile is a machine that is capable of doing great damage if not carefully handled, and for this reason the owner must use care in allowing others to assume control over it. If he intrusts it to a child of such tender years that the probable consequence is that he will injure others in the operation of the car, or if the

person permitted to operate the car is known to be incompetent and incapable of properly running it, although not a child, the owner will be held accountable for the damage done, because his negligence in intrusting the car to an incompetent person is deemed to be the proximate cause of the damage. In such a case of mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner in intrusting the machine to an incompetent driver, and of the driver in its operation." See, also, *Smith* v. *Nealey,* 162 Wash. 160, 298 Pac. 345; *Mitchell* v. *Churches,* 119 Wash. 547, 206 Pac. 6, 36 A. L. R. 1132; *L. P. Tyree, Admr.,* v. *George C. Tudor,* 183 N. C. 340, 111 S. E. 714; *Raub* v. *Donn,* 254 Pa. St. 203, 98 Atl. 861.

It is next contended by the appellant that the court erred in failing and refusing to give his instruction No. 1. If Duncan's car was injured by the carelessness of the driver of Chaney's truck, and Chaney is liable for the damages done, it could, of course, make no difference to appellant whether the amount recovered was payable to the insurance company or to Duncan. If appellant is liable for the damages, it is immaterial to appellant to whom they are paid.

Appellant calls attention to the case of *Layes* v. *Harris,* 187 Ark. 1107, 63 S. W. (2d) 971. We said in that case: "In order for the father to be liable for the negligence of his son in driving his father's automobile, the relation of principal and agent or master and servant must exist, or the father must have permitted his son to drive the car, knowing that he was a careless and reckless driver."

It is not contended in this case that the father would be liable unless the relation of principal and agent or master and servant existed, or unless the appellant permitted the son to drive his car, knowing that he was a careless and reckless driver.

Numbers of cases are cited by appellant, holding that the liability of the father for an injury caused by his son's driving his car, depends upon the existence of the relation of master and servant or principal and agent;

but there are no cases, so far as we know, and our attention has not been called to any by appellant, holding that one will not be liable where he permits his car to be driven by one known to be a careless and reckless driver. In such case the owner of the car is not liable as master or principal, but, if liable at all, it is because of his negligence in permitting one known to be a reckless or careless driver to drive his car.

It is, also, contended by the appellant that the court erred in permitting witnesses to testify as to the intoxication of Ray Chaney at other times. This evidence was admissible as tending to show that he was in the habit of drinking intoxicating liquor, and careless and reckless in driving a car, and as tending to show that the appellant knew these facts.

There is no dispute about the law that if anyone permits another to drive his car, knowing such one to be a reckless or careless driver, or knowing that he is in the habit of becoming intoxicated and driving a car in this condition, he will be liable for any injury caused by the negligence of such driver.

The evidence above set out is sufficient to show not only that the driver was negligent and careless, but that the appellant knew these facts. It is true that the evidence is in conflict, but whether the witnesses were telling the truth and the weight of their testimony, were questions for the jury.

We have examined carefully the instructions given and refused, and find that there was no error in the court's giving or refusing to give instructions.

If appellant knew that his son was a careless and reckless driver, he would be liable for any negligence of the son causing injury, when permitted to use his car. Whether he was a reckless and careless driver and whether his father knew his habits of carelessness and recklessness, were questions of fact properly submitted to the jury, and its verdict is conclusive here.

The judgment is affirmed.

CUTRELL *v.* HOOVER.

4-4821

Opinion delivered November 22, 1937.

Rowell, Rowell & Dickey, for appellant.

Coy M. Nixon and *J. P. McGaughy,* for appellee.

GRIFFIN SMITH, C. J. This appeal is from a decree based upon a complaint originally filed in the Jefferson circuit court, but transferred to chancery on motion of appellee, who was the defendant below. Appellant alleged that by purchase from the state he was owner of three lots in Pine Bluff, but that appellee was in unyielding possession.

The cause was tried upon an agreed statement of facts, as follows: Neither appellant nor appellee was an original owner of the lots, which forfeited for nonpayment of taxes for 1932 and were certified to the Land Commissioner February 12, 1936. Several days prior

to February 29, 1936, Wiley Hoover, acting for appellee, applied personally at the State Land office, and requested of George W. Neal, the commissioner, that blank form be supplied indicating the amount of money necessary to purchase the lots. The commissioner personally delivered such form to Hoover, showing that $96.52 was necessary to make the purchase. Hoover took this application to Coy M. Nixon, Pine Bluff attorney representing appellee, and on February 29 Nixon returned the executed form by mail to the commissioner, with check for $96.52. The application was filed in the Land Office March 1.

On March 3, appellant duly filed his application with the land commissioner, covering the same lots, paying the sum of $109.07. On March 10, the commissioner wrote Nixon, advising that "Fees have now been added to the amount necessary to purchase this property. The total cost now will be $98.82, as shown on your application. If the applicant still desires this property, please return this application, together with a check for the proper amount." The application as originally filled out by Neal was returned to Nixon, with marks through the older figures and with substituted amounts, showing, in addition to tax, penalty and cost of $34.28 due at the time of sale, and two years' subsequent taxes of $61.24, that 30 cents was payable under act 119 of 1935; that calls amounted to $2, and that a charge of $1 was made for the deed.

Under date of March 13, Nixon returned the corrected application to the commissioner and remitted $98.82. In the meantime, appellant's application had been acted on, and deed No. 47203, dated March 10, was sent him. This deed recites payment of $95.52 by R. C. Cutrell, "The amount required to purchase said lands in accordance with the requirements of act No. 129 of 1929, and having otherwise fully complied with the provisions and requirements of said act, and having paid to the commissioner of state lands the further sum of $12.55, expenses incurred by the state under the provi-

sions of act No. 296 of 1929, or act 119 of 1935." To this total of $108.07 was added $1 for the deed.

The remittance of $98.82 made by appellee on March 10 was returned by the commissioner on March 17, with explanation that the property had been sold.

The chancellor's decree contains a direction that upon payment of $109.07 by appellee to appellant, with interest at 6 per cent. from March 10, 1937, title should become vested in appellee. Costs were adjudged against appellant.

The decree must be affirmed. The correct amount for which the lots forfeited was $34.28, and $61.24 was properly chargeable as accumulated taxes. *Neal* v. *Gatz,* 187 Ark. 785, 62 S. W. (2d) 945. When the commissioner advised appellee that the amount necessary to purchase the property was $96.52, he was correct, $95.52 representing the sum due for taxes, $1 being for the deed. With this payment, appellee became the equitable owner of the lots, even though the deed was not executed. This occurred March 1. Appellant's application was not filed until March 3. It was not essential to appellee's equitable title that the deed be executed by the commissioner, this being merely the evidence of an interest already acquired. *Coleman* v. *Hill,* 44 Ark. 452; *Chism* v. *Price,* 54 Ark. 251, 15 S. W. 883, 1031; *Simmons* v. *Wagner,* 101 U. S. 260, 25 L. Ed. 910.

Act 296 of 1929, referred to in the deed issued to appellant, is authority for proceedings by the state to confirm title to lands forfeited to it for the nonpayment of taxes. It authorizes a charge of ten cents per acre for the benefit of attorneys incidental to such confirmation, but omits to provide any basis of charge where town lots, as distinguished from acreage, are the subject of confirmation. Act 119 of 1935 corrected this deficiency by authorizing a charge of ten per cent. of the amount recovered for the state on "City and town lots and parcels thereof," to be paid from amounts received by the state for the redemption or sale of such forfeited property. This act was approved March 19, 1935, and had been in force for almost a year when the commissioner, between

February 29 and March 10, 1936, seems to have ascertained that fees had been added.

Somewhat analogous to this case, but not entirely in point, are instances where taxpayers have tendered money to a collector and verbally directed that such payment be applied in a specified manner, but the collector, through error, applied the fund in satisfaction of a different assessment. It has been held that where such owner, in good faith, attempts to pay taxes, but through the collector's mistake certain taxes are not paid, the owner will be entitled to redeem the land. *Scroggin* v. *Ridling*, 92 Ark. 630, 121 S. W. 1053; *Knauff* v. *National Cooperage & Woodenware Co.*, 99 Ark. 137, 137 S. W. 823; *Oats* v. *Walls*, 28 Ark. 244; *Ward* v. *Stark*, 91 Ark. 268, 121 S. W. 382.

Confirmation suit with respect to these lots was not filed until March 21, 1936. Section 10 of act 119 of 1935 provides that "Compensation of attorneys and court costs shall be paid from amounts received by the state for the redemption or sale of such forfeited property." This means that costs are not chargeable against lands to which title has not been confirmed.

After receiving appellee's application and money on March 1, the commissioner was silent until March 10, and then he demanded $2.30 additional. In the meantime he had accepted appellant's application and larger remittance, and, under date of March 10, issued a deed to appellant. This deed must have been delivered to appellant shortly after its execution, for it was filed of record in Jefferson county March 13. Even then the commissioner did not notify appellee, but remained silent until March 17.

Appellant insists that appellee should have applied to the State Land Commissioner for a hearing under authority of §§ 6764 to 6773 of Crawford & Moses' Digest, now §§ 8696 to 8705 of Pope's Digest; and, having failed to do so, he is not entitled to come into a court of equity and ask for relief. The remedy provided in the digest is in no sense exclusive, and equity was not without jurisdiction.

The decree is affirmed.

HOGUE *v.* STATE.

Criminal 4070.

Opinion delivered November 22, 1937.

Simmons & Lister, for appellant.

Jack Holt, Attorney General, and *John P. Streepey,* Assistant, for appellee.

SMITH, J. Appellant was found guilty of voluntary manslaughter and given a sentence of seven years in the penitentiary, from which judgment is this appeal. It was alleged in the indictment under which he was tried that he had killed one Royston Judy by shooting him with a certain shotgun.

There was testimony that appellant had made threats of violence against deceased, which, however, had never been communicated. Appellant lived in a house on a farm which deceased did not own, but of which he had charge. Deceased went to the home of appellant for the purpose of demanding payment of rent. Appellant declined to discuss the subject with deceased at that time and told deceased to return when he was sober. The testimony is in conflict as to the state of deceased's intoxication. Lester Slate, who accompanied deceased to appellant's home, testified that deceased was not drunk at all, although they drank two small bottles and one quart bottle of beer. Deceased, whose hearing was de-

fective, went upon the porch, where appellant was seated. Appellant told deceased to come no farther, and when deceased started up the steps of the porch appellant stepped inside the door of the house, got his gun and fired the fatal shot, killing deceased almost instantly. The testimony is conflicting as to whether deceased continued his advance when told to stop. Slate testified that when he saw appellant with the gun he told appellant not to shoot, but appellant said, "I will do it," and immediately fired the fatal shot. Deceased was not advancing at the time, according to the testimony of Slate.

The testimony is in conflict as to whether deceased made a gesture as if to draw a weapon. Appellant testified that he saw deceased put his hand to his hip and he thought a murderous assault was about to be made upon him. Slate testified that deceased took a book of cigarette papers out of his pocket as he went up the steps and that he had the cigarette book in his hand when he was shot. The body was not moved until after the arrival of the sheriff, who testified that the porch was about seven feet wide, and that deceased's hips and feet were lying on the porch and his shoulders on the front steps. Deceased was unarmed.

We cannot say that the testimony is insufficient to support the verdict; indeed, a reversal is not asked on that account. The errors assigned relate to the giving and the refusal to give certain instructions. As to the instructions given it may be said that no specific objection was made to any of them, and the objection to the instructions was *en masse*. It was said in the case of *Long* v. *State*, 140 Ark. 413, 216 S. W. 306, that such an exception cannot avail unless all the instructions are erroneous. Certainly all of them were not erroneous; indeed we find no one which was. They appear to be what might be called the usual instructions in homicide cases, several of which have been expressly and frequently approved by this court.

The chief insistence for the reversal of the judgment is the refusal of the court to give requested instructions numbered 7 and 8. Both might very well have been

given, and the refusal to give either would have been error had they not been sufficiently covered by other instructions which were given. Instruction No. 7 copied substantially § 2995, Pope's Digest, defining and declaring the rights of one to defend himself or his habitation against one who manifestly intends or endeavors by violence or surprise to commit a known felony. Instruction No. 8 charged the jury to acquit the defendant if there was a reasonable doubt as to his guilt, and that the burden was upon the state to prove every material allegation of the indictment.

