ARKANSAS REPORTS

VOL. 76

CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

JUNE TO OCTOBER, 1905

T. D. CRAWFORD
REPORTER

PUBLISHED
BY THE
STATE OF ARKANSAS
1906

COPYRIGHT 1905
BY O. C. LUDWIG
SECRETARY OF STATE OF ARKANSAS

Rec. Nov. 14, 1906

LITTLE ROCK
DEMOCRAT PRINTING & LITHOGRAPHING CO.
1906

MEMORANDUM.

On account of ill health Chief Justice HILL was absent from the sittings of the court after September 30, 1905, until April 2, 1906, and did not participate in any opinions delivered in the interim between these dates.

JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

JOSEPH M. HILL, - - -	CHIEF JUSTICE.
BURRILL B. BATTLE, - -	ASSOCIATE JUSTICES.
CARROLL D. WOOD, - - -	
JAMES E. RIDDICK, - - -	
EDGAR A. McCULLOCH, - -	
ROBERT L. ROGERS, - -	ATTORNEY GENERAL.
P. D. ENGLISH, - - -	CLERK.

TABLE

OF CASES REPORTED

A

Abbey (Mutual Life Ins. Co. *v.*) 328
Ackerson *v.* State 301
Adams (Dalhoff Construction Co. *v.*) 98
——— (Gibbs *v.*) 575
Alley *v.* Bowen-Merrill Co.... 4
Anderson (William Fait Co. *v.*) 237
Anglin *v.* Cravens 122
Arkansas Central Railroad Co. *v.* Craig 258
Armour Packing Co. (Nelson *v.*) 352
Arnold (Wagner *v.*) 162

B

Bacon (Martin *v.*) 158
Bank of Batesville *v.* Maxey.. 472
Bank of Fayetteville *v.* Lorwein 245
Bank of Little Rock (Bradshaw *v.*) 501
Bass (Lyon *v.*) 534
Baxter (Thompson *v.*) 326
Beavers *v.* Security Mutual Ins. Co 138
——— *v.* Security Mut. Ins. Co. 595
Benton *v.* Willis 443
Berry (Covington *v.*) 460
Bodeman (Hot Springs St. Ry. Co. *v.*) 302
Boon (Niagara Fire Ins. Co. *v.*) 153
Bowen-Merrill Co. (Alley *v.*) 4
Bowman (St. Louis & S. F. Rd. Co. *v.*) 32
Brademyer (Mallory *v.*) 538
Bradshaw *v.* Bank of Little Rock 501
——— *v.* State 562
Brooks *v.* Yell County 67
Bunch *v.* Tipton 167
——— *v.* Williams 102
Burnett *v.* State 295
Burns *v.* St. Louis S. W. Ry. Co. 10
Burrow (Shelby *v.*) 558
Bush *v.* Prescott & N. W. Ry. Co. 497
Byrd *v.* State 286

C

Cargill *v.* State 550
Carpenter *v.* Dressler 400
——— *v.* Jones 163

Carpenter *v.* Smith..... 447
——— *v.* Thornburn..... 578
Carter (Grayson-McLeod Lumber Co. *v.*)..... 69
Cauthron Lumber Company *v.* Hall 1
Chancellor *v.* State..... 215
Chase (Wells *v.*)..... 417
Chicago Mill & Lumber Co. (Rozell *v.*)..... 525
——— (Rodgers *v.*)..... 520
——— *v.* Rolfe..... 220
Church *v.* Gallic..... 423
Clark (Terry *v.*)..... 435
Clayton (Tillar *v.*)..... 405
Cleere (St. Louis, I. M. & S. Ry. Co. *v.*)..... 377.
Cogburn *v.* State..... 110
Cone (Neal *v.*)..... 273
Coombs (St. Louis, I. M. & S. Ry. Co. *v.*)..... 132
Covington *v.* Berry..... 460
Cowling *v.* Nelson..... 146
Cracraft *v.* Meyer..... 450
Craig (Arkansas Central Rd. Co. *v.*)..... 258
Cravens (Anglin *v.*)..... 122
Crawford *v.* Stainback..... 346
Cross *v.* Johnston..... 363

D

Dalhoff Construction Co *v.* Adams 98
Daniels *v.* State..... 84
Davis *v.* Richardson..... 348
——— *v.* Trimble..... 115
DeWitt *v.* Lacotts..... 250
Dowdle *v.* Wheeler..... 529
Dowell *v.* Schisler..... 482
Downing (Johnson *v.*).....128
Dressler (Carpenter *v.*)..... 400
Duffie *v.* Pratt..... 74
Dungan (Frank *v.*)..... 599
Dyer *v.* Jacoway..... 171

E

Edwards (Texarkana *v.*).... 22
Embry (Kansas City So. Ry. Co. *v.*) 589
Evans *v.* St. Louis, I. M. & S. Ry. Co..... 266
Evins (Little Rock & F. S. Ry. Co. *v.*)..... 261

F

Field (Mountain Park Terminal Ry. Co. *v.*)..... 239
Frank *v.* Dungan..... 599
Fultz (U. S. Fidelity & G. Co. *v.*) 410

G

Gallic (Church *v.*)..... 423
Garner (St. Louis, M. & S. E. Rd. Co. *v.*)..... 555
Gibbs *v.* Adams..... 575
Godbold (Taylor *v.*)..... 395
Gomillion (Sibly *v.*)..... 442
Grady (Miller *v.*)..... 270
Graham *v.* Remmel..... 140
Grayson-McLeod Lumber Company *v.* Carter..... 69
Greer (Price *v.*)..... 426

H

Haas *v.* La. & Ark. Ry. Co.... 607
Hall (Cauthron Lumber Co. *v.*) 1
Haltom (Russell *v.*)..... 506
Hamilton (White River Ry. Co. *v.*)..... 333
Harrison (St. Louis, I. M. & S. Ry. Co. *v.*)..... 430
Hartford Fire Ins. Co. *v.* State 303
Henson *v.* State..... 267
Hinson *v.* State..... 366
Hitt, Luther (St. Louis, I. M. S. Ry Co. *v.*)..... 227
Hitt, Robert (St. Louis, I. M. & S. Ry. Co. *v.*)..... 224
Hot Springs Rd. Co. *v.* McMillan 88
Hot Springs St. Ry. Co. *v.* Bodeman 302
Hunton *v.* Marshall..... 375

I

Irby (Waterman *v.*)..... 551

J

Jacoway (Dyer *v.*)..... 171
James *v.* Mallory..... 509
J. F. Hartin Com. Co. *v.* Pelt.. 177
Johnson *v.* Downing..... 128
——— *v.* Lesser..... 465
——— *v.* Wynne..... 563
Johnston (Cross *v.*)..... 363
Jones (Carpenter *v.*)..... 163
——— (Liddell *v.*)..... 344
Junior *v.* State..... 483

K

Kansas City So. Ry. Co. *v.* Embry 589
——— *v.* McGinty..... 356
Kimberlain (St. Louis, I. M. & S. Ry. Co. *v.*)..... 100
Kraft *v.* Moore..... 391

L

Lacotts (DeWitt *v.*)..... 250
Lacy *v.* Morton..... 603
Langston (White River Mining & Nav. Co. *v.*)..... 420
Layton (Noe *v.*)..... 582
Lesser (Johnson *v.*)..... 465
Liddell *v.* Jones..... 344
Littlejohn *v.* State..... 481
Little Rock & F. S. Ry. Co. *v.* Evins..... 261
Little Rock Ry. & Electric Co. *v.* North Little Rock..... 48
Lockert (Thalheimer *v.*)..... 25
Long *v.* McDaniel..... 292
———*v.* State..... 493
Lorwein (Bank of Fayetteville *v.*) 245
Louisiana & Ark. Ry. Co. (Haas *v.*)..... 607
Louis Werner Sawmill Co. (Walker *v.*)..... 436
Luster *v.* Robinson..... 255
Luther Hitt (St. Louis, I. M. & S. Ry. Co. *v.*)..... 224
Lyon *v.* Bass..... 534

M

McDaniel (Long *v.*)..... 292
McElvaney *v.* Smith..... 468

McGinty (Kansas City So. Ry. Co. *v.*) 356
McMillan (Hot Springs Rd. Co. *v.*) 88
McNutt *v.* McNutt 14
Main *v.* Tracey 371
Malone *v.* Malone 28
Mallory *v.* Brademyer 538
——— (James *v.*) 504
Marshall (Hunton *v.*) 375
Martin *v.* Bacon 158
Mathis (St. Louis & N. A. Rd. Co. *v.*) 184
Maxey (Bank of Batesville *v.*) 472
——— *v.* State 276
Merit Pants Co. (Waters *v.*) .. 252
Merritt *v.* Wallace 217
Meyer (Cracraft *v.*) 450
Miller *v.* Grady 270
——— *v.* Nuckolls 485
Moore (Kraft *v.*) 391
——— (State *v.*) 197
Morris (St. Louis S. W. Ry. Co. *v.*) 542
Morton (Lacy *v.*) 603
Mountain Park Terminal Ry. Co. *v.* Field 239
Mutual Life Ins. Co. *v.* Abbey 328

N

Neal *v.* Cone 273
Nelson *v.* Armour Packing Co. 352
——— (Cowling *v.*) 146
Niagara Fire Ins. Co. *v.* Boon 153
Noe *v.* Layton 582
North Little Rock (Little Rock Ry. & Electric Co. *v.*) 48
Nuckolls (Miller *v.*) 485

O

O'Hair *v.* O'Hair 389

P

Parker (Wells *v.*) 41
Pelt (J. F. Hartin Com. Co. *v.*) 177
Perry *v.* Sadler 43
Petty *v.* State 515
Phoenix Ins. Co. *v.* State 180
Planters' Oil Mill (Wood *v.*) 570
Pratt (Duffie *v.*) 74
Prescott & N. W. Ry. Co. (Bush *v.*) 497
Price *v.* Greer 426

R

Reed (St. Louis, I. M. & S. Ry. Co. *v.*) 106
Reese *v.* State 39
Remmel (Graham *v.*) 140
——— *v.* Witherington 373
Richardson (Davis *v.*) 348
——— (Sheeks-Stephen Store Co. *v.*) 282
Robert Hitt (St. Louis, I. M. & S. Ry. Co. *v.*) 227
Robinson (Luster *v.*) 255
Rodgers *v.* Choctaw, O. & G. Rd. Co. 520
Rolfe (Choctaw, O. & G. Rd. Co. *v.*) 220

Rozell *v.* Chicago Mill & Lumber Co. 525
Russell *v.* Haltom 506

S

Sadler (Perry *v.*) 43
St. Louis & N. A. Rd. Co. *v.* Mathis 184
St. Louis & S. F. Rd. Co. *v.* Bowman 32
——— *v.* Thompson 37
St. Louis. I. M. & S. Ry. Co. *v.* Cleere 377
——— *v.* Coombs 132
——— (Evans *v.*) 266
——— *v.* Harrison 430
——— *v.* Kimberlain 100
——— *v.* Luther Hitt 224
——— *v.* Reed 106
——— *v.* Robert Hitt 227
St. Louis, M. & S. E. Rd. Co. *v.* Garner 555
——— *v.* Shannon 166
St. Louis S. W. Ry. Co. (Burns *v.*) 10
——— *v.* Morris 542
——— (Spratlin *v.*) 82
Sarlo, *In re* 336
Schisler (Dowell *v.*) 482
Security Mut. Ins. Co. (Beavers *v.*) 138
——— (Beavers *v.*) 595
Shannon (St. Louis, M. & S. E. Ry. Co. *v.*) 166
Sheeks-Stephens Store Co. *v.* Richardson 282
Shelby *v.* Burrow 558
Sibly *v.* Gomillion 442
Smith (Carpenter *v.*) 447
——— (McElvaney *v.*) 468
Songer (State *v.*) 169
Spratlin *v.* St. Louis S. W. Ry. Co. 82
Stainback (Crawford *v.*) 346
State (Ackerson *v.*) 301
——— (Bradshaw *v.*) 562
——— (Burnett *v.*) 295
——— (Byrd *v.*) 286
——— (Cargill *v.*) 550
——— (Chancellor *v.*) 215
——— (Cogburn *v.*) 110
——— (Daniels *v.*) 84
——— (Hartford Fire Ins. Co. *v.*) 303
——— (Henson *v.*) 267
——— (Hinson *v.*) 366
——— (Junior *v.*) 483
——— (Littlejohn *v.*) 481
——— (Long *v.*) 493
——— (Maxey *v.*) 276
——— *v.* Moore 197
——— (Petty *v.*) 515
——— (Phoenix Ins. Co. *v.*) 180
——— (Reese *v.*) 39
——— *v.* Songer 169
——— (Sutherland *v.*) 487
——— (Tignor *v.*) 489
——— *v.* Western Union Tel. Co. 125
——— (Williams *v.*) 290
Sutherland *v.* State 487

T

Taylor *v.* Godbold 395
Terry *v.* Clark 435

Texarkana *v.* Edwards..... 22
Thalheimer *v.* Lockert..... 25
Thompson *v.* Baxter..... 326
——— (St. Louis & S. F. Rd. Co. *v.*)..... 37
Thornburn (Carpenter *v.*)... 578
Tignor *v.* State..... 489
Tillar *v.* Clayton..... 405
Tipton (Bunch *v.*)..... 167
Tracey (Main *v.*)..... 371
Trimble (Davis *v.*)..... 115

U

United States Fidelity & G. Co. *v.* Fultz..... 410

W

Wagner *v.* Arnold..... 162
Walker *v.* Louis Werner Sawmill Co..... 436
Wallace (Merritt *v.*)..... 217
Waterman *v.* Irby..... 551
Waters *v.* Merit Pants Co.... 252
Wells *v.* Chase..... 417
——— *v.* Parker..... 41
Western Union Tel. Co. (State *v.*) 125
Wheeler (Dowdle *v.*)..... 529
White River Mining & Nav. Co. *v.* Langston..... 420
White River Ry. Co. *v.* Hamilton 333
William Fait Co. *v.* Anderson 237
Williams (Bunch *v.*)..... 102
——— *v.* State..... 290
Willis (Benton *v.*)..... 443
Witherington (Remmel *v.*).. 373
Wood *v.* Planters' Oil Mill... 570
Wrought Iron Range Co. *v.* Young 18
Wynne (Johnson *v.*)..... 563

Y

Yell County (Brooks *v.*)..... 67
Young (Wrought Iron Range Co. *v.*)..... 18

TABLE OF CASES
CITED BY THE COURT

A

Adair *v.* Ellis, 83 Ga. 404..... 208
Akers *v.* Akers, 16 Lea, 7..... 486
Allen *v.* Ozark Land Co., 55 Ark. 549 255
American Employers' Liability Ins. Co. *v.* Fordyce, 62 Ark. 562..... 331
American Ins. Co. *v.* Hampton, 54 Ark. 78 331
Ammonette *v.* Black, 73 Ark. 310.. 16
Anderson *v.* State, 41 Ark. 229.... 98
Anthony, *Ex parte,* 5 Ark. 358.... 191
Arkadelphia Lumber Co. *v.* Asman, 72 Ark. 320 538
Arkansas Midland Ry. *v.* Canman, 52 Ark. 517 523
——— *v.* Griffith, 63 Ark. 491..... 233
Armstrong *v.* State, 54 Ark. 370.... 98
Arnfeld *v.* Guardian Ins. Co., 172 Pa. St. 605 183
Ashley *v.* Little Rock, 56 Ark. 391.. 553
Atchison *v.* Morris, 11 Fed. 582.... 161
Atkins *v.* State, 16 Ark. 568..... 298
——— *v.* Swope, 38 Ark. 539..... 42
Atkinson *v.* Ward, 47 Ark. 533.... 27

B

Bailey *v.* Mayor of N. Y., 3 Hill, 555 60
Baldwin *v.* Williams, 74 Ark. 361.. 514
Ballard *v.* Hunter, 74 Ark. 174. 465, 467
Barron *v.* Eldredge, 100 Mass. 455.. 135
Bartholomew *v.* Salina First Nat. Bank, 57 Kan. 594..... 249
Bartlett *v.* Wheeler, 195 Ill. 445.... 415
Basham *v.* Toors, 51 Ark. 309..... 316
Batesville & B. R. Co., *Ex parte,* 39 Ark. 82 191
Beidler *v.* Friedell, 44 Ark. 411.... 405
Bentonville Rd. *v.* Stroud, 45 Ark. 280 244
Bernard *v.* Lancashire Ins. Co., 41 C. C. A. 170..... 157
Berry *v.* Ry. Co., 41 Ark. 517..... 316
Bird *v.* Jones, 37 Ark. 195..... 27
Biscoe *v.* Coulter, 18 Ark. 423..... 454
Blair *v.* Turtle, 1 McCrary, 372.... 161
Blanks *v.* Craig, 72 Ark. 80..... 420
Boddie *v.* Pardee, 74 Miss. 13..... 402
Bogy *v.* Roberts, 48 Ark. 17..... 390
Boles *v.* McNeil, 66 Ark. 422..... 262
Bond *v.* Montgomery, 56 Ark. 563 177
——— *v.* State, 56 Ark. 444..... 563
Bordwell *v.* Collie, 45 N. Y. 494... 355
Boston Beer Co. *v.* Massachusetts, 97 U. S. 25 338
Boston Ice Co. *v.* Potter, 123 Mass. 28 560
Bowman *v.* Browning, 17 Ark. 599 600
Boyd *v.* Bryant, 35 Ark. 73..... 201
——— *v.* Whitfield, 19 Ark. 447.... 355
Boynton *v.* Ashabranner, 75 Ark. 415..... 402, 403
——— *v.* Ashabranner, 75 Ark. 514 .... 443, 450
——— *v.* Haggart, 120 Fed. 819.... 528
Bradshaw *v.* Agricultural Ins. Co., 137 N. Y. 137..... 157
Brassfield *v.* State, 55 Ark. 556.... 518

Brinkley Car Works & Mfg. Co. *v.* Cooper, 75 Ark. 325..... 383
Brizzolari v. State, 37 Ark. 364.... 252
Brooks *v.* Western Union Tel. Co., 56 Ark. 224 126
Brown *v.* Wright, 58 Ark. 20..... 480
Bryant *v.* Moore, 26 Me. 84..... 480
Buffalo Zinc & Copper Co. *v.* Crump, 70 Ark. 525 10
Buick *v.* Mechanics' Ins. Co., 103 Mich. 75 182
Burden Cent. Sugar Ref. Co. *v.* Ferris Sugar Mfg. Co., 87 Fed. 810.. 504
Burke *v.* Dulaney, 153 U. S. 228.144, 146
——— *v.* L. & N. Ry. Co., 7 Heisk. 451 135
Burlington Ins. Co. *v.* Kennerly, 60 Ark. 532 331
Burns *v.* St. Louis S. W. Ry. Co., 76 Ark. 10 522
Burud *v.* Great Northern Ry. Co., 62 Minn. 243 137

C

Caldwell *v.* Hall, 49 Ark. 508..... 537
Calloway *v.* Cossart, 45 Ark. 81.... 165
Campbell *v.* Jones, 52 Ark. 493..... 143
Cannon's Case, 47 Mich. 482..... 161
Carpenter *v.* Dressler, 76 Ark. 400 ..... 448, 464
Carson *v.* Levee Dist., 59 Ark. 513.. 201
Casat *v.* State, 40 Ark. 511 289
Cate *v.* Cate 53 Ark. 484..... 31
Catlett *v.* Railway Co., 57 Ark. 461..... .... 14, 96, 522
Chaffe *v.* Oliver, 39 Ark. 531..... 553
Chamblee *v.* McKenzie, 31 Ark. 155. 600
Chandler *v.* Chandler, 21 Ark. 95.. 143
Cheney *v.* Libby, 134 U. S. 68..... 582
Chesnut *v.* Harris, 64 Ark. 580..... 262
Chicago *v.* Rumsey, 87 Ill. 348.... 64
Chicago & A. Ry. *v.* Arnol, 144 Ill. 261.. 523
Chicago & E. I. Rd. Co. *v.* Wiltse, 116 Ill. 449 244
Child *v.* New York, &c., Ry. Co., 129 Mass. 170 249
Chowning *v.* Stanfield, 49 Ark. 87 .. 527
Church *v.* Gallic, 75 Ark. 507..... 425
City Ry. *v.* Citizens Ry., 166 U. S. 557 .... 64, 65
Clark, *Ex parte,* 69 Ark. 435..... 338
Clay *v.* Bilby, 72 Ark. 101..... 467
Cleveland *v.* Cleveland City Ry. Co., 194 U. S. 517 ..... 59, 60
Cogburn *v.* State, 76 Ark. 110...493, 518
Coleman *v.* Hill, 44 Ark. 452.. 409, 527
Collins *v.* Paepcke-Leicht Lumber Co., 74 Ark. 81..... 151
Columbia Finance Co. *v.* Kentucky Union Ry. Co., 60 Fed. 794..... 249
Columbia Ins. Co. *v.* Lawrence, 10 Pet. 507-598
Columbus *v.* Cutcomp, 17 N. W. 47. 338
Collins *v.* Mack, 31 Ark. 684... 233, 436
Commonwealth *v.* Adams, 3 Bush 41 416
——— *v.* Goodhue, 2 Met. 193..... 269
Compton *v.* Wilder, 40 O. St. 130.. 161
Considerant *v.* Brisbane, 22 N. Y. 389 560
Cooper *v.* Lee, 59 Ark. 460..... 450
Cooper *v.* Simpson, 41 Minn. 46.... 131
Cox *v.* Harris, 64 Ark. 213..... 346
Crandall *v.* Smith, 134 Mo. 633..... 532
Crawford *v.* State, 69 Ark. 360.... 563
Creanor *v.* Creanor, 36 Ark. 91.... 346
Crill *v.* Hudson, 71 Ark. 390... 443, 450
Crosthwait *v.* Ross, 1 Humph. 23... 10
Crutcher *v.* C., O. & G. Rd. Co., 74 Ark. 358 224
Culberhouse *v.* Culberhouse, 68 Ark. 405 391
Curser Estate, *Re,* 89 N. Y. 401..... 381

D

Daniel *v.* Garner, 71 Ark. 484..... 426
——— *v.* Hunt, 77 Ala. 567..... 176
David Bradley Mfg. Co. *v.* Eagle Mfg. Co., 57 Fed. 980..... 426
Davis *v.* Bay State League, 158 Mass. 434 504
——— *v.* Gaines, 48 Ark. 370.. 201, 209

Davis *v.* Goodman, 62 Ark. 262.... 554
——— *v.* Guarnieri, 45 O. St. 470.. 386
——— *v.* Holland, 43 Ark. 425.... 34
——— *v.* Railway Co., 53 Ark. 117.. 557
——— *v.* State, 45 Ark. 464..... 269
——— *v.* Yonge, 74 Ark. 161..... 254
Dawson *v.* Parham, 55 Ark. 286.... 402
Delaine *v.* James, 94 U. S. 207..... 501
DeLassus *v.* Faherty, 164 Mo. 361.. 533
Derrick *v.* Cole, 60 Ark. 397..... 273
Detroit *v.* Detroit City Ry., 56 Fed. 867 64
Dews *v.* Cornish, 20 Ark. 332..... 553
Dial *v.* Holter, 6 O. St. 228..... 486
Dibble *v* Northern Ins. Co. 70 Mich. 1 183
Dowell *v.* Tucker, 46 Ark. 438..... 34
Drew County *v.* Burnett, 43 Ark. 364 343
Driggs *v.* Norwood, 50 Ark. 42.... 254
Driver *v.* Evans, 47 Ark. 300..403, 448
Duke *v.* State, 56 Ark. 485..... 409
Dyer *v.* Jacoway, 50 Ark. 217..... 173

E

English *v.* Anderson, 75 Ark. 577... 40
——— *v.* Oliver, 28 Ark. 317..... 446
Enterprise Ins. Co. *v.* Parisot, 35 O. St. 35 598
Equitable Life Ass. Soc. *v.* Vogel, 76 Ala. 441..... 394
Erwin *v.* Ry. Co., 94 Mo. App. 289.. 523

F

Falls *v.* Wright, 55 Ark. 562..... 151
Faisst *v.* Waldo, 57 Ark. 275..... 537
Farrar *v.* U. S., 5 Pet. 373..... 415
Fawcett *v.* Superior Court, 15 Wash. 345 486
Fenston *v.* Commonwealth, 82 Ky. 549 270
Fidelity Mut. Ins. Co. *v.* Bussell, 75
Fertig *v.* Henne, 197 Pa. 560..... 171
Ark. 25 331
Figge *v.* Hill, 6 Iowa, 430..... 179
Finalyson *v.* Utica Mining & Milling Co., 67 Fed. 507..... 73
Findley *v.* Means, 71 Ark. 289..... 143
Finley *v.* Hanbest, 30 Pa. St. 190.. 426
——— *v.* Hogan, 60 Ark. 499..... 443
Fletcher *v.* Eagle, 74 Ark. 585..... 227
——— *v.* Peck, 6 Cranch, 87..... 200
Foote, *Ex parte,* 70 Ark. 12..... 251
Ford *v.* Bodcaw Lumber Co., 73 Ark. 49 73
——— *v.* St. Louis, I. M. & S. Ry. Co., 66 Ark. 363..... 522
——— *v.* Ward, 26 Ark. 360..... 119
Fordyce *v.* McCants, 51 Ark. 509... 557
——— *v.* Merrill, 49 Ark. 277..... 363
Fort *v.* State, 52 Ark. 180..... 383
——— *v.* State, 74 Ark. 210..... 40
Fort Smith *v.* McKibbin, 41 Ark. 45 59
Fowler *v.* Scott, 11 Ark. 675..... 486
Fox *v.* Drewry, 62 Ark. 316..... 574
Franklin *v.* State Board, 23 Cal. 173 203
Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295 375
Frauenthal *v.* Western Union Tel. Co., 50 Ark. 78 127
Freeman *v.* Lazarus, 61 Ark. 252... 170
Friend *v.* Smith Gin Co., 59 Ark. 86 131

G

Gannett *v.* Blodgett, 39 N. H. 150.. 249
Gardner *v.* Barrett, 36 Ark. 476.... 131
Gates *v.* Kelsey, 57 Ark. 523..... 450
George *v.* Tate, 102 U. S. 564..... 501
German-American Ins. Co. *v.* Brown 75 Ark. 251 598
——— *v.* Harper, 70 Ark. 305..... 40
——— *v.* Humphrey, 62 Ark. 348 331
Gerstlauer's License, 5 Pa. Dist. Rep. 97.. 340
Godfrey *v.* Herring, 74 Ark. 186.... 254
Goodwin *v.* McCabe, 75 Cal. 584... 533
Grayson *v.* Bowlin, 70 Ark. 145.... 391

Green *v.* State, 64 Ark. 523..... 288
Greene *v.* Byrne, 46 Ark. 453 394
Grenada County *v.* Bragden, 112 U. S. 269 325
Greer *v.* Turner, 47 Ark. 17..... 537
Grosvenor Hotel Co. *v.* Hamilton, [1894] 2 Q. B. Div. 836..... 470
Giron *v.* Stedman, 145 Mass. 439.. 355
Gulf, C. & S. F. Ry. Co. *v.* Helfley, 158 U. S. 98..... 83
——— *v.* Jackson, 65 Fed. 48..... 73

H

Hagan *v.* Railroad Co., 86 Mich. 615 ..... 135, 137
Hale *v.* Boylen, 22 W. Va. 234..... 43
Haley *v.* Petty, 42 Ark. 392..... 417
Hamet *v.* Letcher, 37 O. St. 356... 561
Hamilton *v.* Fowlkes, 16 Ark. 340.. 27
——— *v.* Levy, 41 S. C. 374..... 381
——— *v.* Rhodes, 72 Ark. 625..... 537
Hanover Nat. Bank *v.* Brown, 53 S. W. 206 131
Harris *v.* Watson, 56 Ark. 574..... 177
Hatch *v.* Attleborough, 97 Mass. 533 416
Hays *v.* Emerson, 75 Ark. 551..... 514
Heard *v.* Ewan, 73 Ark. 513..... 387
Helena *v.* Hornor, 58 Ark. 151 ..... 443, 450, 455
Henson *v.* King, 48 N. C. 419..... 179
Hogg *v.* Laster, 56 Ark. 382..... 119
Hogins *v.* Brashears, 13 Ark. 242... 456
Holland *v.* State, 73 Ark. 425..... 301
Holliday *v.* Holliday, 123 Cal. 26... 43
Hooe *v.* Jamison, 166 U. S. 395.... 362
Horsley *v.* Hilburn, 44 Ark. 458.... 426
Hot Springs El. Light Co. *v.* Hot Springs, 70 Ark. 300..... 60
Hot Springs Rd. Co. *v.* McMillan, 76 Ark. 88..... 541
Hovey *v.* Foster, 118 Ind. 502 ..... 203, 209, 210
Howard *v.* Emmerson, 110 Mass. 320 355
Hudson *v.* Gilliland, 25 Ark. 100... 600
Huffman *v.* Cauble, 86 Ind. 591.... 260
Huggins, Croker & Cowdy Co. *v.* People's Ins. Co., 41 Mo. App. 530 183
Hughes *v.* State, 6 Ark. 134..... 315
Hurbur *v.* Baugh, 43 Ia. 514..... 340
Hutsonpieler *v.* Storer, 12 Gratt. 579 58
Hutts *v.* Martin, 134 Ind. 587..... 152
Hyatt *v.* Sewing Machine Co. 41 Mich. 225 415

I

Indiana *v.* Milk, 11 Fed. 389..... 60
Inglish *v.* Breneman, 5 Ark. 377.... 143
Inman *v.* State, 65 Ark. 508..... 34
Insurance Company *v.* Brodie, 52 Ark. 11 375
Ins. Co. *v.* McCain, 96 U. S. 84.... 332
Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 336 331

J

Jacoway *v.* Hall, 67 Ark. 340..... 174
Jamison *v.* State Ins. Co., 85 Iowa 229 182
Jennings *v.* McIlroy, 42 Ark. 239... 346
Johnson *v.* Berkshire Mut. Ins. Co. 4 Allen, 388 598
——— *v.* Branch, 48 Ark. 535..... 588
——— *v.* Douglass, 60 Ark. 39..... 408
——— *v.* Myer, 54 Ark. 437..... 131
——— *v.* Railway Co., 77 Ia. 667 ..... 135, 136
——— *v.* State, 43 Ark. 391 405
Jones *v.* Quick, 28 Ind. 125..... 179
——— *v.* Quinnipiack Bank, 29 Conn. 25 176
Jowers *v.* Phelps, 33 Ark. 465..... 27