The court had given, however, at appellant's request, instructions numbered 4, 5 and 6. These told the jury that the defendant was entitled to act upon appearances as they addressed themselves to him, and that if they were such as to induce in the mind of a reasonable person, and had induced in appellant's mind, the fear that death or great bodily harm was about to be inflicted, that defendant had the right to act under these appearances even though he was mistaken as to the extent of the danger. These instructions told the jury that where a person, in his own dwelling, is assaulted, or is about to be assaulted, under such circumstances as to furnish reasonable ground for such person to believe that his assailant intends to take his life or do him great bodily injury, that such person is not required to retreat, but has the right to resist force with force, even to the extent of taking the life of his assailant if he, acting without fault or carelessness, honestly believed that it was necessary for him to do so, to protect himself from losing his life or receiving great bodily harm at the hands of his assailant, and that this was true although the necessity might not now appear to the jury to have existed. These instructions submitted and covered the defense interposed, and would have required the acquittal of the defendant if the jury had found that he was under the apparent necessity of killing his assailant to protect himself from death or great bodily harm. The verdict of the jury reflects a finding that this necessity did not

exist, and, as we have said, the testimony of Slate supports that finding.

The court gave an instruction conforming to § 2968, Pope's Digest, which reads: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." It is argued that this instruction cast upon the defendant the burden of proving his innocence, inasmuch as he admitted the killing. Such, however, is not the effect of the instruction when read in connection with instruction No. 11, given by the court, reading as follows: "Under the law the defendant is presumed to be innocent. This presumption is evidence in his behalf and protects him from a conviction at your hands until his guilt is established to your satisfaction beyond a reasonable doubt."

This assignment of error is disposed of by the opinion in the case of *Tignor* v. *State,* 76 Ark. 489, 89 S. W. 96. A headnote in that case reads as follows: "Where the jury are instructed, in a murder case, that the killing being proved, the burden of proving circumstances that justify or excuse the homicide devolves upon the accused, as provided by Kirby's Digest, § 1765, they should be further instructed that on the whole case the guilt of the accused must be proved beyond a reasonable doubt."

The judgment in that case was reversed because, after giving § 1765 of Kirby's Digest (which appears as § 2968, Pope's Digest) as an instruction, the court did not further charge the jury that on the whole case the guilt of the accused must be proved beyond a reasonable doubt. Here, however, the instruction numbered 11, copied above, does what the court there said should have been done.

Upon the whole case we find no error, and the judgment must be affirmed, and it is so ordered.

McDonald *v.* Case.

4-4830

Opinion delivered November 22, 1937.

Williamson & Williamson, for appellant.

Dene H. Coleman, for appellees.

Baker, J. The judgment was rendered against appellant McDonald upon a promissory note in the sum of $637.55 with interest. After the rendition of the judgment and the issuance of an execution, its return unsatisfied, a garnishment was issued against Citizens Bank & Trust Company of Batesville, Arkansas, in which it was alleged that the defendant, A. B. McDonald, had money upon deposit.

McDonald contested this garnishment, his son intervened, claimed a large part of the funds, but upon final determination of the issues involved, upon answer of the garnishee and other evidence, the circuit court held the funds in the said bank to be the property of the defendant, A. B. McDonald, and subject to the garnishment. The proper order was thereupon made to pay over the said funds. Thereafter, the bank paid or delivered to the attorney for the plaintiff, the appellee here, the amount it had on deposit to the credit of A. B. McDonald, and two days thereafter McDonald filed his schedule or claim of

exemptions, seeking to exempt the said fund and other property. Said schedule was duly allowed and supersedeas issued by the circuit clerk. Upon appeal from the circuit clerk's allowance and issuance of supersedeas, the circuit court quashed the supersedeas and held that the money having been paid over by the garnishee in good faith prior to the time of the filing of the schedule or claim of exemptions, the payment could not be recalled and disallowed the claim of exemptions. It is from this order of the circuit court that this appeal has been taken. The facts in the case are stipulated as follows:

"Stipulation of Facts

"It is hereby agreed and stipulated by and between the plaintiff and the defendant, that this cause, which is an appeal to the Stone circuit court from an order of the circuit clerk of Stone county, allowing the defendant his schedule of exemptions and issuing a supersedeas herein, may be submitted to the Hon. S. M. Bone, judge of the Third Judicial Circuit of Arkansas, in chambers, sitting as the Stone circuit court, and that the said court may render final judgment herein and that said judgment may be entered of record on the circuit court records of Stone county, and have and bear the same force and effect as if entered in term time.

"It is agreed and stipulated that the plaintiff, H. R. Case, had a writ of garnishment issued against the Citizens Bank and Trust Company of Batesville, Arkansas, upon an existing and unpaid judgment which he had obtained against A. B. McDonald *et al.*, in the Stone county circuit court on November 16, 1936. The bank answered that it had $475 on deposit in the name of A. B. McDonald and Son and was holding the same subject to the orders of the court.

"On May 4th, in the Stone circuit court, A. B. McDonald and Warren McDonald filed a motion to quash the writ of garnishment, which was overruled by the court. On the same day said Warren McDonald filed an intervention in this cause claiming that $326.80 of said $475 was his individual property. Proof was taken on the intervention and the court found that the $475 in the

Citizens Bank and Trust Company was the property of A. B. McDonald and was subject to garnishment, and rendered judgment for the plaintiff for the sum of $475 against the bank as garnishee.

"(Copy of said order hereto attached and made a part hereof.)

"The defendant had the court note on the docket the filing and overruling of a motion for new trial and an appeal to the Supreme Court. No motion for new trial was in fact filed at the time. No supersedeas bond has been filed by either A. B. McDonald or Warren McDonald.

"On May 4th, the defendant, A. B. McDonald, notified H. R. Case, the plaintiff, that he would on May 10, 1937, file his schedule of exemptions with the circuit clerk of Stone county. A copy of this notice was received by Dene H. Coleman, attorney for plaintiff, on the night of May 4, 1937.

"On May 8, 1937, Dene H. Coleman, attorney for plaintiff, ascertained that no motion for new trial had in fact been filed and no appeal bond or supersedeas bond filed by the defendant, and said attorney procured a certified copy of the judgment aforementioned and on the afternoon of said May 8, 1937, presented to the Citizens Bank and Trust Company the certified copy of said judgment, and informed said bank that no motion for new trial had been filed and no bond filed, and demanded from the bank the said $475.

"The bank thereupon, in good faith, made payment of the said sum to said attorney for the plaintiff and took from him the following receipt:

" 'May 8, 1937, received of Citizens Bank and Trust Company four hundred seventy-five and no/100 dollars, payment in satisfaction of judgment of Stone circuit court in case of H. R. Case, plaintiff, v. A. B. McDonald, defendant, and Citizens Bank and Trust Company, garnishee.

'H. R. Case
'By Dene H. Coleman, Atty.'

together with a certified copy of said judgment. On the same day Dene H. Coleman deposited said $475 in said

bank in the name of Dene H. Coleman, trustee, in order to not mingle it with his personal account.

"On May 10, 1937, A. B. McDonald filed his schedule of exemptions with the circuit clerk of Stone county, claiming this $475 as part of his constitutional exemptions, and the said clerk allowed said exemptions and issued a supersedeas.

"The plaintiff immediately filed affidavit and bond and took this appeal.

"Statement of Chas. F. Cole, deposit slip of Dene H. Coleman and copy of final judgment of court hereto attached.

"May 21, 1937.

"Dene H. Coleman
"Attorney for Plaintiff.
"Ben B. Williamson,
"Attorney for Defendant."

It will be observed from the foregoing stipulation of facts that the bank in good faith made payment of the said sum of money to the attorney for the plaintiff and took his receipt therefor. A judgment of the circuit court had been rendered against the garnishee with an order for the payment of the money; that this judgment was in no manner superseded and since the money was paid over in good faith, that is without any collusion or fraud, and placed in the hands or possession of the plaintiff, prior to the time of the filing of the schedule and its allowance, the court rightly determined, we think, that it was then too late for any order of the court to exempt the property from process legally issued and rightfully pursued. To hold otherwise would be tantamount to a decision that after a debtor's money had been subjected to a payment of his debt and used and applied for that purpose, that as to the debt or so much thereof as had been paid, the debtor could sue for and recover such payments after due credit had been given.

This court, in a similar case, has held that money adjudged to be in the hands or owing by the garnishee, or the proceeds or property in hands, when once paid toward the satisfaction of a judgment, cannot be recalled

at the instance of the defendant. *Blass* v. *Erber,* 65 Ark. 112, 44 S. W. 1128, 67 Am. St. Rep. 907.

The rule to the same effect is announced in another case, adding to the decision this comment:

"Of course, this has reference to a good faith payment, and there is nothing in this record to show that appellee paid the Tharp judgment in bad faith." *McGowan* v. *Freeberry,* 133 Ark. 579, 583, 202 S. W. 848.

There are, also, some interesting comments affecting the nature of the liability of the garnishee, when no supersedeas bond had been made and no order made suspending the effect of the judgment. *American National Bank of Fort Smith* v. *Douglas,* 126 Ark. 7, 11, 189 S. W. 161, L. R. A. 1917B, 588.

At any rate, we know of no rule of law whereby the effect of the judgment against the garnishee might be suspended, or should have been, under the circumstances here noted merely to allow the serving of notice and filing of a claim of exemptions. Ample time had accrued for this kind of proceeding after the service of the writ of garnishment. The defendant during that time, however, attempted to make another defense. This remedy he had the liberty to pursue if so advised, but if in so doing he has waived or delayed his other remedies so that they are ineffectual, he alone is at fault.

It appears that the court overruled the claim of exemptions in its entirety. We presume this was done because there was no contention made about certain personal property set forth in the claim of exemptions.

The claim of exemptions should be allowed as to the other property except the $475, and the court's judgment is so modified, and as modified it is affirmed.

THE PEOPLES NATIONAL BANK, ADMR. *v.* COHN.

4-4788

Opinion delivered November 22, 1937.

[redacted]

Donham & Fulk, for appellants.

Chrisp & Nixon, for appellee.

SMITH, J. Sid Moss, a resident of Brooklyn, New York, left that city in an automobile in 1931, accompanied by a young man named Leo Cohn. They drove to Little

Rock, where they stopped at a tourist camp for about two weeks. Moss was looking for a location to make his future permanent home. Moss and Cohn drove from Little Rock to California, where they remained for a few weeks, but, preferring Little Rock, they returned to that city, where Moss resided until his death, which occurred January 3, 1935. Moss built a home, in which he resided with Cohn as a member of his family. Cohn remained with Moss from April 10, 1931, until September 25, 1933, at which time Cohn returned to New York on account of his health.

The undisputed evidence shows that Moss was a confirmed invalid, and he was paid disability benefits under an insurance policy which he had carried. In addition, he received monthly remittances from his wife, who remained in New York. He had a son, who went by the name of Raymond Brush, from whom he was estranged, in fact, Moss stated to more than one person in Little Rock that he had no children, and he never referred to his wife.

Cohn lived with Moss as companion, chauffeur, servant, nurse, and manager of his household, and had such charge of his personal affairs that a power-of-attorney was given him to discharge the duties which he performed. Cohn made all purchases for the house and paid for them with Moss' funds.

Dr. A. B. Tate, a neighbor and intimate friend of Moss, testified that he was at Moss' home nearly every day during Moss' life in Little Rock, and that Moss was a very sick man all the time. Moss' sight was much impaired, and he had to have some one with him all the time, and Cohn was with him constantly. Moss was able to attend to some of his more simple wants, but Cohn went with Moss whenever Moss left home, and would assist Moss across streets when they walked and drove him in the car when they rode. Cohn helped dress and undress Moss, who was partially paralyzed. Moss "was a dominating person," being of a very nervous disposition, but Cohn was attentive and patient. Witness had heard Moss speak of Cohn frequently in terms of great-

est affection, and they were like father and son. Witness heard Moss say he was going to leave his property to Cohn to pay him for his attentions. Cohn got his room and board at Moss' house. He was given a night off once a week, at which time he drove Moss' car, the operation and upkeep of which was paid by Moss. Moss frequently had guests at his home, and Cohn was occasionally allowed that privilege. Moss kept both a cook and yard servant in addition to Cohn.

Dr. Roe, who attended Moss in a professional capacity during Moss' residence in Little Rock, testified that Moss suffered from partial paralysis of his arm and leg, and had defective vision, and required constant attention, which Cohn rendered both during the day and at night. Cohn performed the duties of a practical nurse, which witness thought were worth from $25 to $35 per week. Cohn left Little Rock upon his advice and with the reluctant consent of Moss for treatment on account of loss of weight.

A Mrs. Dover, who operates the tourist camp where Moss and Cohn first stopped when they came to Arkansas, and by whom Cohn is now employed, and who saw much of Moss after he had built a home near her camp, testified that she knew the relationship between Moss and Cohn, and heard Moss speak of Cohn frequently in terms of gratitude and affection, and had heard Moss say that Cohn was to have pay for his services.

Mrs. Mary Byrd, who had been employed as a cook by Moss for eight months of the time Cohn lived with Moss, when asked whether Moss had ever talked with her about Cohn, answered: "He did all the time, and said he was going to make a will and leave everything to him."

John Lofton, an attorney, testified that at the direction of Moss he had prepared a will, a carbon copy of which he had retained. This testimony was objected to as incompetent. It does not appear that the will was ever executed. There was testimony, also, to the effect that Moss attempted to buy an interest in a business for Cohn's benefit.

When Cohn left Little Rock he did not return until after the death of Moss, when, finding that Moss had died intestate, he filed a claim against the estate of Moss for services in the sum of $3,000. This claim was disallowed by the administrator of the estate of Moss, but was allowed by the probate court in the sum of $1,500. Upon an appeal from the judgment of the probate court a trial was had in the circuit court, where the testimony, summarized above, was heard, and the court rendered judgment in Cohn's favor for $1,500. This appeal is from that judgment. This judgment was rendered upon the following finding made by the circuit court: "* * * There is proof, and the court finds that the deceased made declarations of his intention to pay the claimant, but that the payment was to be made at the time of his death rather than deplete his then property. * * * Having rendered the services on an expressed or implied contract for payment, the court finds that the claimant is entitled to pay and fixes the sum from the testimony at $1,500 to cover the period, in addition to his board and room, with the deceased."

After Cohn's departure, Moss employed a man named Ned Beckham, to render substantially the same services which Cohn had performed, and Beckham has a claim for his services against the estate of Moss.

Beloit Taylor, a practicing attorney in Little Rock, testified that as attorney for Beckham he attempted to probate a will executed by Moss, which devised property in small amounts to a number of persons and directed the payment of Beckham's expenses through a medical college. When witness learned that Moss had a son, whose name was not mentioned in the will, he abandoned the attempt to probate the will, and filed a claim against the estate of Moss for the value of the services which Beckham had rendered Moss. The merit of that claim is not before us.

Our own and other cases are to the effect that claims of this character are to be closely scrutinized, because of the opportunity for fraud. But it is the trial court, or jury, which thus considers and weighs the testimony

tending to establish the claim. When it has been adjudged valid by a jury, or by the court sitting as a jury, as in this case, we must give the same weight to the finding of the court or the verdict of the jury which is accorded in other cases, and that finding or verdict will not be disturbed if there is substantial evidence to support it. Measured by this test, we are unable to reverse the judgment here appealed from as being unsupported by sufficient testimony; indeed, the undisputed testimony shows that Cohn rendered services of a very valuable nature.

It is true that, while doing so, Cohn lived with Moss as a member of the latter's family, and the presumption is, therefore, that the services were gratuitous, and the burden of proof is upon the claimant to establish otherwise. *Lineback* v. *Smith,* 140 Ark. 500, 215 S. W. 662; *Nissen* v. *Flournoy,* 160 Ark. 311, 254 S. W. 540; *Clerget* v. *Williams,* 176 Ark. 533, 3 S. W. (2d) 301; *Graves* v. *Bowles,* 190 Ark. 579, 79 S. W. (2d) 995.

At § 881, p. 281, vol. 24, C. J., chapter Executors and Administrators, it is said that this rule applies where the family relationship actually existed between claimant and decedent, although there was no consanguinity, affinity or adoption.

If, therefore, it be insisted that Cohn should not recover compensation because he lived as a member of Moss' family, it may be answered that even near relatives, bound by ties of blood, may recover under these circumstances, if there was an agreement, either express or implied, that compensation should be paid for the services rendered.

In the case of *Nissen* v. *Flournoy, supra,* a sister filed claim against her brother's estate. The jury was instructed at the trial of that case in the circuit court that the claimant "could not recover without establishing a special or express promise to pay her." In holding this instruction erroneous Judge HART said: "It was incumbent upon the plaintiff to show that she performed the services which were at the foundation of her claim, expecting, at the time, to be paid therefor, and that her

brother so understood it, or that, under the circumstances, he had sufficient reason to believe that she expected pay for her services." That holding was reaffirmed in the case of *Clerget* v. *Williams, supra,* as was also the declaration that the agreement to pay might be shown by circumstantial as well as by direct evidence.

It was not necessary, therefore, to prove an express contract to pay Cohn; that obligation will be implied, if the circumstances in proof establish the obligation to pay. This being true, it is not essential that the testimony establish a contract specifying the amount to be paid. The competent evidence does not establish what sum of money this would be. But a recovery is not to be defeated on that account. In such case, the court or jury will determine the reasonable value of the services under all the circumstances, as was done at the trial from which this appeal comes.

Here, both the circumstances and the positive testimony support the finding of the court, set out above, that, although Cohn lived with Moss as a member of Moss' family, there was in fact an agreement that Cohn should be paid for his services.

So much of the testimony of the attorneys mentioned as was admitted was competent. The will prepared by Lofton was not admitted in evidence, and if he made any use of it at all, which fact does not appear, it was merely to refresh his recollection as to his conversation with Moss.

At § 141 of the chapter on Witnesses in 28 R. C. L., p. 550, it is said: "Communications relating to making of will generally.—An attorney who prepares a will cannot during the life of the testator testify to communications concerning the will made to him by the testator, or to the contents of the will itself, but it may be laid down as a general rule that, unless otherwise provided by statute, communications by a client to the attorney who drafted the will, in respect to the document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a

suit between the testator's devisees and heirs-at-law, or other parties who all claim under him. * * *."

The will testified to by Taylor was not offered in evidence, and his testimony tending to show that Beckham filed a claim for services rendered was not incompetent.

Cohn offered to testify as to the details of his contract and relationship with Moss; but this testimony was properly excluded under § 5154 of Pope's Digest. The other competent testimony, set out above, is sufficient to support the finding of the court that there was a contract, implied if not express, that Cohn should have compensation, in addition to his living, and a contract, either express or implied, suffices to sustain the recovery.

It is argued that there was no testimony that Moss had not paid Cohn for his services. There were only two witnesses who could have given definite testimony upon this subject. One of these was Moss, who was dead, and the other was Cohn, who was not permitted to testify, because, under the law, his testimony was not competent. It is true that Cohn presented no bill against Moss during Moss' lifetime; but it is true also, under the undisputed testimony, that he had a just expectation of being compensated in Moss' will.

The rules of law here involved are extensively annotated in a note to the case of *Carlson* v. *Krantz,* 172 Minn. 242, 214 N. W. 928, 54 A. L. R. 545. The annotator there says: "But if the services are rendered in pursuance of a mutual understanding that compensation is to be made by will, the value of the services may be recovered in an action at law, in the event no will is made, though, if rendered merely with the expectation, by the person rendering them, that they would be compensated by will, without a mutual understanding they do not constitute a valid claim."

Here, the proof is that there was not a mere expectation, but a contract, implied if not express, that Cohn should be paid for his services.

It is true that had Moss lived, something less than two years longer than he did live, the claim would have been completely barred by Cohn's inactivity in attempt-

ing to collect his demand, but the fact remains that the claim was not completely barred at the time of Moss' death. The inactivity on the part of Cohn in waiting for his pay raises no presumption of law that he had been paid. It was a mere circumstance to be weighed by the court in determining whether Cohn had a right to recover, and, if so, whether he had been paid for his services.

In the chapter on Payment in 48 C. J. 680, it is said that "The general rule is that the burden of proving payment is upon the party who alleges it," and several hundred cases are cited in support of the text quoted.

In the case of *Herrick* v. *Hayes,* 173 N. W. 110, decided by the Supreme Court of Iowa, a headnote reads as follows: "In action against nephew by uncle's administrator on nephew's note in which nephew counterclaims for accommodations furnished uncle, and proves that accommodations were furnished upon expectation of payment, administrator has burden of proving payment." In other words, the nephew had the burden of showing that the accommodations had been furnished upon his expectation of payment of the value thereof. That proof being made, the burden of showing payment was upon the administrator. See, also, 68 C. J., § 211, p. 591.

The compensation allowed by the court of $1,500 for a period of service covering 29 months and 15 days amounts to $51.70 per month, according to a calculation not questioned, and the testimony is sufficient to support the finding that this was the reasonable value of the services; but the time for which the compensation was allowed is excessive. The case of *Beauchamp* v. *Jernigan,* 189 Ark. 361, 72 S. W. (2d) 535, is decisive of that question. It was there held (to quote a headnote) that "A claimant who kept house for and waited upon decedent for nine years under an oral agreement to pay therefor, *held* not entitled to recover for any work done more than three years before decedent's death, under Crawford & Moses' Digest, § 6950."

Upon the authority of this case appellant requested the court to make the following declaration of law: "That where a claim is made for alleged services rendered to a decedent, the statute of limitations provided in § 6950 of Crawford & Moses' Digest applies, and the claimant is not entitled to recover for any such services, except such as were rendered within three years immediately preceding the death of decedent."

It was error to refuse this declaration. There could be no recovery except for such services as were rendered within three years immediately preceding the death of the decedent, which occurred January 3, 1935, so that there could be no recovery for services rendered prior to January 3, 1932. But Cohn quit the service of Moss on September 25, 1933, and could not, of course, recover for services after that date. The judgment should, therefore, have been only for services rendered between these dates, which would be, not 29 months and 15 days, but 1 year, 8 months, and 22 days, and compensation, for that period, figured at $51.70 per month, amounts to $1,072.41. The judgment must, therefore, be modified by reducing it to that amount, and as thus modified will be affirmed.

RIDER *v.* MCELROY.

4-4831

Opinion delivered November 29, 1937.

Mark E. Woolsey, for appellant.

SMITH, J. The transcript in this cause reflects the following proceedings. Appellant Rider filed suit in the court of a justice of the peace against appellee McElroy, praying judgment on two certain notes in the sum of $60. McElroy filed a pleading denominated "demurrer," reading as follows: "Comes the defendant and demurs, and says this cause between the same parties has been determined by a court of competent jurisdiction."

The judgment of the justice of the peace recites: "Demurrer says this cause between the same parties has been determined by a court of competent jurisdiction. Court then ordered it would be heard 17th day of April, 1936. After taking evidence court dismissed said cause without prejudice."

Upon proper affidavit, an appeal was prayed and perfected to the circuit court. McElroy filed in the circuit court a motion to dismiss the appeal, which reads as follows: "The defendant says that there was no final determination of the cause in the court of the justice of the peace; and that the order of the lower court dismissing the action because of former determination of the matter in controversy in that court it was not such an order as may be appealed from."

Upon hearing this motion, the circuit court sustained the motion to dismiss the appeal. That order and judgment, from which is this appeal, reads as follows: "Now on this day is presented to the court the motion of the defendant, W. L. McElroy, to dismiss the appeal of the plaintiff, J. P. Rider, and the court, after reading said motion, and without taking any testimony, is of the opinion that said motion should be sustained. It is therefore by the court considered, ordered and adjudged that said motion be and the same is hereby sustained, and said appeal is hereby dismissed."

This was error. It may be that a former adjudication by a court of competent jurisdiction had deter-

mined the matter in issue; but this is a question of fact upon which the plaintiff had the right to be heard. It was not a question which the circuit court could determine without hearing testimony. The action of the circuit court may have been predicated upon the view that there was no final judgment in the justice court from which an appeal would lie. If so, this, too, was error.

This court has held in numerous cases that an order merely overruling or sustaining a demurrer to a pleading, without further action, is not appealable. *Flanagan* v. *Drainage Dist. No. 17,* 176 Ark. 31, 2 S. W. (2d) 70. But that rule does not apply here.