K

Kansas City, F. S. & M. Rd. Co. *v.* Daugherty, 138 U. S. 298 362
——— *v.* Joslin, 74 Ark. 551..... 501
Kansas City So. Ry. Co *v.* McGinty, 76 Ark. 356 524

Kansas Pacific Ry. Co. *v.* Cutter, 16 Kan. 568 381
Karsen *v.* M. & St. P. Ry. Co., 29 Minn. 12..... 135, 137
Kelly *v.* Carter, 55 Ark. 112..... 143
Kelly's Heirs *v.* McGuire. 15 Ark. 555 553
Kendall *v.* Davis, 55 Ark. 318..... 27
Kinlochs, Case of, Foster, 16..... 299
Kirby *v.* Ins. Co., 13 Lea, 340..... 182
Krumm *v.* St. Louis, I. M. & S. Ry. Co., 71 Ark. 590..... 523
Kurtz *v.* Kurtz, 38 Ark. 119..... 30

L

LaFayette Bridge Co. *v.* Streator, 105 Fed. 729 60
Lake Shore & M. S. Ry. Co. *v.* Taylor, 134 Ill. 603..... 58
Lancashire Ins. Co. *v.* State, 66 Ark. 466 ....305, 310, 311, 315, 317, 318, 322
Lantz *v.* Hightstown, 46 N. J. L. 102 342
Levy, *Ex parte,* 43 Ark. 42..... 338
Lewis *v.* Lewis, 75 Ark. 191..... 119
——— *v.* Rutherford, 71 Ark. 218.. 394
Ligon *v.* Ry. 3 Tex. App. Civ. Cas. 1 224
Little Rock & Ft. S. Ry. Co. *v.* Blewitt, 65 Ark. 235 13
——— *v.* Cavenesse, 48 Ark. 106 ..... 363, 524
——— *v.* Hannaford, 49 Ark. 291.. 83
——— *v.* Miles, 40 Ark. 298..... 363
——— v. Oppenheimer, 64 Ark. 271 315
——— *v.* Pankhurst, 36 Ark. 371 .....363, 524
——— *v.* Payne, 33 Ark. 818..... 135
Little Rock, H. S. & T. Ry. Co. *v.* Spencer, 65 Ark. 183 316
Little Rock Tr. & El. Co. *v.* Kimbro, 75 Ark. 211 ..... 363, 524
Long *v.* State, 72 Ark. 427..... 494
Low *v.* Adams, 6 Cal. 277 486
Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351 81
Luckinbill *v.* State, 52 Ark. 45..... 232
Lumpkins *v.* Johnson, 61 Ark. 80... 150
Lynch *v.* Daggett, 62 Ark. 592..... 509

M

McConnell *v.* Beattie, 34 Ark. 113.. 249
McDaniel *v.* Snelling, 96 Mass, 295. 434
McGuigan *v.* Gaines, 71 Ark. 614.. 16
McMullen *v.* Winfield B. & L. Assoc., 64 Kan. 298..... 416
McPherson *v.* State, 29 Ark. 225.. 446
Magee *v.* Leggett, 48 Miss. 139 249
Mansfield, &c., Ry. Co. *v.* Swann, 111 U. S. 379 362
Marbury *v.* Madison, 1 Cranch, 137 206
Marshall *v.* Minter, 43 Miss. 666... 58
Martin *v.* Hickman, 64 Ark. 217.... 480
——— *v.* Little Rock & Ft. S. Ry. Co. 62 Ark. 156..... 226
——— *v.* South Salem Land Co., 94 Va. 28 486
——— *v.* State, 23 Neb. 371 338
Maxwell *v.* Lee, 34 Minn. 511 179
Mears *v.* Stewart, 31 Ark. 19 34
Mercantile Trust Co. *v.* St. L. & S. F. Ry. Co., 69 Fed. 193..... 58
Merchants' Exchange Co. *v.* Sanders, 74 Ark. 16 372
Merrick *v.* Hutt, 15 Ark. 331.. 454, 455
Merrill *v.* Ins. Co., 103 Mass, 245.. 394
Metropolitan Board *v.* Barrie, 34 N. Y. 667..... 338
Mich. Pipe Co. *v.* Mich. Ins. Co., 92 Mich. 482..... 183
Mickey *v.* Burlington Ins. Co., 35 Ia., 174 598
Miller *v.* Fraley, 21 Ark. 22..... 528
——— *v.* Freeman, 40 Ark. 67..... 390
——— *v.* Hines, 15 Ga. 197 10
——— *v.* Life Ins. Co., 12 Wall. 285 331
——— *v.* Ry. Co., 41 Fed. 898..... 43

Milwaukee & S. P. Ry. Co. *v.* Kellogg, 94 U. S. 475 434
Minneapolis F. & M. Ins. Co. *v.* Fultz, 72 Ark. 365 410
Missouri Pac. Ry. Co. *v.* Moseley, 97 Fed. 921 14
Moletor *v.* Sinnen, 44 N. W. 1099 .. 161
Morris *v.* Ham, 47 Ark. 293 346
Morrison *v.* Peay, 21 Ark. 110 366
Morrow *v.* James, 69 Ark. 539 150
Moore *v.* Indianapolis, 120 Ind. 483. 338
——— *v.* Sanford, 151 Mass. 285 .. 244
Moss *v.* Rowland, 3 Bush. 505 381
Mugler *v.* Kansas, 123 U. S. 623.206, 210
Mullen *v.* Sanborn, 25 L. R. A. 721. 160
Murray *v.* Wilcox, 97 N. W. 1087 ..... 160, 161
Mutual Life Ins. Co *v.* Parrish, 66 Ark. 612 98

N

National Fire Ins. Co. *v.* O'Bryan, 75 Ark. 198 157
Neimeyer & Darragh *v.* L. R. Junction Ry., 43 Ark. 111 ..... 243, 244
Nelson *v.* State, 52 Wis. 534 551
Newton *v.* Kennedy, 31 Ark. 626 ... 131
——— *v.* Russian, 74 Ark. 88 178
Niagara Fire Ins. Co. *v.* Boon, 76 Ark. 153 255
Nicklace *v.* Dickerson, 65 Ark. 422 .. 470
Nix *v.* Pfeifer, 73 Ark. 201 ..531, 532, 540
Nixon *v.* State, 2 S. & M. 507 298

O

O'Bannon *v.* Ragan, 30 Ark. 181 ... 191
Ogden *v.* Saunders, 12 Wheat. 213 .. 200
Olds *v.* New York, etc., Ry. Co., 172 Mass. 73 523
Ousler *v.* Robinson, 72 Ark. 339 ... 149

P

Park *v.* Webb, 48 Ark. 293 600
Patrick *v.* Davis, 15 Ark. 363 454
Payne *v.* State, 66 Ark. 545 518
Peay *v.* Western Union Tel. Co., 64 Ark. 538 352
Penzel *v.* Brookmire, 51 Ark. 105 .. 248
People *v.* Garbutt, 17 Mich. 9 289
——— *v.* Judge, 40 Mich. 630 161
——— *v.* Kerr, 27 N. Y. 213 64
Pettigrew *v.* Summers, 32 Ark. 571. 131
Phenix Ins. Co. *v.* Sullivan, 39 Kan. 449 598
Pillow *v.* King, 55 Ark. 633 425
Pool *v.* Doster, 59 Miss. 258 176
Pope *v.* Latham, 1 Ark. 66 143
Powell *v.* Durden, 61 Ark. 21 201
——— *v.* State, 74 Ark. 335 217
Powers *v.* Arkadelphia Lumber Co., 42 C. L. J., 397 160
Pratt *v.* Dudley, 73 Ark. 536 446
Price *v.* Peterson, 38 Ark. 494 219
Prince *v.* Skillin, 71 Me. 361 310
Pulaski County *v.* Downer, 10 Ark. 588 34
Pulteney *v.* Warren, 6 Ves. Jr., 73 .. 57
Purple *v.* Union Pac. R. Co., 114 Fed. 123 110

Q

Quertermous *v.* Hatfield, 54 Ark. 16 581

R

Railway Co. *v.* Cook, 57 Ark. 387 .. 546
——— *v.* Cullen, 54 Ark. 431 .. 14, 225
——— *v.* Fire Assoc., 55 Ark. 174 .. 10
——— *v.* Maddry, 57 Ark. 306 ..... 189, 193, 386
——— *v.* Robbins, 57 Ark. 384 193
——— *v.* Ross, 56 Ark. 271 14
——— *v.* Sweet, 60 Ark. 550 .. 189, 193
——— *v.* Thomason, 59 Ark. 140 .. 541
——— *v.* Tippett, 56 Ark. 457 14
——— *v.* Torrey, 58 Ark. 228 73
——— *v.* Yarborough, 56 Ark. 612 ..... 546, 547, 549
Receivers of N. J. Midland Ry. Co. *v.* Wortendyke, 47 N. J. Eq. 658 .. 249
Redell *v.* Moores, 63 Neb. 219 309
Reeves *v.* Jackson, 46 Ark. 272 426
——— *v.* Plough, 41 Ind. 204 131

Reichardt *v.* St. Louis & S. F. Ry Co., 51 Ark. 491 64
Rhea *v.* Bagley, 63 Ark. 374 391
Rhodes *v.* Covington, 69 Ark. 357.. 464
Richmond & D. Rd. Co. *v.* Powers, 149 U. S. 43 ..... 231, 237
Ringo *v.* Woodruff, 43 Ark. 495.... 409
Robinson *v.* Robinson, 45 Ark. 481.. 390
Rockafellow *v.* Oliver, 41 Ark. 169.. 27
Rose *v.* Rose, 9 Ark. 507..... 30, 31
Roselius *v.* Delachaise, 5 La. Ann. 481 119
Ross *v.* Hixon, 46 Kan. 550 43
Runyon *v.* Bennett, 4 Dana, 559.... 486

S

St. Louis & N. A. Rd. Co. *v.* Crandell, 75 Ark. 89 143
——— *v.* Mathis, 76 Ark. 184 234
——— *v.* Midkiff, 75 Ark. 263 227
St. Louis & S. F. Rd. Co. *v.* Crabtree, 69 Ark. 138 .... 13, 225, 233
——— *v.* Kilpatrick, 67 Ark. 47... 96
——— *v.* Townsend, 69 Ark. 380 .. 524
St. Louis, I. M. & S. Ry. Co. *v.* Biggs, 52 Ark. 240.... 545, 546, 547
——— *v.* Biggs, 47 Ark, 59..... 600
——— *v.* Bragg, 69 Ark. 402..... 434
——— *v.* Brown, 73 Ark. 42..... 501
——— *v.* Coolidge, 73 Ark. 112.... 593
——— *v.* Evans, 74 Ark. 407..... 524
——— *v.* Hill, 74 Ark. 478 14
——— *v.* Johnson, 74 Ark. 372 14
——— *v.* Leathers, 62 Ark. 235 363
——— v. Martin, 61 Ark. 549 ..... 13, 231, 237, 363
——— *v.* Richter, 48 Ark. 349..... 34
——— *v.* Rickman, 65 Ark. 138.... 188
——— *v.* Robert Hitt, 76 Ark. 227.. 225
——— *v.* Stephens, 72 Ark. 127.... 547
——— *v.* Taylor, 64 Ark. 364..... 363
——— *v.* Wilson, 70 Ark. 136 96
St Louis Ref. & W. G. Co. *v.* Thornton, 74 Ark. 383..... 449
St. Louis S. W. Ry. Co. *v.* Birdwell 72 Ark. 502..... 593
St. Louis S. W. Ry. Co. *v.* Byrne, 73 Ark. 377..... 96, 98
——— *v.* Dingman, 62 Ark. 245.... 363
——— *v.* Grayson, 72 Ark. 119.... 202
——— *v.* White Sew. Mach. Co., 69 Ark. 431 404
Sanders *v.* Riedinger, 51 N. Y. Supp. 937 533
San Francisco *v.* Spring Valley Waterworks, 48 Cal. 493..... 64
Schattler *v.* Cassinelli, 56 Ark. 172. 464
Schauer *v.* Queen Ins. Co. 88 Wis. 561 183
Scheffer *v.* Ry. Co., 105 U. S. 252.. 434
Schoonover *v.* Allen, 40 Ark. 132... 249
Schwuchow *v.* Chicago, 68 Ill. 444 .....338, 339, 341
Scott *v.* Mills, 49 Ark. 266..... 455
——— *v.* Patterson, 53 Ark. 49..... 376
——— *v.* State Bank, 9 Ark. 36.... 143
Searcy *v.* Yarnell, 47 Ark. 269..... 59
Sellick *v.* Hall, 47 Conn. 269..... 549
Shaeffer *v.* Blair, 149 U. S. 248.... 399
——— *v.* State, 61 Ark. 241..... 288
Shaul *v.* Harrington, 54 Ark. 305.. 509
Sharp *v.* State, 51 Ark. 154..... 260
Shegogg *v.* Perkins, 34 Ark. 117... 394
Shields *v.* Trammell, 19 Ark. 62.... 553
Shoemaker *v.* United States, 147 U. S. 298 244
Shorter University *v.* Franklin, 75 Ark. 571 218
Shreveport *v.* Draiss, 111 La. 511.. 339
Sicard *v.* Davis, 6 Peters, 124 464
Simpson *v.* Simpson, 25 Ark. 487... 191
Sisk *v.* Almon, 34 Ark. 391..... 27
Sloggy *v.* Dilworth, 38 Minn. 179.. 549
Small *v.* Montgomery, 23 Fed. 707. 161
Smith *v.* Butler, 72 Ark. 350.. 345, 346
——— *v.* London & S. W. R. Co., L. R. 6 C. P. 14..... 135
——— *v.* State, 50 Ark. 545..... 232
——— *v.* Sloan, 37 Wis. 285..... 9
——— *v.* Thornton, 74 Ark. 572... 555
Snead *v.* Sellers, 66 Fed. 37 362
Snell *v.* Ins. Co., 98 U. S. 85..... 182
Snow *v.* Pulitzer, 142 N. Y. 263.... 471

Solum *v.* Gt. Northern Ry. Co., 63 Minn. 233 137
South Covington & Cinn. St. Ry. Co. *v.* Stroh, 57 L. R. A. 875.... 260
Southern Ins. Co. *v.* Williams, 62 Ark. 382 182
Southwestern Telephone Co. *v.* Woughter, 56 Ark. 210 73
Sprayberry *v.* Atlanta, 87 Ga. 120 ..... 338, 341
Stanley *v.* Bracht, 42 Ark. 210..... 600
——— *v.* Davenport, 54 Iowa, 463.. 64
State *v.* Ashley, 1 Ark. 279..... 191
——— *v.* Carter, 18 S. E. 577 551
——— *v.* Downs, 148 Ind. 324 309
——— *v.* Finn, 98 Mo. 532 416
——— *v.* Jennings, 27 Ark. 419.... 34
——— *v.* Jones, 22 Ark. 331 191
——— *v.* Madison St. Ry., 72 Wis. 617 ..... 64, 65
——— *v.* Schoonover, 135 Ind. 526. 309
——— *v.* Sloan, 66 Ark. 575.201, 205, 209
——— *v.* Wallis, 57 Ark. 94..... 144
State Bank *v.* McGuire, 14 Ark. 530. 233
State Fair Assoc. *v.* Townsend, 69 Ark. 215 123
Steadman *v.* Planter's Bank, 7 Ark 427 454
Steele *v.* Robertson, 75 Ark. 228... 514
Steward *v.* Scott, 57 Ark. 158 ..... 165, 403, 448
——— *v.* Welch, 84 Me. 308..... 176
Stewart *v.* State, 13 Ark. 720..... 298
——— *v.* State, 15 O. St. 155..... 299
Stout *v.* LaFollette, 64 Ind. 553.... 310
——— *v.* State, 43 Ark. 415..... 315
Strauss *v.* White, 66 Ark. 167..... 27
Sugg *v.* Thrasher, 30 Miss. 135.... 58
Swinnerton *v.* Columbian Ins. Co., 37 N. Y. 188..... 310

T

Tabor *v.* Peters, 74 Ala. 95..... 179
Texarkana Water Co. *v.* State, 62 Ark. 188..... 464
Thatcher *v.* Pray, 113 Mass. 291.... 480
Thomas *v.* Blake, 126 Mass. 320.... 415
——— *v.* United States, 136 Fed. 159 533
Thompson *v.* Ins. Co., 136 U. S. 287 182
——— *v.* Kirkpatrick, 18 Ark. 580.. 35
Thornton *v.* St. Louis Ref. & W. G. Co., 69 Ark. 124..... 554
——— *v.* Smith, 36 Ark. 508..... 455
Tillar *v.* Bass, 57 Ark. 179..... 577
——— *v.* Henry, 75 Ark. 446.... 16, 390
Tilley *v.* St. Louis & S. F. R. Co. 49 Ark. 535 135
Tompkins Co. *v.* Chester Mills, 90 Fed. 39 504
Towell *v.* Etter, 69 Ark. 34 47
Towson *v.* Denson, 74 Ark. 302... 429
Trustees *v.* Greenough, 105 U. S. 527 ..... 504, 505
Turman *v.* Sanford, 69 Ark. 95.... 528
Turner *v.* Risor, 54 Ark. 33..... 394
Tuttle *v.* Campbell, 74 Mich. 652.. 601

U

Union Cent. L. Ins. Co. *v.* Skipper, 115 Fed. 69 414
Union Pac. Ry. *v.* Wyler, 158 U. S. 285 464
U. S. *v.* California & Oregon Land Co., 148 U. S. 31 528
——— *v.* Com., 6 Mackey 409..... 339
——— *v.* Ellis, 4 Sawyer, 591..... 416
——— *v.* La Chapelle, 81 Fed. 152.. 60
——— *v.* Trans. Mo. Freight Assoc. 166 U. S. 290 ..... 309, 315
——— *v.* Union Pac. Ry. Co., 91 U. S. 72 309

V

Vance *v.* State, 70 Ark. 272 520
Vaughan *v.* State, 58 Ark. 353.... 280
Vicksburg & M. Rd. Co. *v.* Ragsdale, 46 Miss. 458..... 224

W

Wagner *v.* Arnold, 72 Ark. 371..... 162
Wallace *v.* Driver, 61 Ark. 429..... 540

Wallace *v.* Swepston, 74 Ark. 520 177
Walker *v.* Taylor, 43 Ark. 543 455
Ward *v.* Derrick, 57 Ark. 500 426
——— *v.* Estate of Ward, 36 Ark. 586 390
Ware *v.* Allen, 128 U. S. 590 144
Waterman *v.* Hawkins, 75 Ark. 120 ..... 201, 209
Watkins *v.* Griffith, 59 Ark. 344 ... 316
——— *v.* Turner, 34 Ark. 663 436
Watson *v.* Murray, 54 Ark. 499 27
Wells *v.* Parker, 76 Ark. 41 483
Welton *v.* Dickson, 22 L. R. A. 496. 244
West. Un. Tel. Co. *v.* Hall, 124 U. S. 444 224
——— *v.* Swain, 109 Ind. 406 127
Whalen *v.* Gordon, 95 Fed. 305 464
Whaley *v.* Gaillard, 21 S. C. 560 ... 207
Wheeling Steel & Iron Co. *v.* Evans 55 Atl. 373 239
White *v.* McCracken, 60 Ark. 613 .. 509
——— *v.* Rintoul, 108 N. Y. 222 ... 295
——— *v.* White, 52 Ark. 188 391
Whitehill *v.* Butler, 51 Ark. 341 588
Whitmore *v.* State, 43 Ark. 271 299
Whittington, *Ex parte,* 34 Ark. 394 338
——— *v.* Flint, 43 Ark. 504 409
Wilkins *v.* State, 68 Ark. 441 519
Williams *v.* Young, 71 Ark. 164 409
Wilson *v.* Donaldson, 117 Ind. 356 .. 160
——— *v.* Massie, 70 Ark. 25 34
Wood *v.* State, 47 Ark. 488 34
Woods, *Ex parte,* 3 Ark. 532 191
Woodson *v.* M. & St. P. Ry. Co., 21 Minn. 60 135
Wood-Stock Iron Co. *v.* Roberts, 87 Ala. 436 402
Woolfork *v.* Buckner, 60 Ark. 163 ..... 443, 450
Wooten *v.* Walters, 110 N. C. 251 .. 81
Wordsworth *v.* Adams, 138 U. S. 380 399
Work *v.* Harper, 66 Am. Dec. 549 .. 58
Worster *v.* Forbush, 171 Mass. 423 .. 9

Y

Young, *Ex parte,* 74 Ark. 361 292
——— *v.* Commonwealth, 96 Ky. 573 270
——— *v.* Stevenson, 75 Ark. 182 ..... 42, 483

ERRATA

On p. 94, 14th line from top, for "trail" read *trial.*
On p. 119, 8th line from top, for "interests" read *interest.*
On p. 136, 15th line from bottom, for "communicater" read *communicated.*
On p. 144, top line, for "is" read *are.*
On p. 155, 6th line from top, for "Com." read *Conn.*
On p. 292, 2d line from bottom, for "ability" read *liability.*
On p. 463, 2d line from top, the words "prior a" have been transposed.
On p. 467, 2d line from top, for "85 T. W." read *85 S. W.*
On p. 512, 2d line from top, for "jurisprudence" read *jurisdiction.*
On p. 541, 17th line from top, after "intelligently" insert quotation marks.
On p. 577, 3d line from top, for "was" read *were.*

In 75 Ark. on p. 141, second line from top, and p. 142, top line, for "Sammons" read *McDaniels.*

In 73 Ark. p. 249, for 9th line from bottom substitute the following line: question to deal with in this case—whether, finding that land—

In 69 Ark. p. 66, 9th line from bottom, for "assignable" read *assigned.*

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

CAUTHRON LUMBER COMPANY *v.* HALL.

Opinion delivered June 10, 1905.

1. ACCOUNT—PRODUCTION OF BOOKS.—Where the complaint contained an itemized statement of the account sued on, and defendant neither demurred to the complaint, nor moved to make it more specific, nor gave plaintiff notice before the trial to produce his books, it was within the court's discretion to refuse at the trial to require them to be produced. (Page 3.)
2. STATUTE OF FRAUDS—ORIGINAL UNDERTAKING TO PAY ANOTHER'S DEBT.—A contract whereby defendant undertook to pay for goods to be furnished to his employees is an original undertaking, and not within the statute of frauds as a promise to pay another's debt. (Page 4.)

Appeal from Scott Circuit Court.

STYLES T. ROWE, Judge.

Affirmed.

STATEMENT BY THE COURT.

This suit was instituted in the circuit court of Scott County by appellee against appellant on account, the complaint alleging:

"That defendant, the Cauthron Lumber Company, is indebted to him in the sum of $923.14 for goods and merchandise sold and delivered to defendant's hands and employees at defendant's request, and upon contract made by and between plaintiff and defendant; particulars of which are set out in an account here-

with filed, together with credits to which defendants are entitled, and leaving due and unpaid the sum above mentioned." Prays for judgment.

The account annexed to the complaint is as follows:

Cauthron Lumber Company to J. P. Hall, Dr.

Per C. E. Barkes	$ 62 20
" Bob Wilkes	9 25
" George Thompson	12 50
" H. L. Thompson	36 45
" J. W. Smith	23 21
" Sam Kunkle	179 46
" W. H. Mills	21 83
" R. M. Mills	114 65
" Z. B. Hogue	69 09
Balance on Lundy timber	21 25
Hauling John Thompson timber	63 00
Work on road	3 00
Hauling A. L. Smith timber	81 14
Hauling R. G. Moore timber	15 51
Hauling Will Cooly timber	5 00
Hauling Jim Cooly timber	30 60
To profit on one car of feed	100 00
To profit on two cars hay	60 00
To merchandise	14 70
Total	$923 41

Affidavit of J. P. Hall to account that it "is true and correct, that nothing has been paid thereon, and that the sum of $923.14 is now justly due thereon."

Appellant filed answer and cross-complaint, denying that it is indebted to plaintiff in the sum of $923.14, or in any other sum; denied that plaintiff sold goods and merchandise to defendant's hands and employees at defendant's request and upon contract made by and between plaintiff and defendant; and alleged that plaintiff was indebted to it in the sum of $81 for 9 tons of hay ordered by defendant, and by defendant turned over to

plaintiff upon his promise to pay the purchase price of same, which he has not done; admitted an indebtedness of $14.70 for merchandise, $3 for road work and $20.09 for balance on timber bought from Lundy, making a total of $37.79, which, deducted from $81, leaves a balance of $43.21 due from plaintiff to defendant, for which amount it prayed judgment.

Plaintiff filed reply, denying indebtedness to defendant in the sum of $81 for hay or in any other sum.

During the trial, while the plaintiff was testifying relative to the items of his account as set forth in his complaint, defendant's counsel asked if he had a book account of these, and, on his replying that he had, the defendant objected to his proceeding without producing his book. The court permitted the witness to proceed, and this is urged as cause for reversal. It appears that an itemized statement of the account was filed in the clerk's office, with the complaint, on July 11, 1903, and suit was commenced July 23, 1903. The regular term of the circuit court convened on the 3d of August, 1903. The appellant filed his answer and setoff on the 4th day of August. The appellee filed a reply to the setoff on the 6th day of August. The issues were made, and no further pleadings were had in the case. The trial was had on the 7th day of August.

A. G. Leming and *Daniel Hon,* for appellant.

The court erred in refusing to compel plaintiff to produce his books of account. 15 S. W. 121; 71 Ark. 577; 128 Ala. 505. They were the best evidence. 18 S. W. 904; 20 *Id.* 29; 76 *Id.* 593: 81 *Id.* 750; 60 Ark. 333; 1 Greenleaf, Ev. § 117; 62 S. W. 1081. The verdict of the jury is without evidence to support it. 9 Am. & Eng. Enc. Law, 82. The undertaking upon which plaintiff claimed liability was within the Statute of Frauds. 8 Am. & Eng Enc. Law, 678; 89 N. W. 560; 19 S. W. 250.

WOOD, J., (after stating the facts.) The court did not err in overruling appellant's motion to have appellee produce his books. It was not a matter that appellee had the right to insist upon at that stage of the proceedings. It was too late to call upon appellee to enter upon a more specific itemization of account

at the time. The appellant had not moved to make more specific, and had not demurred to the complaint when the issues were being made up. Nor had he given appellee notice, before the trial was entered upon, to produce his books of account. He should have taken some or all of these steps if he expected to insist, as matter of right, upon the production of appellee's books. The books were not essential to the maintenance of appellee's cause of action; and, if appellant desired them for any purpose, it should have called for them before. It was at least within the sound discretion of the court, under the circumstances, to refuse appellant's request made at that juncture of the trial. Appellant might very properly have had some of the items in the account made more specific, had it demanded it earlier, and might have had appellee produce his books, if it had advised him before that they were material or essential in its defense.

Second. The statute of frauds is urged as a defense here. But the allegations of the complaint show a suit upon an original undertaking on the part of appellant to pay appellee for goods and merchandise furnished appellant's hands and employees, at the request of appellant, and upon contract made by and between appellant and appellee.

There is evidence sufficient here to sustain the verdict, both as to the contract and the amount recovered under it.

Affirmed.

ALLEY v. BOWEN-MERRILL COMPANY.

Opinion delivered June 10, 1905.

1. LAW PARTNERSHIP—AUTHORITY OF MEMBER.—The act of one member in a firm of lawyers within the scope of the partnership business is the act of all. (Page 8.)

2. SAME—AUTHORITY TO BUY LAW BOOKS.—A member of a partnership for the practice of law is authorized to purchase, in the name of the firm, such law books as are reasonably necessary in the firm's business. (Page 9.)

3. FOREIGN CORPORATION—DOING BUSINESS IN STATE.—The institution and prosecution of an action by a foreign corporation is not doing business, within the meaning of the act of February 16, 1899, and other statutes upon the subject. (Page 10.)

Appeal from Polk Circuit Court.

JOEL D. CONWAY, Judge.

Affirmed.

STATEMENT BY THE COURT.

This is a suit begun in a justice's court on the 2d day of August, 1902, by Bowen-Merrill Company, a corporation under the laws of Ohio, against Glitsch & Alley, a law firm.

Omitting the caption, the complaint filled in justice's court by said corporation sets forth the following allegations:

"That the said Bowen-Merrill Company is a corporation organized under the laws of the State of Ohio, and doing business in Indianapolis, in the State of Indiana, with a branch house at Kansas City, Mo. That the said defendants, by their said contract in writing, under their said firm name of Glitsch & Alley, promised to pay to the said plaintiff on the 25th day of June, 1898, the sum of $25 for law books, with interest from maturity at the rate of 10 per cent. per annum; that the said defendants, by their written contract, promised to pay to the said plaintiff on the 27th day of October, 1898, the sum of $12 for law books, with 10 per cent. interest from maturity—copies of which said contracts are filed herewith, as exhibits A and B, respectively, and asked to be made and taken as a part of this complaint; and the said plaintiff also files herein a statement, duly verified, of the amount due and owing by the said defendants to the said plaintiff; and the said plaintiff says that the said defendants, nor either of them, have paid the said sums of money, nor the interest thereon, and that same is due, etc., and pray for judgment."

At the trial in the justice's court, in answer to the above allegations of plaintiff, J. I. Alley, a member of the former law firm, filed his separate answer, which, aside from caption and prayer, reads as follows:

"Admits that he was at some time a partner of H. Glitsch in the practice of law, but denies that he, as a member of the firm of Glitsch & Alley, made or signed the contract sued upon; denies that it was done with his knowledge or consent by Glitsch or any one else; denies that it was a part of the partnership business, or that, if Glitsch signed said contract with the firm name, as alleged, he had any right or authority to do so, and [alleges] that same is not binding upon defendant J. I. Alley."

Defendant denies that the contract was made as alleged by plaintiff.

Defendant, further answering, says: "That the plaintiff corporation herein is a foreign corporation, and that, as such corporation, it has never complied with the laws of Arkansas, and especially with the act of the Legislature approved February 16, 1899, in the filing of a copy of its articles of incorporation with the Secretary of State, and for said reason cannot do business or maintain this suit in this State."

Further answering, defendant says: "The claim and contract sued on herein is barred by the statute of limitations; the same, if made as alleged, was made more than three years ago." Prayer for judgment.