The pleading denominated "demurrer" was in fact an answer. It does not allege that the complaint showed on its face that there had been a former adjudication of the subject-matter. It averred that "the cause between the same parties has been determined by a court of competent jurisdiction." This allegation presented a question of fact, which, if true, was a good defense to the action, but it was a question which could have been raised only by an answer, as the facts constituting the alleged former adjudication do not appear from the complaint. In the chapter on Pleading, 21 R. C. L., p. 505, under the subdivision entitled "demurrers," the well-established rule of pleading applicable here is stated as follows: "But where the facts constituting a defense affirmatively appear on the face of the petition, the defense may be interposed by demurrer, without the necessity of a plea or answer. A demurrer which sets up a ground *dehors* the record, or a ground which, to be sustained, requires reference to facts not appearing on the face of the pleading thus attacked, is said to be 'a speaking demurrer,' and is bad."

To dispose of the pleading denominated "demurrer," but which was, in effect and in fact, an answer, it was essential that testimony be heard. This, the justice of the peace did. Whether his decision was correct or erroneous was a question which the plaintiff sought and was entitled to have reviewed by the circuit court on the appeal which was duly prosecuted for that purpose. The justice was evidently of the opinion that the testimony

heard by him sustained the plea of former adjudication, as is evidenced by the dismissal of the cause, and that judgment was none the less final because the dismissal "was without prejudice."

In the chapter on Appeal and Error, 4 C. J. S., p. 237, § 121, it is said: "As a general rule an appeal or writ of error may be taken from a judgment, order, or decree finally dismissing the action or proceeding without plaintiff's consent or granting a judgment or final order of compulsory nonsuit, as such judgment, order, or decree is a final determination of the cause, this being so even if the dismissal or nonsuit be without prejudice. In some jurisdictions, however, there are exceptions to the rule based on special circumstances or particular statutory provisions." There are here no special circumstances or statutory provisions which prevent the application of this general rule. The numerous cases cited in the note to the text quoted fully sustain the law as stated. See, also, 2 Am. Jur., chapter Appeal and Error, p. 897.

We conclude, therefore, that the court erred in dismissing the appeal, and that judgment will be reversed, and the cause will be remanded with directions to hear the appeal on its merits.

LAMBERT *v.* REEVES.

4-4819

Opinion delivered November 29, 1937.

Bevens & Mundt, for appellant.

C. L. Polk, Jr., for appellee.

J. G. Burke, Jno. I. Moore, Jr., and *G. D. Walker, amici curiae.*

McHaney, J. Appellees brought this action against appellant to cancel a tax deed from the state to appellant, dated June 8, 1936, and to quiet title in them to west half of section 16, township 5 south, range 1 east and south half of northeast quarter section 31, township 4 south, range 2 east, Phillips county, which land was alleged to be their property, and was wild, unimproved and not held adversely by appellant. It was further alleged that there was an attempt to forfeit and sell said lands to the state for the nonpayment of taxes due for the year 1926, and that said forfeiture and sale were and are void for various reasons hereinafter mentioned. Appellant answered denying the various grounds of in-

validity set out in the complaint, and, for affirmative defense, pleaded confirmation of the sale to the state, under the provisions of act 296 of 1929, on May 28, 1931, and also pleaded the curative provisions of act 142 of 1935.

The case was tried on stipulation of facts, in substance as follows: 1. That appellees were the owners in fee of said lands at the time of the alleged forfeiture and sale for the taxes of 1926, that the lands were wild and unimproved and that no taxes thereon were paid for 1926; 2, that said lands were assessed in 1925 for the taxes of 1926 by assessing all of section 16, 640 acres at a valuation of $6,400, and the land in section 31, 80 acres at a valuation of $640; 3, that the county clerk delivered the tax books to the collector on January 6, 1927, without extending the taxes on the books in dollars and cents, and in the following form:

Name of Owner	Date Paid	Parts of Section	Section	Township	Range	AREA		Valuation	School Dist.	Rate, Dist. School Tax	State Tax 8.7 Mills	County Tax 8 Mills	City Tax	Laconia Levee Dist. Tax	Helena Ferguson Road Dist. Tax
						Acres	100ths								
Reeves, W. D. Est. (above listed on Page 47)		All	16	5S	1E	640		6400	31	12				448.00	336.00
Reeves Timber Co. (above listed on Page 176)		S½ NE¼	31	4S	2E	80		640	34	12				3.20	63.00

Also that the warrant for the collection of taxes as required by law was attached to the last of three books, which was entitled "Real Estate Tax Book, city of Helena," which was not the book in which rural property was described; 4, that the collector failed to file with the clerk as is required by law, a delinquent list showing the amount of taxes delinquent on each description reported delinquent * * *; 9, that the lands involved were certified to the state; 10, that the state secured a decree of confirmation to its title under said act 296 of 1929, on May 28, 1931; and 11, on June 8, 1936, sold same to appellant.

Based on this stipulation the court entered a decree canceling appellant's deed from the state and quieting title in appellees, on the finding "that by reason of the failure of the clerk of Phillips county to extend the taxes against said lands as is provided by law, that the sale of said lands for taxes for the year 1926 to the State Land Commissioner of the state of Arkansas was void for want of power and authority, and that the defendant's deed from the state of Arkansas to said lands is a cloud on plaintiffs' title, and that plaintiffs' title to said land is superior and paramount to any right, claim or interest of the defendant."

For a reversal of the judgment, appellant contends, first, that there was no failure in Phillips county to extend the taxes on the tax records against these lands; and second, that if there were a failure to extend the taxes, such failure should be designated as a mere informality or irregularity, which is cured by the confirmation decree under act 296 of 1929, or by the later curative act, No. 142 of 1935. We cannot agree with appellant on either contention. As shown above, the lands involved were properly described and properly assessed, but there was a total failure on the part of the county clerk to extend in dollars and cents in the columns in the tax-books provided for that purpose, the amount of state tax due on said property, the amount of county tax, the amount of school district tax and the total of all taxes. The only tax extended against said lands was the amount due the Laconia Levee District and the

Helena-Ferguson Road District. In this respect, the clerk failed to perform a duty required of him by law. Section 13758 of Pope's Digest provides: "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." This section makes it imperative upon the clerk to "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." This would seem to be an unnecessary requirement if it did not mean that he was required to put the sum so found to be due on the tax books for the information of the collector, so that the collector, when any person calls to pay his taxes, may determine the sums due and payable from the books, without having to make the calculations himself. Here, the clerk made no calculations. He failed to determine the sums due upon this property or, if he did, he failed to put said sums upon the tax books. No taxpayer could look at the books himself and determine the amount of taxes that had been assessed against his land, without making the calculations himself, and it is extremely doubtful whether one taxpayer in ten could make the calculations. In *Sawyer* v. *Wilson,* 81 Ark. 319, 99 S. W. 389, Judge Battle, speaking for the court, holding the delinquent list sufficient against attack, said: "There is no law prohibiting the blending of all taxes in a delinquent list of lands as published for sale. This is immaterial, and can not affect the owner. The taxes and amount of each charged against the land can be readily

ascertained by reference to the tax books." To support this statement, the case of *Scott* v. *Watkins,* 22 Ark. 556, is cited. In that case, it was said: "The statute does not require the advertisement to state the sums of the state and county taxes severally, though it is perhaps customary to do so. If the advertisement had stated the aggregate amount of taxes due upon the land, with the penalty added, it would have been sufficient, we think, without setting forth what sum was due for state, and what for county taxes." These cases have reference to the delinquent list and the advertisement of delinquent lands for sale, and not to the extension of the taxes on the tax books by the clerk. Appellees could not have readily ascertained by reference to the tax books what the taxes against their lands were, either for state, county, school district or for the total amount of all taxes thereon. In this respect, the case at bar differs from *Evans* v. *F. L. Dumas Store, Inc.,* 192 Ark. 571, 93 S. W. (2d) 307, and *Alphin* v. *Banks,* 193 Ark. 563, 102 S. W. (2d) 558. In the former case, all of the several amounts of taxes were actually extended against the land including state, county, school district and total, and the same thing is true in the latter case. In that case, the court said: "There is filled in, however, the blanks opposite each tract of land giving its description and area the total state tax due at the rate of 8.7 mills, and the county tax at the rate of 8 mills, and the school tax at the appropriate rate, which, as to the lands here under consideration, was 12 mills, and then the sum total of these taxes. There was a column—which was not filled—for the city taxes; but these lands were not subject to a city tax. In addition to the column showing the assessed valuation there was another column showing the value as equalized, and still another column showing the value as fixed by the county court." It will be seen that in both cases, the taxes were extended as required by law. In both cases, the rate of state tax was 8.7 mills and the rate of county tax was 8 mills, just as in the case at bar. In the Alphin case, it was contended that each separate millage tax for state purposes that went to make up the total of

8.7 mills and each millage county tax that went to make up the total of 8 mills should have been separately shown on the tax books and not grouped under one head, and it was in answer to this contention that the court correctly used this language: "The objection is made to the failure of the county clerk to extend upon the tax books the amount of taxes to be collected for the various purposes for which the state and county levies were expressly imposed. We do not find any statute which requires this to be done. To impose this requirement would greatly increase the cost of making up a tax book, and would require a book of unwieldly size." There are many millage taxes levied for state purposes that go to make up the total of 8.7 mills and there are at least two millage taxes levied for county purposes that go to make up the total of 8 mills, for instance, 5 mills for county general purposes and 3 mills for road tax. There is no requirement of law that these separate mills be itemized on the tax books and the tax extended for each separate purpose, and it is proper to group all of the state taxes under one heading and all of the county taxes under one heading and it is a sufficient extending of taxes if the amount is thus determined in dollars and cents based upon the assessed valuation, but anything short of this would not be a complete and valid assessment of taxes. The statute referred to above expressly requires it to be done and failure to comply with it results in an invalid assessment of taxes or no assessment at all. As said by Judge BATTLE in *Sawyer* v. *Wilson, supra,* "Lands in this state are assessed in dollars and cents. Taxes are payable only in money or its representative."

The result of our views on this point is that there was a total failure in Phillips county, at least as to these lands, to extend the taxes on the tax records.

It is next contended that confirmation under act 296 of 1929 cures the defect in failing to extend the taxes against said lands. We have several times held that a decree of confirmation under said act has the effect of curing all irregularities and informalities in the assessment of taxes and the subsequent sale of delinquent real

property in those cases where the state acquired the power to sell. *Little Red River Levee District No. 2* v. *State,* 185 Ark. 1170, 52 S. W. (2d) 46; *Stringer* v. *Conway County Bridge District,* 188 Ark. 481, 65 S. W. (2d) 1071; *Kirk* v. *Ellis,* 192 Ark. 587, 93 S. W. (2d) 139, and *Mixon* v. *Bell,* 190 Ark. 903, 82 S. W. (2d) 33. This point is ruled adversely to appellant's contention in *Mixon* v. *Bell, supra.* In that case, as in this, the tax records of Phillips county were involved. The land was assessed by the assessor, but the clerk had failed to extend the taxes just as in this. It was there said: "* * * that the record of assessment and extension of taxes in Phillips county, Arkansas, for the year 1923 which was referred to by the defendant, shows no money extensions against any of the lands contained on page 223 where the lands in controversy in this suit is described with reference to state tax, county tax, or district school tax, but at the top of the page there appears these words: 'State tax 8 7/10 mills' in one column, and in the other column the words 'county tax 8 mills,' and in another column, 'district school tax 10 mills'." Based upon these facts, the court said: "Appellant contends for a reversal of the judgment, because any defects in the state's title were cured by the confirmation suit brought by the state under act 296 of the Acts of the General Assembly of 1929. The act referred to was construed in the case of *Stringer* v. *Conway County Bridge District,* 188 Ark. 481, 65 S. W. (2d) 1071, as curing the state's title to forfeited lands for informalities and irregularities only connected with the assessment and sale thereof, but where the state was without power to sell lands for failure to pay taxes thereon for any reason, the confirmation decree would not and could not perfect the title in the state. In the instant case, there was no proper extension of the taxes against these lands on the tax record; hence the attempted sale thereof was without power or authority, and the state acquired no title by virtue of the confirmation decree." The two cases are exactly in point and to hold as appellant contends would require us to overrule this well considered case, which we decline to do.

It is furthermore contended that this is a collateral attack upon the decree of confirmation. Even so, if the confirmation decree is void, in so far as it attempts to confirm a tax sale that is void for the defect above mentioned, then it is open to collateral attack, as a void judgment may be attacked collaterally. *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39; *Bragg* v. *Thompson,* 177 Ark. 870, 9 S. W. (2d) 24.

It is finally said that act 142 of 1935 cures the defect in failing to extend the taxes against this land as required by law. Again we cannot agree that such is the fact. All that act proposes to cure is "any irregularity, informality or omission by any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book." The defect was in the failure of the clerk to extend the taxes levied in dollars and cents so that the taxpayer might know how much he owed in money.

We, therefore, hold that said act 142 did not have the effect of curing the defect here involved. Both it and the confirmation decree heretofore referred to did have the effect of curing the other defects mentioned in the agreed statement of facts, as these were mere irregularities or informalities.

The decree of the chancery court is correct, and is in all things affirmed. It is so ordered.

SMITH and MEHAFFY, JJ., concur.

SMITH, J., (concurring). The majority say there was a total failure to extend on the tax book the 1926 taxes. The only taxes extended against the land were those due the Laconia Levee District and the Helena-Ferguson Road District. There was, as the majority say, "A total failure on the part of the county clerk to extend, in dollars and cents, in the columns in the tax books provided for that purpose, the amount of state taxes due on said property, the amount of county taxes, the amount of school district taxes, and the total of all taxes." On these facts all must agree that the tax sale was void, and was not cured by the confirmation decree. The case of *Mixon* v. *Bell,* 190 Ark. 403, 82 S. W. (2d) 33,

so expressly held. But the instant case does much more than to reaffirm the holding in the Mixon case, *supra.*

It is now held that, not only does the failure to extend the total amount of all taxes invalidate a sale beyond the power of a confirmation decree to cure, as was held in the Mixon case, with which holding I am in entire accord, but that the failure to extend and calculate separately the taxes due the state, county and the school district renders the sale invalid, and that there is no authority to collect any taxes unless these items are separately calculated and extended upon the tax books.

This holding is so far reaching, and will be so disastrous to the beneficiaries of the various taxes, that I am constrained to register my dissent.

The majority opinion, in practical effect, makes the payment of current taxes optional, by relieving the taxpayer of any apprehension that the sale of his land for the non-payment of taxes will cause him to lose it, even though he fails to redeem it, after the sale, and permits the state to confirm the sale by a proper decree.

I submit that the statutes of this state, and the opinions of this court cited by the majority, furnish no basis for that holding. It may be conceded that for many years it was the practice to so rule the tax books as to provide columns for the extension of the amounts due the various taxing agencies. This operated to increase the fees and emoluments of the county clerks in many counties where, even with these fees, those officers were poorly paid; but the majority opinion cites no law which required that this should be done.

This custom was within the knowledge of Judge Battle when he wrote the opinion in *Sawyer* v. *Wilson,* 81 Ark. 319, 99 S. W. 389, in which he said there was no law prohibiting the blending of all taxes in the delinquent list of lands as published for sale. He made this statement upon the authority of the case of *Scott* v. *Watkins,* 22 Ark. 556, from which he quoted and where it had been said: "The statute does not require the advertisement to state the sum of the state and county taxes severally, although it is perhaps customary to do so." I submit

it is the holding of this case that mere custom cannot add to the requirements of the statute. If it is essential to a valid sale that the taxes be separately calculated and extended upon the tax books, which but few, if any taxpayers, would ever see, it would be equally essential that the landowner have this information in the notice of the sale of his land, and the Sawyer case expressly holds that this is not essential to a valid sale.

Now it is true that the argument was made in the case of *Evans* v. *Dumas Stores, Inc.,* and *Alphin* v. *Banks,* cited by the majority, that the tax sale would be void where there was no separate extension of the taxes due the state, county, etc. The argument there made, that the sales there questioned were void, because those taxes had not been separately calculated and extended upon the tax books, was met with the answer that this had in fact been done, and if this had been done those sales could not be held invalid, even though the law imposed this requirement. It was not necessary, in either of those cases, to discuss or decide whether the law imposed this requirement. It was sufficient to say that the thing insisted upon had in fact been done. It was said, however, in the Alphin case, *supra,* in discussing this quotation that: "We do not find any statute which requires this to be done."

The majority say that § 13758 of Pope's Digest imposes this requirement. I do not so construe that section, and no case has been called to our attention which does. It was insisted, in our consultation, that such was the effect of *Porter* v. *Ivy,* 130 Ark. 329, 197 S. W. 697, cited as a note to that section, and as a note also to the corresponding § 10010, Crawford & Moses' Digest.

It is so obvious that this case does not support the majority opinion that it is not there cited. Lest someone else may entertain this misapprehension, I briefly review that case. It was there insisted that the county levying court had not authorized the extension of the state taxes, and that, lacking this authorization, the sale for taxes, including the state taxes, was void. The opinion by Chief Justice McCulloch points out the manner

in which state taxes are levied, as distinguished from the levy of taxes for county and school purposes. The point which was there in issue, and which was decided by the court, was stated by Chief Justice McCulloch as follows: "In other words, the contention is, as we understand it, that the words, 'county taxes,' (which a local agency was required to levy) include all taxes to be imposed in the county for both state and county purposes." In overruling that contention, it was said: "State taxes are levied by the Legislature, and the clerk of the county court is required by statute to extend upon the tax books the taxes levied for state purposes as certified by the Auditor of State." In other words, it was the duty of the county clerk to extend the state taxes upon the tax books, although that action had not been directed by the levying court; but it was not held that this must be done by extending these taxes separately and apart from the other taxes.

These taxes were extended when they became, and were made, a part of the total taxes due on the land, for the particular year. That total must, of course, be stated to make a valid sale. The extension of taxes is not complete until that total has been extended upon the tax books, but the state taxes were extended when they were included in the sum total of all the taxes due. The sale here under review is void because this was not done, and inasmuch as the extension was not completed by showing the total amount of taxes due, there was a defect which neither a confirmation under the Confirmation Act nor the provisions of act 142 of the Acts of 1935 could cure. The Mixon case so holds, and was correct in so holding; but it is a very great—and I think unwarranted—extension of that case to now hold that the items making up the total amount of taxes should be separately calculated and extended.

Does § 13758 of Pope's Digest require this to be done, as the majority have concluded? An analysis of that section will answer this question. Its requirements are that the county clerk shall (a) after receiving statements of the rates and sums of money to be levied for

state purposes from the Auditor of State, and (b) after receiving similar information from other officers and authorities empowered to determine rates and amounts to be levied for the other various purposes authorized by law, to then, forthwith, determine, from these statements, the sums to be levied on all the real property in his county, and to these amounts he is required to add the taxes of any previous year which have been omitted, and he is then required to compute the taxes upon the valuations of the personal property at the same rate employed in computing the taxes upon the real estate. There are no other provisions in this section, and something must be read into it—which does not there appear—if we are to impose the additional requirement that the county clerk shall separately compute and extend the taxes due each of these taxing agencies against each tract of land or against the total valuation of an owner's personal property.

In the case of *Alphin* v. *Banks, supra,* cited by the majority, it was pointed out that "The law requires that the books be uniform and be approved by the Tax Commission. Section 9880, Crawford & Moses' Digest." The duties of the Tax Commission have been transferred to a department of the Arkansas Corporation Commission by act 165 of the Acts of 1937, p. 613. Section 9880, Crawford & Moses' Digest, requires the Tax Commission to prepare and furnish the blanks and records to be used in the extension and collection of taxes in each county, and that no other records shall be used. These tax books are so ruled as to show all the items the statutes require. An examination of a sheet from one of these books shows that separate columns are not provided for the state and county taxes, as distinguished from other taxes, but that there is a column for the total amount of taxes. Tax books of this character appear to have been used since the passage of act 16 of the Special Session of 1933, p. 61, approved August 25, 1933, and the books now in use show only the total taxes, and not the separate items making up this total.

It must, therefore, follow, from the majority opinion, that all sales for taxes thus extended are void, al-

though no other irregularity attends the sale, and that the infirmity is one which a confirmation decree will not cure.

The collector must, of course, account to each taxing agency for the taxes collected for its benefit, and that result is arrived at by adding the total of all valuations both of real estate and personal property upon which taxes were paid for the account of such agency, and multiplying that total by the appropriate rate of taxation. It may be, as the majority say, that all taxpayers are not able to make these calculations; but the taxpayer may know what his total valuations are, both upon his real estate and his personal property, and he may know the sum total of all the rates of tax he is called upon to pay. If he wishes to verify the accuracy of his tax statement, his perplexity would not be diminished, nor would the labor of his calculations be reduced, by determining the tax due on his various valuations for each of the purposes, and adding them together, rather than by multiplying the valuation by the total amount of all the various rates.

There appears to be neither reason, nor requirement of law, for the separate extension of the various amounts of taxes on the tax books due each taxing agency, and to impose this unnecessary and useless requirement very greatly increases the cost incident to the collection of taxes, and will invalidate all tax sales which have been made for the past several years.

I, therefore, dissent, and am authorized to say that Justice MEHAFFY concurs in the views here expressed.

MCHANEY, J., (supplemental opinion). On further consideration on our own motion, we have reached the conclusion that our opinion, rendered herein on November 29, 1937, is incorrect in holding that the failure of the county clerk, in all instances, to extend in dollars and cents in the columns in the tax books provided for that purpose, the amount of the several taxes due the state and its various subdivisions and the total of all taxes, renders a tax sale based thereon void and not cured by subsequent confirmation.

Section 9880 of Crawford & Moses' Digest as amended by § 8 of act 172 of 1929, now digested as § 13648, Pope's Digest, reads as follows:

"The Arkansas Tax Commission shall prepare and furnish, at the proper time, to the county clerks in this state, copies for all lists, blanks and records to be used in the assessment, extension and collection of taxes, and the county clerk shall have all such lists, blanks and records made at the expense of the county; provided, this shall not apply to poll tax receipts; and provided further, no lists, blanks or records shall be used by any official in the assessment, extension or collection of taxes, except as shall have had the approval of said commission.

"As soon after the passage and approval of this act as is practicable, and on or before the first day of January of each year thereafter, the county clerk shall furnish to the assessor all lists, blanks and records necessary for the assessment of all real and personal property for the year, same to be prepared by law provided unless otherwise directed by the Arkansas Tax Commission."

We are of the opinion that this section confers authority on the Tax Commission to change the form of tax books so as to omit blank spaces for the extension in dollars and cents of the amounts due the state and its various subdivisions, such as counties, cities, towns and school districts, and that acting under this authority the Tax Commission has, for a number of years, approved forms of tax books which do omit such extensions. In view of this fact, the failure of the county clerk to make such extensions does not render a tax sale based thereon void. To this extent § 13758 of Pope's Digest is amended by necessary implication.

But in the case now before us, there was a failure, extend the total amount of taxes due, and this rendered not only to extend the various items, but a failure to the sale based thereon void, as it was not a complete assessment.

In the respects herein mentioned the opinion heretofore rendered is modified. In all other respects it is

approved, and the decree of the chancery court is not disturbed.

SMITH and MEHAFFY, JJ., concur.

LOUISIANA & ARKANSAS RAILWAY COMPANY *v.* O'STEEN AND BARR.

4-4834

Opinion delivered November 29, 1937.

House, Moses & Holmes, E. M. Anderson and *Steve Carrigan,* for appellant.

W. S. Atkins, for appellees.

BAKER, J. The two suits here under consideration on this appeal arise out of an accident that occurred on May 9, 1936, a mile or two south of Hope, Arkansas, at a point where highway No. 29 crosses appellant's railway. O'Steen, driving an automobile for his employer, H. B. Barr, had driven to a CCC Camp, about six miles south of Hope and was returning upon highway No. 29, which

runs practically parallel with the railway track. About a mile and a half south of Hope, this highway upon which appellee was going in a northward direction curves and crosses the railroad at a right angle. At the point where the highway begins to curve, it is approximately four hundred feet to the railroad tracks, and there is some timber to the north along this curve upon the highway, so as to prevent open and clear vision toward the north, and this timber extends to a point within approximately one hundred or one hundred and twenty-five feet of the railroad. It is said also that the highway is banked on the north side as it approaches the railroad, so as to make that side approximately three feet higher than the south side where O'Steen says that the road was rough, so much so, that it was hard to hold the automobile in the road, that it was raining; and that although he approached the crossing cautiously, driving only twelve or fifteen miles an hour, he had gotten the front part of the car just upon the railroad tracks when the automobile was struck by the right front part of the locomotive; that the impact of the collision was such as to turn the automobile almost completely around, wrecking it, shocking him considerably, but not rendering him unconscious; that he alighted from the car while the train was still passing, and that after he was upon the ground twelve or fifteen cars passed. He tried to attract the attention of anyone who might be in the caboose, but failed to do so.