The case was tried upon the issues as made by the complaint and answer in the justice's court, where judgment was in favor of defendant Alley, and the case was appealed to the Polk Circuit Court, where it was tried upon the same issues by the court sitting as a jury, and upon the following agreed statement of facts:

"I. It is agreed that during 1898 Henry Glitsch and J. I. Alley were partners in the practice of law in Mena, Arkansas, under the style of Glitsch & Alley, and that the partnership agreement was a verbal one.

"II. It is further agreed that Henry Glitsch signed the firm name of Glitsch & Alley to a contract for law books of the Bowen-Merill Book Company, and that the order, contract and agreement was made by Henry Glitsch in the firm name and committed to writing.

"III. It is agreed that J. I. Alley never gave his consent to nor authorized Henry Glitsch to make this order for books, nor any other order, nor to sign the firm name to the order, nor any other order nor contract, other than the use of his and the firm name in pleadings in court.

"IV. It is agreed that this suit was begun in the justice's court of S. H. Smith on August 9, 1902.

"V. It is agreed that the following is a correct statement of the account:

1898.

July 15, Shearman & Redfield on Neg	$12 00
July 18, Sackett's Instructions to Juries	6 00
July 18, Underhill's Criminal Evidence	6 00
October 27, Beach on Contracts	12 00

"VI. It is agreed that the plaintiff, the Bowen-Merrill Company, is a foreign corporation, and that it has not complied with the laws of the State of Arkansas by filing a certificate of articles, etc. (Act of February 16, 1899), with the Secretary of the State of Arkansas.

"VII. It is further agreed that the defendant, J. I. Alley, never acknowledged this indebtedness, or any liability whatever.

"VIII. It is agreed that J. I. Alley has been a continuous resident of the State of Arkansas since the making of this contract.

"IX. That the defendant, Henry Glitsch, in two letters written by him, one to the plaintiff and one to the plaintiff's attorney, admitted that said books were bought for the use of said firm, and that he, as one of the partners, signed the firm name to the contract for the purchase thereof.

"X. It is agreed that the contract for the purchase of said books was made outside of this State."

This trial resulted in a verdict in favor of plaintiff, and defendant Alley appeals to this court.

Wright Prickett and *J. I. Alley,* for defendant.

A member of a non-trading firm has no implied authority to bind the firm by negotiable paper, and the burden is upon the one who seeks to hold the firm liable. 22 Am. & Eng. Enc. Law, 147; 4 *Id.* 178; 78 Mo. 128; 37 Wis. 285; 50 Miss. 344; 13 Bush, 67; 44 Ill. 525; 45 Kan. 8. A foreign corporation cannot maintain its suit without filing its articles here. Kirby's Dig., § 830; 70 Ark. 535.

R. G. Shaver, for appellee.

The institution and prosecution of an action by a foreign corporation is not doing business within the meaning of the statute. 70 Ark. 535; 55 Ark. 174; 57 Ark. 424; 55 Ark. 172. Appellant's partner had authority to bind the appellant by signing the firm's name to the note. Bates, Part. § § 327-329, 343; 13 Ark. 174; 15 Ga. 197; 31 Ark. 411; 29 Ark. 511. Notice of, and acquiescence in, or taking advantage of, an unauthorized act amounts to ratification. 67 Ark. 236; 1 Bates, Part. § § 266, 315, 322; 58 Ark. 84, 460; 32 Ark. 251; 54 Ark. 216; 55 Ark. 116.

WOOD, J., (after stating the facts.) Two questions are presented:

First, is J. I. Alley, the appellant, liable on the contract made by Glitsch, his law partner, without his knowledge or consent?

Second, can the Bowen-Merrill Company bring this suit and maintain it in this State, it being an Ohio corporation, without filing here its articles of incorporation and appointing an agent?

1. Upon the first question the trial court declared the law as follows over defendant's objection, which was declaration No. 4:

"In a partnership for the practice of law the act of one partner in the scope of business of said firm is the act of all, and every responsibility incident to other partnerships in general attaches to legal partnerships, as well as corresponding rights."

Upon this point the defendant asked the following declarations, which were refused:

"(1). That a firm of lawyers is a non-trading partnership, and one member of the firm cannot bind the other without express authority from the other."

"(2). It is necessary in this case for the plaintiff to prove that Henry Glitsch had the right to contract for books in the firm name."

"(3). It is the duty of persons or firms doing business with a non-trading partnership to know if one member is authorized to bind the other on contracts and commercial paper."

"(5). That a firm of lawyers is a non-trading partnership, and that one partner cannot bind the other, either on commercial paper or on contracts, although the proceeds were used in the business, without express authority from the other partner."

The court correctly declared the law that the act of one partner in a firm of lawyers in the scope of its business is the act of all.

It is generally held that non-trading firms have no power to borrow money and sign negotiable paper, and that one member of such firm has no power to bind the other members by signing the firm name to such paper. *Worster* v. *Forbush,* 171 Mass. 423; *Smith* v. *Sloan,* 37 Wis. 285; 22 Am. & Eng. Enc. Law, p. 154, note (Lawyers). This is because such transactions are not generally within the legitimate scope of the business of such firms. There is no reason why such firms should not be bound by the acts of their members within the scope of their business. This would be true even in the case of negotiable paper, where it was shown that such paper was executed within the scope of the firm's business. 1 Bates, Part. § 343. Mr. Bates, after an exhaustive review of the authorities on the powers and liabilities of non-trading partnerships, says: "Each partnership must stand largely on the nature of its peculiar business, and no rule of universal application is possible." This is the correct doctrine, and there is no reason why a firm of lawyers should not be bound by the act of one of its members in buying such law books as may be reasonably necessary for carrying on the business. Such an act is certainly within the scope of the business of such a

partnership. It is impossible to practice law successfully in these times without some law books. As Mr. Bates says: "It is difficult to conceive of a partnership which does not require some purchases to be made in the usual course of its business." In non-trading firms this is certainly necessary. He instances the case of lawyers purchasing their law books. *Miller* v. *Hines,* 15 Ga. 197. See also *Crosthwait* v. *Ross,* 1 Humph. 23. The purchase of law books reasonably necessary in the business is a responsibilty and liability incident to a partnership for the practice of law. And when lawyers come together for that business, they are presumed to repose in one another the trust and confidence necessary to attend to the duty of purchasing law books for the firm, and to clothe each with authority to bind the other.

2. "The institution and prosecution of an action is not doing business within the meaning of the act February 16, 1899, and other statutes upon the subject." *Buffalo Zinc & Copper Co.* v. *Crump,* 70 Ark. 525; *Railway Company* v. *Fire Association,* 55 Ark. 174.

Affirm.

---

76 10
76 522

76 10
81 371

76 10
83 302
84 276

76 10
85 333

76 10
90 284

BURNS v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered June 10, 1905.

1. PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.—Where undisputed evidence shows that plaintiff, suing for personal injuries, was guilty of contributory negligence, it was the duty of the court to declare that he had no cause of action. (Page 12.)

2. RAILROAD—INJURY TO PEDESTRIAN ON TRACK—CONTRIBUTORY NEGLIGENCE.—A railway company is not liable for an injury caused by its train negligently striking plaintiff while he was walking down its track if he failed to use his senses of sight and hearing to prevent the injury, unless the trainmen either injured him wantonly, maliciously or intentionally, or were guilty of negligence after discovering his peril. (Page 13.)

Appeal from Monroe Circuit Court.

GEORGE M. CHAPLINE, Judge.

Affirmed.

STATEMENT BY THE COURT.

On the 14th day of October, 1901, appellant was conducting a hay, farming implement, and lumber business at Stuttgart. This business brought him often to appellee's depot at Stuttgart, where he had barns on each side of the numerous switches of appellee at the depot, and wagon scales between the barns where hay and other farm products were weighed. He often daily passed over the many switches, as well as the "main" and "passing" track at the depot. On the day appellant was injured, to use the language of his counsel in describing the injury, "he had just left the depot, and saw a train standing just northeast of the depot at the tank, and knew that it could not get on the 'passing' track until it came thirty steps south of the depot; and about the time said freight train reached said 'passing' track he turned round and looked at it, and saw it turn, as he thought, on the 'passing' track, which he was then on, as it was the custom of trains of that kind to do. He was familiar with the different trains on the Cotton Belt Railroad. Some are local freight trains, and some are through freight trains, and there are fifteen or twenty passing during the day. Now, he walked down the 'passing' track for some distance, which was the common walk way, and, hearing the train move rapidly, thought it would be safer to step over on the main track, and be further away, so it could pass. Now, he used his eyes, and he thought he saw it go on the 'passing' track, as it was the custom of that class of trains to do so."

The train ran him down while he was on the "main" track, injuring him severely. He brought suit, setting out in minute detail the situation at the depot of the houses, trains, tracks, and all the circumstances of the unfortunate occurrence. His specifications of negligence were: that the train was running at an unusually rapid speed, at least fourteen miles per hour, when it should have been running not exceeding four miles per

hour in obedience to the city ordinance; that the men in charge of the train were not keeping a constant lookout; had they done so, they could have prevented the injury; that, on account of the unusual speed, the train could not be stopped after appellee's servants discovered his situation, whereas it might have been stopped after seeing him, had the train been running not more than four miles per hour, as required by the ordinance, etc.

The answer denied all material allegations, and set up contributory negligence. After the evidence was in, the court, at the request of appellee, directed a verdict in its favor.

H. A. & J. R. Parker and *C. E. Pettit,* for appellant.

The court erred in withdrawing the case from the jury. 71 Ark. 445; 60 Ark. 363; 55 Fed. 940; 1 Shear. & R. Neg. § 99; 19 Ill. 499; 29 Md. 420; 42 Am. & Eng. R. Cas. 110; 25 Ia. 550; 3 S. W. 150; 60 Mo. 475; 114 Ga. 397. A city has the power to regulate the speed of trains running through it. 33 Ill. App. 78; 49 Ia. 282; 18 S. W. 1103; 84 Mo. 119; 38 Fed. 15; 49 Am. & Eng. R. Cas. 358; 28 Md. 522; 108 Mo. 525; 96 Mo. 290; 18 S. W. 847. Greater care is to be exercised in the running of trains through cities than in the country. 8 Am. & Eng. R. Cas. 280; 69 Ark. 130; 70 Ark. 481; 53 Ark. 201; 86 Fed. 240; 50 Ark. 477. There may be circumstances which will excuse a party from looking and listening at a railroad crossing. 100 Ill. 603; 6 Am. & Eng. R. Cas. 304, 117; 88 N. Y. 13; 82 Ind. 435; 35 Pa. St. 60. Contributory negligence must be proved. 48 Ark. 348; 66 Pa. St. 399; 57 Pa. St. 380; 78 Mo. 212; 18 S. W. 178.

Samuel H. West and *J. C. Hawthorne,* for appellee.

Plaintiff was guilty of contributory negligence. 54 Ark. 431; 57 Ark. 461; 95 U. S. 161; 114 U. S. 615; 50 Ark. 271, 457; 65 Ark. 236; 3 Elliott, Railroads, § 1166; 69 Ark. 134. The appellee was guilty of no negligence. 69 Ark. 382; 65 Ark. 429; 62 Ark. 235, 245.

WOOD, J., (after stating the facts.) It is unnecessary to discuss the evidence at length. The appellant was guilty of con-

tributory negligence, according to the undisputed facts, and it was the plain duty of the court to declare as matter of law that appellant had no cause of action. On the question of contributory negligence, this was the testimony of appellant himself, as abstracted by his counsel:

"He started from the depot to go to a pair of scales to weigh a load of hay, and he was on what is called the 'passing track,' and, remembering that a freight train was at the tank just northeast of the depot, about 100 yards, and hearing it start from the tank, when it got just southwest of the depot a few feet, a point where all the switches branch out, he looked back, and thought he saw the engine heading for the 'passing track', which it was customary for trains of that kind to do. He then stepped across the usual traveled way between the two tracks, and, to be sure he was out of the way, he stepped over in the center of the main track, and immediately the engine struck him, when he was just about at the southern or western edge of College Street, on a line with the western line of College Street. After he stepped on the main track he walked at least thirty yards or ninety feet, before he was struck."

This leaves nothing for the jury. According to familiar rules often announced by this court, appellant did not make that use of his senses for his own protection which the law exacts before he can recover for the negligence of the company that concurred in his injury. *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549; *Little Rock & Fort Smith Ry. Co.* v. *Blewitt,* 65 Ark. 235; *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 134.

Appellant's great familiarity with the tracks and trains where he was injured, and the ever imminence of peril, where there was so much passing and switching, should have kept his senses alert, and have caused him to walk between the railroad tracks where according to the witnesses, it was "nice and smooth," and free from all danger. The law wisely and justly holds the company liable for its own acts of negligence which result in injury to another. But there would be no reason or justice in holding it responsible for the mistakes of another which it did not cause, and could not prevent, and but for which there would have been

no injury, notwithstanding its own negligence. *Railway Company* v. *Cullen,* 54 Ark. 431; *Railway Company* v. *Ross,* 56 Ark. 271; *Railway Company* v. *Tippett,* 56 Ark. 457; *Catlett* v. *Railway Company,* 57 Ark. 461. See also *Missouri Pac. Ry. Co.* v. *Moseley,* 57 Fed. 921, and other cases cited in appellee's brief.

There is no proof whatever that would warrant the conclusion that appellee wantonly, maliciously or intentionally injured appellant, or was guilty of such negligence, after discovering appellant's peril, as to make an inference of this kind justifiable. *Mo. Pac. Ry.* v. *Moseley,* 57 Fed. 921. On the contrary, appellant alleges in his complaint that "they were running the train at such an unusual speed that it could not be stopped after seeing him," and the evidence on the part of the engineer and fireman was affirmative and positive that they "did not see him on the main line, and never knew he was there until after the accident, thus distinguishing the case in this respect from the recent cases of *St. Louis, I. M. & S. Ry. Co.* v. *Johnson,* 74 Ark. 372, and *St. Louis, I. M. & S. Ry. Co.* v. *Hill,* 74 Ark. 478.

Judgment affirmed.

McNUTT v. McNUTT.

Opinion delivered June 10, 1905.

TRUST EX MALEFICIO—EVIDENCE TO PROVE.—In order to justify a court of equity in imposing a trust *ex maleficio* upon real property, and changing the beneficial title thereto from defendant to plaintiffs upon merely parol evidence of fraud, the fraud should be clearly established; a mere preponderance of the evidence being insufficient.

Appeal from Miller Chancery Court.

JAMES D. SHAVER, Judge.

Reversed.

Scott & Head, for appellant.

The deposition of Rachel McNutt should have been stricken out. 53 Ark. 279; 55 Ark. 235. A court of equity will not rescind a contract on the ground of fraud, unless the fraud is clearly established. 8 How. 134; 37 Ark. 145; 38 Ark. 419; 55 Ark. 148; 94 U. S. 207; 16 Atl. 640. The findings of the chancellor are against the preponderance of the evidence. 43 Ark. 307; 50 Ark. 185; 34 Ark. 112.

William F. Kirby, for appellees.

The findings of the chancellor are supported by a preponderance of the evidence, and are conclusive. 67 Ark. 287; 68 Ark. 134, 314; 71 Ark. 605. The deed should have been canceled. 33 Ark. 762; 67 Ark. 527. The decree is equitable. 54 Ark. 499; 63 Ark. 376; 51 Ark. 188, 530; 48 Ark. 17.

RIDDICK, J. This is an action by a son and a daughter against their mother to cancel a deed executed by them conveying to her two lots in the city of Texarkana and the improvements thereon, on the ground that the conveyance was procured through fraud. The facts are that one A. B. McNutt purchased the two lots mentioned, paying $200 cash and agreeing to pay a balance of $600 in installments of $25 each. His wife, Mrs. Margaret A. McNutt, the defendant in this action, claims that she paid all of the purchase money except the $200 paid by her husband in cash. By the consent of herself and her husband, their vendor executed a deed conveying the lots to their two children, who are the plaintiffs in this case. After these children became of age and were married, they executed a deed conveying these lots to the defendant, their mother. The deed recites that it was executed "for and in consideration of the sum of $5 and other good and valuable considerations paid by Margaret A. McNutt." But the plaintiffs and also the wife of one of the plaintiffs testify that the defendant procured the execution of the deed by telling her son and daughter that she desired to sell the property to Mrs. Preston, who, she said, was willing to pay $1,500 for it, but that Mrs. Preston would not purchase from

the plaintiffs, but insisted upon having a conveyance from defendant. The defendant then proposed that plaintiffs convey the property to her, promising that she would convey it to Mrs. Preston and divide the purchase price between the plaintiffs. They say that they made the conveyance, but that the defendant refused to carry out her part of the contract, and still retains the property, in fraud of their rights.

The defendant answered the complaint, and denied that she had procured the property as alleged in the complaint. But she states that, she having paid a large part of the purchase money, the plaintiffs, her children, when they became of age, as a matter of justice, executed the deed conveying the lots to her for love and affection, in order that she might have a home, and that she is the owner thereof, both in law and equity.

The chancellor found the issues in favor of the plaintiffs, and the question presented by the appeal from his judgment is mainly a question of fact. But this is an effort to have a court of equity impose a trust *ex maleficio* upon real property, and to change the beneficial title to such property by parol evidence from the defendants to plaintiffs. In order to justify a court in granting such relief, the fraud alleged should be clearly established. A mere preponderance of the evidence is not sufficient to obtain such relief. *McGuigan* v. *Gaines*, 71 Ark. 614; *Ammonette* v. *Black*, 73 Ark. 310; *Tillar* v. *Henry*, 75 Ark. 446. Now, the plaintiffs do testify positively that their mother obtained the property in the manner alleged, but there are undisputed facts in the case which cast a suspicion upon the justness of their claim. This deed that they say was procured by fraud was executed on the 11th of June, 1900. As Mrs. Preston lived in Texarkana, near where they lived, they must have discovered the fraud of their mother only a short time afterward, but it was nearly three years afterward before they brought this action to set the deed aside. There is nothing to show that the daughter ever asked her mother to perform her part of the contract or pay her for the lots. The son, A. B. McNutt, testified that he did ask his mother two or three times to sell the lots and pay him his part of the proceeds, but she denies that he did so. The testimony and his own letters

read in evidence show that he was poor, and had to borrow money from his parents. In several of these letters he asks them for financial assistance, but in none of them does he mention the fact that his mother owed him anything for this land. On the contrary, in several of these letters he refers to the lots as her property, and offers to rent one of them from her if she will put up a small house on it. These letters written by plaintiff A. B. McNutt commence only a month or two after the deed was executed by plaintiffs to their mother, and continue at intervals for a year or two. If this mother had perpetrated such a gross fraud upon him in reference to this deed, it is remarkably strange that, though he several times refers to this property in his letters as his mother's property, he never refers to or hints at the fraud which he now testifies that she committed in reference thereto. These letters, it seems to us, completely overthrow the testimony of this plaintiff in reference to the acts of his mother, for it is inconceivable that she should have committed such a fraud, and that he should never have mentioned it in letters which refer to the property.

The parties who testify to this fraud are all interested parties, and one of them the wife of a plaintiff, and for that reason of doubtful competency as a witness. But it is unnecessary to discuss that point, for it seems to us that, considering all the evidence, it does not make out a case clear enough to justify the court in granting the relief asked and in changing the title to this land.

On the whole case, we are of the opinion that the chancellor erred in his decree in favor of plaintiffs. The judgment will therefore be reversed, and the cause remanded with an order to dismiss the complaint for want of equity, at the costs of the plaintiffs. It is so ordered.

WROUGHT IRON RANGE COMPANY v. YOUNG.

Opinion delivered June 10, 1905.

1. CONTRACT—SETOFF.—Where a superintendent of salesmen entered into separate annual contracts with his employer for three successive years, which differed only in their dates, and sued on two of them to recover amounts due him by the employer, the latter may setoff against such claim sums due by the former under the contract for the third year. (Page 20.)

2. SAME—LIABILITY FOR PERMITTING OVERDRAFTS.—Where a contract for the employment of a superintendent of salesmen stipulated that he should be liable if he permitted any man under his supervision to overdraw the monthly allowances due him for his work, the superintendent was not liable because sums belonging to the employer were appropriated by the salesman to their own use, without the permission, knowledge or contract of the superintendent; but if he permitted them to retain out of their collections more than their monthly allowances, he became liable therefor as for overdrafts. (Page 21.)

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

Reversed.

STATEMENT BY THE COURT.

During the years 1897, 1898 and 1899, S. K. Young was employed by the Wrought Iron Range Company to take supervision of salesmen engaged in selling Home Comfort Ranges manufactured by the defendant. The company agreed to allow him for his services about $2 on each range sold by men under his supervision. But when a range was sold on credit, the commission was not due until the notes given for the same were collected.

On his part Young agreed:

"1. To discharge the duties required of him strictly and faithfully; to devote all his time to the business of said company, in such territory and in such manner as may be prescribed by it; to keep careful oversight of the expenses of the men under his

supervision, keeping their and his own expense account to the lowest possible limit, and to accept said commission, as provided, in full satisfaction for his services.

"2. To personally inspect all notes and sales made by men under his supervision, and to ascertain if any promises or verbal agreements have been made by such men and left unfilled; to report each month to his general superintendent the work inspected and its condition; to settle the books of all men under his supervision on or about the first of each calendar month, and transmit them immediately, together with his monthly report and all cash on hand in excess of $500, to said company, at Denver. Any failure upon his part to discharge these duties shall be sufficient grounds for the termination of this contract.

"3. Not to draw for his personal use more than $100 per month until the final settlement at the expiration of this contract.

"4. Ten per cent. of all losses upon notes received for sales made by men under his supervision during the term of this contract shall be deducted from amount due him; and any balance due on notes for ranges taken up and returned to the company shall be accepted as losses.

"5. Under no circumstances will he permit any man under his supervision to overdraw the monthly allowance due him for his work. In the event of such overdraft, same to be charged to the account of the party of the second part."

A separate contract was signed for each year of service, but these contracts, with the exception of the dates, were the same.

Afterward S. K. Young brought an action at law against the defendant company in which he alleged that the company was owing him $774.57 for commissions due January 1, 1899, for sales made by men under his supervision for the years 1897 and 1898, and the further sum of $600 for commissions for sales made on credit during the year 1898 and not realized on until the year 1899, and which were due January 1, 1900, and also the further sum of $600 for services as superintendent during the year 1898, outside of the contract referred to. Wherefore he asked

judgment against the company for the amounts named, with interest.

The defendant in its answer denied that it was due the plaintiff any sum upon the contracts sued on, and denied that plaintiff performed any services not included in the contracts made by him, and denied that it was indebted to plaintiff anything either on the account or for extra services. Defendant further alleged by way of counterclaim and setoff that during the year 1897 the plaintiff overdrew his personal account $80.78, and, further, that during the years 1897, 1898 and 1899 he permitted salesmen under his supervision to draw, in excess of the commissions due them, sums amounting to $3,748.03, for which overdrafts, it alleged, the plaintiff was liable under the terms of his contract.

On the trial there were a verdict and judgment in favor of the plaintiff for the sum of $1,974.57, from which judgment the defendant appealed.

J. M. Moore & W. B. Smith, for appellant.

Campbell & Stevenson and *Smead & Powell,* for appellee.

RIDDICK, J., (after stating the facts.) The plaintiff was employed by the defendant for the years 1897, 1898 and 1899 to have supervision of salesmen selling ranges manufactured by defendant. He sued for commissions due him for the years 1897 and 1898, but it appeared that during the year 1899 plaintiff had overdrawn his account, and that, if the account for 1899 be considered, and plaintiff charged with the amounts advanced to him by defendant during that year, it will materially reduce the amount due from defendant to plaintiff. While the services performed by plaintiff for defendant were continuous during the years named, they were performed under separate contracts; but it is clear, we think, that the amounts due by plaintiff to defendant on the account of 1899 can be used as a setoff against the sums due from defendant to him on the accounts for the years 1897 and 1898. When the accounts for all these years are considered, it seems quite clear that the judgment in this case is excessive, for, if every item claimed by plaintiff is allowed, when

the accounts for 1899 are considered, the judgment is still much too large.

Again, the contract under which plaintiff performed the services for defendant stipulated that he should not permit any man under his supervision to overdraw the monthly allowance due him for his work; and that in the event of such overdraft the same should be charged to the account of the plaintiff. Now, the evidence showed that the men under the supervision of plaintiff retained from time to time various sums collected by them in excess of the amounts due them for their work, and it became a material question in the case as to whether these sums should, under the contract, be charged to plaintiff, and the loss be borne by him, if the sums were never refunded by such salesmen. On this point, we think the court correctly stated the law in his first instruction, in which he said that if those sums were appropriated by the salesmen to their own use without the permission, knowledge or consent of the plaintiff before such sums reached his hands, such retention did not constitute an overdraft within the meaning of the contract. But he refused to give the fifth instruction asked by defendant, in which the converse of that proposition was stated, to the effect that, if plaintiff did permit salesmen to retain out of the moneys paid them on account of sales more than their monthly allowance, then, under the terms of the contract, he was chargeable with such amounts as overdrafts. The refusal to give this instruction, we think, was error prejudicial to the defendant, because, under the facts of this case, it was a question for the jury to determine whether the plaintiff consented to the retention of such amounts by the salesmen under his supervision. If he did consent to the retention by salesmen of sums in excess of their monthly allowance, he was in effect permitting them to overdraw their accounts, and he became liable for such sums under his contract.

For the reasons stated, the judgment will be reversed, and the cause remanded for a new trial, with leave for either party to amend his pleadings so as to include accounts of 1899. It is so ordered.

TEXARKANA v. EDWARDS.

Opinion delivered June 10, 1905.

1. ROAD TAX—EXPENDITURE.—The road tax, when collected, is a fund belonging to the county, and should be paid into the county treasury; and the expenditure of the fund is under the jurisdiction of the county court, which, so far as street improvements are concerned, must act in conjunction with the city authorities having control of the streets. (Page 23.)

2. SAME—URBAN AND COUNTY HIGHWAYS.—Under Kirby's Digest, § 7351, requiring the road tax to be expended upon the roads of the district where the tax was collected, and section 7358, *Id.*, directing that at least one-fifth of such tax collected within the limits of cities of the first class shall be expended on roads outside of such cities, no part of the tax collected on property outside of a city of the first class can be expended in the city, and but four-fifths of that collected on property in the city can be expended on its streets. (Page 23.)

Appeal from Miller Chancery Court.

JAMES D. SHAVER, Chancellor.

Affirmed.

Pratt P. Bacon and *Scott & Head*, for appellant.

Roads and streets are synonymous terms. 24 Am. & Eng. Enc. Law, 986; 27 N. Y. 269; 36 Fla. 196; 3 Nev. 361; 93 Am. Dec. 416. Expenditure of money raised under section 7358 of Kirby's Digest upon the streets is not a diversion of the funds. 36 Fla. 196. All doubts are resolved in favor of the validity of an act. 59 Ark. 528; 39 Ark. 355; 51 Ark. 539. Acts are construed according to the intention of the Legislature. 178 U. S. 41; 160 U. S. 100; 37 Ark. 494; 40 Ark. 432; 65 Ark. 529. The control of the streets is vested in the city council. Kirby's Dig. § § 5530, 5495; 14 S. E. 666.

John N. Cook and *W. H. Arnold*, for appellees.

An act should be construed according to meaning of those who adopted it. 51 Ark. 539; 5 Md. 337; 47 Miss. 367. Streets were not intended to be embraced in section 7358 of Kirby's Digest. Elliott, Roads and Streets, 1; Kirby's Dig. § §1758, 1807; 25 Ark. 289; Cooley, Con. Lim, 73; 48 Ark. 214.

RIDDICK, J. This is a suit in equity by the city of Texarkana against the collector of taxes for Miller County to restrain him from paying certain road taxes collected by him into the county treasury, and to compel him to pay four-fifths of the road tax collected on property within the limits of said city into the treasury of the city, to be expended by the city for the improvement of its streets, and further to enjoin the county judge of that county from expending such part of the tax on roads outside of the city limits.

The defendants appeared, and filed a demurrer to the complaint, which was sustained by the chancellor, and the complaint dismissed.

The questions raised by the appeal from this judgment are, first, whether any portion of this road tax can be properly expended on the streets of a city; and if it be lawful to do so, whether it should be expended by the county judge, or should be turned over by the collector to the city authorities to be expended by them. After due consideration of the matter, we are of the opinion that, as the law now stands, the road tax, when collected, is a fund belonging to the county, and that it should be paid into the county treasury to be expended under the orders of the county judge. As the city has control of its streets, it is probably true that the county court could not carry out a system of street improvement against the wishes of the municipal authorites. To avoid conflict in jurisdiction between the county and city officers in such matters, further legislation may be required. As the law now stands, we think the expenditure of this fund is under the jurisdiction of the county court, which, so far as street improvement is concerned, must act in conjunction with the city authorities having control of the streets.

On the question as to whether the county judge had the right to expend any part of this road tax fund on the streets of the

city, there is more room for doubt. In some of the counties of the State a large portion of such tax is paid by residents of cities of the first class on property located in such cities. If the law did not allow any portion of the tax to be expended on roads within the city limits, it is not unlikely that the result would be that many of these taxpayers would refuse to vote for the tax, and the collection of the tax might in that way be defeated. Although the purpose of the tax is to improve the public roads and highways of the county, still a street is a public highway; and while ordinarily, in speaking of public roads and highways, one does not include streets, yet such language may include streets as well as other highways. Now, as this tax is paid by owners of property in cities, as well as by those who live outside of cities, the presumption should be that it was intended to be used for the benefit of all the property owners and citizens of the county, without regard to whether they live within or without the limits of a city, and that the discretion of the county judge in that regard is unfettered, unless the law is plainly to the contrary. We see nothing in the Amendment to the Constitution which authorizes the collection of a county road tax that prevents such an equitable distribution of the fund. The Legislature seems to have adopted this view of the amendment; for in the act of 1899 (see Kirby's Dig. § 7351) it requires this road tax to be expended upon the roads of the district where the tax was collected, though some of the towns and cities of the State have been constituted separate road districts. In a subsequent act (section 7358) it directs that at least one-fifth of such tax collected within the limits of cities of the first class shall be expended on roads outside of such cities, leaving the place or places in the county where it is to be expended to the discretion of the county judge, from which it may be clearly implied that the remaining four-fifths may be expended in the city.