Though injured, he made his way south down the highway until he came to a filling station operated by two brothers, T. D. Byers and O. F. Byers. They took him to Hope. That night, an hour or two later, the car was picked up by a garage man, hauled or towed into Hope, where pictures were made of it the next morning. The morning after the accident, the garageman, or one of his employees, went to the place of accident and across the railroad tracks, on the opposite side from where the damaged car was picked up the night before, a part of the radiator of the car was found. Later, down the railroad, some two or three hundred feet, an air-cleaner, an-

other part of the automobile was picked up. Upon the trial of the case O'Steen testified to the facts substantially as above stated. In addition, he testified that he did not see any lights upon the train; that if it had lights they were defective; that as he approached the track he was watchful and careful; that he did not know of the approach of the train until it was within twelve or fifteen feet of him and that it was at that time too late to stop in time to avoid the collision; that the front part of the automobile had gone barely far enough to be struck by the right hand side of the engine.

Several witnesses for the appellant company testified. Their testimony was in substantial agreement. They had just left the city of Hope, had passed over a slight grade or hill, something like a quarter mile to the north; that their lights were in perfect condition; they had just been inspected before the train left; they were operating perfectly when they went over the crossing; the engineer, fireman and brakeman were all upon the engine at the time and all testified that a lookout was kept; that the appellee and his car were not seen at this crossing and that he was not struck by any part of the engine. They did not know that any accident had occurred, perhaps, until after they had completed the trip. Some of them were present when the engine was inspected at the end of the journey and there were no marks of any kind to indicate that the engine or any part of it had come in contact with this automobile. In addition to this positive and direct testimony, the plaintiff was contradicted by the two Byers brothers who operated the filling station just south of the place where the accident occurred, who testified to a statement made by O'Steen to them that night after the accident, to the effect that he had driven the car into the middle of the train upon this crossing. He also made the same statement, according to the testimony, to a special agent and claim agent of the railroad company and also to a reporter for a newspaper at Hope in explanation of how the accident occurred. Evidence was also offered by the mechanics at the garage to the effect that the front part of the

automobile had apparently been driven straight back as though it had been run squarely into some object, but it was also shown that the left-hand wheel upon the automobile was crushed or broken down and that the door on the left-hand side, that next to the driver, had been broken off. This conflicting testimony, much of it given in contradiction to O'Steen's testimony, was before the jury.

On account of the fact that a great number of instructions were asked and given by the court covering every phase of the case, so far as the issues were presented and urged upon the trial, we think it unnecessary to take these up for analysis and discussion. Some of them may not have been proper had specific objections been urged, but the principal objection made by the appellant to the instructions given, at the request of the appellee, was that they were not applicable to the facts in the case, because of the fact that the plaintiff had driven the car head on into the middle of the train. This objection, it will be observed, was upon a matter assumed to be true as a fact when it was, in truth, a proposition in issue upon the trial. There is, therefore, no good reason for detailed discussion of these instructions. It will be sufficient to say that the instructions given over the objections, as urged, were not improper in submitting the several issues for determination.

In passing, we will make this comment: That there was evidence of a substantial nature warranting the submission of the disputed questions to the jury. The jury decided these questions in favor of the appellee. The trial court gave approval to the verdict rendered. It may be that had we, the members of this court, been upon the jury we would have decided otherwise, or differently from what the jury decided.

It is evident that the trial judge believed that the jury had correctly decided the case according to a preponderance of the evidence. Otherwise it was his duty, not ours upon appeal, to grant a new trial therefor. See § 331, Crawford's Civil Code, p. 302, which is also § 1311,

Crawford & Moses' Digest, and now appearing as § 1536, Pope's Digest.

The authorities are numerous to the effect that it is the duty of the trial court to set aside the verdict which is against a preponderance of the evidence. See Crawford's Civil Code, p. 306. Numerous cases from this court support the above statement.

The argument urged in respect to the question under discussion is one properly made to, and for the consideration of, the trial court and not for the Supreme Court.

We are sometimes called upon to determine whether there may be substantial evidence to support the verdict when it is presented here upon appeal. We are not required to make an explanation or to determine the inscrutable or inexplicable mental processes of the jury in the determination of such matters as may be presented to them. We may suggest, however, that in this case there is some evidence that seemingly tends to support the testimony of the appellee, although he is very strongly and forcefully contradicted by other testimony. One of the physical facts is to the effect that a part of the radiator was discovered the next morning on the opposite side of the railroad track from where the car had been picked up the night before. Ordinarily this could not have happened had O'Steen driven the car into the middle of the train. This testimony was objected to for the reason urged that this portion of the radiator was found or picked up at a time too remote or long after the accident had occurred. In other words there had been time within which the particular portion of the radiator might have been carried or tossed across the railroad track. There is that possibility, but this was a rainy night, in the country, distant from where any one interested might have been. Whatever these possibilities were, they were known to, and no doubt appreciated by, the jury who must be presumed to have been men of ordinary information, possessed of reasonable intelligence and who would have considered and did weigh such facts and circumstances under the conditions under which they appeared to them. Besides, there were some

other physical facts. The left front wheel of the car was broken down, the door and chassis on the left side of the automobile suffered injuries more severe than happened to the other side. This might have happened had he run directly into the side of the car. They are facts which present themselves for interpretation by men of everyday experience and ordinary information. They are not questions of law that may be determined by us, to conclude the proposition of liability or nonliability. The jury may have found that since O'Steen or the automobile he was driving was not discovered by the three men upon the locomotive for the reason that his automobile never came within the range of the headlight, but that he drove upon the track almost under the light, so that it did not in fact strike directly upon the automobile, and they may also have determined that had the bell been ringing or the whistle been sounded, either the one or the other, as required by law, that O'Steen would have heard these before the train was within twelve or fifteen feet of this crossing and he could, therefore, have stopped, when the rate at which he was driving was considered, and, therefore, averted the injuries. Whatever the jury may have found, there was substantial testimony; the verdict was approved by the trial court, and we cannot say, as a matter of law, upon appeal, that the verdict is unsupported as it relates to O'Steen. O'Steen, himself, did not have to be free of contributory negligence in order that he might recover. The doctrine of contributory negligence applied to him and was properly submitted to the jury for a diminution of the damages he may have suffered. Section 11153, Pope's Digest. Many cases there cited by the digester illustrate the application of the legislative enactment. There is no reason to incorporate further citations or to re-examine them.

Besides, O'Steen was injured by the operation of appellant's train. Section 11138, Pope's Digest, is also applicable. See authorities cited by digester.

It is also urged that O'Steen's recovery in the sum of $2,500 is excessive. We do not think so. He has been

incapacitated in part, at least, continuously since the date of the injury, and the most favorable conclusion that can be drawn from the condition that now prevails, as a result of the injury, is that he must undergo an operation to remove a tumor formed at his knee, at or near the place most seriously injured. He will probably recover after this operation, but at the present time there is no doubt about his incapacity to a great degree, nor is there any serious doubt about the fact that he has continuously suffered since the time of injury. There is no law, or real reason, however, to compel him to submit to an operation and more particularly when the results therefrom are doubtful. Under the circumstances the recovery of $2,500 does not appear to be excessive.

But a different rule obtains as to the damage to the automobile, the property of the appellee, Barr. Barr sued for the value of this automobile as his damages in this accident. It is urged that the trial court erred in consolidating these two cases for trial. We do not think so. The evidence competent or material in the trial of one case, except to the extent of the injuries, is thoroughly competent in the other. It is true that there is a different rule in the law of liability, but this was taken care of by the trial court in the instructions given. The court erred, however, only to the extent that it should have determined as a matter of law, that O'Steen was guilty of contributory negligence in this accident and that his contributory negligence barred the recovery for the personal property. If O'Steen's sworn evidence is to be taken as true, then there could be no recovery for personal property, when he drove upon the railroad in front of this train.

Although the appellant's employees may not have sounded the whistle or rung the bell, that is not conclusive. He says that he did not see or hear the engine and train. This may be partly explained by reason of the fact that the highway was rough, that he was upon the lower side of it which was two or three feet lower than the north side. But if he was not driving more than twelve or fifteen miles an hour he did not need

much more than the length of his automobile in which to bring his car to a full stop before entering upon the railroad track or coming so close or near to it as to be in imminent danger of being hit and damaged. It was his duty as he approached that track to have his automobile under such control that he could stop when the danger became imminent. He abandoned his claim of no lights or defective lights, therefore, a glance to the north in the last hundred feet before he reached the track would have disclosed the presence of the approaching train. He must be deemed to have seen what he should have seen.

We have already determined that the effect of this contributory negligence, so far as it affects O'Steen, was properly submitted to and determined by the jury. But since there was contributory negligence, this will prevent a recovery by Barr for the automobile.

The judgment in favor of O'Steen is affirmed. The judgment in favor of Barr is reversed, and the cause dismissed.

JACKSON *v.* POOL.

4-4839

Opinion delivered November 29, 1937.

H. S. Grant and *H. U. Williamson,* for appellant.

McHANEY, J. Appellee sued appellant to recover judgment for $115 on a board bill of one Bill Herrington, in which she claimed that appellant promised to pay the bill if she would furnish him room and board. Appellant defended on the statute of frauds which requires the contract of one to answer for the debt, default or mis-

carriage of another to be in writing. At the conclusion of the testimony, he moved for a directed verdict which was overruled. The case was submitted to a jury which resulted in a verdict and judgment in appellee's favor for the amount sued for, with interest and costs. The case is here on appeal.

It is true, as appellant says, that this court has held in a long line of decisions beginning with the case of *Kurtz* v. *Adams,* 12 Ark. 174, that "where there is no previously existing debt, or other liability, but the promise of one is the inducement to and ground of the credit given to another, by which a debt or liability is executed, such a promise is a collateral undertaking; the general rule being that wherever the party undertaken for is originally liable on the same contract, the promise to answer for that liability is a collateral promise and must be in writing. As, if B gives credit to C for goods sold and delivered to him on the promise of A to see him paid or to pay him if C should not, in that case it is the immediate debt of C for which an action would lie against him, and the promise of A is a collateral undertaking to pay that debt, he being liable only as security." *Swaboda* v. *Throgmorton-Bruce Co.,* 88 Ark. 592, 115 S. W. 380; *Smith* v. *Westlake,* 152 Ark. 384, 238 S. W. 34; *Grady* v. *Dierks Lumber & Coal Co.,* 154 Ark. 255, 242 S. W. 548.

In this case, there was no pre-existing indebtedness from said Herrington to appellee. She testified very positively that she permitted said Herrington to board and room at her house on the credit of appellant; that appellant agreed with her to pay Herrington's board, and that she charged Herrington's board to appellant. These facts were disputed by appellant, and the court submitted the question to a jury, and the jury has chosen to believe appellee's testimony instead of appellant. If appellee was telling the truth, and we assume that she was, under the jury's verdict, then appellant's undertaking was not a collateral one, and the judgment was properly rendered against him.

No error appearing, the judgment is affirmed.

GILLEY *v.* SOUTHERN CORPORATION.

4-4823

Opinion delivered November 29, 1937.

W. F. Reeves, for appellant.

H. V. Young, for appellee.

SMITH, J. This appeal involves the validity of the sale of a sixty-acre tract of land in Marion county for the nonpayment of the general taxes due thereon for the year 1932. The suit was pending when act 142 of the Acts of 1935 was repealed. This was an act to cure irregularities and informalities and omissions in tax sales. The validity of the sale must, therefore, be determined as if that act were still in force and effect. *Carle* v. *Gehl,* 193 Ark. 1061, 104 S. W. (2d) 445. From a decree holding the sale bad is this appeal.

It is insisted that the sale was void for two reasons: (a) that the sale was made on a day not authorized by law, and (b) the county court clerk had failed to attach his warrant to the tax book directing the collector to collect the taxes thereon extended, as required by § 13763, Pope's Digest.