Now, the facts in this case show that Garland Township of Miller County is one of the road districts of that county, and that the City of Texarkana is situated in that district. Under the acts of the Legislature above referred to, we think that the county judge may expend the road fund collected in that district upon the roads of the district as in his discretion may seem best,

except that one-fifth of that part of the tax collected in the city of Texarkana, a city of the first class, must be expended on roads outside of the city, and such fifth may be expended in any portion of the county where the county judge may deem that it can be used to the best advantage. In other words, under these statutes the amount of the road fund collected in cities of the first class which can be expended within the city is limited to four-fifths of the tax collected in such city. No part of the tax collected outside of the city can be expended in the city, and but four-fifths of that collected in the city can be expended on the roads or streets in the city limits, for the Legislature, which has full control over public highways, has so enacted.

It results from what we have said that in our opinion the judgment of the court refusing to enjoin the collector from paying over the tax in question to the county treasurer was right, and the same is affirmed.

McCULLOCH, J., concurred in the judgment, but was of the opinion that the city was entitled under the law to have four-fifths of the road tax collected on city property expended on its streets, the expenditure to be made by the county judge. In his opinion the county judge has no discretion to expend more than one-fifth of the tax collected in the city on roads outside of the city limits.

---

76 25
f82 459

76 25
90 152

THALHEIMER v. LOCKERT.

Opinion delivered June 10, 1905.

POSSESSION—NOTICE.—Possession of land is equivalent to notice of whatever title, rights or equities the occupant may possess.

Appeal from Pulaski Chancery Court.

JESSE C. HART, Chancellor.

Affirmed.

STATEMENT BY THE COURT.

This is a suit by appellee Lockert against appellants Fannie Thalheimer and her husband, Ben S. Thalheimer, and John F. Smith, for the reformation of a deed executed by appellant Smith to appellee.

It is alleged in the complaint that Smith was the owner of the northwest quarter of section 6, in township 2 north, range 14 west, and on December 19, 1900, agreed to sell and convey to appellee forty acres off the west end of the south half of that quarter section for the sum of $100; that appellee paid the price, and Smith undertook to convey the land, and by mistake in the preparation of the deed the land was described as the southwest quarter of said quarter section, which, according to the Government survey, was fractional, and contained only 23 acres; that Smith subsequently sold and conveyed the remainder of the quarter section to appellant Fannie Thalheimer, who bought with the full notice of the previous sale of 40 acres to appellee.

Thalheimer and wife answered the complaint, denying that Smith sold appellee any more land than that described in the deed, and that Fannie Thalheimer bought without notice of the sale to appellee.

The chancellor gave a decree in accordance with the prayer of the complaint for the reformation of the deed, so as to describe the 40 acres of land claimed by appellee, and the Thalheimers appealed.

Mehaffy & Armistead, for appellant.

The doctrine of constructive notice from possession will not benefit one who is without equity. 48 Ark. 409.

W. S. McCain, for appellee.

McCULLOCH, J., (after stating the facts.) Appellee and Smith both testify to the same effect that under the purchase appellee should have 40 acres of land, and that the deed should have described it. As against Smith, appellee's right to a refor-

mation of the deed is clearly established; the only question in dispute being whether Mrs. Thalheimer under her subsequent purchase took without notice.

Smith testifies that when he agreed with Thalheimer (who made the trade as agent of his wife) for the sale, he informed the latter of his previous sale of 40 acres to appellee, and that he proposed to sell the remainder. At the time of appellee's purchase, there was open and in cultivation on the place about 15 acres, all but about two acres being on the 23-acre tract (fractional southwest quarter of northwest quarter). The remaining two acres of open land were in the same inclosure, but on the southeast quarter of said northwest quarter. Appellee at the time of his purchase occupied the land as Smith's tenant, and immediately after his purchase he moved the east line of his fence so as to enlarge his inclosure and include about eight acres of the southeast quarter of the northwest quarter. He cleared several acres of this addition to his inclosure, and was occupying the whole when Mrs. Thalheimer purchased. She purchased without any actual notice of appellee's occupancy, and appellee did not place his deed of record until after the sale to Mrs. Thalheimer. But she was informed by Smith that he had previously sold 40 acres to appellee, and, when she purchased, appellee was in actual, open and visible possession of eight acres of the land which Smith conveyed to her. Such possession was equivalent to actual notice of the title, rights or equities of the occupant. *Hamilton* v. *Fowlkes,* 16 Ark. 340; *Jowers* v. *Phelps,* 33 Ark. 465; *Sisk* v. *Almon,* 34 Ark. 391; *Bird* v. *Jones,* 37 Ark. 195; *Rockafellow* v. *Oliver,* 41 Ark. 169; *Atkinson* v. *Ward,* 47 Ark. 533; *Watson* v. *Murray,* 54 Ark. 499; *Kendall* v. *Davis,* 55 Ark. 318; *Strauss* v. *White,* 66 Ark. 167. Mrs. Thalheimer purchased, therefore, with notice of appellee's equities, and the reformation can be enforced against her.

Appellee claims in his complaint 40 acres off the west end of the south half of the northwest quarter, and the court so decreed by reforming the deed so as to embrace 17 acres off the west side of the southeast quarter of the northwest quarter, in addition to the fractional southwest quarter of the northwest quarter; but the testimony of appellee and Smith both shows that according

to agreement he was to have 40 acres in the southwest corner of the quarter section, and the decree should have been for a reformation according to that agreement. However, appellants contested the right of appellee to any reformation at all, and raise no question as to this variance, so we will not disturb the decree on that account.

Decree affirmed.

MALONE v. MALONE.

Opinion delivered June 10, 1905.

DIVORCE—PARTIES EQUALLY AT FAULT.—Where the parties to a divorce suit are equally at fault, it must be shown that there is something which makes cohabitation unsafe before the courts will interfere.

Appeal from Woodruff Chancery Court.

EDWARD D. ROBERTSON, Judge.

Reversed.

J. F. Summers, for appellant.

A divorce will not be granted on the ground of cruel and intolerable treatment, unless the proof clearly shows that such treatment was habitual. 38 Ark. 119, 324; 53 Ark. 484. The facts in the case do not justify the decree of the chancellor. 34 Ark. 317; 53 Ark. 482.

P. R. Andrews, for appellee.

There is sufficient corroboration to justify the granting of the divorce. 94 Cal. 225; 38 Atl. 950; 94 N. W. 765.

MCCULLOCH, J. Appellee filed her complaint against her husband, J. E. Malone, in the chancery court of Woodruff County for divorce on the ground that he was guilty of such con-

duct toward her as rendered her condition intolerable. Appellant answered, denying the allegations of improper conduct toward his wife, and also filed his cross-complaint on the ground of wilful desertion for a period of one year.

The chancellor granted the prayer of the complaint, and decreed a divorce.

The case presents only a question of fact, and, after a careful consideration of the testimony, we are convinced it is insufficient to warrant a dissolution of the bonds of matrimony, and that the conclusion of the learned chancellor was erroneous.

Appellant and appellee were married in June, 1898, he being then 21 years of age and she 32, and they lived together until some time in November, 1899, when she left him and returned to the house of her mother. Appellee testified that soon after their marriage appellant began a course of harsh and unkind treatment, frequently calling her a fool, and upon one occasion, upon a trivial pretext, slapped her in the face, and upon another, when he was sick and irritable, threatened to throw a mug at her. Her description of the latter scene is as follows: "At another time he drew a mug on me. I was out of the room, and he was sick at the time, and called me several times, and I didn't hear, and when I went to the room he began to fuss, and I told him he was like a sore-headed bear, and he drew the mug, and told me if I didn't shut my mouth he would knock me in the head with it. I told him if he did hit me with it I would leave him then and there and go home to my mother, and he said if he had a pistol he would shoot me." She further testified that she left appellant, and went to her mother in November, 1899, because she learned that he intended to leave her in a few months.

The testimony of appellee was corroborated in part by her daughter by a former marriage, who was 11 years of age, and testified to some instances related by appellee. Appellee called another witness, J. M. Daughtry, who testified that he knew the parties, lived in about two and a half miles from them, and visited at their home about every two weeks. He said he knew of only one instance of improper conduct of appellant toward his wife, which he described as follows: "I happened in when Mrs.

Malone was taking up ashes. Mr. Malone made the remark, 'Why haven't you a fire? Hurry up; I am cold. I am in the notion of throwing this cup at you.' I spoke to him, and said. 'Mr. Malone, ain't you ashamed to talk to your wife that way?' and I stepped out."

This was substantially all the evidence in support of appellee's alleged ground for divorce.

Appellant testified, denying all the charges of improper conduct or harsh or unkind treatment towards his wife, except that he slapped her on account of an improper accusation which she made against him. He describes the occurrence as follows; "I became vexed, and told her she was foolish for believing such, and in discussing the matter or trying to reason with her we both became angry, and had the worst 'spat' or quarrel we ever had. I told her if she was foolish enough to believe such she should have her jaw slapped. She dared me to slap her, and I did. After having realized what I was doing, I slackened the blow, and it could not have inflicted any pain whatever." He denied that he ever struck her, or offered to strike her on any other occasion, or made a practice of calling her a fool.

Appellant introduced two witnesses, who lived near them for several months before the separation occurred; one lived in about fifty yards and the other, one Crenshaw and wife, lived in the house with appellant and appellee. Both of these witnesses testified that they saw no evidence of harsh or unkind treatment on the part of appellant.

We think that the preponderance of the testimony is in favor of appellant, and that appellee has established no grounds for divorce. Even her own testimony and that of her two corroborating witnesses do not clearly establish the existence of a state of facts upon which a court of equity should interpose relief by a dissolution of the bonds of matrimony.

In the case of *Kurtz* v. *Kurtz,* 38 Ark. 119, Judge Eakin, speaking for the court, approving the rule laid down in *Rose* v. *Rose,* 9 Ark. 507, that the personal indignities contemplated by the statute as grounds for divorce included "rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, studied

neglect, intentional incivility, injury, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate, alienation and estrangement," said: "It must be confessed that this position goes to the very verge of safety, and should be pressed no further. In applying it the chancellor should act with great caution to avoid the gradual approach, by imperceptible steps, to the practice of holding all matrimonial bickerings by which parties may render each other unhappy to be valid ground of divorce. Where there are no fixed and well-defined barriers of principle, it is difficult to limit the encroachment of precedents setting in one direction. Each so nearly supports the next that before one is aware the bounds of reason are passed."

In *Cate* v. *Cate,* 53 Ark. 484, Chief Justice COCKRILL said that "courts are not quick to interfere in domestic quarrels, and where the parties are equally at fault it must be shown at least that there is something that makes cohabitation unsafe, to move the courts to interfere."

We think that this court has gone to the limit in the case of *Rose* v. *Rose, supra,* and that it would be extending the rule entirely too far to hold that a divorce should be granted upon the testimony of appellee, corroborated only by the daughter, who was but 9 years old at the time of the occurrence about which she undertakes to testify, and by one other witness who relates one instance of harsh language used by appellant to his wife. By her own admission she was not always as considerate of her husband's feelings as her duty demanded. One of the instances she relates of his unkind treatment when he threatened to throw a mug at her was provoked by her own inconsiderate conduct and remark while appellant was sick. To our minds the evidence shows that both parties were somewhat at fault, and that both, by failure to exercise that "mutual forbearance and mutual forgiveness" which the relation demanded, aggravated rather than tended to ameliorate their unhappy conjugal state.

It may be that the opposition to the marriage shown to have been manifested by appellee's mother and other near kindred was continued, as claimed by appellant, after the marriage, and was

responsible in some measure for the dissensions which led to the final separation; but at any rate it appears that neither party came up to the full conjugal duty to prevent the separation. Upon the proof introduced both were at fault, and both should have been denied relief.

The decree for divorce must therefore be reversed, and the cause dismissed for want of equity either in the complaint or cross-complaint; and it is so ordered.

---

76 32
82 306

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* BOWMAN.

Opinion delivered June 10, 1905.

1. STATUTES—REPEALS.—While appeals by implication are not favored, yet if the later of two statutes covers the whole subject-matter of the former, and it is evident that the Legislature intended it as a substitute, the prior act will be held to have been repealed, although there may be no express words to that effect, and there be in the old act provisions not in the new. (Page 34.)
2. GARNISHMENT—REPEAL OF STATUTE.—Kirby's Digest, § 3707, is repealed by the later act of April 8, 1889 (Kirby's Digest, § 3706), which covers the subject-matter of the former act. (Page 35.)
3. SAME—ISSUANCE OF WRIT TO ANOTHER COUNTY.—Under Kirby's Digest, § 3705, a writ of garnishment may be issued from the circuit court of one county to any other county in the State upon judgment for an amount exceeding $10, rendered by justices of the peace of which certified copies have been duly filed in the circuit court, as well as upon judgments originally rendered by the circuit court. (Page 35.)

Appeal from Pike Circuit Court.

JAMES S. STEEL, Judge.

Affirmed.

STATEMENT BY THE COURT.

Appellee recovered judgment against John R. Probst for $125 before a justice of the peace of Polk County, and later filed

a certified transcript of the same in the office of the clerk of the circuit court of that county, and the clerk entered such judgment on the docket of that court for judgments and decrees, as provided by statute. Thereafter appellee filed proper allegations and interrogatories, and sued out a writ of garnishment, directed to the sheriff of Sebastian County, summoning appellant to answer as garnishee.

Appellant appeared on the return day, and filed a special plea to the jurisdiction of the court on the ground that a writ of garnishment cannot be issued to another county from a judgment rendered by a justice of the peace. The court sustained a demurrer to this plea, the garnishee failed to make further answer, and judgment was rendered for the full amount of the plaintiff's judgment, and an appeal was taken by the garnishee to this court.

L. F. Parker and *B. R. Davidson,* for appellant.

Sections 353-356, 375-379, of Kirby's Digest, repealed all garnishment laws prior to their adoption. 29 Ark. 470; 45 Ark. 271; 48 Ark. 349; 52 Ark. 130; 67 Ark. 347. No garnishment could have been issued unless section 3707 of the Digest is in force. 18 Ark. 580. Appellant waived none of its rights by answering under protest. 32 Ark. 428; 59 Ark. 593; 63 Ark. 30.

S. A. Downs, for appellee.

The garnishment was properly issued. Kirby's Dig. § § 4631, 4632, 3705, 3206. Justice had authority to render judgment. 70 Ark. 127. The provisions of Gould's Digest are the law until repealed or amended. 29 Ark. 111; Kirby's Dig. § § 7818, 7819; 34 Ark. 503; 41 Ark. 151; 50 Ark. 137; 53 Ark. 417; 50 Ark. 132; 60 Ark. 159. The court had jurisdiction. 69 Ark. 401; 62 Ark. 619.

L. F. Parker and *B. R. Davidson,* for appellant in reply.

Sections 4631-4633 of Kirby's Digest do not authorize the issuance of garnishment. 18 Ark. 580; 48 Ark. 349; 46 Ark. 438.

McCULLOCH, J., (after stating the facts.) The General Assembly passed an act, approved February 27, 1867, amendatory of the then existing garnishment statute, section 2 of which act is as follows:

"When a judgment before a justice of the peace in any county, together with the interest accrued on the same and the costs, amounts to more than $100, and the plaintiff, or any other person having the right to collect the said judgment, may desire to have the benefit of garnishment thereon, it shall be lawful for such person to file in the office of the clerk of the circuit court a transcript of such judgment, certified by such justice of the peace, and the clerk shall enter the same on the judgment docket in his office, and, at the request of such person so filing the same, shall issue to any county in the State a writ or writs of garnishment thereon."

This section has been brought forward in subsequent digests of the laws of the State, and is found in Kirby's Digest, section 3707.

Appellant contends that this section has been repealed, and is no longer in force.

The General Assembly of 1889 enacted a statute the title of which is "An act to provide the procedure in judicial garnishment," omitting any provision similar to section two of the act of February 27, 1867, but reenacting section three of that act, providing that a judgment obtained before a justice of the peace in one county may be filled with some justice of the peace in another county, and a writ of garnishment or execution issued thereon. Repeals by implication are not favored. But where the later of two statutes covers the whole subject-matter of the former, and it is evident that the Legislature intends it as a substitute, the prior act will be held to have been repealed threby, although there may be no express words to that effect, and there be in the old act provisions not in the new. *Pulaski County* v. *Downer,* 10 Ark. 588; *State* v. *Jennings,* 27 Ark. 419; *Mears* v. *Stewart,* 31 Ark. 19; *Davis* v. *Holland,* 43 Ark. 425; *Dowell* v. *Tucker,* 46 Ark. 438; *Wood* v. *State,* 47 Ark. 488; *St. Louis, I. M. & S. Ry. Co.* v.

Richter, 48 Ark. 349; *Inman* v. *State,* 65 Ark. 508; *Wilson* v. *Massie,* 70 Ark. 25.

Applying the doctrine established by these decisions, it must be held that section 3707, Kirby's Digest, has been repealed.

It does not follow, however, that there is no provision in the law for the issuance of writs of garnishment to another county from the circuit court upon a judgment of a justice of the peace filed therein. On the contrary, we hold that under section 3705, of the garnishment statute, the writ can be issued upon such judgment filed in the circuit court; and this view of the law makes the repeal of section 3707 all the more obvious for the reason that the same method of enforcement is provided in the latter statute. Kirby's Dig., § § 4631-2-3, provides that the certified copy of a judgment for more than $10, exclusive of cost, recovered before a justice of the peace, may be filed in the office of the clerk of the circuit court of the county, and entered on the judgment docket of said court; and that "every such judgment, from the time of filing the transcript thereof, shall be a lien on the real estate of the defendant in the county, to the same extent as a judgment of the circuit court of the same county, and shall be carried into execution in the same manner and with like effect as the judgments of such circuit courts." The effect of this provision is to completely transfer the judgment from the inferior to the superior court, and give it the same force and effect and the same remedies for enforcement as if the judgment had been originally rendered by the latter court. Section 10 of the act of 1889 (Kirby's Dig. § 3705) provides that "writs of garnishment may be issued from the circuit court of one county to any other county of the State," thus authorizing the issuance of such writs upon all judgments of the circuit court, those rendered by justices of the peace and certified copies of which have been properly filed and docketed in the office of the circuit court, as well as judgments originally rendered by that court.

We do not overlook the decision of this court in *Thompson* v. *Kirkpatrick,* 18 Ark. 580, where it was held that under sections 134, 135, ch. 87 of the Revised Statutes of 1838, which are identical in terms with sections 4631-2-3 of Kirby's Digest, a

writ of garnishment could not be issued from the circuit court upon a judgment of a justice of the peace filed in the circuit court. Chief Justice ENGLISH there said: "The object of this statute was to enable the plaintiff in a justice's judgment to obtain satisfaction thereof by a sale of the real estate of the debtor, which cannot be done by an execution issuing from the justice. Neither this nor any other statute authorizes the issuance of a garnishment from the clerk's office upon judgment, nor the determination of such garnishment in the circuit court." This was tantamount to holding that no remedy was afforded by this statute except for the creation and enforcement of a lien of the judgment rendered by a justice of the peace upon real estate owned by the defendant, and that the judgment still remained upon the docket of the justice as a judgment of his court, with all the statutory methods of enforcement by execution or garnishment intact. The next succeeding section (136) provided that execution might be issued at any time (without exception) by the justice who rendered same. Section 53 of the act of April 29, 1873, "to define the jurisdiction, and regulate the course of proceeding in the courts of justices of peace in civil actions" (Kirby's Dig. § 4634) wrought a radical change with respect to judgments of justices after the same have been filed and docketed in the office of the clerk. It provides, in effect, that thereafter an execution cannot be issued by the justice. Clearly, the effect of sections 4631-2-3, in connection with this section (4634), is to provide a complete transfer of such judgments from justices to the circuit court, with all the remedies for enforcement thereof given to judgments rendered by the latter court. This change in the law brought about a more harmonious condition, and prevents any conflict from arising by reason of the judgment being in force in the circuit court for the purpose of enforcement by one method, and in force with the justice who rendered it for the purpose of enforcement by other methods. No such conflict can arise now, since it becomes fully and for all purposes the judgment of the circuit court.

This view is also in harmony with sections 10 and 11 of the garnishment statute (Kirby's Dig. § § 3705-6), which give the plaintiff in a judgment rendered by a justice the choice of two methods of reaching by garnishment a debtor of the defendant

residing in another county; he can either file a transcript of his judgment in the office of the clerk of the circuit court, and sue out a writ of garnishment from that court under section 3705, or file it before some justice in the county where the garnishee resides, and sue out the garnishment there under section 3706. When the judgment does not exceed $10, only the latter method of enforcement against a garnishee in another county is open.

Learned counsel for appellant urge the hardship which this construction of the statute entails upon a garnishee—especially a railroad corporation—in being required to answer in a garnishment proceeding in a distant county; but this should be addressed to the lawmakers, as a reason for a change in the law, so as to ameliorate the alleged hardship. The same reason might be urged against the provision of the statute allowing the issuance of a writ of garnishment to another county upon a judgment rendered by any court.

The court did not err in overruling the special plea of the appellant, and the judgment is affirmed.

---

76 37
80 274

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. THOMPSON.

Opinion delivered June 17, 1905.

RAILROAD—NEGLIGENCE—KILLING STOCK.—Where a railroad company admitted the killing of stock, and the testimony of the engineer and fireman sustained the allegation that the killing was unavoidable, a verdict against the company will not be set aside if there was evidence tending to impeach the correctness of their testimony.

Appeal from Madison Circuit Court.

JOHN N. TILLMAN, Judge.

Affirmed.

L. F. Parker and *B. R. Davidson,* for appellant.

The record fails to show any negligence on the part of appellant. 39 Ark. 413; 40 Ark. 336; 41 Ark. 161; 47 Ark. 321; 53 Ark. 96; 66 Ark. 439; 67 Ark. 514.

E. B. Wall, for appellee.

Upon disputed facts the verdict will not be disturbed. 51 Ark. 467; 31 Ark. 163; 25 Ark. 474. The proof of appellant did not overcome the statutory presumption of negligence. 64 Ark. 236. The issue of fact was properly submitted to the jury. 71 Ark. 445; 66 Ark. 363; 62 Ark. 63.

HILL, C. J. This was an action for killing a cow by appellant railroad company. The appellant admitted the killing of the cow by the train, and assumed the burden of proof that it was not negligently killed. The testimony of the engineer and fireman sustained the allegation that it was unavoidable, and the case is brought here on the sole ground that the jury arbitrarily discarded their testimony in finding for the appellee. The engineer's testimony was weakened on cross-examination, and contradictions with a previous statement shown. The fireman's testimony, while fully sustaining the allegation that it was an unavoidable accident, did not in all respects accord with the engineer's version of the matter. The appellee introduced evidence tending to prove the cow could have been seen much further than the testimony of the engineer and fireman showed it could have been. It is true, this testimony was directed to the vision along the track in the day time, but, assuming the engine was equipped with a proper headlight, it was contradictory to the testimony of the engineer and fireman as to the distance of unobstructed vision at night.

The court is of opinion that this is not a case where the refusal to believe the engineer and fireman is arbitrary and without cause, but it presented a conflict in the testimony rendering the submission of the issue of fact proper, and the finding of the jury final.

The judgment is affirmed.

REESE v. STATE.

76 39
82 504

Opinion delivered June 17, 1905.

TRIAL—ARGUMENT.—In a prosecution for conducting an illicit liquor business the prosecuting attorney made this statement: "A blind tiger man will swear a lie any time. * * * Any man that will run a blind tiger will swear a lie to beat the law." *Held,* without approving the language, that it was not reversible error.

Appeal from Howard Circuit Court.

JAMES S. STEEL, Judge.

Affirmed.

Feazel & Bishop, for appellant.

The remarks of the prosecuting attorney were improper and prejudicial. 38 Ark. 368; 48 Ark. 106; 65 Ark. 625; 71 Ark. 418.

Robert L. Rogers, Attorney General, for appellee.

HILL, C. J. These three cases present but one question, and it is practically the same in each case. The prosecuting attorney, in his closing argument, said:

"That, in considering the testimony of the defendant, the jury should take into consideration his interest in the result; should consider whether his statement was made in good faith, or merely to avoid conviction; that he (the prosecuting attorney) would not believe any man on oath who would deliberately violate the law by running a blind tiger; that, if he would violate the law in that respect, he would not hesitate to swear a lie to get out of it."

His closing argument in another of the cases contained this statement:

"A blind tiger man will swear a lie any time. This man, John F. Reese, is not worthy of belief. Any man that will run a blind tiger will swear a lie to beat the law."

On objection made by the defendant, the court declined to interfere with the argument, and, preserving proper exceptions, the cases are brought here for review.

These statements of the prosecuting attorney are nothing but the expressions of his individual opinion, stated in over-forcible terms. The statements do not fall within that class of statements where the attorney makes a witness of himself in his argument, and states facts without the record. These cases may be found discussed in *German-American Ins. Co.* v. *Harper,* 70 Ark. 305; *Fort* v. *State,* 74 Ark. 210; *English* v. *Anderson,* 75 Ark. 577.

An attorney undoubtedly has a right, if his taste and judgment calls for it, to express his individual opinion freely in discussing the facts in evidence, so long as he couches his remarks in language befitting his high profession and the place of its utterance—a temple of justice.

In this case the prosecuting attorney was at perfect liberty to express his opinion freely as to all matters in evidence attacking the credibility of the defendant as a witness, provided he framed his argument in proper language and manner. This addressed itself to him in the first place; to the trial judge in the second place; and lastly to this court, not to pass on its propriety, taste or elegance, but merely to pass on whether the circuit judge abused his discretion in permitting it, and whether it worked a prejudice to the defendant not warranted by the law or facts of the case. Without approving the language used in expressing his opinion of the testimony of the defendant, the court is of opinion that there is no reversible error in it. The court hopes that attorneys, especially those representing the State of Arkansas, who act in a *quasi* judicial role, will couch their expressions of opinion in language less intemperate and denunciatory, and that the circuit judges will require it of them. Instances may arise of excesses in this line calling for reversal, but this case is not such an instance.

The judgments are affirmed.

WELLS v. PARKER.

Opinion delivered June 17, 1905.

76 41
76 483
76 41
78 428
80 535
41
76 104
86

1. INSTRUCTIONS—GENERAL OBJECTION.—A general objection to several instructions in gross is not sufficient if any one of them is good. (Page 45.)

2. MALICIOUS PROSECUTION—TERMINATION.—A discharge of a case by a grand jury is *prima facie* a termination of the prosecution, and is sufficient to support the requirement in an action for malicious prosecution that such prosecution be terminated. (Page 42.)

3. PROBABLE CAUSE—BINDING OVER TO GRAND JURY.—While the binding over of the accused, by a committing magistrate, to await the action of the grand jury is deemed evidence of probable cause, it is not conclusive evidence, as would be a conviction in a court of competent jurisdiction, even though it be subsequently reversed. (Page 43.)

4. ADVICE OF COUNSEL—QUESTIONS FOR JURY.—Whether the defendant in a suit for malicious prosecution acted under advice of counsel and made a full disclosure of the facts to him is a question of fact for the jury. (Page 43.)

Affirmed.

Hallum & Clay, for appellant.

The court's instruction as to the existence of probable cause was erroneous. 63 Ark. 387; 98 U. S. 195; 13 Gray, 201; 15 Mass. 243; 3 B. Mon. 4; 69 Ark. 439; 71 Ark. 362.

W. C. Adamson and *J. H. Carmichael*, for appellee.

This case should be dismissed for noncompliance with Rule IX. 85 S. W. 776. The jury's findings upon questions of fact are conclusive. 23 Ark. 208, 131; 40 Ark. 168; 19 Ark. 684. Exceptions to the instructions were not properly saved. 32 Ark. 224; 28 Ark. 18; 39 Ark. 339; 38 Ark. 539; 59 Ark. 465. The bill of exceptions does not show all the evidence in the case. 45 Ark. 240; 43 Ark. 451; 2 Ark. 33. The dismissal of the matter by the grand jury was a sufficient termination in plaintiff's favor. 19 Am. & Eng. Enc. Law. 682; 92 Ga. 421; 47 N. J. L. 413; 13 Am. & Eng. Pl. & Pr. 446; 109 Mass. 158; 133 Mass. 419; 144 Mass. 431.

HILL, C. J. This is a suit for malicious prosecution, and terminated in the circuit court in a judgment for the plaintiff for $500, and the defendant has prosecuted this appeal.

1. The motion for new trial presents four grounds. The first three are that the verdict is contrary to the law, to the evidence and to the law and evidence. The fourth is: "The court erred in giving instructions, Nos. 2, 3, 4, 5, 8 and 9 asked for by the plaintiff." The exception upon which this assignment is based reads as follows: "The defendant at the time excepted to the giving of instructions numbered 2, 3, 4, 5, 8 and 9, and asked that his exceptions be noted of record, which was accordingly done."

Mr. Justice EAKIN, speaking for this court in *Atkins* v. *Swope,* 38 Ark. 539, where the exception was in the exact language of the foregoing exception, said:

"The objection made to giving these instructions was general, embracing all of them in gross. It was not specific as to either or any of them, and directed the attention of the court to no particular error. We have several times held that objections of such sweeping nature will not be considered here if any of the instructions be good. It is not to be encouraged, even if all be bad. It is manifestly due the court that the attorney should lay his finger upon the errors complained of, and not compel the judge to seek them amongst all the matter included in a dragnet objection."

This rule has been a settled rule of practice in this court (and it is practically the same in every appellate court) for many years, and has been often followed. The authorities on this subject have been recently reviewed and approved in the case of *Young* v. *Stevenson,* 75 Ark. 182. Some of these instructions excepted to are elemental statements of law, and this kind of exception precludes the court from going beyond a finding that any one of them is sound.

2. This leaves only the question of the sufficiency of the evidence to sustain the verdict.

The plaintiff was bound over by a justice of the peace to answer before the grand jury for a felony, and the grand jury dismissed the case. The appellant contends that the dismissal of

the case by the grand jury is not a sufficient termination of the prosecution to authorize the maintenance of the action for malicious prosecution. The authorities are practically uniform in holding that a discharge by a grand jury is *prima facie* a termination of the prosecution, and is sufficient to support the action on this requirement. *Miller* v. *Ry.* (C. C.) 41 Fed. 898. Newell on Malicious Prosecution, pp. 358-363; 19 Am. & Eng. Enc. Law (2d Ed.), p. 682.

The binding over to await the grand jury by a committing magistrate is deemed evidence of probable cause, but the authorities do not go beyond holding it only *prima facie* evidence of probable cause, not conclusive evidence, as a conviction in a court of competent jurisdiction is, even though it be reversed. *Hale* v. *Boylen,* 22 W. Va. 234; *Holliday* v. *Holliday,* 123 Cal. 26, 55 Pac. 703; *Miller* v. *Ry.* (C. C.) 41 Fed. 898; *Ross* v. *Hixon,* 46 Kan. 550, 26 Pac. 955, 12 L. R. A. 760, 26 Am. St. Rep. 123; 19 Am. & Eng. Enc. Law (2d Ed.), 664.

This committal by a magistrate was evidence in favor of the appellant, but not conclusive. There was evidence that he acted under advice of counsel (but there is some conflict on that), and also evidence that he did not make a full disclosure to his counsel of all facts known to him. These were issues of fact properly determinable by a jury, and, in the absence of any uncontroverted evidence of a fact conclusive of itself in favor of appellant, the verdict cannot be disturbed.

The judgment is affirmed.

PERRY *v.* SADLER.

Opinion delivered June 17, 1905.

1. REFORMATION OF INSTRUMENT—MISTAKE.—Where by mutual mistake, a tract of land was omitted from a deed, the instrument will be reformed to include such tract. (Page 45.)

2. SALE OF LAND—WHEN ACCRETION INCLUDED.—Where a contract for the sale of a tract of land described it as "the Keywood place, say about 68 acres, more or less," and the Keywood place fronted on a navigable stream, whose water line constituted one of its boundaries, the water line remained the boundary, no matter how it shifted, and any accretions formed by the shifting of such line belonged to the tract intended to be conveyed. (Page 46.)

3. SAME—WHEN ACCRETION NOT INCLUDED.—Where a contract for the conveyance of land, and the conveyance itself, designated a certain number of acres to be taken from a certain part of a larger tract, and the land was appropriately described, so that the lines could be, and were, laid out in accordance with such description, the boundaries of the land were fixed, and did not include an accretion thereto. (Page 47.)

Appeal from Yell Circuit Court in Chancery, Dardanelle District.

WILLIAM L. MOOSE, Judge.

J. M. Parker, for appellants.

The court may reform a deed, so as to make it conform to the intention of the parties. 50 Ark. 184; 66 Ark. 155; 51 Ark. 394; 68 Ark. 544; 68 Ark. 547. Perry's deed did not carry with it all accretions. 69 Ark. 34; 71 Ark. 390; 59 U. S. 150; 134 U. S. 178; 76 Cal. 169; 7 How. 593.

Bullock & Davis, for appellees.

All accretions passed in the description contained in Perry's deed. 71 Ark. 390; 40 Fed. 386; 134 U. S. 178; 55 S. W. 241; 3 Wash. Real Prop. 402; 99 Mass. 231; 33 Ark. 119; 32 Ark. 309; 50 Ark. 179. Perry had title to the land, and his possession was notice of the same. 33 Ark. 465; 37 Ark. 47; 38 Ark. 571; 24 Ark. 371; 18 Ark. 142; 3 Wash. Real Prop. 74; 80 S. W. 306. Appellants are estopped from claiming the land. 28 Pa. 124; 16 Pa. St. 301; 15 Pa. St. 526; 2 Exch. 663; 10 N. Y. 406; 29 Ga. 312; 13 Cal. 362.

J. M. Parker, for appellants in reply.

Under the rule announced in the cases cited by appellees in 69 Ark. 33 and 71 Ark. 390, if same have any applica-

tion to the case at all, it would result that, as the accretions were part of the N. 1-2, S. E. 1-4 section 15 at the time of the execution of the contract and deed, appellees only acquired title to 1032 acres off the south side of the tract, including accretions, and hence the accretions passed as part of the tract of 32 acres, and not in addition thereto, as claimed by appellees. If this be true, appellees have obtained possession of more of the original tract than they were entitled to, and equity will not allow them to take possession of 32 acres of the original lands, and then take part of the accretions as a part of the 32 acres. These cases are based upon the principle that where there is a general description, it controls; but since in this case there is no general description, and the only description is as "32 acres," the latter must control. 2 Am. & Eng. Enc. Law (1st Ed.), 499. There is no question of estoppel in this case, for there was no reason why the deed should not be made directly to Mrs. Perry. The real question is whether Perry, by his contract, agreed to sell the accretions to R. C. Sadler, or to deed them to Mrs. Sadler for life and R. C. Sadler in remainder. If the former, they belong to Mrs. Perry; if the latter, to Mrs. Sadler, for equity will enforce the contract so as to make it conform to the intention of the parties. 61 Ark. 123. Appellees could not have a decree for reformation of the deeds from Wooten and McCracken to Perry and from Mr. Perry to Mr. and Mrs. Sadler, so as to made Wooten, McCracken or Perry defendant in their make them cover the tract in section 14, because they have never cross-bill. 66 Ark. 400; 49 Ark. 437.

Bullock & Davis, for appellees in reply.

Perry was duly made a party defendant in the cross-bill.

HILL, C. J. Perry and Sadler entered into a written contract on November 11, 1890, containing, among many other clauses, this one: "Said Perry to deed, unincumbered, to said Sadler the Keywood place, say about 68 acres, more or less, and 32 acres off lower side of Brown place, along the upper side of Keywood place." Pursuant to this contract two deeds were executed, one to R. C. Sadler, and one to R. C. Sadler and Elizabeth C. Sadler, his mother, to different tracts. In the deed to R. C. Sadler

"all of north half of the southeast quarter except the 32 acres off the south side in section 15, township 6 north, range 20," etc., is conveyed. In the deed to Sadler and his mother the following description is found: "The south half of the southeast fractional quarter, containing 68 acres more or less, and 32 acres off of the south side of the north half of southeast fractional quarter, all in section 15, township 6 north of the base line, and range 20 west fifth principal meridian," etc.

The Keywood place was conveyed to Perry in 1883 as "the south half of the southeast quarter of section 15, in township 6 north and range 20 west, containing 66 acres more or less." This action is brought by appellants, claiming a small tract of .62 of an acre, being described in the governmental survey as southwest fractional quarter of section 14, township 6 north, range 20 west, and its accretions and the accretions to said 68-acre and 32-acre tracts. It is undisputably shown that it was an unintentional oversight in the conveyance to Perry and from Perry to Sadler that said fractional quarter section of section 14 was not included. It was a small wedge-shaped tract running almost to the dwelling house on the Keywood place, including part of the yard and garden. This part of it was inclosed with other land, and all of it under control of the owner of the Keywood place. The parties did not know that this fraction did not pass under the deeds, as they supposed all of this land was in section 15, and it was clearly shown that it was intended to be conveyed. The chancellor held that it and its accretion passed to Sadler, and in this the decree is right.

The Keywood place fronts the Arkansas river, and there is a large accretion there formed by alluvium. Appellants contend that the contract and conveyance were to convey to Sadler 100 acres, no more nor less, and that the 32 acres were to be conveyed from the Brown tract, in order to add to the Keywood tract of 68 acres, to constitute the 100 acres, and that the accretions did not go with the conveyances, as the 100 acres were conveyed without them. The contract to convey the Keywood place shows that the tract going under that name, containing approximately 68 acres, was to be conveyed, and the conveyance of it contained the words "more or less," indicating that the acreage was an approximation, and not a fixed quantity. This court has adopted

the rule of the Supreme Court of the United States in regard to conveyances affecting accretions. This is the principle which governs here: "Where a waterline is the boundary of a named lot, that line remains the boundary, no matter how it shifts, and a deed describing the lot by number or name conveys the land up to that shifting line, exactly as it does up to the fixed side lines." *Towell* v. *Etter,* 69 Ark. 34. The conveyance of the Keywood place by name in the contract, and the conveyance of what was supposed to be the Keywood place by the Governmental survey numbers (and which was in fact all of it except this small tract which the chancellor reformed the deed to convey), carried the line to the river, and included the accretions. The chancellor so held, and his holding is affirmed.

The chancellor held that the accretions fronting the 32-acre tract did not pass to Sadler and his mother, and that, as the appellant, Mrs. M. C. Perry (wife of the other appellant) had acquired title to all of that tract except the 32 acres conveyed to Sadler and his mother, she was entitled to the accretions between it and the river. The appellees, Sadler and mother, cross appeal from this part of the decree.

The contract and deed designated a certain number of acres to be taken from a certain part of the Brown place. It was appropriately described, so that the lines could be, and they were, laid out in accordance therewith. When located, there was an accretion between the lines thus located and the river. This tract was not described by name or number, like the Keywood place, thereby carrying the boundary to the shifting water line; but this boundary was fixed, and the acreage determined by the contract and deed.

The chancellor was right, and the cross appeal is not sustained, and the decree is in all things affirmed.

76 48
188 330

LITTLE ROCK RAILWAY & ELECTRIC COMPANY v. NORTH LITTLE ROCK.

Opinion delivered June 17, 1905.

1. INJUNCTION—RECIPROCAL EFFECT OF WRIT.—Where the city of Little Rock and a street railway company holding a franchise under it brought suit to enjoin the town of North Little Rock from holding an election for the purpose of annexing a portion of the territory of Little Rock to defendant, and the court refused to restrain the holding of such election, but restrained the declaration of the result until final hearing, which was in defendant's favor, such temporary injunction was reciprocally binding upon all the parties, so that an ordinance of the city of Little Rock granting to the street railway company a franchise to construct its railroad along the streets of the annexed territory, passed after such territory would have been annexed to the town of North Little Rock but for the injunction, was void; but a similar ordinance passed before the election was held, but after the injunction was granted, was valid. (Page 56.)

2. MUNICIPAL CORPORATION—CONTROL OF STREETS—ESTOPPEL.—Although a municipal corporation is but a trustee for the public in regard to the control over its streets, it may estop itself from exercising the power to grant a franchise to a street-car company along the streets of a certain territory by procuring an injunction to restrain an adjacent municipal corporation from annexing such territory, if but for such injunction it would have no authority to grant such franchise. (Page 59.)

3. PROCUREMENT OF INJUNCTION—IMPLIED CONTRACT.—Where a city procured an injunction *pendente lite* to restrain an adjacent town from annexing part of its territory and from granting any street railway franchise therein, it impliedly contracted that it would not take advantage of the restraining order to grant any such franchise, which, but for the injunction, would have been beyond its authority. (Page 61.)

4. SAME—WHEN ACQUIESCENCE NO ESTOPPEL.—Where a city restrained an adjacent town from annexing part of its territory, and while the injunction was in force granted a franchise over such territory to a street railway company, the fact that during the pendency of the injunction the company expended large sums of money in constructing its road without protest or resistance on the part of the town did not estop the latter from contesting the validity of the franchise. (Page 61.)

5. MUNICIPAL CORPORATIONS—ANNEXATION.—Under Kirby's Digest, § 5522, providing, in effect, that in proceedings to annex territory to municipal

corporations, the declaration of the vote favorable to annexation and entry thereof upon its record by the council constitute the annexation, the jurisdiction of the annexing municipality begins whenever the result of the election is so declared and entered, and does not relate back to the time when the election was ordered. (Page 61.)

6. MUNICIPAL FRANCHISE—CONDITION PRECEDENT.—A stipulation in a municipal ordinance granting a franchise to a street railway company that, before the franchise could be enjoyed, the company should obtain consent of the county court to use a certain bridge which had been constructed by the county was a reasonable and enforceable condition precedent. (Page 61.)

7. REASONABLE TIME—HOW ASCERTAINED.—Where an ordinance granting a franchise to a street railway company stipulated that, before the franchise could be enjoyed, the company should obtain consent of the county court to use a certain bridge, the company was required to obtain the consent of the county court within a reasonable time, in determining which the subject-matter and all the circumstance are to be considered. (Page 62.)

8. SAME.—*Held* in this case that one month was not a reasonable time for the street car company to obtain the consent of the county court to use the bridge in question. (Page 63.)

9. APPEAL—RELIEF NOT ASKED BELOW.—The Supreme Court, on appeal, will not grant relief not asked in the trial court. (Page 66.)

Appeal from Pulaski Chancery Court.

JESSE C. HART, Chancellor.

Affirmed.

STATEMENT BY THE COURT.

On the 16th day of March, 1903, the General Assembly passed an act authorizing parts of one municipal corporation to be annexed to another municipal corporation. This act is contained in section 5522, Kirby's Digest.

On the 11th of May, 1903, petitions were filed with the town council of the town of North Little Rock, signed by a majority of the citizens of that town and a majority of the citizens of the Eighth Ward of the city of Little Rock, praying for the annexation of the Eighth Ward of Little Rock to the incorporated town of North Little Rock. On the 15th of June, 1903, an ordinance

was passed calling for an election to be held in the affected territory on the question of annexation, pursuant to the terms of the act. The election was called for July 21, 1903. On the 6th of July, 1903, the city of Little Rock, its mayor and aldermen and numerous citizens and corporations—among the latter the appellant, which will hereafter be called "the street railway company"—filed a complaint in the Pulaski Chancery Court against the town of North Little Rock.

The complaint set forth fully the relation of the Eighth Ward to the city of Little Rock, and the alleged effect upon it and the city of Little Rock, should the proposed annexation to North Little Rock be consummated. The complaint alleged that the act under which the proceedings were progressing was unconstitutional for various reasons set forth therein, and consequently the whole proceeding under it was void, and sought to arrest by injunction the election ordered for July 21. The complaint further alleged:

"Complainants further state that, unless defendants are restrained from holding such election and proceeding further under said act, defendants will hold said election, will declare the result in favor of disannexation, and will then proceed to grant all kinds of franchises, privileges, licenses and contracts of public nature; that said franchises, privileges and contracts will conflict with those heretofore granted by the said city of Little Rock; that it will grant street car, lighting and water franchises to parties other than those to whom they have been granted by said city." Other probable conflicts in rights and jurisdiction were alleged to be imminent. The prayer was to restrain the holding of said election, and from taking any further steps towards annexing the Eighth Ward to North Little Rock. On July 16 a demurrer was sustained to the complaint, and the injunction refused, and the city of Little Rock and its co-plaintiffs appealed to the Supreme Court. The court was not then in session, and application was made to Hon. HENRY G. BUNN, then Chief Justice of the Supreme Court, for an injunction pending the appeal. The petition to the Chief Justice recited the status of the annexation proceedings and the litigation, and

alleged: "That for the reasons and grounds set forth and referred to in said complaint, and for others hereinafter set forth, it is of the utmost importance that a temporary restraining order should be issued by your Honor in vacation of said Supreme Court, to restrain said defendants from all further proceedings in the matters set forth and referred to in said complaint and exhibits, during the vacation of said Supreme Court, and until its further order." Then other and additional reasons were alleged why the injunction should issue. This further statement appears in the petition: "Plaintiffs further state that the granting of the injunction herein prayed for will work no injury or detriment to the defendants; that it will only result, so far as the defendants are concerned, in a postponement of the election, if said act is hereafter adjudged to be constitutional; that said injunction will, in all respects, merely result in the maintenance of the *status quo* of the parties, property and interests herein involved."

On July 18 Chief Justice BUNN refused to enjoin the holding of the election, allowing the proceedings to go to the extent of holding the election, counting the votes, and completing the election returns, but enjoined the declaration of the result and from entering the same on the record of the proceedings of the council of North Little Rock, and enjoined North Little Rock from doing any act towards the assumption of jurisdiction or control over the property or affairs of the Eighth Ward, or the exercise of any municipal function whatever over the same, and from interfering with the existing jurisdiction of the city of Little Rock, until the further orders of the Supreme Court, or of one of the judges thereof. It was further ordered that the ballots and returns of the election were to be counted and cast up and transmitted to the council of North Little Rock, and, without opening or further action thereon, were to be kept until the further orders of the Supreme Court, or one of the judges thereof.

The act under which this proceeding was held provided that, if a majority of those voting at the election should vote in favor of annexation, the council "shall so declare, and enter (it)

upon its record book of proceedings." And "thereafter the said consolidated territory, and the inhabitants thereof, shall constitute a municipal corporation of this State," etc. The declaration of the vote in favor of annexation, and the record thereof, constituted the point where the jurisdiction of the enlarged corporation began. The Chief Justice allowed the proceedings to go to this point, but arrested the changes of jurisdiction until the appeal was heard and determined. The vote at the election, July 21, resulted in 475 votes for annexation, and 44 against it. The returns were counted, cast up and delivered pursuant to the order, but the declaration and record of the results were stayed by the injunction. On February 6, 1904, the Supreme Court affirmed the decision of the chancellor, and on February 22 time for filing motion for reconsideration was waived, the injunction dissolved, and the annexation proceedings then completed. On the 25th of June, 1903, the same being after the election was ordered and before it was held, the council of the city of Little Rock granted to the street car company a franchise to build and maintain a street railway over certain streets in the Eighth Ward. The franchise, however, contained conditions, so far as material, in substance as follows: That before the rights conferred should be enjoyed the free bridge over the Arkansas River (the Eighth Ward being on the North side of the river) should be so strengthened as to bear with safety the weight of the cars. Details in regard to this were provided for in the ordinance. The next condition is: "Nor shall said rights herein granted be enjoyed until the grant hereby made of a right of way over the said free bridge has been confirmed by the county court of Pulaski County." The bridge was constructed by the county of Pulaski, and not by the city of Little Rock. It was further provided that the grant would be void unless within thirty days after said confirmation by the county court the street car company should begin the work of laying tracks and strengthening the bridge, and prosecute the work with reasonable dispatch, and complete it within eighteen months; but it was provided that, if the work was stopped by judicial proceeding, the time it was so suspended should be excluded. The ordinance provided that it should not be operative until the street car company should accept its terms and

conditions in writing within five days, and deposit with the city treasurer $10,000 in cash, or, at its option, a good bond in that sum, conditioned to comply with the terms of the ordinance, and containing, among others, this condition: "If the county court declines to confirm the right of way herein granted, then the council reserves the right to revoke this ordinance at such time as it sees fit, or wait on said confirmation at its option." In another section it is provided that such confirmation shall not be necessary if there is obtained a final judgment of the Supreme Court holding the right of way valid without such confirmation. It is conceded that no litigation has been begun or had wherein this question could be finally passed upon by the Supreme Court.

The final section is that the ordinance should be a binding contract between the city of Little Rock and the street car company upon its passage and the acceptance in writing and depositing the cash or bond. The ordinance was duly passed, it was accepted in writing within the time, and the bond duly made and delivered. On the 10th of August, 1903, the city council of Little Rock materially amended this ordinance. The part important here is that the provision requiring confirmation of the grant of right of way by the county court of Pulaski County to be obtained before any rights therein conferred became operative was stricken out, and the company given an absolute franchise to construct and maintain a street car line over certain streets in the Eighth Ward. Similar provisions were made as to acceptance in writing, the giving of bond, and other matters not entering into this case. This was passed as stated, on the 10th of August, while the injunction suit was still pending in the Supreme Court, and while the temporary injunction of Chief Justice BUNN was in force. After the passage of this ordinance, and before the case was finally determined, the street car company began the construction of its line in the Eighth Ward, laid considerable track, and spent in all about $27,000 on the work. It was not completed in any part, nor ready for operation, when the decision in the injunction suit was rendered by the Supreme Court. After the latter event the town of North Little Rock, which had been advanced to

the grade of a city of the first class, brought this suit to annul the franchises, and succeeded in the chancery court.

Ashley Cockrill and *Rose, Hemingway & Rose,* for appellant.

A city has control of its streets and alleys, with the duty of keeping them open and free from nuisance. 2 Dill. Mun. Corp. § § 656, 658, 680, 683; 51 Ark. 491; Elliott, Roads & Streets, § § 16, 17, 739, 741; Angell, Highways, § 301; 23 Am. Dec. 302; 8 B. Mon. 237; 10 Pet. 662; 16 Pet. 431; 65 L. R. A. 566; Elliott, Roads & Streets, 321, 327; 27 Fed. 412; 72 Wis. 617; 87 Ill. 348; 171 U. S. 48; 40 Pac. 560; 2 Dill. 82; 9 Bush, 127; 10 Wall. 38; 27 Am. & Eng. Enc. Law, 16, 150; 56 Fed. 867; 166 U. S. 557; 18 Oh. St. 292; 76 Fed. 271; 33 Oh. St. 336; 66 Fed. 140; 42 La. Ann. 188; 66 Ind. 396; 8 Cal. 453; 48 Cal. 493; 19 Colo. 236; 160 N. Y. 377; 64 S. W. 106; 44 S. E. 371. A city has no proprietary rights in the streets or franchises for street use. 61 Neb. 109; 71 N. H. 367; 87 Me. 151; 96 Ill. 232; 166 U. S. 565; 148 Mass. 375; 74 Am. Dec. 358; 18 So. 84; 24 Ia. 469; 27 Fed. 412. A city cannot divest itself of the power given by the Legislature, except as the law authorizes. 24 Fed. 306; 76 Fed. 283; 8 Bush, 417; 5 Cow. 538; 59 N. Y. 228; 194 U. S. 534; 9 Mich. 165; 33 Ohio, 367; 56 Fed. 867; Angell, Highways, § 301; 48 Miss. 710; 52 Miss. 723; 26 Mo. 97. A change in territory is not operative until the board in control of the annexation declares the result of the election, and enters it upon the minutes. 24 Am. & Eng. Enc. Law, 277; 53 Ark. 145; 27 Mo. 97. A rule of equity will not be applied to override the express provisions of the statute. 166 U. S. 565. There cannot be, at the same time, two distinct municipal corporations, exercising the same powers and privileges. 1 Dill. Mun. Corp. § 184; Grant, Corp. 18; 5 So. 818; 18 Tex. 874; 31 Pa. St. 515; 16 How. 164; 4 Wheat. 246; 9 How. 614. Vested rights cannot be affected by a change in territory. 16 Am. & Eng. Enc. Law, 1128; Hall's Int. Law, § 4; 4 Pet. 511; 20 How. 20, 10 Wall. 224; 12 Pet. 410; 21 Wall. 521; 10 Pet. 331; 7 Pet. 51; 161 U. S. 208; 98 U. S. 494; 139 U. S. 588; 10 Pet. 736; 8

The function of injunction is to stay threatened action and suspend conflicting claims of right of the restricted parties, where they then are, until they can be adjudicated. 1 Beach, Inj. § 343; 134 Ill. 603; 2 Dan. Ch. Pr. 1633, 1639; 2 McCrary, 642; 36 Wis. 355; 50 Ill. 460. The first ordinance was passed before the injunction was granted, and was a present right, with the enjoyment postponed for a future time. 50 Ark. 367. The right of Little Rock over its streets and to provide street railways upon them is conferred for public benefit. It could not by contract abdicate the right, and it could not accomplish by estoppel what it was forbidden to do by contract, 55 Ark. 318; 38 S. E. 60; 27 N. Y. 611; 24 Fed. 306. There can be no inquiry into the motives of the city council in granting the franchise. 160 N. Y. 377; 64 S. W. 106; 9 Pet. 311. When the council gave the appellant the right to build its street railway, it contemplated its existing limits. 2 Dill. Mun. Corp. § 658; 37 Mich. 195; 20 Oh. St. 7. The street railway has the right to mortgage its properties. Booth, St. Rys. § 423; 114 U. S. 501; 111 N. Y. 1; 52 Fed. 56; 76 Fed. 299; 31 S. E. 125.

James P. Clarke, for appellee.

There is no uncertainty as to the status of a city in the matter of interests owned and controlled by it in the streets and alleys and other highways within its limits. 50 Ark. 466; 24 Ark. 102; 32 Conn. 579; 17 L. R. A. 477; Kirby's Dig. § 5448. After the decision of the Pulaski Chancery Court, it was not within the competency of the town of North Little Rock to make other than a defeasible grant of the streets which were then in process of being taken beyond her borders. 76 Fed. 282; Dill. Mun. Corp. § 66; 66 Fed. 140; 9 Cal. 453; 132 Pa. St. 288; 42 La. Ann. 188; 3 Wash. 316; 21 L. R. A. 519; 16 L. R. A. 485; 66 Ind. 396; 49 N. J. L. 558; 33 Oh. St. 336. After the election was ordered on the 21st day of July, 1903, the final act of annexation was carried back to the day the election was ordered, and cut off every conveyance which was not consummated before the act ordering the election on the 15th day of June. 92 U. S. 330; 28 Mich. 397; 58 Ill. 310; 26 Mo. 100; Broom's Leg. Max. 128; 48 Miss. 710; 52 Miss. 723; 194 U. S. 394;

10 Pet. 615; 98 U. S. 438. This proceeding is an attempt to pervert the action instituted into one for despoiling an adversary when his hands are tied. 25 N. E. 588; 134 Ill. 603; 2 McCr. 642; 36 Wis. 355; 4 Beav. 130; 2 Tenn. Chy. 728; 26 L. R. A. 593. One taking a mortgage *pendente lite* is bound by result of suit. 30 Ark. 249; 96 Ala. 421; 11 Ark. 411; 57 Ark. 229; 12 La. Ann. 776; 29 Ark. 85; 130 U. S. 565; 141 U. S. 648; 131 U. S. 353; 144 U. S. 119; 59 Fed. 811. The decree of the court below is not cancelled by appeal. 101 Fed. 669; 83 Ky. 274; 91 Ky. 625; 11 Ark. 675; 29 Ark. 80; 45 Ark. 373; 100 U. S. 81; 11 Miss. 143; 12 Miss. 289. It would be a mockery of justice to dissolve the injunction and leave defeated defendant in possession obtained by the injunction. 35 N. Y. 477; 35 Oh. St. 646; 139 U. S. 216; 132 N. Y. 362. A purchaser pending an appeal takes at his peril. 3 N. Y. 328; 51 Ark. 318. An affirmance of the decree is a reversal of the order granting injunction. 14 La. Ann. 57; 28 Cal. 75; 29 Ark. 95. Judgment of affirmance neither satifies, merges nor extinguishes judgment below. 11 Miss. 143; 140 Ill. 193; 14 How. 28, 312; 34 Ark. 580; 31 Oh. St. 28; 68 Me. 334; 51 Me. 149; 50 Am Dec. 119; 43 Am. Dec. 126; 57 Ark. 229.

Ashley Cockrill and *Rose, Hemingway & Rose,* for appellant in reply.

The authority of the council to grant street railway franchises is a power, and not a property, and its exercise is proprietary. 76 Fed. 282; 24 Fed. 306; 41 Fed. 558; 191 U. S. 221; 194 U. S. 543; 25 Sup. Ct. Rep. 327.

HILL, C. J., (after stating the facts.) 1. The franchise sought to be enjoyed was granted by the council of Little Rock, August 10, 1902, when the jurisdiction of the city of Little Rock over the Eighth Ward thereof, where the franchise was to have been enjoyed, would have ceased for all purposes but for the injunction granted for the instance of the city of Little Rock, this appellant company, and other parties to the suit.

One of the grounds relied upon for the injunction was the probability that the other municipality seeking to absorb this territory would grant therein street car franchises conflicting with

those theretofore granted by the city of Little Rock. So far as this record shows, the franchise to this company, granted subject to several conditions set out in the statement of facts, was the franchise sought to be protected against encroachment and conflict. This franchise was amended after the injunction, so as to take out the conditions which prevented it from becoming at once operative. The injunction was granted upon this and other allegations, and unquestionably was intended to preserve the *status quo* of the two municipalities, so far as the Eighth Ward was concerned, pending the appeal to determine whether or not the proceedings for its annexation to North Little Rock were valid.

Lord Chancellor Eldon held that where a party obtained an injunction which prevented his adversary from pursuing and enjoying rights, and the injunction was finally dissolved, the party could not take advantage of any rights which he had thus wrongfully prevented his adversary from enjoying. The Lord Chancellor said: "If there be a principle upon which courts of justice ought to act without scruple, it is this, to relieve parties against that injustice occasioned by its own acts or oversights, at the instance of the party against whom the relief is sought. That proposition is broadly laid down in some of the cases." In such cases it is reasoned by the great chancellor that the plaintiff, seeking relief by the mere circumstances of filing the bill, would be required to submit to every thing conscience and justice required. That the plaintiff seeking the relief impliedly says that he asks it on the terms of putting his adversary in exactly the same situation if it be determined in his favor. *Pulteney* v. *Warren,* 6 Vesey, Jr., 73.

This principle has found secure lodgment in equity jurisprudence, and is applied to varying kinds of cases involving its application. Frequently it is applied when an injunction stays an action, and it becomes barred, or right to execution lapses; and in many cases where an injunction wrongfully prevents the assertion of a right, or causes it to lapse, then the court treats the plaintiff wrongfully causing this effect to be reciprocally bound by the injunction. *Mercantile Trust Co.* v. *St.*

L. & S. F. Ry. Co., 69 Fed. Rep. 193; *Hutsonpeiler* v. *Storer,* 12 Gratt. (Va.) 579; *Marshall* v. *Minter,* 43 Miss. 666; *Work* v. *Harper,* 66 Am. Dec. 549; *Sugg* v. *Thrasher,* 30 Miss. 135.

Chief Justice SCHOLFIELD in applying this doctrine in a case in Illinois, said:

"The only function of an injunction is to stay threatened action and suspend the conflicting claims of right of the respective parties where they then are until they can be properly adjudicated. 2 Daniell, Ch. Pr. (5th Ed.) 1639, and note. And so it must necessarily follow that to allow one party to obtain any advantage by acting when the hands of the adverse party are thus tied by the writ or the order for it is an abuse of legal process which cannot be tolerated." *Lake Shore & M. S. Ry. Co.* v. *Taylor,* 134 Ill. 603, s. c. 25 N. E. 588.

While the hands of the town of North Little Rock were effectually tied by the injunction sought at the instance of the city of Little Rock and the street car company, then the street car company obtained from its co-plaintiff the franchise in question in territory over which the city of Little Rock would not have had at that time a vestige of jurisdiction except by reason of the injunction preserving the *status quo* in regard to franchises as well as police and municipal control. The statement of the situation shows more clearly than argument that it is inequitable to allow rights to be thus acquired.

It is argued that these cases proceed upon the ground that the party obtaining the injunction has violated its spirit, or that the restraining party took advantage of something he could not have had before, or that the position of the party enjoined was more favorable before the injunction. Many of the cases do proceed on such propositions, but the underlying principle is that the injunction acts reciprocally, and binds in spirit the moving party, while binding expressly the other.