It is not questioned that the sale of the land was actually made on the day provided by law. The insistence is that the land was first sold to the state, and, on a later date, the tax sale records were changed to show that the sale had been made to appellant. The county clerk testified that the practice in that county was not uncommon, where land had been struck off to the state, to permit an individual, at a later date and before he had made up his tax records, which was usually done within from two or three days and not exceeding two or three weeks after the tax sale, to become the purchaser by substituting his name as purchaser instead of the state. As tending to show that this had occurred as to the tract of land here in question, testimony was offered to the effect that the word "state" had been written opposite this tract and erased and the name of appellant written. Opposed to this evidence was that of appellant, who testified that he attended the tax sale, which continued only for one day, and that he bought the land in question on the day of the sale. Without further considering this question of fact it may be said that permitting the substitution of the name of appellant as the purchaser, if, indeed, it was done, was an irregularity which would be cured by the provisions of act 142 of the Acts of 1935, *supra*.

The failure of the county clerk to attach his warrant to the tax books is an omission which would ordinarily be fatal to the validity of a tax sale. In the recent case of *Wildman* v. *Enfield,* 174 Ark. 1005, 298 S. W. 196, it was held that the failure of the county clerk to attach to the tax book a warrant authorizing the collector to collect taxes extended thereon invalidated the tax sale, and that the omission was not cured by the provisions of (§ 10119, Crawford & Moses' Digest) § 13883, Pope's Digest. The sale there held void had not been confirmed

under act 296 of the Acts of 1929, which act authorized the state to confirm sales to it for nonpayment of taxes, as had the sale involved in the case of *Kirk* v. *Ellis,* 192 Ark. 587, 93 S. W. (2d) 139, and the opinion in the case of *Wildman* v. *Enfield,* was rendered prior to the passage of act 142 of the Acts of 1935. This act 142 was a curative act, and its purposes and effect was fully stated in the case of *Carle* v. *Gehl, supra,* and will not be here repeated. It operated to cure substantially the same defects as did a confirmation decree under the confirmation act No. 296 of the Acts of 1929. Neither professed to cure sales where the power to sell was nonexistent. Both cured sales, in cases where they were applicable, against all mere irregularities and informalities and omissions in tax sales.

The case of *Kirk* v. *Ellis, supra,* recited, as a ground of attack upon the sale there questioned, the failure, in that case, as in this, of the clerk to attach his warrant to the tax book. It was there held that "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 case of *Deaner* v. *Gwaltney, ante* p. 332, 108 S. W. (2d) 600, is to the same effect.

The sale is alleged to be void because of the attempt of appellee, made in good faith, to redeem the land from the sale at a time when the right to do so had not expired. The testimony upon that issue is to the following effect. Harve Keeter, as a stockholder of appellee, the Southern Corporation, testified that he went to the county clerk's office to redeem the land, and that he gave the clerk a slip of paper showing the deed records and the pages thereof where two deeds were recorded, from an examination of which descriptions of the land sought to be redeemed could be obtained. One deed described a sixty-acre tract, the other a thirty-acre tract. The clerk prepared a redemption certificate which properly described the thirty-acre tract, but did not include the sixty-acre tract. Witness did not examine the redemption certificate prepared by the clerk, as the land which he sought to redeem was all the land owned by the Southern

Corporation, which was also known as the Stinchcomb land, of which the land known as the Mattie May Mine land was a part. Had the clerk examined the deed records he would have found, in the two deeds, a correct description of both the thirty-acre and the sixty-acre tracts.

The county clerk testified that he had no recollection of having been given the "slip of paper," with the request that he make a search of the deed records. The recollection of the clerk was that appellee applied to redeem the Mattie May Mine property, known as the Stinchcomb land, and that "the tax record shows the thirty acres is in the Stinchcomb land."

The clerk further testified that the sixty-acre tract was assessed in the name of "The Ozark Mining & Milling Company," and that he had no knowledge or information that the Ozark Mining & Milling Company had any interest in any of the Mattie May Mine property, and that "my information was that the Stinchcomb and Mattie May land was the same, and that the thirty acres was all there was embraced in it until after the period of redemption had passed."

Upon these facts it is insisted that the redemption was in fact effected, and the case of *Forehand* v. *Higbee,* 133 Ark. 191, 202 S. W. 29, is cited to support that contention. We do not concur in that view.

In that case the county clerk issued a redemption certificate properly describing the land sought to be redeemed. The clerk, in making this certificate of redemption, did not embrace in it the full amount of penalty required by the statute, so that the owner lacked $6 of paying the full amount of the penalty due. In other respects, the redemption was regular and conformed to the requirements of applicable statutes. The contention was made that the failure of the clerk to include the proper amount of the penalty rendered the redemption ineffective. That contention was not sustained. On the contrary, it was held that the taxpayer who made an attempt, in good faith, to pay his taxes, or to redeem his land after failure to do so, was not to be defeated in that attempt by the mistake, negligence or other fault on

the part of the public officers in the discharge of their official duties. Here, there was no error of the clerk in computing the amount necessary to redeem the land. The error, if any, in the redemption certificate was that it did not include all the Stinchcomb or Mattie May Mine land; but this omission was as obvious to the owner as it was to the clerk. Indeed, more so, for the clerk testified that the redemption certificate included all the land which he thought the owner wished to redeem, and did, in fact, embrace all the land assessed to appellee. The clerk, according to his testimony, was guilty of no neglect of his official duties. Keeter did not testify that he was unaware of the fact that the redemption certificate did not include all the land which he wished to redeem. He did testify that he had furnished the clerk a slip of paper containing references to deeds showing the lands sought to be redeemed, of which the clerk had no recollection, but Keeter had been given a redemption certificate correctly describing only thirty acres of the land, the slightest examination of which would have disclosed the omission of the sixty-acre tract. We think the clerk should not be charged with this omission as a neglect of his official duty. The fault was that of Keeter, rather than that of the clerk. In the Forehand case, *supra,* the landowner had the right to rely upon the accuracy of the redemption certificate, but not so here. In the Forehand case, it was said that the taxpayer was authorized to believe the certificate was correct, and that ordinary care and prudence did not require him to examine the certificate for mistakes. Here, there was no mistake in the certificate issued; on the contrary, it was a correct and sufficient description of all the land which it described, and we think the court was in error in holding the clerk responsible as having neglected or as having improperly discharged his official duty.

The decree is, therefore, reversed, and the cause remanded with directions to dismiss the suit to redeem as being without equity.

HASTINGS *v.* WESTFALL.

4-4838

Opinion delivered November 29, 1937.

Arthur Sneed and *E. G. Ward,* for appellant.

O. T. Ward, for appellees.

MEHAFFY, J. Appellant, Carl Hastings, brought suit in the Clay circuit court alleging that he was the owner and entitled to possession of lots 3 and 4, block 23 in Bare's Addition to the town of Piggott, Arkansas. He claimed to have acquired title by purchase from the public improvement districts of Piggott, Arkansas, and exhibited deeds; that the title to the property, prior to the sale for improvement taxes, was in Fannie E. Westfall; that since the purchase of said property, he has paid state, county and improvement district taxes, has demanded possession, and this was refused him. He alleges that he was entitled to reasonable rent and fixed the amount at $10 per month.

The appellees answered denying the allegations of the complaint, and alleged that appellant's deeds were void and asked that they be canceled as a cloud on title of appellees, and sought to redeem said property from

the foreclosure sale for improvement taxes. Appellees asked that the cause be transferred to equity. Appellees filed an amendment to their answer and cross-complaint to which appellant filed a reply, and the following agreement was entered into:

"I.

"That lots 3, 4 in block 23 in Bare's Addition to the town of Piggott, Clay county, Arkansas, same being the property involved in this action, became delinquent and forfeited for the nonpayment of the improvement taxes thereon in the Water Works Improvement District Number One; Sewer Improvement District Number One; and Light and Power Improvement District Number One; all in the city of Piggott, Clay county, Arkansas, for the years 1928, 1929 and 1930, and that said improvement districts by and through their board of commissioners, instituted suit in the eastern district Clay chancery court, to foreclose the lien for said improvement district taxes on said lots above described, together with various other lots and parcels of land as delinquent therein; that at the November term of said court held in Piggott, Arkansas, on the 23rd day of November, 1931, said chancery court rendered a decree of foreclosure of said improvement taxes as charged against said lots above described as extended against the same for said years, as shown by said decree in said chancery court record 8 at pages 396, 398 and 403 respectively.

"II.

"That O. C. Grider was duly appointed commissioner in chancery by said court to make the sale of said property, and after he had advertised the same in the way and manner provided in said decree, said commissioner on the 29th day of January, 1932, offered and sold said lots herein described, at which said sale the said improvement districts became the purchaser of said lots described for the sums as charged against said lots therein. That thereafter said commissioner executed

and delivered to said improvement districts his deed for said lots, which deed was by said court duly confirmed on the 18th day April, 1932, and was thereafter filed for record and now appears of record in the office of the recorder of the eastern district of Clay county, Arkansas, in deed record 61, pages 366, 370 and 385 respectively, and shown by plaintiff's exhibits to his complaint as exhibits 'B' No. 1, No. 2 and No. 3 thereto.

"III.

"It is further agreed that on the 17th day of February, 1932, said Improvement District, Light & Power Improvement District No. 1 of Piggott, Arkansas, purchased said lots from the State Land Commissioner as forfeited to the state for the nonpayment of the state and county general taxes for the year 1926, and which had been duly certified to the state of Arkansas as delinquent lands by the county clerk of Clay county, Arkansas, on the 21st day of August, 1929, and that said improvement district received State Land Commissioner's deed No. 36,953, therefor which said deed was duly recorded in the office of the recorder of said district, county and state, on the 19th day of February, 1932, and now appears of record therein in deed record 61, page 320 thereof.

"IV.

"That on the 14th day of December, 1932, said improvement districts by its duly authorized officers, made, executed and delivered its special warranty deed for said lots to the plaintiff, Carl Hastings, which said deed was duly recorded in the office of the recorder on the 27th day of March, 1933, and now appears of record therein in deed record 61 at page 460 thereof.

"V.

"That the plaintiff, Carl Hastings, since receiving his said deed from said improvement districts, has paid the improvement taxes and the state and county general taxes on said lots, and holds receipts therefor, as the same accrued thereon, from year to year.

"VI.

"It is agreed herein that the above and foregoing stipulations may be offered and read as evidence herein

as being the facts as stated herein, and to be taken by the court, along with other evidence offered by the parties in this cause.

"Witness our hands on this the 5th day of May, 1937."

Laud Payne testified that he was circuit clerk and was present in open court and heard the discussion between the parties when the question of settlement of the suit was discussed; that the settlement was discussed at length by both parties before the judge; it was then verbally agreed by both parties to hear the case again before the same judge at Corning a few days later. It seemed that about the only thing that was holding the transaction during the court was the matter of attorneys' fees and court costs, and Mr. Hastings would not settle until the attorneys' fees and court costs were all paid, in addition to $518.18 that he was to accept from appellee; heard Mr. Hastings say if defendants would pay the amount, $518.18, taxes, attorneys' fees and costs, he would settle the lawsuit; that the money was paid into his, witness' hands, and he now has the money; he told Mr. Hastings it had been paid, but Hastings refused to accept it; he first wanted to know who paid it; witness told him Mr. J. M. Walker; he said he would have been glad for Mr. and Mrs. Winston and Mrs. Westfall to have the place, and if they are going to keep the property he would accept the money; he added that he wanted to know who was to get the property before he would accept the money; the conversations mentioned by witness took place in the court house, March 16, 1937. The case was continued over-night to give the defendants an opportunity to get the money; the money was paid to witness on March 20.

Ethel Fay Winston testified that, while the court was in session, she, Mr. Winston and Mr. Walker had an agreement with Mr. Hastings about the settlement of the lawsuit; Mr. Hastings agreed to take $518.18 plus lawyer's fee; lawyer's fee was $50. Mr. Hastings agreed to accept this. Mr. Walker was assisting witness and her mother to adjust the matters; her mother is 76 years

old, health no good, and she owns no other property. The conversation occurred during court proceedings.

P. S. Winston testified that Hastings came to him and told him he was out $700, and witness told him he did not think it was that much, and if he would get down to where it was right they would settle; he told Hastings that Mrs. Westfall would settle with him if he would get to the right amount. The matter came up during court and an agreement and settlement was entered into, and in compliance with the agreement $568.18 was paid to the clerk in accordance with the agreement.