While the city of Little Rock could have granted an absolute franchise the day it obtained the injunction, it did not do so, and when it did grant the absolute franchise, the city of North Little Rock was then under injunction from granting such franchise. If it had not been under such injunction, it could

have been granted a franchise over these streets, and the city of Little Rock could not have done so. The court is of the opinion that the principles of these cases apply to this case.

2. Counsel for the appellant contends that the city has no property interests in the streets; that it is a mere agent of the State, to whom the State has delegated control of the streets, and the State, in the first instance, and the city, in the second instance, is but a trustee for the public. Many authorities are cited on this proposition, and it is summed up in a recent case in the Supreme Court of the United States in this language:

"The statutes show that there was lodged by the Legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated. * * * That, in passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the State, as an agency of the State, cannot in reason be disputed." *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517.

The argument of counsel on this line is fully conceded as established in principle and by authority. But it does not follow from this status of the city that it may by its own act prolong its governmental agency, and grant rights otherwise divested from it by the State. In this case the State by appropriate legislation authorized the transfer of the control of the streets in question from one agent to another agent. The holding agent prolonged its holding by this injunction, contrary, as it was afterwards determined, to the act of the Legislature. Can it be said that on account of these governmental functions it is freed of the ordinary rules governing litigants? In *Fort Smith* v. *McKibbin,* 41 Ark. 45, the statute of limitations was invoked against the city's control of an alley of the city of Fort Smith. The doctrine of governmental agency was there presented, but this court held, on a conflict in the authorities, that the weight of authority and the better reason was in favor of applying the statute. In *Searcy* v. *Yarnell,* 47 Ark. 269, this court quoted

approvingly from *Bailey* v. *Mayor of New York,* 3 Hill, 555, as follows: "A municipal corporation, when in the exercise of franchises and the prosecution of works for its own emolument or advantage, and in which the State in its sovereign capacity has no interest, is answerable as a private corporation, although such works may also be in the nature of 'great enterprises for the public good,' and 'granted exclusively for public purposes belonging to the corporation in its public, political or municipal character.' Powers granted for private advantages, though the public may also derive benefit therefrom, are to be regarded as exercised by the municipality as a private corporation." In that case an estoppel was invoked against the town of Searcy. In fact, an estoppel may be invoked against the government of the United States, the government of a State, or a municipality. *Indiana* v. *Milk,* 11 Fed Rep. 389, and numerous authorities there cited; *La Fayette Bridge Co.* v. *Streator,* 105 Fed. Rep. 729; *United States* v. *La Chapelle,* 81 Fed. Rep. 152.

In the case of *Indiana* v. *Milk, supra,* Judge Gresham said: "Resolute good faith should characterize the conduct of States in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel." If the State may be estopped, certainly the agent of the State, who prolongs the power of the State in itself, may be estopped by reason of its action in so prolonging this power.

Passing, however, from the governmental agency of the city to the result of the action of the city in pursuance of this agency, in the recent case, heretofore referred to, of *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517, the court said: "That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract" is settled. (Citing authorities.) Then the court considered the question as one of general law, without treating the decisions of Ohio as binding, and reached the same conclusion. A like view is taken of the question in this State. "Now, a grant which has been accepted and acted upon by the grantee is a contract, within the meaning of the Constitution of the United States, which forbids laws impairing the obligation of contracts." *Hot Springs Electric Light Co.* v. *Hot Springs,* 70

Ark. 300. This is the general rule. McQuillin, Mun. Ord. § 238.

The grants in this case were duly accepted, and constituted contracts; and hence it follows, aside from any estoppel of the governmental agent, that the grant in question was a contract right, and subject to all the protection and liability of other contractual rights, and among the latter is the sound equitable rule that such rights can not be acquired in violation of an injunction obtained for the benefit of the contracting parties. All of these reasons would be applicable if a stranger had obtained the franchise; but when it is obtained from one party to the injunction in favor of a co-plaintiff therein, they are doubly applicable. Without pursuing the question further, the court is of opinion that neither the city of Little Rock nor the street car company can hold rights acquired over the streets of the Eighth Ward during the life of the injunction.

3. An estoppel is sought against the town of North Little Rock on account of its permitting the street car company to partially construct its line over these streets, and expend about $27,000 without protest or resistance. The city of North Little Rock was enjoined from interfering in any manner with the jurisdiction and control of the city of Little Rock over the Eighth Ward. The street car company was acting with open eyes; if it won its injunction suit, its rights were perfect, and necessarily it knew that, if it lost, its rights were builded solely on rights acquired while it tied the hands of the other municipality from exercising control over these streets. The case does not call for an estoppel on this ground against North Little Rock.

The decree in the court below allowed the street railway company sixty days to dispose of or remove the rails, cross ties and other material placed by it on the streets, and that is as favorable as it can ask on this score.

4. Deciding that no rights can be sustained under the ordinance of August 10, 1902, does not dispose of any rights which the street car company may have under the ordinance passed June 25, 1902. It is true that the ordinance of August 10 repealed the conditions precedent therein to its vesting

at once, and attempted to vest the franchise forthwith; but the view the court takes of that ordinance renders that action entirely nugatory, and leaves in force whatever right the street car company may have had when the jurisdiction of the municipalities over the Eighth Ward would have been changed but for the intervention of the injunction. The appellee seeks to avoid that proposition by invoking the doctrine of relation, and contends that the final act of annexation was carried back to the date the election was ordered, June 15, 1903. That contention overlooks the plain provision of the act under which the proceedings were had. It declares that, upon the declaration of the vote favorable to annexation by the council and entering it upon the record of the council such actions constitute the change of jurisdiction. Those acts raise the new flag over the territory annexed.

The obtaining of the consent of the county court of Pulaski County to the use of the free bridge before the franchise could be enjoyed was clearly a condition precedent to it vesting, and was a reasonable and enforcible condition precedent. Joyce on Electric Law, § § 187, 352, 358, and authorities cited in notes.

This and the other conditions mentioned in the ordinances would have to be complied with within a reasonable time. In determining reasonable time the subject-matter and all the circumstances are to be considered, as there can never be a fixed rule on such a subject. In this case the ordinance was passed June 25, 1903, and the election was held July 21, and the result would have at once been declared, and the jurisdiction changed, but for the injunction. The rights of North Little Rock must be determined as of date when it should have acquired jurisdiction. That date was less than one month after the passage of the ordinance. Therefore North Little Rock assumed jurisdiction over the Eighth Ward subject to a valid ordinance granting a franchise to certain streets therein subject to conditions precedent to be performed in a reasonable time from June 25, 1903. The subsequent proceedings did not alter that status, for the jurisdiction, when assumed in February, 1904, was, so far as these parties were concerned, as of date July 21, 1903, or as soon thereafter as the vote could be declared. The rights

acquired after that date should be cut off, and those acquired prior thereto given full force.

The court is of opinion that one month was not reasonable time to allow the street car company to comply with the conditions precedent, and it follows, therefore, that the street car company still has a reasonable time, under the ordinance of June 25, 1903, to comply with the conditions precedent.

The decree of the chancellor cancelling and annulling the ordinance of June 25, 1903, is erroneous, and the same is hereby reversed. The decree cancelling and annulling the ordinance of August 10, 1903, and all other matters therein, except as above stated, is affirmed.

BATTLE, J., (dissenting.) Judge Dillon says: "Public streets, squares, and commons, unless there be some special restriction, when the same are dedicated or acquired, are for public use, and the use is none the less for the public at large, as distinguished from the municipality, because they are situated within the limits of the latter, and because the Legislature may have given the supervision, control and regulation of them to the local authorities. The Legislature of the State represents the public at large, and has, in the absence of special constitutional restraint, and subject to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places."

He further says: "Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is in either case of the essence of the street that it is public, and hence, as we have already shown, under the paramount control of the Legislature as the representative of the public. Streets do not belong to the city or town within which they are situated, even although acquired by the exercise of eminent domain, and the damages paid out of the corporation treasury. The authority of municipalities over streets they derive, as they derive all their other powers, from the Legislature—from charter or statute. The fundamental idea of a street is not only that it is public for all purposes of free and unobstructed passage, which is its chief and primary, but by no

means sole, use." 2 Dillon on Municipal Corporations, § § 656, 683.

"The city corporation, as freeholder of the streets and highways in trust for public use, is but an agent of the State. Any control which it exercises over them, or the power of regulating their use, is a mere public or governmental power delegated by the State, subject to its control and direction, and to be exercised in strict subordination to its will. The corporation, as such, has no franchise in connection with the use of the streets for the transportation of passengers." *People* v. *Kerr,* 27 N. Y. 213; *Chicago* v. *Rumsey,* 87 Ill. 348, 355; *State* ex rel. v. *Madison St. Ry.,* 72 Wis. 617, 619; *Stanley* v. *Davenport,* 54 Iowa, 463.

Neither the State nor the cities have any proprietary interest in the streets. The public they represent has no interest in the soil. *Reichardt* v. *St. Louis & S. F. Ry. Co.,* 51 Ark. 491, 497. The power and control either has over the same is governmental. When they grant an easement over the streets, not common to the public at large, they do so, not because they have any proprietary interest in the land, but because of their control over the streets in a governmental capacity. *San Francisco* v. *Spring Valley Waterworks,* 48 Cal. 493, 529; *Detroit* v. *Detroit City Ry.,* 56 Fed. 867, 874; *City Ry.* v. *Citizens Ry.,* 166 U. S. 557, 563.

Under the statutes of this State, city councils have the care, supervision and control of all the public highways, streets and alleys within the city, and may grant an exclusive privilege of the streets of the city for street railway purposes for such term of years as they may agree upon. Kirby's Dig. § § 5530, 5448. This power extends to all the streets within the city, and continues so long as they remain in the city, regardless of the time they have been in or may remain in the city. It is exclusively governmental. The streets in question in this case, together with the care, supervision, control and power over the same, remained in the city of Little Rock until the 22d day of February, 1904, when they became a part of the city of North Little Rock, according to the act entitled, "An act to amend the laws in relation to municipal corporations," approved March 16, 1903. Acts of 1903, page 148.

The ordinances in question were passed by the city council of Little Rock while the streets of which they were the subjects of legislation were in that city, and within its territorial jurisdiction; and as an incident to that jurisdiction it had the power to pass them. Appellant accepted them, and undertook, by the expenditure of considerable sums of money and labor, to construct a railway over the streets according to the terms thereof. The ordinance thereby became a valid contract, binding upon the public, the city of Little Rock and of North Little Rock. *State* v *Madison St. Ry.*, 72 Wis. 617, 619; *City Ry.* v. *Citizens Ry.* 166 U. S. 557, 563; Elliott on Roads and Streets, § § 741, 742; 27 Am. & Eng. Enc. Law (2d Ed.), 15.

I think the ordinances should be sustained.

WOOD, J., concurs in this opinion.

ON REHEARING.

Opinion delivered September 30, 1905.

MCCULLOCH, J. Both parties seek a rehearing of the cause. Appellant asks that we set aside that part of the decision holding that ordinance No. 1019, passed August 10, 1903, is void, and that appellant acquired no rights thereunder, and appellee asks that we set aside that part of the decision holding that ordinance No. 1002, passed June 25, 1903, conferred a valid franchise.

Upon consideration we adhere to the conclusion heretofore announced, and both petitions for rehearing will be overruled.

Counsel for appellee insists that when the disannexation of territory was accomplished, the power reserved in ordinance No. 1002 by the city of Little Rock to revoke the franchise upon the refusal of the county court to confirm the right of way over the free bridge, as well as all other rights and powers reserved to that municipality, passed to the city of North Little Rock, and that the latter could then properly exercise the power of revocation. He contends that we should, for that reason, hold that appellant had no existent rights in the franchise conferred

by that ordinance. It is sufficient to say, in response to that contention, that the condition upon which the power of revocation rests, *i. e.*, the refusal of the county court to confirm the right of way over the free bridge, is not shown either in the pleadings or proof in this case to exist. Appellee's complaint alleges that application to the county court to confirm the right of way had never been made, and appellant's answer expressly admits this to be true. J. A. Trawick, the manager of appellant company, testified (which was all the testimony on the subject) that no application was made to the county court, though he had reason to believe, he says, from information received that permission to cross the bridge would not be granted.

The question of revocation is, therefore, not presented to us in this record, and we cannot properly pass upon it.

We merely held in the former opinion that ordinance No. 1002 conferred a valid franchise, and that at the time of the commencement of this suit an unreasonable time for the performance by the grantee of the conditions precedent therein named had not elapsed.

Whether or not it is now too late for appellant, under the circumstances, to perform them and preserve the granted rights; whether the power of revocation passed to appellee upon the disannexation of territory, and, if so, under what circumstances it may be exercised; and whether or not appellant may proceed to the enjoyment of the franchise without obtaining from the county court the right of way over the bridge, are all questions which we have not decided, and do not deem it necessary or proper upon the record in this case to decide. They must be brought before us in proper proceedings, and upon appropriate allegations and proof, before a determination can be reached.

Appellant asks further that the judgment of this court be modified so as to permit the tracks constructed under the franchise by appellant before the commencement of this suit to remain in the streets of North Little Rock pending further proceedings by appellant to test and secure enjoyment of its alleged rights under ordinance No. 1002, and to restrain said city from disturbing said tracks during such further proceedings. This, however, is provisional relief, which must be granted,

if at all, by the court of original jurisdiction in which such further proceeding is instituted, subject to review on appeal. We cannot grant it in this suit. Nothing in this decision will bar such relief, if appellant be shown in other respects to be entitled to it. Following the decree of the chancellor, appellant has in the original judgment here been allowed sixty days in which to dispose of or remove the tracks and material now on the streets of North Little Rock, and said period will run from this date.

To that extent the judgment heretofore entered here will be modified. In all other respects it will stand.

BROOKS v. YELL COUNTY.

Opinion delivered June 17, 1905.

ESTOPPEL—ACCEPTANCE OF DAMAGES.—Where the county court condemned land for road purposes, and caused the damages to the land to be assessed, and issued a warrant in payment thereof to the landowners, the latter, by accepting the warrant, are estopped from subsequently contesting the right of the county to use the land so condemned, and cannot, without the consent of the county, restore their right to contest by return of the money received on the warrant.

Appeal from Yell Circuit Court.

WILLIAM L. MOOSE, Judge.

Affirmed.

The county court of Yell County appointed viewers to lay out and designate a public road. They laid out the road across the land of Brooks, Neely & Company, and fixed the compensation at a sum named. Brooks, Neely & Company filed a motion to disapprove the report of the viewers, alleging numerous irregularities. The county court overruled the motion, and approved

the report of the viewers. Brooks, Neely & Company appealed to the circuit court.

On the trial in circuit court it was admitted that during the pendency of the appeal the agent of Brooks, Neely & Company received from the county court warrants for the amount of the damages awarded by that court to Brooks, Neely & Company for the land taken, but such agent offered at the trial to return same.

The court found the agent of Brooks, Neely & Company had cashed the warrant issued by the county court as damages for the land condemned herein for road purposes, and declared the law to be that, by reason of the collection of said warrants by said agent, Brooks, Neely & Co. were estopped from further recovery or relief herein. Brooks, Neely & Co. filed their motion for a new trial, which was overruled, and they appealed.

John M. Parker, for appellant.

The order of the county court locating the road for the viewers was void. Kirby's Dig. § § 3000, 3009. Notice of the location of the road should have been first given. Kirby's Dig. § 2999; 69 Ark. 587; 66 Ark. 292. The viewers must determine the amount to be paid in money for the property sought to be appropriated. Kirby's Dig. § § 2996, 3001, 3009; Const. Art. II, § 22; 28 Ark. 460; 39 Ark. 170. Appellants are entitled to recover the amount of deductions made. 56 Ark. 43; 62 Ark. 139.

No brief for appellee.

BATTLE, J. Yell County was entitled to the condemnation of a portion of the lands of Brooks, Neely & Company for a certain public highway over the same. The land was condemned for that purpose, and the damages caused thereby were assessed, and a county warrant was issued to them therefor, and was received and collected by them. They cannot now contest the right of the county to the land so condemned. The warrant was issued in payment of such damages, and they were not entitled to hold it to satisfy damages that might thereafter be assessed in

another proceeding to condemn other lands of theirs for the same highway. Having received and collected it, they accepted it for the purpose for which it was issued, and are estopped from claiming the land appropriated for the highway; and cannot, without the consent of the county, restore their rights by the return of the money received on the warrant.

Judgment affirmed.

GRAYSON-MCLEOD LUMBER COMPANY v. CARTER.

76 69
e77 374
76 69
d88 296

Opinion delivered June 17, 1905.

1. MASTER AND SERVANT—SAFE PLACE—RISK OF EMPLOYMENT.—The rule that a master is required to furnish his servant a safe place in which to work is not applicable where the servant is employed to wreck or tear down a structure, as the servant assumes the hazard of such employment. (Page 72.)

2. INSTRUCTIONS—CONFLICT.—The error of giving an erroneous and misleading instruction is not cured by giving without explanation a correct instruction on the same subject. (Page 73.)

3. MASTER AND SERVANT—DUTY TO INSTRUCT.—It was error to instruct the jury that the burden was on the master to instruct the servant as to the risks of his employment, unless there was evidence that the master knew, or ought to have known, that the servant did not appreciate the dangers to which he was exposed. (Page 73.)

Appeal from Clark Circuit Court.

JOEL D. CONWAY, Judge.

Reversed.

John H. Crawford, for appellant.

A servant who knowingly consents to work in a place of danger will be held to assume the attendant risk. 56 Ark. 53; 57 Ark. 82; 68 Ark. 316; 56 Ark. 232; 58 Ark. 168; 27 Minn. 367; 34 Minn. 94; 78 S. W. 363; 124 Ind. 326; 134 Ind. 625;

41 Minn. 289; 88 Wis. 376; 18 R. I. 513; 31 S. W. 525; 34 S. W. 298; 39 Fed. 65; 115 Ind. 566; 111 N. Y. 520; 54 Wis. 226; 66 Ia. 305; 18 Fed. 239; 126 Fed. 494. The court should have given the fourth instruction asked by appellant. 89 Mich. 249; 47 Minn. 128. An order from a master to a servant is immaterial, where the servant is exposed to an assumed risk. 34 N. E. 90; 46 N. E. 417; 66 Mich. 277; 50 N. W. 189; 9 N. E. 728; 12 Atl. 599; 43 N. E. 916; 54 Ill. App. 578; 167 Pa. St. 495; 86 Texas, 96; 31 Fed. 528. Instructions number 1, 2 and 3, given by the court, are erroneous. 56 Ark. 236; 59 Ark. 103; 53 Ark. 188; 65 Fed. 48; 67 Fed. 507.

J. E. Callaway and *C. V. Murry,* for appellee.

There was no error in the instructions of the court. 48 Ark. 345; 53 Ark. 128; 30 Ark. 17; 46 Ark. 396; 18 Am. St. 729; 25 *Ib.* 242; 57 Ark. 164; 18 S. W. 977; 20 N. W. 147; 24 N. W. 311. The judgment upon the whole case was right, and should not be reversed. 62 Ark. 228; 56 Ark. 600; 44 Ark. 556; 46 Ark. 542.

BATTLE, J. Henry Carter sued Grayson-McLeod Lumber Company for damages arising from personal injuries. He alleged, in his complaint, substantially as follows: "That defendant owns and operates a line of railway in connection with its sawmill at Gurdon. That plaintiff is a common laborer, and was in 1892 in defendant's employ, engaged in removing a railway trestle; that he was ordered to go upon a trestle by defendant's superintendent, who assured him that it was safe; that in obedience to said order, being unaware of the danger, he went upon the trestle, and while there at work it fell, and he was thrown to the ground, his hip broken, body and head seriously injured, from which he suffered great physical pain and mental distress, continuing for months, and was permanently injured, and made a cripple for life. He charges defendant with negligence, (1) in requiring him to go upon said trestle while it was being torn down, knowing that it was liable to fall, and that it was dangerous to be on it at the time, place and under the circumstances; (2) in being unmindful of his safety in having the

stringers of said trestle pulled down while he was upon it; and (3) in failing to use such care in the removal of the trestle as would subject the laborers thereon to the least possible danger. That before said injury he was a stout, active, healthy man, but since he is permanently disabled and incapable of earning a living. He prayed judgment for $5,000 damages."

Defendant in its answer specifically denied each and every act of negligence as charged in the complaint, and alleged that plaintiff was engaged in an extra hazardous line of duty, that of dismantling the bridges on its logging road; that whatever danger attended that work was as apparent to plaintiff as it was to defendant; and that, if there was any special danger, the defendant was not aware of it prior to the collapse and fall of the bridge. It alleged that plaintiff's injury grew out of the risks assumed by him, and which were incident to the dangerous character of the work in which he was engaged; that plaintiff was guilty of contributory negligence in exposing himself upon an apparently dangerous bridge.

The evidence adduced in the trial of this action tended to prove the following facts: At the time plaintiff was injured, as alleged in his complaint, he had been working upon defendant's "logging road" for some time. He was working with a crew, taking up the track of the road, wrecking or dismantling a trestle or bridge, taking from it the rails, bolts and spikes, and such ties and stringers as were good and might be serviceable elsewhere. The bridge was 640 feet in length, 23 feet high, and contained 40 "bents," each being 16 feet long. In obedience to the directions of defendant's superintendent, plaintiff and others were upon the bridge, pulling spikes that had been overlooked. While he was so employed, oxen were hitched to the "far end of the trestle" (from where he was at work) pulling off some stringers. The whole bridge fell, and plaintiff was injured.

Among other instructions, the court gave the following to the jury, over the objections of the defendant:

"1. The law requires the master to provide a safe place for the servant to do the work required of him; and, if it is a work of extra hazard, to warn him of the danger, and to direct

the performance of the work in such a way and with such care as will not subject the servant to a risk that a reasonably prudent man would not knowingly assume. So, if you believe from the evidence that the defendant failed in any particular to discharge this duty to the plaintiff, you must find for the plaintiff, unless the proof shows that, after being aware of the danger or by the exercise of ordinary care he might have known of it, the plaintiff failed to use reasonable care for his own safety.

"2. The plaintiff was not required to inspect the trestle to see if it was safe to go upon it; he was only required to use ordinary care. The law made it the duty of the defendant to see that it was safe; and the plaintiff had a right to rely upon the care, superior knowledge and judgment of his employer, and to act upon the assumption that the defendant would not expose him to unnecessary risk, and that it had [taken] and would take all proper precaution to guard him against danger.

"3. Although you may believe from the evidence that the plaintiff knew, or by the exercise of ordinary care might have known, the condition of the trestle in every particular, and the effort that was being made to pull it down, this alone will not preclude a recovery. Before the plaintiff can be charged with having assumed the risk, it must be proved that he not only knew these facts, but that he fully appreciated the danger. So, if you believe from the evidence that a person of plaintiff's experience and intelligence, under all of the circumstances, might reasonably have supposed that he could safely perform the work he was ordered to perform by the use of proper caution, he is not guilty of contributory negligence, unless the proof shows that he failed to use proper care for his own safety, after being aware of the danger, and you should find for the plaintiff."

Other instructions were given. The jury returned a verdict against the defendant for $1,500. It appealed.

The instructions copied above are inapplicable to this case. In this case the appellee was engaged in tearing down a bridge, and in continually changing his place of work, and sometimes in making it more insecure. There was no duty to furnish him a safe place in which to work, since his employment made it his

duty to tear down and to change and destroy his places for work, and to make them safe or unsafe as his work rendered them; and was such as to place it out of the power of his employer to perform such duty. He assumed the hazards of this employment. *Gulf, C. & S. F. Ry. Co.* v. *Jackson,* 65 Fed. Rep. 48; *Finalyson* v. *Utica Mining & Milling Co.,* 67 Fed. Rep. 507, 510.

It is true that the court, at the instance of appellant, instructed the jury as follows: "The doctrine that the master or employer must furnish its servant or employee with a safe place in which to work does not apply to a case where the servant or employee is engaged, with knowledge of the dangers, to do work obviously and inherently hazardous, such as wrecking or repairing structures. In such cases the servant or employee takes upon himself the extra hazardous risk of the employment; and if he is injured, he cannot recover, unless the master or employer is guilty of some act of negligence, or, with knowledge of some special danger unknown to the servant, sends him into the dangerous position."

This did not explain the instructions given over the objections of the appellant, but is in irreconcilable conflict with them.

In the third instruction given over the objection of the defendant the court told the jury: "Although you may believe from the evidence that the plaintiff knew, or by the exercise of ordinary care might have known, the condition of the trestle in every particular, and the effort that was being made to pull it down, this alone will not preclude a recovery. Before the plaintiff can be charged with having assumed the risk, it must be proved that he not only knew these facts, but that he fully appreciated the danger." This is not correct. The burden was not upon the defendant to prove that the plaintiff fully appreciated the danger. There was no evidence that it knew, or ought to have known, that he did not appreciate the danger to which he was exposed, and there was no duty to instruct; and, of course, there was no liability for his failure to appreciate a danger, when there was no duty to instruct. See *Southwestern Telephone Co.* v. *Woughter,* 56 Ark. 210, 211; *Railway Company* v. *Torrey,* 58 Ark. 228; *Ford* v. *Bodcaw Lumber Co.,* 73 Ark. 49.

The instructions given over the objections of the appellant were calculated to mislead the jury, and were prejudicial.

Reverse and remand for a new trial.

---

76 74
f78 181
81 230

76 74
e90 83

DUFFIE v. PRATT.

Opinion delivered June 17, 1905.

1. SALE WITH WARRANTY—WAIVER.—Where goods were sold by sample, with warranty as to quality, and it was stipulated that the vendees should examine and inspect the goods at once upon their delivery, and that, if they failed to comply with the warranty, the vendees should, within five days from date of delivery, give notice of such failure to the vendors, but, if such notice was not given, the warranty should be waived, the failure to give the notice was an acceptance of the goods, and a waiver of the warranty. *Pratt* v. *Meyer,* 75 Ark. 206 followed. (Page 79.)

2. CONTRACT OF SALE—WHEN SEVERABLE.—Where a contract for the sale of a bill of goods embraced numerous items, each of which was sold by sample, and was warranted to be the same in quality as the sample, and the price to be paid was apportioned to each item, the contract was severable, and the purchaser was bound to accept such of them as corresponded to the samples. (Page 80.)

3. SAME—RESCISSION.—In the case of a severable contract of sale of numerous articles of merchandise by sample, the purchaser was not entitled to rescind the entire contract because one of the articles did not come up to the sample. (Page 81.)

4. WARRANTY—WHEN BROKEN.—Where a contract for the purchase of a bill of goods was severable, and not entire, and stipulated that the vendors warranted each article to be the same in quality as the sample furnished, but that the warranty would be waived by failure to give notice of its breach within five days after delivery of the goods, the acceptance of each article depended upon a distinct test, and the purchasers could not claim a breach of warranty as to the entire contract because one article failed to come up to the sample. (Page 81.)

5. SAME—GUARANTY OF PROFITS AS AFFECTING SEVERABILITY.—The fact that a contract for the sale of a bill of goods contained a guaranty of profits for a term of years from all goods purchased during the year did not affect the severability of the contract. (Page 81.)

Appeal from Garland Circuit Court.

CHARLES D. GREAVES, Special Judge.

Affirmed.

Wood & Henderson, for appellants.

The contract was not a severable one. 7 Am. & Eng. Enc. Law, 95; 75 Ill. 205; 41 N. E. 465; 43 N. W. 864; 44 Pac. 544; 84 Am. Dec. 728.

Leslie & Huff, for appellees.

The contract sued on was a severable one, consisting of several distinct items, and founded on a consideration apportioned to each. Beach, Contracts, § 731; 40 Cal. 251; 66 Pa. St. 351. Appellants failed in their defense as to the quality of the goods. Mech. Sales, § § 1320, 1328; 7 Allen, 29; 30 Oh. St. 671; 1 Wall. 359.

BATTLE, J. This action was instituted by Walter Pratt & Co. against S. M. Duffie & Co. upon the following written contract:

"Walter Pratt & Co. hereby guaranty that the purchaser's gross profit from the sale of the perfumery and toilet preparations bought under this order and hereafter purchased of said firm will not be less than 33 1-3 per cent. of the amount of this order each year for a period of three years from date of invoice, and the said Walter Pratt & Co. further agree and hold themselves bound at the end of each year, if the gross profits do not amount to 33 1-3 per cent. of the amount of this order for that year, to pay to the purchaser a sufficient sum of money by New York or Chicago draft to make up the deficiency, if there be any, or to buy back at the purchase price at the expiration of this agreement all goods remaining on hand at that time. The foregoing is conditional on the purchaser keeping the goods tastefully displayed in his store in the show case furnished by us for that purpose, purchasing from us at least semi-annually sufficient goods to keep this department complete and up to the

amount of this order, making settlement for all goods purchased of us as provided in order, sending us by registered mail at the end of each year a complete and accurate list of all goods sold, with a correct inventory of all goods on hand at that time, allowing no article to go for a less profit than is usually made on this class of goods, and using reasonable diligence in promoting the sale of these goods. Goods shipped to purchaser and not on hand or returned will be considered sold. Bond to be filed with Security Bank covering all agreements in the order.

"Exchange—Any goods contained in this order may be returned to us for exchange at any time. To protect us from unreasonable demands for exchange, we require that goods so returned must be accompanied by a new order for goods of an equal value. We pay freight to factory on goods returned for exchange.

"Warranty—All goods are warranted to be same in quality, material and in all other respects as samples shown by salesman. The purchaser agrees to examine and inspect the goods at once upon their arrival at destination, and if said goods fail to comply with said warranty he shall within five days from date of arrival at destination give detailed written notice of such failure by registered letter to Walter Pratt & Co., Chicago, Ill.; otherwise, all warranty of said goods is waived. Goods cannot be returned for credit on account, except as herein provided.

"We deliver all goods to purchaser by delivering them to the transportation company herein specified, purchaser to pay all transportation charges.

"The following is the list of goods contained in this order:

			Per Doz.	Am't.	R't'l.
4	Doz.	Handkerchief Extracts, assorted, on easel...	$ .75	$ 3.00	$ .10
2	"	Handkerchief Extracts, assorted, No. 745...	2.00	4.00	.25
3	"	Handkerchief Extracts, assorted, No. 755...	4.00	12.00	.50
4	"	Sachet Powders	.75	3.00	.10
2	"	Persian Violet Perfume	.40	.80	.05
1	"	Princess Toilet Water, No. 237.....	4.00	4.00	.50
½	"	Princess Toilet Water, No. 247.....	4.00	2.00	.75
1	"	Farina Cologne	4.00	4.00	.50

2	Doz	Velvet Talcum Powder	.75	1.50	.10
1	"	Roger's Hair Grower	6.00	6.00	.75
1	"	Benzo Hazel Cream	2.00	2.00	.25
2	"	Mentholated Cream	4.00	8.00	.50
1	"	Invisible Toilet Powder (white)	2.00	2.00	.25
1	"	Invisible Toilet Powder (flesh)	2.00	2.00	.25
1	"	Pratt's Velvette	6.00	6.00	.75
1	"	Pratt's Dentifrice	2.00	2.00	.25
1	"	Pratt's Tooth Powder	1.65	1.65	.25
3	"	Rosalana	4.25	12.75	.50
1	"	Princess Tissue Developer	6.25	6.25	.75
2	"	Pratt's Toilet Soap	.75	1.50	.10
2	"	Quinine Hair Tonic	6.00	12.00	.75
1	"	Foot Relief	2.00	2.00	.25
1	"	Invisible Complexion Powder (white)	4.00	4.00	.50
1	"	Invisible Complexion Powder (flesh)	4.00	4.00	.50
1	"	Invisible Complexion Powder (Brunette)	4.00	4.00	.50
1	"	Cherry Lip Pomade	2.00	2.00	.25
2	"	Pratt's Shampoo Powder	2.00	4.00	.25
½	"	Bulk Sachet Powder, violet	3.00	1.50	
½	"	Bulk Sachet Powder, rose	3.00	1.50	
½	"	Bulk Sachet Powder, heliotrope	3.00	1.50	
½	"	Crushed Sachet Powder, carnation	3.00	1.50	
½	"	Crushed Violet Handk'f Extract, No. 923	4.00	2.00	.50
½	"	Crushed Violet Handk'f Extract, No. 946	6.00	3.00	.75
½	"	Persian Rose Handk'f Extract, No. 933	4.00	2.00	.50
½	"	Persian Rose Handk'f Extract, No. 956	6.00	3.00	.75
1	"	Pearl Toilet Powder	.75	.75	.10
1	Bottle	Pink Bulk Perfume, White Rose	4.00	4.00	
1	"	Pink Bulk Perfume, White Lilac	4.00	4.00	
1	"	Pink Bulk Perfume, Frangipanni	4.00	4.00	
1	"	Pink Bulk Perfume, Snow Lily	4.00	4.00	
1	"	Pink Bulk Perfume, Jockey Club	4.00	4.00	
1	"	Pink Bulk Perfume, Heliotrope	4.00	4.00	
1	"	Pink Bulk Perfume, Blue Gentian	4.00	4.00	
1	"	Pink Bulk Perfume, Jasmine	4.00	4.00	
1	"	Pink Bulk Perfume, Red Carnation	4.00	4.00	
1	"	Pink Bulk Perfume, Crab Apple Blossom	4.00	4.00	
1	"	Pink Bulk Perfume, Swiss Violet	4.00	4.00	
1	"	Pink Bulk Perfume, Wild Thorn Blossom	4.00	4.00	
1	"	Pink Bulk Perfume, Crushed Violets	6.00	6.00	
1	"	Pink Bulk Perfume, Persian Rose	6.00	6.00	
		Total amount of this order		$194.20	

1 Atomizer.

1500 Circulars advertising this line of goods.

1500 Circulars describing the pictures going with the Perpetual Advertising System.

Name and address of purchaser printed on above circulars.

3 Bottles of Perfumery, retail price 50c each, to pay for distributing circulars.

1 Graduate.

6 Portfolio, No. 5607, containing 10 sample pictures belonging to the Advertising System.

100 Booklets, "Suggestions."

8 Sterling Silver Thimbles, assorted sizes.

97 Envelopes containing advertising and drafts good for one Sterling Silver Thimble each, mailed by Walter Pratt & Co. to a list of 97 names furnished by the purchaser.

1 Walter Pratt & Co. Regulation Oak Show Case, wood doors and wood shelves. Size 21 in. wide, 48 in. long, and 40 in. high.

"Terms—Five per cent. fifteen days from date of invoice, or two, four and six and eight months net, divided into four equal payments, each for one-fourth of the amount of this order. When long terms of credit are taken, account must be closed by notes without interest, due in two, four, six and eight months from date of invoice. Accounts not closed as provided above will be subject to sight draft without further notice. Separate verbal or written agreements with salesmen are not binding upon Walter Pratt & Co. All conditions of sale must be shown on this order.

"Positively no goods on commission or open account. This order not subject to countermand.

"Hot Springs, Ark. Feb. 27, 1902.

"Walter Pratt & Co., Chicago, Ill.—Gentlemen: Please ship us, care of Burlington, Cedar Rapids & Northern Ry., the assortment of goods listed above, like samples shown us by your salesman, at the prices specified and in accordance with all the terms above specified, which we have carefully read and find to be complete and satisfactory. We have no agreement or understanding with salesman except as printed or written on

this order. Receipt of duplicates of this order from your salesman is hereby acknowledged.

"Name of purchaser, S. M. Duffie & Co.

"WALTER PRATT & Co.

"By M. Sankey, Salesman."

In making the foregoing contract, plaintiffs were represented by a traveling salesman, who sold the goods referred to in the contract to the defendants by samples exhibited to them at the time the order was made. The goods were shipped, and were received by the defendants on the 9th of March, 1902. On the 17th of the same month they notified the plaintiffs of the receipt. Defendants tested the White Lilac perfume, which was sold to them at the price of $4, and, on a day subsequent to the 17th of March, 1902, refused to accept the goods, because the lilac perfume did not correspond to the sample by which it was sold to them. They did not test any of the remainder of the goods by the samples by which the same were sold.

According to the terms of the contract, the defendants waived the warranty and accepted the goods, and thereby became bound to pay for them, having failed to give notice of the failure of the goods to comply with the warranty within five days after they (defendants) received them. *Pratt* v. *Meyer,* 75 Ark. 206.

But the defendants asked the court to instruct the jury as follows: "4. The contract between plaintiffs and defendants is an entire contract; and defendants were not required to accept any of said goods, if any material part of the goods shipped under said contract were different and inferior in quality from the goods ordered."

The court refused to instruct the jury as asked, but instructed them as follows:

"The contract shows that several articles of goods were included in one and the same order, and that a price was fixed in said contract for each separate article. I therefore instruct you that said contract is not an entire, but a severable contract; and if any of said articles correspond with the samples, then defendants were bound to accept each of said articles as cor-

responded with samples, and are liable to plaintiffs for the value thereof, as the same were fixed in said contract.

"If you find from the evidence that the defendants, within a reasonable time after the receipt of the goods mentioned in said contract, examined a bottle of lilac mentioned in said contract as bulk perfume, and upon such examination it was found that said bottle of lilac did not correspond with the sample, then defendants had the right to refuse to accept said bottle of lilac.

"If defendants did not examine any of said goods except a bottle of lilac, then they are bound to have accepted all of said goods which they did not examine, and are liable to plaintiffs for the value thereof, as the same are fixed in said contract.

"If you find from the evidence that the bottle of lilac mentioned in said contract as bulk perfume did not correspond with the sample, then you will find that that is evidence tending to show that all the bulk perfume mentioned in said contract did not correspond with the samples; and if you find that the bulk perfume mentioned in said contract did not correspond with the samples, then defendants had the right to refuse to accept said bulk perfume; and if they did refuse to accept the same, they are not liable to plaintiff therefor."

The jury returned a verdict for plaintiffs in the sum of $134.20. They evidently deducted from the amount of the order $60, the aggregate price for which the "bulk perfumes" sold. The defendants appealed.

Assuming that the question as to the nature of the contract was properly raised in the trial court, was the contract sued on entire or severable?

Mr. Parsons, in his work on the Law of Contracts, says: "Any contract may consist of many parts; and these may be considered as parts of one whole, or as so many distinct contracts entered into at one time, and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case

by considering the language employed and the subject-matter of the contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." 2 Parsons on Contracts (9th Ed.), bottom page 672.

Judged by this citation, the contract in this case is severable. The list of goods embraced in the order sued upon consists of fifty items, with the price for which each sold placed opposite the same, amounting in the aggregate to $194.20. The price of no single item exceeds $12.75. Each item was sold by a sample, and was warranted to be the same in quality, material and in all other respects as sample; the contract as to each article, in that respect, being different; and the purchaser was furnished with a sample to enable him to determine whether the goods shipped were such as he agreed to buy. The acceptance of each depended upon a distinct test; and the price to be paid for each was stipulated. According to the general rule in such cases, the contract is several. *Lucesco Oil Company* v. *Brewer,* 66 Pa. St. 351; *Wooten* v. *Walters,* 110 N. C. 251, 256; Beach, Contracts, § 731; Clark, Contracts (2d Ed.), page 453.

The guaranty of profits set out in the paper sued on does not affect the severalty of the contract of sale. It applied to all the goods purchased in the same year, and was to continue for three years. The sale was in no way dependent on it.

Appellants have no right to complain of the judgment against them.

Affirmed.

76 82
80 541

76 82
84 236

SPRATLIN v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered June 17, 1905.

INTERSTATE COMMERCE—PENALTY FOR EXCESSIVE CHARGE FOR TRANSPORTATION.—The act of February 27, 1885, making it unlawful for any railroad company in this State to charge and collect a greater sum for transporting freight than is specified in the bill of lading, and imposing a penalty for so doing, is, when applied to shipments of freight into the State from without, in conflict with the Interstate Commerce Act of February 4, 1887, c. 104, § 6, as amended by act of March 2, 1899, c. 382, and must therefore give way.

Appeal from Arkansas Circuit Court.

GEORGE M. CHAPLINE, Judge.

Affirmed.

Spratlin sued the St. Louis Southwestern Railway Company, alleging that he purchased a carload of corn at a point on defendant's road in the State of Missouri, and shipped it over defendant's line, consigned to himself to De Witt, Arkansas; that the bill of lading stipulated that the freight on the carload was $56; but when the car arrived, defendant demanded and plaintiff was compelled to pay $12 overcharge in freight and $11 in demurrage. Plaintiff asked that he have judgment for the $23 overcharge and demurrage, and also that he recover, under the act of February 27, 1885, a penalty of $56 per diem for the eleven days that it was wrongfully withheld.

The court found the facts as alleged in plaintiff's complaint, and gave judgment in his favor for $23, but disallowed the penalty. Plaintiff appealed.

P. C. Dooley, for appellant.

Our statute does not interfere with interstate commerce; it is intended only to prevent discrimination, and to make railway companies adhere to established rates. 17 Wall. 567; 95 U. S.

465; 49 Ark. 291; 107 U. S. 38; 52 Fed. 690; 21 La. Ann. 256; 23 Ia. 349; 55 Nev. 240; 130 Mass. 1; 51 Miss. 335; 52 Fed. 690; 119 N. C. 120; 120 Fed. 144; 57 Fed. 276; 186 U. S. 380; 68 Ark. 38; 65 Ark. 415; 162 U. S. 650; 102 U. S. 691.

Samuel H. West and *Bridges & Wooldridge,* for appellee.

The interestate commerce act superseded the act of 1885 of the General Assembly of Arkansas. 68 Ark. 38; 128 U. S. 190; 165 U. S. 631; 195 U. S. 332; 2 Peters, 252; 118 U. S. 571; 125 U. S. 485; 120 U. S. 489; 154 U. S. 473; 184 U. S. 36; 128 Fed. 533; 40 S. W. 431; 81 Fed. 803; 119 Ala. 546; 92 Fed. 349; 43 S. W. 610; 167 U. S. 642.

WOOD, J. The act of 1885, upon which this suit is based, is a copy of the Laws of Texas, Extra Session 1882, ch. 26, p. 35. The Supreme Court of the United States in *Gulf, C. & S. F. Ry. Co.* v. *Hefley,* 158 U. S. 98, held the Texas statute was in conflict with the Interstate Commerce Act of February, 1887, as amended by act of March, 1889. That court said: "The State statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The State statute must therefore give way."

The court shows how the State and national law conflict. It is only necessary to refer to that opinion as controlling this case. When this court passed upon the act of 1885 in *Little Rock & Ft. Smith Ry. Co.* v. *Hannaford,* 49 Ark. 291, and sustained it as a proper exercise of the police power, Congress had not passed the act of March 2, 1889, amending the interstate commerce law of February, 1887, in the particulars named therein, and the decision of the Supreme Court of the United States construing the effect of the two statutes had not been rendered.

The decision of the Supreme Court of the United States, *supra,* construing the two statutes is conclusive of the question here presented.

Judgment affirmed.

DANIELS v. STATE.

Opinion delivered June 17, 1905.

1. MURDER—SUFFICIENCY OF INDICTMENT.—An indictment for murder which uses the word *willingly* in lieu of "willfully" is not defective where it charges that the defendant "unlawfully, feloniously and of his malice aforethought and after deliberation and premeditation did kill and murder," etc., as these words include all the meaning which could be conveyed by the word "willfully." (Page 84.)
2. JUROR—CHALLENGE—PRESUMPTION.—Where the record shows that the State was permitted to challenge a juror peremptorily after he had been accepted by both sides, it will be presumed, in the absence of a contrary showing, that the challenge was allowed before the juror had been sworn in chief, as prescribed by Kirby's Digest, § 2357. (Page 85.)

Appeal from Sevier Circuit Court.

JAMES S. STEEL, Judge.

Affirmed.

Brizzolara & Fitzhugh, W. H. Collins and *Pole McPhetrige,* for appellant.

Robert L. Rogers, for appellee.

WOOD, J. At the September, 1904, term of the Polk Circuit Court the grand jury returned an indictment against appellant, charging him with murder in the first degree, and, having been granted a change of venue to the Sevier Circuit Court, he was, at the January term thereof, tried upon the plea of not guilty, convicted of murder in the second degree, and his punishment assessed at five years in the penitentiary. His motion for a new trial having been overruled, he appealed to this court, alleging numerous grounds for reversal of the judgment.

The indictment was sufficient. The word "willingly" in the indictment instead of "willfully," which latter word was doubtless intended, does not render the indictment insufficient. The utmost that can be claimed is that the word "willfully" was

omitted. But the indictment, with the word "willfully" omitted, still charges that the defendant "unlawfully, feloniously and of his malice aforethought and after deliberation and premeditation did kill and murder," etc. These words include all the meaning that could be conveyed by the word "willfully."

The record shows that "T. B. Holman, who was a juror and a member of the regular panel of the jury, during the impaneling of the jury in this action, was duly accepted as a juror herein by the State and the defendant, and the State was permitted by the court, over the objection and exception of the defendant, to excuse said T. B. Holman by peremptory challenge, without stating or showing any cause therefor, after the said Holman had been accepted by the State and the defendant as a juror as aforesaid." This record does not show that the State was permitted to exercise this peremptory challenge "after the jury had been made up," as stated by counsel for appellant. As every presumption, in the absence of a showing to the contrary, must be indulged in favor of the regularity of the proceedings, we must presume that the State exercised this peremptory challenge before the juror was sworn in chief, as prescribed by section 2357, Kirby's Digest. These are the only grounds for a new trial which the verdict could not cure, and these are not well taken. All the others relate to alleged errors of the court during the progress of the trial, which do not affect the integrity of the trial itself, and which, however egregious, the verdict of the jury upon the uncontradicted evidence has cured.

The undisputed facts show that appellant was guilty at least of murder in the second degree, and the jury gave him the lowest punishment for that offense. Therefore, no error in the introduction of the evidence complained of, the argument of counsel, or the instructions of the court could be prejudicial to the rights of appellant. His own evidence shows that he was an engineer on the Kansas City Southern Railroad, and on the night of August 18, 1904, he returned from a trip on the road to his home at Mena, Ark. He arrived at his home about 1:25 a. m., and found the deceased, Dr. Magness, in his house, under circumstances which indicated clearly that he was committing adultery with his wife. The appellant chased the doctor, who

was partially disrobed, from his house, failing, however, to catch him. The doctor left behind in the house of appellant a shirt, collar, cuff, necktie and hat, which afforded indisputable evidence of his identification. Besides, the unfaithful wife, when called upon by appellant for an explanation, frankly confessed to appellant that Dr. Magness was the author of her ruin, and told her husband that Dr. Magness had first accomplished his purpose by administering to her on one occasion a narcotic, when she had called him in on a professional visit. Dr. Magness was the family physician and intimate friend of appellant. The appellant proceeds to tell how the betrayal of confidence by his family physician and friend and the disclosure of his wife's infidelity so preyed upon his mind that he could neither eat nor sleep. He shows that during the remainder of the night of the awful discovery he could not sleep. In fact, he says he neither ate nor slept from the time he came home and caught the doctor in his house until he had killed him. He says his wife had told him that Dr. Magness had said that if he (appellant) ever came home and found him (Magness) in their house, he (Magness) would kill him (appellant). "Knowing," he says, "that he had just threatened my life, and finding this murderous thing (pistol) in my house, I saw nothing but to go prepared, as I firmly believed that man would kill me. That is the reason I took the pistol, and went to the hardware store, and bought the cartridges." He further portrays his feelings and subsequent conduct as follows:

"I could get no satisfaction from life, knowing that that man had robbed my home and taken from me everything that I had. I sought in some manner redress for the harm and disgrace that he brought upon me. I knew that he would kill me on sight. I looked for him on the street the next day, but failed to find him. I was on the streets most of the day, but I did not see him anywhere, and feel sure that he was hiding from me. That night I could not sleep, and the next morning I went down town, and as I passed the drug store I saw his horse and buggy hitched there in front, but did not see him. I went into the drug store, passed the last opening between the counters on the lefthand side. I went behind these counters in an upright

manner, as straight as I could walk, and as I got about half way between the counters, Dr. Magness came out from behind the prescription case. He had a bottle of medicine in his hand, and from his appearance he was reading the directions on the label. I started toward him, and when I got in about ten feet of him he saw me, and as he did so he went for his gun. Up to that time my right hand was by my side. When I saw him reach for his gun, I knew the time had arrived, and that one of us was going to die. I pulled my gun, and while he was looking at me I shot him in the lip. I shot him twice more, while he was standing upright, over the heart. At that he fell over on his back, and while he was falling he stumbled over a chair, which turned his right side toward me while he was falling, and I shot him twice more. That man's back was never to me at any moment of the shooting. I did not make any step toward him, nor did I shoot him while on the floor. I shot him to protect my life. He had ruined my home, and had threatened to kill me, and I believed that he would do it."

This testimony reveals the settled purpose of appellant, from the time he found Dr. Magness in his home, to seek and take his life. About two days intervened, the appellant not wavering one moment in his determination. All the eyewitnesses save appellant show that appellant shot the deceased in the back, and when he was apparently unaware of appellant's presence. The pathetic portrayal of the deplorable circumstances which destroyed appellant's home and happiness, and caused him to take the life of the wicked author of it all, can but elicit the profound sympathy of every man who loves virtue and appreciates conjugal fidelity and domestic peace. But, nevertheless, the law, in its wisdom, defines the taking of human life under the circumstances as detailed by appellant as murder; and, so long as it is thus written, courts and jurors must obey its plain mandate.

Affirmed.

76 88
76 541

76 88
82 109

HOT SPRINGS RAILROAD COMPANY v. MCMILLAN.

Opinion delivered June 17, 1905.

1. JURY—PROVINCE.—It is the exclusive province of the jury to determine disputed questions of fact. (Page 96.)
2. RELEASE—EVIDENCE.—Where plaintiff's contention was that a release signed by him, which recited the payment of a sum as consideration thereof, was obtained by fraud, it was admissible for him to prove that such sum was due him according to the custom of defendant company in dealing with its disabled employees, and that when he signed same he did so under the impression that he was signing a receipt for money due him as a disabled employee, and not a release. (Page 97.)
3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—It was not an abuse of discretion to refuse a new trial on the ground of the newly discovered evidence of one of the appellant's employees if there was evidence that such witness was present at the trial for the purpose of assisting in the case, and could have testified, even though he neglected to inform appellant's counsel of what he knew until after the trial. (Page 98.)
4. APPEAL—QUESTION NOT RAISED BELOW.—That the trial court erred in rendering a personal judgment against one of the appellants will not be considered on appeal for the first time. (Page 98.)

Appeal from Hot Spring Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Affirmed.

This suit was brought by McMillan against the Hot Springs Railroad Company to recover damages for the crushing and mangling of his left hand. McMillan was a brakeman of the Hot Springs Railroad Company, and his injury was caused while he was coupling cars at Butterfield. He charged that the liability of the railroad company grew out of negligence in failing to provide him with suitable and safe appliances with which to make the coupling in this: that the holes in the drawhead of one of the cars were out of shape, and the pin furnished to make the coupling was too large to pass readily through said holes. Plaintiff charged that by reason of the imperfect, unsafe and dangerous condition of these appliances his hand was caught between

the drawheads, while he was attempting to make the coupling, and badly crushed and mangled; that plaintiff was in the discharge of his duty as brakeman, and did not know of, and by the use of ordinary care could not have discovered, the dangerous condition of such appliances. Damages were laid at $25,000.

The Choctaw, O. & G. Railroad Company is made defendant because, since the injury, it had purchased the Hot Springs Railroad Company, and was operating it when suit was brought. The Hot Springs Railroad Company answered, setting up the following alleged release in accord and satisfaction, viz:

"In consideration of the sum of three hundred forty-six and 5-100 dollars ($346.05) paid to me by the Hot Springs Railroad Company, and the agreement of the said company to pay me fifty dollars ($50) in addition to the above sum, and to employ me in such capacity as I may be able to work for a period of six months from the date hereof at a salary of not less than fifty dollars ($50) per month, I hereby release said company from any and all liability it may be under to me for and on account of an injury received by me while working as a brakeman on the railroad of said company on or about the 2d of February, 1900.

"Witness my hand and seal October 1, 1900.

(Signed.) "A. H. MCMILLAN."

It also denied all the material allegations of the complaint, and set up contributory negligence.

The Choctaw, Oklahoma & Gulf Railroad Company filed a separate answer, denying in detail all of the allegations of the complaint, and admitting its purchase of the Hot Springs Railroad, and that it was at that time in the possession of and operating the same, but denying that, as a purchaser or otherwise, it assumed all or any of the debts and liabilities of the Hot Springs Railroad Company, and denying that it was liable to the plaintiff for said alleged injury.

The plaintiff replied to that part of the answer of the Hot Springs Railroad Company setting up a release as follows:

"Plaintiff alleges that he never at any time agreed to release the defendant, Hot Springs Railroad Company, from the damages resulting to him from the injury complained of herein; that it is true the said defendant Hot Springs Railroad Company presented the plaintiff a writing containing a full release to said ccompany from such damages, but plaintiff refused to make or sign such release; that at the time said writing was presented to him another writing was also exhibited to him, which was simply a receipt for money which had been paid to him by said company during the time he was disabled from work on account of said injuries as salary that had accumulated to him during such time; that it was customary for said company to allow the time of its employees who were disabled from work by injuries received while in the discharge of their duty to continue, and to pay such employee for such lost time without any deduction, and that said company paid plaintiff said salary during the time he was unable to work, and in that way said sums of $346.05 and $50 were paid to plaintiff, and the writing that plaintiff signed, or intended to sign, was the receipt for said money, and plaintiff says that if said company has any paper with his name thereto as that a copy of which is exhibited with said answer, his signature thereto was obtained by and through the fraudulent acts of Fred A. Bill, the agent and employee of said company, at the office of John M. Moore, in the city of Little Rock, in substituting said writing which he has refused to sign for the receipt which he had agreed to sign, and which he intended and believed he was signing.

Motions to strike this reply were overruled.

Upon the question of fraud in the execution of the release, the evidence of A. H. McMillan shows that he was notified by telegram from Mr. Bill, the superintendent of appellant Hot Springs Railroad Company, to be ready on specified time to go to Little Rock in company with Mr. Bill. At the appointed time Mr. Bill went to Malvern, where McMillan lived, and had McMillan accompany him to Little Rock and to the office of Mr. Moore, the attorney for said Hot Springs Railroad Company.

As soon as they entered the office of Mr. Moore, a paper was exhibited to McMillan by Mr. Moore which Mr. Moore stated they would like for McMillan to sign. McMillan read the paper, and it proved to be a release, the paper introduced in evidence, and, after reading it, McMillan refused to sign it, stating that he could not sign his rights away. Mr. Moore then told him there was no danger in signing the paper at all, that it was only a matter of form, of business, and it was not signing his rights away. After discussing the matter for a while in Mr. Moore's office, siting at a desk, Mr. McMillan got up, and went out of the room into the hall, and Mr. Moore followed him. Mr. Bill remained seated at the desk in Mr. Moore's office, while McMillan and Mr. Moore were out in the hall. After remaining in the hall awhile, McMillan went back into the room, and sat down at the desk where Mr. Bill was. Mr. Bill then showed McMillan a paper, which had a statement of the amounts paid to McMillan by the railroad company as a salary on the pay day of each month from the time McMillan was hurt up to that time, and asked McMillan to sign it, stating to him that it was a matter of form, and he wanted to send it to Mr. Morton, the president of the company, to show that everything was all right, and that McMillan had reported for work, and had gone back to work. The paper which Mr. Bill showed to him and requested him to sign was not the release which was introduced in evidence, and did not have anything in it about releasing the railroad company from damages on account of the injury. The paper which Mr. Bill requested him to sign, and which he thought he signed, was not the paper at all which was introduced in evidence. When McMillan signed the paper, he and Mr. Bill were sitting together alone by the desk or table. Mr. Moore was called by some one, and had stepped out. There were a lot of papers scattered around on the table at the time. McMillan did not intend to sign the release, and refused to do so, and thought he was signing the paper which Mr. Bill had requested him to sign, and which had nothing in it about releasing the railroad company, but it contained the amount of salary due him for all the time he was disabled from work on account of the injury, and all that had been paid him during such time. After McMillan signed the

paper which Mr. Bill requested him to sign, or what he thought was such paper, Mr. Moore came into the room, and saw the paper, and made a seal on it. Nothing had been said to McMillan about releasing the company at any time after the accident until he got to Mr. Moore's office in Little Rock, when he was requested to sign the release. The company paid him his salary regularly on each monthly pay day from the time of the accident up to the time he was in Mr. Moore's office, although he was not able to work. McMillan never made any agreement to release the company, and no money was paid to him at the time he signed the paper. The salary which accrued for the time McMillan was disabled from work up to the time he resumed work amounted to the sum of $346.05, and the $50 mentioned in the release. The $346.05 had been paid prior to signing the release, and the $50 were then due, but were paid at the next pay day. It was the custom of the Hot Springs Railroad Company to pay its employees regular wages during the time they were disabled from work by accidents occurring while such employees were in the discharge of their duty.

McMillan was badly injured. One of his hands was so badly crushed that amputation was necessary, and he was unable to do any work for several months. He had notified Mr. Bill, a few days before the trip to Little Rock, that he was able to resume work.

Mr. Bill's evidence shows that it was customary for the railroad company, when its employees were injured by accidents on the railroad while in the discharge of their duty, to procure from such employees a release to the company from all liability for damages on account of the accident, before allowing the employees to resume work. On receiving notice from McMillan that he was able to return to work, Mr. Bill planned and carried out the trip with McMillan to Little Rock in order to get the release.

After hearing the evidence and the instructions of the court, the jury returned a verdict in favor of McMillan for $5,000, and judgment was accordingly entered.

Subsequently defendants filed a motion for a new trial, based upon newly discovered evidence. Mr. J. C. Fox made affidavit as follows:

"Some time during the year 1900, I think in the early fall, I went to the Iron Mountain depot early in the morning, and saw A. H. McMillan standing on the Iron Mountain side of the depot, dressed up, and inquired of him where he was going. McMillan stated that he had a telegram from Fred A. Bill, the auditor of the Hot Springs Railroad, and he read the telegram to me, which stated in substance that he (Bill) would be over on the first morning train from Hot Springs, and desired McMillan to meet him, and go with him to Little Rock on No. 4 of the Iron Mountain road. On the following morning, or the second morning afterwards, I am not sure which, as I was coming from my home, I met A. H. McMillan on the north side of the court square, and asked him what he did in Little Rock. I had an idea that he had gone to Little Rock for the purpose of making some settlement with J. M. Moore, the attorney of the company, and for that reason asked him the question. He stated that he compromised the matter with the company upon the payment to him of a little over three hundred dollars, and signed a release releasing the company from all claims on account of his injuries. He also stated to me in that connection that the company agreed to employ him for a period of six months. I believe that was the number of months he said. I know he stated a limited number of months, and I am sure it did not amount to the period of a year; but stated that he understood that they would keep him in their employ so long as he was able to work. I was present at the trial of the case of A. H. McMillan against the Hot Springs Railroad Company at the August term, 1903, of the Hot Springs Circuit Court, and heard a good part of the evidence, and after the trial was over and court had been adjourned for the term, in conversation with W. B. Smith, an attorney of the railroad company, I told him that McMillan did sign this release which he denied signing at the trial, because McMillan had so stated to me immediately after his return from Little Rock. This was the first time that I had ever made the statement to any one connected with the road; in fact, I had not

considered it of any importance, and had not thought of it for some time until my memory was refreshed by the incidents of the trial. If I had thought the matter of importance, or appreciated its importance, I should have called the attention of either Mr. Smith or Mr. Bill to the fact during the trial. The railroad company had no way of ascertaining my knowledge of this fact until I voluntarily told them of it."

The plaintiff, to maintain the issues on its part, read the following affidavit of S. H. McMillan:

"S. H. McMillan says that he is a brother of A. H. McMillan, the original plaintiff in this case, who is now dead; that said A. H. McMillan died some time in the fall of 1903, and after the trial of this case at the August term of this court; that during the trail of said case Joe Fox, who has filed the affidavit supporting the motion for new trial, was present all the time and was in attendance at the court house all the time while the trial was progressing; that said Fox at the time said A. H. McMillan was injured, and for which he sued in this action, was roadmaster for the Hot Springs Railroad Company, which position he held until said road was sold and transferred to the Choctaw, Oklahoma & Gulf Railroad Company; that as such roadmaster the said Fox had general supervision and control of the men who kept said road in repair and in proper running condition, and the section bosses, or bosses of the section houses, were under him; that the said Fox as a rule assisted in looking up evidence and preparing cases for trial that were brought against the Hot Springs Railroad Company for any cause, and he was present at the trial of this case for that purpose, and had been doing that all the time he was roadmaster for said company, and that said Fox held said position for a number of years."