J. M. Walker testified that he assisted the Winstons in the attempted settlement; in a conversation Hastings agreed that if they would pay him $518.18 with a $50 lawyer fee he would make them a deed.

O. T. Ward testified that the agreement was made, and the payment of the amount constituted a settlement of the lawsuit.

Fannie E. Westfall testified to the conversation between Hastings, Walker and her daughter, and Hastings agreed to accept the $518.18 with a $50 lawyer fee.

Carl Hastings, the appellant, testified that he had no conversation with J. M. Walker nor with his attorney while court was in session; that he had not at any time agreed to accept his money back and make a deed to the property; that no one had tendered him the $518.18 or any other amount; that he offered in September, 1935, to pay defendant $200 for her equity; Laud Payne told witness he had the money and witness refused to accept it; does not remember getting a letter from O. T. Ward offering to pay the taxes and interest in redemption of the place; witness does not know how the question of $50 arose; his attorney had advised him that if the case stopped his fee would be $50, or $100 if he took it through court. No writings of any kind were signed regarding the alleged settlement.

J. M. Walker was recalled and testified to a conversation with Hastings, and said that Hastings told him that, if he would pay $50 lawyer's fee, he would make the deed; witness then went and got the money and put it in Laud Payne's hands; Hastings, on the

day court was in session, agreed to accept the taxes, interest and attorney's fee of $50.

O. T. Ward was recalled and testified that Hastings was demanding a $50 lawyer fee.

The chancery court entered a decree dismissing plaintiff's complaint, and divesting title to the property described out of Hastings, and investing the same in Fannie E. Westfall. This appeal is prosecuted to reverse said decree.

Appellant's first contention is that no agreement was made. Whether there was agreement was a question of fact, and we cannot say that the finding of the chancellor is against the preponderance of the evidence; and under the well-established rule of this court, unless we can say that the finding of the chancellor was against the preponderance of the evidence, we cannot reverse his decree.

His next contention is that, if the agreement was made, it was within the statute of frauds, because it was not in writing.

The statute of frauds, § 6059 of Pope's Digest provides that no action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the same is in writing.

No action was brought in this case to charge any person upon a contract for the sale of land, but the appellant, who claimed under a tax title, brought the suit against appellees, who were in possession of the land, and the agreement testified about was an agreement to settle the lawsuit, and the statute of frauds has no application. Appellant claimed to be the owner of the land by reason of his purchase from the improvement district, and the appellees, who were in possession, claimed that his title was void, and then, according to the contention of appellees, they entered into an agreement settling the lawsuit.

It is finally contended that if there were a contract made, it was not sufficiently certain and definite to justify a decree of specific performance. The facts are that there is no dispute about the tract of land in controversy.

The appellant himself introduced the deeds, or attached them to his complaint, showing a description of the land, and the amount that appellees were to pay, in order to settle the lawsuit, was definite and certain.

We find no error, and the decree is affirmed.

CENTER HILL SCHOOL DISTRICT NO. 32 *v.* HUNT.

4-4832

Opinion delivered November 29, 1937.

Glover & Glover, for appellants.

Farmer Tackett and *Elmer Tackett,* for appellee.

HUMPHREYS, J. Appellee brought this suit against appellant in the circuit court of Hot Spring county to recover $300 on a written contract to teach the school in Center Hill School District No. 32 in said county for a

term of six months beginning July 8, 1935, at $50 per month, alleging that although the contract was signed by only two out of the three directors of said district, it was a valid contract; that he appeared at the school house on July 8 for the purpose of entering upon his duties as teacher, but was refused admittance to the school house, and was forbidden to teach the school by the board of directors; that he was unable to get another school, and that on account of the breach of the contract he was damaged in the amount of $300.

Appellants interposed the defense that the contract was invalid, and that appellee was not damaged in any amount.

The cause was submitted upon the pleadings and evidence at the conclusion of which each party asked an instructed verdict and requested no other instructions. Thereupon, the court found that the contract was valid, and that appellant had breached the same to the damage of appellee in the sum of $300, and, in accordance with the findings, rendered judgment against appellants for the amount sued for, from which is this appeal.

All the directors had been duly elected, and none of them had died or resigned at the time the contract was signed by two of the directors and appellee. W. H. Thacker, C. W. Massey and J. W. Skates were the duly elected directors of said district. No notice was given of a meeting, but all of them got together near W. H. Thacker's home, Thacker testifying that they did not meet by agreement to elect a teacher, and C. W. Massey and J. W. Skates testifying that the meeting was by agreement for the purpose of electing a teacher for the district for the ensuing term. W. H. Thacker admitted that they discussed the selection of a teacher, and that several applications to teach the school had been filed, but testified that C. W. Massey and J. W. Skates wanted to employ appellee, and that he favored the selection of Mr. Louton, and that he told them he was opposed to appellee, but that, if they would agree to select anyone of the other applicants except appellee, he would make it unanimous and sign a contract; that they refused to

select anyone of the others, and that the meeting ended, and that no vote was taken.

C. W. Massey and J. W. Skates testified that they took a vote on the selection of the teacher, resulting in two votes for appellee and one vote for Mr. Louton; that C. W. Massey subsequently wrote up the minutes of the meeting to that effect, but that they were never submitted to or approved by the board. After the meeting C. W. Massey and J. W. Skates signed a written contract with appellee for his employment to teach the ensuing term of six months for $50 a month. The contract was introduced as evidence which was signed by C. W. Massey, J. W. Skates and appellee.

Appellants offered to introduce testimony tending to show that, in December, several months prior to the execution of the contract, C. W. Massey had moved out of the district, and had turned the books over to W. B. Thacker stating that he did not intend to act as a director any longer. The court excluded the evidence assigning as a reason that removal of a director from the district did not create a vacancy. Appellants contend that the court erred in excluding the testimony. Even though the removal of a director from a district creates a vacancy, no prejudice resulted to appellants on account of the exclusion of this evidence as the vacancy had not been filled by the remaining members of the board, nor had a successor been appointed by the county court to succeed Massey, and as Massey assumed to and did act in making this contract. In assuming to and in acting as a director he was a *de facto* officer, and his acts were binding on the district as much so as if he had not removed out of the district. Of course, if a successor to Massey had been appointed by the remaining directors or the county judge, C. W. Massey could not have acted as a *de facto* officer. This court indicated in the case of *Watson* v. *Trotter,* 188 Ark. 485, 66 S. W. (2d) 634, that a removal from the district would create a vacancy, although there is no statute specifically saying so; yet, in the case of *Carroll* v. *Leemon,* 175 Ark. 274, 299 S. W. 11, this court recognized that where vacancies existed ineligi-

ble directors might act as *de facto* officers and bind the district. In that case it was said by the court:

"As to who are officers *de facto,* in the case of *Faucette* v. *Gerlach,* 132 Ark. 58, 200 S. W. 279, this court quoted from Constantineau on the *de facto* doctrine as follows : 'A person who enters into an office and undertakes the performance of the duties thereof by virtue of an election or appointment, is an officer *de facto,* though he was ineligible at the time he was elected or appointed, or has subsequently become disabled to hold the office.' Indeed, it is settled by the current of authority almost unbroken for over 500 years in England and this country, that ineligibility to hold an office does not prevent the ineligible incumbent, if in possession under color of right and authority, from being an officer *de facto* with respect to his official acts, in so far as third persons are concerned. The reason of the rule is that 'the eligibility of an officer is as difficult of ascertainment as his actual election, and sound policy requires that the public should be no more required to investigate the one than the other, before according respect to his official position.' "

"And the court, in stating the general rule in the same case, said: 'The general rule is that the official acts of *de facto* judicial officers, within the scope of their jurisdiction, are as valid and binding as if they were the acts of *de jure* officers.' *Inland Construction Co.* v. *Rector,* 133 Ark. 277, 202 S. W. 712; *School Dist. No. 54* v. *Garrison,* 90 Ark. 335, 119 S. W. 275."

Since the court sitting as a jury found the facts to be that there was a meeting by the directors to employ a teacher, and that all three directors participated in the meeting, the contract was valid under the rule announced in the case of *Carroll* v. *Leemon Special School District, supra; School District No. 45* v. *McClain,* 185 Ark. 658, 48 S. W. (2d) 841. Appellants contend that no notice was given of the meeting, but where all participate in a meeting notice is not necessary. *School District No. 68* v. *Allen,* 83 Ark. 491, 104 S. W. 172.

Appellants contend that the directors had no right to employ appellee for more than three months citing § 8952 of Crawford & Moses' Digest in support of their

contention. That section of the Digest was repealed by act 169 of the Acts of 1931. Section 167 of act 169 of the Acts of 1931 reads as follows:

"There shall be taught in all of the common or elementary schools of this state such subjects as may be designated by the state board of education or required by law. * * * All common schools of this state shall be open and free for at least six months each year."

Appellants also contend that the court erred in not submitting the question of appellee's damages to the jury. There is no evidence in the record which warranted the submission of appellee's damages to the jury. Appellee testified that he could not get another school as the surrounding districts had already elected teachers. It is true that he said he had worked around home, and had gathered his crop which had been laid by before the school term began. There is nothing to show how much crop he had or what it was worth to gather it. We think the undisputed facts show that he earned nothing after he was discharged, and, this being true, there was no question as to the amount he earned or could have earned to submit to the jury.

No error appearing, the judgment is affirmed.

AMERICAN WORKMEN INSURANCE COMPANY *v.* IRVIN.

4-4841

Opinion delivered November 29, 1937.

Brewer & Cracraft, for appellant.

Peter A. Deisch, for appellee.

BAKER, J. Thomas Ervin sued the American Workmen Insurance Company in the Helena municipal court. The case was decided on September 9, 1936, in favor of the defendant company. On September 21, 1936, Ervin filed his affidavit for an appeal. No judgment had been written up and no precedent for a judgment was prepared until the 26th of April, 1937, on which day the judgment was entered of record and a transcript was on that day filed in the circuit court.

The defendant insurance company filed its motion to dismiss this appeal because not made in time. The plaintiff Ervin filed a motion duly verified in which he stated that no judgment had been entered and that his appeal could not have been perfected until the 26th day of April, 1937, by reason thereof, and further that after the trial in the municipal court and, presumably after he had prepared his affidavit and filed it, he was taken very violently ill, suffering such disabilities that he was unable to talk or communicate with his attorney and arrange to perfect the appeal within the time required by the act creating the Helena municipal court. The facts in regard to the motion filed by the defendant insurance company appeared from the record itself. The motion filed by the plaintiff was verified by affidavit. It seems that both of these motions were presented simultaneously. The court overruled the motion filed by the insurance company, granted prayer of plaintiff, and put the defendant to trial. The only question presented on this appeal is one of law arising out of the following language appearing in act 18 of the Acts of 1917 creating the municipal court of the city of Helena. From § 6 we take the following: "All appeals from the municipal court must be taken and the transcripts of appeal lodged in the office of the clerk of the circuit court within thirty days after judgment is rendered, and not thereafter."

At the time this act was passed the Supreme Court of this state had already had before it the same language, in the matter of appeals from justice courts in Pulaski

county, under act 64 of the General Assembly of 1913. The court in effect held that the language used was mandatory and that appeals must be perfected within the time fixed; that if not done the circuit court could not properly proceed with trial of the case on appeal. *Loveland* v. *State Pharmacy,* 123 Ark. 320, 185 S. W. 288.

Ordinarily, when the Legislature adopts certain language, or expressions, or terminology in an enactment, it adopts prior constructions or interpretations thereof. *Fort Smith Gas Co.* v. *Wisemen,* 189 Ark. 675, 683, 74 S. W. (2d) 789.

The same language in a case appealed from Sebastian county was before us for consideration a short time ago and our decision at that time was in exact conformity to that of *Loveland* v. *State Pharmacy, supra.* The language is so clear and positive that the meaning may not be misconstrued. *Nowlin* v. *Merchants National Bank,* 192 Ark. 529, 92 S. W. (2d) 390.

The appellee argues, however, that the appellant, after its motion to dismiss in the circuit court was overruled, proceeded to trial and, therefore, is bound by the result. Appellant did not voluntarily proceed. It was forced and required to do so by the court at the instigation of the appellee. Its position is not inconsistent and it waived no right.

For the error indicated the judgment must be reversed, and the cause is dismissed.

[redacted]

[redacted]