Defendant in rebuttal read the following additional affidavit of J. C. Fox:

"J. C. Fox states on oath: That, while it is true he was in attendance upon the August term, 1903, of the Hot Spring Circuit Court, and was present during the trial of the case of A. H. McMillan against the Hot Springs Railroad Company, and heard most of the evidence, he was not in attendance at the

instance of the Hot Springs Railroad Company, and did not assist the attorneys and representatives of that company in the preparation of the evidence, or advise or confer with them in regard to the case; that he was not at that time in the employ of the Hot Springs Railroad Company, or its successor, the Choctaw, Oklahoma & Gulf Railroad Company, in any capacity, and had not worked on said road since some time during the month of July preceding; that he was not roadmaster of the Hot Springs Railroad Company in February, 1900, when A. H. McMillan was injured; that he relieved Col. Richardson as roadmaster some time during the spring of 1900 temporarily, and did not become roadmaster of the company permanently until September, 1900; that he was serving as extra section foreman at the time of McMillan's injury; that it was never his duty to look up evidence for the company and assist in preparing cases for trial that were brought against it, and he does not remember ever having done so; that he was not requested to, and did not, look up evidence in the case of A. H. McMillan, or assist in the preparation of the case for trial, either while he was in the employ of the company or after he had severed his relations with the company; that the motion for new trial filed by the Hot Springs Railroad Company had been overruled, and the court adjourned when he had the conversation with W. B. Smith, as sworn to in his original affidavit filed herein, and the said W. B. Smith was at the time preparing to leave for Little Rock; that he was not supœnaed or used as a witness in said case."

After the judgment was rendered, and before the motion for new trial was disposed of, plaintiff died, and the case was revived in the name of Martha A. McMillan, as his administratrix. The motion for new trial was overruled, and defendants have appealed.

W. B. Smith, E. B. Pierce and *T. S. Buzbee,* for appellants.

There was no fraud in the execution of the release, which was a complete bar to the action. 36 L. R. A. 442; 46 Ark. 220; 91 Fed. 606; 65 Fed. 461. A new trial should have been granted upon the ground of newly discovered evidence. Kirby's Dig.

§ § 6215-6220. A compromise of a disputed claim is sufficient consideration to support a promise to pay the sum agreed upon. 21 Ark. 69; 44 Ark. 559; 68 Ark. 82. There was no liability upon the part of the Choctaw, Oklahoma & Gulf Railroad Company. 74 Ark. 366; 68 Ark. 171.

Wood & Henderson, for appellee.

The release introduced was not binding upon McMillan. 17 Ark. 498; Bish. Contr. § 645; 158 U. S. 326; 76 Fed. 66; 90 Fed. 395; 95 Fed. 360; 64 N. E. 304; 54 Atl. 332; 58 S. W. 735; 41 S. W. 126; 73 Ark. 42. McMillan was not guilty of contributory negligence. 48 Ark. 333; 53 Ark. 458; 56 Ark. 232; 70 Ark. 295; 14 Fed. 277; 78 L. R. A. 845; 41 L. R. A. 399; 16 Am. Neg. Rep. 351. The question of granting a new trial was discretionary with the court. 14 Enc. Pl. & Pr. 982; 54 Ark. 370; 41 Ark. 229.

WOOD, J. First. It is conceded by the learned counsel for appellants that the question of whether or not there was fraud in the execution of the release was submitted to the jury upon proper instructions, but it was ably contended in oral argument, and in brief, that the evidence on this issue was not legally sufficient to support the verdict.

We have carefully examined the record on this question of fact, and have reached the conclusion that there was evidence to support the verdict. We do not hesitate to say that, were it the province of this court to pass upon the weight of the evidence and the credibility of witnesses, we would find in favor of appellants on the question of the execution of the release. But, according to the rule long ago established by this court, since followed, and recently approved in many cases, it is the exclusive province of the jury to determine disputed questions of fact. 1 Crawford's Dig., Appeal & Error, VIII, e; *St. Louis Southwestern Ry. Co.* v. *Byrne,* 73 Ark. 377; *St. Louis, I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136; *St. Louis & S. F. Ry. Co.* v. *Kilpatrick,* 67 Ark. 47; *Catlett* v. *Railway Company,* 57 Ark. 461.

The testimony of McMillan certainly tends to establish the allegations of his reply to the answer of the Hot

Springs Railroad Company on the subject of the release. While his testimony in regard to the preparation and execution of the release is contradicted in every material essential by the positive testimony of witnesses for appellants, and while the testimony of McMillan on this question appears to us to be inherently weak and contradictory, yet, unless we overturn a long line of decisions of this court, we must hold that all these were matters for the jury to settle; and, as they were properly instructed, their decision is final.

Second. The court, over the objection of appellants, permitted the plaintiff to testify in regard to the custom of the Hot Springs Railroad Company to continue the wages of its employees while they were disabled from work on account of injuries received in the service. This testimony was proper. Appellee was contending that the purported release was fraudulent. It recited a consideration of $346.05 as paid, and $50 in addition to be paid. These recitals conveyed the impression that the railway company had paid and was to pay the amounts named as part consideration for the execution of the release. Proof that these recitals were false, by showing that these amounts were already due him, according to the custom of the company in dealing with its disabled employees, certainly tended to establish the contention of appellee that the alleged release was fraudulent, and that when he signed same he did so under the impression that he was signing a receipt for money due, and which the company had paid according to its custom, and not as a part consideration for a release.

The testimony was germane to the contention of appellee as to the fraudulent execution of the release. Moreover, appellants have nowhere denied that such was the custom, and they do not now contend, as we understand, that the $346.05 and the $50 were paid as part consideration for the execution of the release. Therefore we do not discover any possible prejudice to appellants by the introduction of the testimony.

Third. The alleged negligence of the appellant Hot Springs Railroad Company in failing to exercise ordinary care to provide McMillan safe appliances, and the alleged contributory

negligence of McMillan in failing to exercise ordinary care in the use of the appliances furnished him, were questions of fact properly submitted to the jury, and their verdict is supported by legally sufficient evidence.

Fourth. It was within the sound discretion of the trial court to refuse the motion for new trial setting up newly discovered evidence. *Anderson* v. *State,* 41 Ark. 229; *Armstrong* v. *State,* 54 Ark. 370; *Mutual Life Ins. Co.* v. *Parrish,* 66 Ark. 612; *St. Louis S. W. Ry. Co.* v. *Byrne,* 73 Ark. 377.

We find no abuse of the court's discretion in this case. On the contrary, we think it was properly exercised.

Fifth. The contention that the court erred in rendering a personal judgment against appellant, Choctaw, Oklahoma & Gulf Railroad Company, was not made a ground of the motion for new trial. Such question will not be considered here for the first time.

Affirmed.

DALHOFF CONSTRUCTION COMPANY *v.* ADAMS.

Opinion delivered June 17, 1905.

GARNISHMENT—LIABILITY.—A garnishee, having no funds in its hands belonging to the principal debtor, cannot be held liable for his debts.

Appeal from Hot Spring Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Reversed.

Adams obtained judgment against Gibbs on a claim of $345.99, and instituted garnishment proceedings against the Dalhoff Construction Company, alleging that Gibbs had a contract under it to construct one and one-third miles of railroad, and that plaintiff furnished supplies for his laborers and for his teams.

The evidence showed that the garnishee sublet six miles of work, which it had undertaken, to Kimball, who sublet same to Ford, who sublet one and one-third miles thereof to Gibbs.

The garnishee requested the court to give to the jury the following instruction:

"1. The jury are instructed that there is no testimony in this case to justify a verdict for the plaintiff, and they will therefore find for the garnishee."

The court refused to instruct as requested, but instructed as follows:

"4. The jury are instructed that if they find from the evidence that Gibbs was a subcontractor under Ford, and that there was no contractual relationship existing between him and the Dalhoff Construction Company, they will find for the defendant; *but if the jury find from the evidence, that Gibbs was not in fact a subcontractor under Ford, but a subcontractor under the Dalhoff Construction Company, and that Ford was not a subcontractor, but was merely an agent of the Dalhoff Construction Company, and you further find that the Dalhoff Construction Company owed Gibbs, at the time of the service of the writ of garnishment herein, an amount over and above prior liens, you will find for the plaintiff.*

Verdict was rendered against the garnishee, which was appealed.

H. F. Auten, for appellant.

No judgment was taken in the original case against W. T. Gibbs; consequently no judgment could be taken against the garnishee. 66 Ark. 616; 70 Ark. 127.

E. H. Vance and *Andrew I. Roland,* for appellee.

The garnishment was properly issued, and judgment taken. Kirby's Dig. § 3694.

WOOD, J. The undisputed testimony shows that Gibbs was a subcontractor under Ford; that the Dalhoff Construction Company had no contract with him. The uncontroverted proof also shows

that the Dalhoff Construction Company had no money in its hands belonging to Gibbs at the time the writ of garnishment was served on it. True, appellee's witnesses testify that they heard Dalhoff say "that Gibbs got scared and run off before he was hurt; that there was $550 coming to him." But Dalhoff did not say that his company was owing Gibbs any money, or that any money was coming to Gibbs from his company. Nor does the language warrant such an inference, in view of the positive proof, undisputed, that whatever was due from the Dalhoff Construction Company under its contract was due to Ford, and not to Gibbs; that Gibbs left some claims of laborers unpaid, which were liens upon the work, and which Ford had to pay off, and that it not only consumed all the money going to Gibbs on the contract, but that the Dalhoff Construction Company was compelled to advance Ford more money than was due him on the contract to pay the balance of these liens, and is still owing part of this balance.

In view of this proof we are of the opinion that the court erred in not giving instruction number one. The majority of the judges are also of the opinion that there was no evidence to justify the court in submitting to the jury the question as to whether or not Ford was the agent of the Dalhoff Construction Company, and that the court erred in doing so.

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

---

76 100
f80 274

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. KIMBERLAIN.

Opinion delivered June 17, 1905.

1. RAILROAD.—STOCK-KILLING—NEGLIGENCE.—Where a train, passing through a town at the rate of forty miles an hour, struck and killed a cow, which came from behind a house distant twenty or thirty feet from the track, testimony of the engineer that it was too late after he saw the cow, when she came from behind the house, to do anything towards checking the speed of the train, and that he did not

have time to give the stock alarm, without going into the particulars, is not sufficient to overcome the statutory presumption of negligence, as the jury might have found that he had time to sound the stock alarm. (Page 101.)

2. SAME—RUNNING TRAIN THROUGH TOWN.—A higher degree of care is required of railroads in running a train at a high rate of speed through a town than when going through the open country. (Page 102.)

Appeal from Jackson Circuit Court.

FREDERICK D. FULKERSON, Judge.

Affirmed.

B. S. Johnson, for appellant.

The cause should be reversed and dismissed. 67 Ark. 516; 66 Ark. 439; 53 Ark. 96; 62 Ark. 182; 43 Ark. 225; 66 Ark. 248; 14 Am. & Eng. R. Cas. 30; 83 Ga. 393.

RIDDICK, J. This is an appeal from a judgment against the defendant for damages for killing a cow belonging to plaintiff. The cow was struck and killed by a passenger train on the 19th day of April, 1902. The train was passing at the rate of forty miles an hour through the town of Tuckerman early in the morning of that day, and the cow came from behind an ice house about twenty or thirty feet from the track. The engineer testified that he did not and could not see the cow until it came from behind the ice house going towards the track, and that it was then too late to do anything to avoid striking it. He did not sound any stock alarm, and there was evidence tending to show that no bell was rung for the crossing. It seems clear from the engineer's testimony that it was too late after he saw the cow to do anything towards checking the speed of the train, and he says that he did not have time to even give the stock alarm. But he stated that he did not know whether the cow was walking or running, nor does he state how far the train was below the crossing at the time he first saw the cow. As the cow was twenty or thirty feet from the track at the time she came from behind the ice house, with a ditch between her and the track, it would seem that, unless she was running very fast, he could

have sounded the stock alarm, as that can be done in an instant. He states that he did not have time to do this, but that statement was in the nature of an opinion. As he did not go into particulars, and show how near the train was to the cow, or whether the cow was walking or running, we think the facts are not definitely enough shown for us to say as a matter of law that the jury had no right to disbelieve his statement that he did not have time enough to sound a stock alarm. A higher degree of care is required in running a train at such high rate of speed when passing through a town than when going through an open country. The engineer, passing through this town, should have been on the alert, prepared for instant action, and whether by so doing he might have sounded the stock alarm was, we think, properly left to the jury under the facts proved.

Judgment affirmed.

BUNCH v. WILLIAMS.

Opinion delivered June 17, 1905.

LEASE—RIGHT OF RE-ENTRY—CONDITION PRECEDENT.—Where a lease stipulated that the lessees should have the use of so much new ground as they should clear up for the term of five years, free of rent, and that they should, with certain exceptions, cut down and remove all the timber, and further provided that the lessor should have the option to take back such cleared land, but that in doing so he should pay to the lessees a certain amount per acre for each acre cleared, the payment by the lessor for the clearing is a condition precedent to his right to retake the cleared land before the lease expired; and this is true although the land is only partially cleared at the time it is retaken.

Appeal from Jefferson Circuit Court.

ANTONIO B. GRACE, Judge.

Reversed.

STATEMENT BY THE COURT.

E. W. Williams, on the 5th day of December, 1898, rented to Bunch & McKenzie a part of the Leland plantation in Jefferson County for one year for the sum of $4,000. Along with this improved land Williams let them have 240 acres that had been deadened, but not cleared, which is called "New Ground" in the contract. This contract was reduced to writing, and so much of it as refers to this "New Ground" is as follows: "It is expressly understood and agreed between the parties that the New Ground hereinbefore described, that they, the said Bunch & McKenzie, are to have the use and occupation thereof, or the use and occupation of so much thereof as they may clear up and put in a good state of cultivation for the term of five years, free of rent. The clearing necessary to make this term of the contract operative shall be as follows: The said Bunch & McKenzie are to cut down and remove all the timber from the land, with the exception of all gum and sycamore trees exceeding two and one-half feet in diameter, which trees are to be deadened and left standing; the said Bunch & McKenzie are to further build a house 16x32 feet with a partition in the middle, for every twenty acres of cleared land at such points as may be designated by the said E. W. Williams. It is not understood by the terms of this contract that the said Bunch & McKenzie are to clear and put into a good state of cultivation all of the New Ground hereinbefore specified; but it is especially understood and agreed that whatever amount of uncleared land they shall put into cultivation as aforesaid, they shall have the use thereof free of rent for a term of five years. It is, however, agreed and understood between the parties that the said E. W. Williams shall have the option, after the expiration of one year, to take back the lands that have been cleared and placed in cultivation by the said Bunch & McKenzie; but in doing so he shall pay to the said Bunch & McKenzie the sum of three and 50-100 dollars per acre per annum for each acre that they may have so cleared as aforesaid until the expiration of the five years." Bunch & McKenzie during 1897 cleared and put in cultivation about forty acres of the new ground, and erected two cabins upon it, but left several hundred trees standing on the land

which were two and one-half feet in diameter. In December, 1900, Williams notified Bunch & McKenzie that he would exercise the option reserved in the contract, and take back the new ground on January 1, 1901, and asked them to have the ground measured to determine what was due them under the contract. Bunch & McKenzie replied that they would hold possession of the new ground until "the same is paid for according to our contract." Williams served notice on defendants to quit as provided by the statute in proceedings for unlawful detainer, and afterwards brought this action to recover possession. But he made no tender or offer to pay defendants for the clearing before bringing the action. On the trial it was shown, as before stated, that Bunch & McKenzie had cleared and put in cultivation about forty acres of land, and had built two houses thereon of the dimensions as required by the contract, and that they had expended in such work something over $500. It was also shown that at the end of the first year there were several hundred trees under two and one-half feet in diameter still standing on the land, to remove which at once would cost several hundred dollars. Bunch & McKenzie testified that it was their intention to burn or remove these trees from time to time, and to turn the land over at the expiration of five years cleared as called for by the contract. The circuit court held that under the contract the plaintiff was entitled to re-enter and take possession of the land without regard to whether a tender had been made or not, and gave judgment in favor of the plaintiff. Defendants appealed.

J. M. & J. G. Taylor, for appellants.

RIDDICK, J., (after stating the facts.) This is an action by plaintiff to recover possession of certain land which he had leased to defendants. The decision of the case turns on the construction of the following clause in the contract: "It is, however, agreed and understood between the parties that the said E. W. Williams shall have the option, after the expiration of one year, to take back the lands that have been cleared and placed in cultivation by the said Bunch & McKenzie, but in doing so he shall pay to the said Bunch & McKenzie the sum of $3.50 per acre per annum for each acre they may have so cleared as

aforesaid until the expiration of the five years." The provisions of this contract are not altogether clear, but after consideration of the same we are of the opinion that the payment of the defendants for the clearing was a condition precedent to the right of the plaintiff to take back the land under this contract before the expiration of the five years. It is true that the evidence here shows that this land had not, at the time this suit was brought, been fully cleared as required by the contract, for there were at that time trees still standing on the land under two and one-half feet in diameter. But defendants, having put the land in cultivation during the first year, were not required by the contract to have it fully cleared during that year. Defendants had during the first year expended over $500 in improving this land, and it would be a harsh construction of the contract to hold that, as the land was not then fully cleared, plaintiffs could take it back and pay nothing for the work and labor expended by defendants. The time during which these trees were all to be taken from the land was not limited to the first year, and, if defendants had been permitted to retain the use of the land for the full term of five years to pay for the clearing, it would not have injured plaintiff if the trees had been taken from the land before the expiration of the term of the lease. But counsel for plaintiff admit that defendants were entitled to some compensation for the work and labor expended on the clearing, but contend that this compensation was not to be paid before plaintiff re-entered the land, but afterwards. I feel some doubt about that point myself, but after consideration thereof the court has concluded that the contract required that a payment or tender of the amount due defendants for the clearing, whatever it was, should have been made before commencing the action to recover the land.

It follows, therefore, that in our opinion the suit, being brought before any payment or tender was made, was premature. The judgment will therefore be reversed, and the case remanded for further proceedings.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. REED.

Opinion delivered June 17, 1905.

1. RAILROAD—PRESUMPTION AS TO ONE RIDING IN FREIGHT TRAIN.—When there is a division of the freight and passenger business of a railroad, the common presumption is that a person found on a freight train is not legally a passenger; and if he claims that he is, it devolves upon him to show a state of case that will rebut the presumption. (Page 109.)
2. SAME—INJURIES FROM RIDING IN FREIGHT TRAIN.—Where a person, without paying fare, rode upon the caboose of a through freight train, when he knew, or ought to have known, that such caboose was not intended for the carriage of passengers, and sustained injuries in a collision, he cannot recover therefor unless the injuries were wantonly or willfully inflicted. (Page 110.)

Appeal from Hot Spring Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Reversed.

STATEMENT BY THE COURT.

Levi Reed was a machinist in the employ of the "Cotton Belt" Railway Company at Texarkana, Ark. His home was at Malvern, Ark., where his family lived. On the 3d of March, 1902, Reed desired to visit his home, and, meeting Tom Gentry, a conductor on a through freight train of the defendant company, he asked him "when he would get out." Gentry replied, "I am going out now."

Reed testified that, while he had known Gentry for several years, he did not know that he was a conductor, but supposed that he was a brakeman, and did not ask him if he could go with him. But, after having this conversation with Gentry, Reed obtained a leave of absence from his company, and then went

and boarded the caboose attached to the through freight train on which Gentry was conductor. This train was not at the depot, but was standing on what was called the "caboose track," near the stock pens and some distance away from the passenger depot. None of the employees of the company were at the caboose when Reed boarded it, but he saw some of them there before the train pulled out. He did not buy a ticket, and paid no fare. He understood that the train which he boarded was a through freight, but says he did not know that it did not carry passengers.

The conductor testified that when Reed met him at Texarkana "he asked me when I was going out, and wanted to know if there would be any show for him to go up the road with me. I told him I supposed it would be all right, that the caboose was in the yard, and I did not think that anybody would see him or find out if he went up with me." He further testified that nothing was said about fare; that he did not collect any fare, and did not intend to collect any.

The train left Texarkana about 5 o'clock, and the night following, about fifty miles north of Texarkana, at Boughton, another train accidentally ran into the caboose, and Reed's leg was broken above the ankle, and he received other injuries. He brought an action against the company to recover damages. The company set up that it was against its rules and regulations for conductors to carry passengers on through freight trains, and that the plaintiff was on the train without its permission, and was a trespasser, and the company was not responsible for his accidental injury.

There was a verdict and judgment against the company in favor of plaintiff for five hundred dollars, from which it appealed.

B. S. Johnson, for appellant.

Appellee was not a passenger, and cannot recover for injuries received, because they were not wantonly and willfully inflicted. 114 Fed. 123; 67 Fed. 522; 81 Ill. 250; 83 Ill. 431; 85 Ill. 84; 131 Ill. 64; 22 Barb. 91; 8 Kan. 505; 76 Tex. 175; 64 Ia. 48; 73 Ia. 463; 45 Kan. 377; 39 Kan. 531; 38 Kan. 608; 5 S. E.

175; 22 Barb. 91; 57 N. Y. 382; 153 Mass. 188; 64 Mich. 196; 49 Ark. 360; 45 Ark. 46; 67 Fed. 553; 3 Thomp. § 3157; 57 N. Y. 382; 59 Ark. 395; 45 Ark. 46; 53 Fed. 997; 153 Mass. 188; 149 Mass. 204; 70 Me. 65; 51 Conn. 143; 83 Ill. 427.

E. H. Vance, Jr., and *Andrew I. Roland,* for appellee.

Appellant is liable. 11 S. W. 751; 50 Mo. 107; 66 Mo. 576; 104 Mass. 120; 107 Mass. 108; 35 Kan. 185; 58 Me. 187. Appellant cannot escape liability upon the ground that the conductor had no authority to permit appellee to ride. 2 Shear. & R. Neg. § 489; 2 Wood, Railroads, 1045; 72 Mo. 62; 6 L. R. A. 409; 50 L. R. A. 381; Hutch. Car. § 565; Thomp. Car. Pas. 44; 2 Wood, Railroads, 1214; 2 *Id.* 1207; 107 Mass. 110; 104 Mass. 117. Appellant was guilty of gross negligence. 99 Ala. 397; 14 Fed. 710.

RIDDICK, J., (after stating the facts.) This is an action by the plaintiff to recover damages received while riding on one of the defendant's through freight trains. The rules and regulations of the company did not allow the conductors of such trains to carry passengers. The plaintiff in this case was an employee of another railroad company, but, being an acquaintance of the conductor who had charge of this train, he was permitted by him to ride in the caboose attached to it. The plaintiff testified that he did not know that it was against the rules of the company to carry passengers on such trains, but, leaving out the testimony of the witness for the defendant on this point, the question arises whether the undisputed facts do not show that he either had notice, or, what is the same thing, that he had notice of facts sufficient to put him upon inquiry, and that if he had made any inquiry he could easily have ascertained the fact that the employees of this train had no right to accept him as a passenger. Now, plaintiff did not find this train at the passenger depot. He boarded it in the yards of the company, near the stock pen. It had no passenger coach attached, and there was nothing about it to indicate that it was intended for the carriage of passengers Plaintiff himself shows that, though he had time and opportunity to inquire and ascertain whether passengers were allowed to be carried on this train, he did not do so.

When we consider that plaintiff was 53 years old, had worked for railroads about fifteen years, was then at work at Texarkana for the Cotton Belt Railway Company, while his family lived at Malvern, a town on defendant's railway, between which place and Texarkana several passenger trains were run each day, one of which trains was due to leave Texarkana only a few hours after plaintiff left on the freight, and by which plaintiff could have reached his home as soon or sooner than he could have reached it by the freight train, even had there been no accident—when we consider that plaintiff took this freight, on which an acquaintance was conductor, when he could have taken a passenger train and made better speed, and that up to the time of the accident he had neither paid, nor offered to pay, nor been asked to pay any fare—it seems not unreasonable to believe, as counsel for defendant contends, that he chose this train in preference to the passenger because he had grounds to hope that, through the courtesy of his friend, the conductor, he would be given free transportation. But we need not discuss that feature, for it is quite immaterial. For, conceding that plaintiff acted in good faith in getting on this train, it is clear that he acted carelessly. One should not get on the caboose of a through freight train, standing away from the passenger depot, in the yards of the company near a stock pen, with the intention to travel thereon as a passenger, without making some inquiry as to whether the train is intended for passengers. If, without inquiring, he does get on such a train not intended for passengers, and is carried safely to his destination, he gains that much at the expense of the company. On the other hand, if an accident happens, and he is injured, there is no reason or justice in requiring the company to pay for his injuries, unless they have been wantonly or willfully inflicted. "When," said Chief Justice COCKRILL, "there is a division of the freight and passenger business of a railroad, the common presumption is that a person found on a freight train is not legally a passenger; and if he claims that he is, it devolves upon him to show a state of case that will rebut the presumption." *Hobbs* v. *Texas Pacific Ry. Co.*, 49 Ark. 360.

The facts in this case do not rebut this presumption, but show conclusively that the circumstances under which plaintiff boarded this train were sufficient to give him notice that this train was not intended for the carriage of passengers. Whether in fact he believed it was intended for passengers is a matter of no moment; for, although members of the train crew were present, he made no inquiry, and cannot hold the company responsible for his ignorance. The law in such a case treats him as knowing those things which he could and should have ascertained by inquiry. This question has been fully discussed by a recent decision of the Court of Appeals to which we refer. *Purple* v. *Union Pacific R. Co.*, 114 Fed. Rep. 123.

Had plaintiff been a boy or person of immature years, there would be more reason to support the judgment; but the facts in this case show that plaintiff, and not the company, was to blame for his presence on this train. He was injured by a collision which the evidence shows was the result of carelessness, but was not the result of wanton or wilful negligence. On the whole case, we are convinced that it would be unjust to compel the company to pay damages for the injury to plaintiff which was caused by his getting on a train not intended for passengers, in violation of the rules of the company.

Judgment will, therefore, be reversed, and the action dismissed. It is so ordered.

COGBURN v. STATE.

Opinion delivered June 17, 1905.

76 110
76 493
h76 518

76 110
f81 234
82 115

76 110
84 71

76 110
f85 358

1. HOMICIDE—BURDEN OF PROOF AS TO MITIGATING CIRCUMSTANCES.—While it is true that when a killing is proved the burden of showing circumstances that mitigate or excuse the crime devolves upon defendant if there is nothing in the evidence on the part of the State that tends to mitigate, excuse or justify the killing, still the burden on the whole case is on the State; and when evidence is introduced, either on

the part of the State or of the defendant, which tends to justify or excuse the killing, the jury must acquit if upon the whole case they have a reasonable doubt as to defendant's guilt. (Page 112.)

2. SAME—INSTRUCTION.—An instruction in a murder case that if the jury had a reasonable doubt they should acquit, yet as to matters of mitigation defendant "would be required to furnish a preponderance of the evidence," was erroneous and misleading; if the defendant introduced proof tending to prove that the killing was justifiable or excusable, this tended to rebut the allegation of malice; and if the jury had a reasonable doubt on that point, they should acquit. (Page 112.)

Appeal from Pike Circuit Court.

JAMES S. STEEL, Judge.

Reversed.

Robert L. Rogers, Attorney General, for appellee.

RIDDICK, J. The defendant, George Cogburn, was indicted by the grand jury of Montgomery County for murder in the first degree, on account of the killing of Jim West. On the trial the evidence tended to show that Cogburn and West had previously had a fight, and that there was a bad state of feeling between them. West said afterwards that Cogburn had hit him with a rock, and some of the witnesses stated that West had threatened to get even with him, saying that he intended to "peck his head with the same rock." Still others testified that he had threatened to kill him.

With this state of feeling between them, they attended a picnic at Fancy Hill, in that county, on the 25th day of July, 1903. George Cogburn, the defendant, and one of his cousins, had a lemonade stand at the picnic, and several of his brothers were at the picnic. Cogburn and his brothers were probably anticipating trouble from West, for they had with them at the lemonade stand two Winchester rifles. West and one Perrin came up to the stand, Perrin having a Colt's 44 pistol in his hand, and some of the witnesses say that West had a pistol also. Cogburn and his brother, being, perhaps, apprehensive that West and Perrin were about to assault them, fired upon them with the

Winchester rifles, killing both of them almost instantly. Several witnesses for the State testified positively that, at the time of the shooting, neither West nor Perrin was making any hostile demonstration toward the defendant or his brother. On the other hand, several witnesses testified for the defendant that Perrin and West approached the lemonade stand in a threatening manner. That, as they approached, Andy Cogburn, a brother of George, commanded the peace, to which Perrin and West replied, "Damn your peace!" That Perrin made a demonstration as if he was about to shoot Andy Cogburn, when the defendant said, "Hold on there!" That Perrin then turned and fired a Colt's 44 revolver at defendant, who returned the fire with his rifle, and that, about this time, West also fired at defendant with a pistol, and that defendant then turned and shot him. Other shots were fired by a brother of the defendant. In other words, the testimony of a number of witnesses for the State tended to show that defendant was guilty of murder; while, on the other hand, the testimony of other witnesses, most of whom were related to the defendant, tended to show that he shot in self-defense. The jury found the defendant guilty of murder in the second degree, and assessed his punishment at five years in the penitentiary.

On the trial the court gave the jury very full instructions in reference to the law of self-defense and the other points involved in the case, and we see no error in these instructions. Among them was the following, which is a copy of the statute:

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon 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." Kirby's Dig. § 1765. This section of the statute, it will be seen, is a rule of law to be applied when the killing has been proved, and there is nothing shown to justify or excuse said act. In such a case it may well be presumed that there was no justification, or the defendant would have shown it.

In commenting on this instruction, the attorney for the State said:

"The court tells you, under this instruction, which I read to you, that, the killing being proved, the burden of proving circumstances of mitigation and justification devolves on the accused. Under this law, after we introduced Jim West, we could have rested our case, and the burden was upon them to establish justification; and if they fail to satisfy you by a preponderance of evidence that the killing was justifiable, then you should convict him." To which the defendant objected, and the court said: "While it is true that if, upon the whole case, they had a reasonable doubt, they must acquit, yet as to matters of mitigation he would be required to furnish a preponderance of the evidence." Now, the argument of the prosecuting attorney, as shown in the record, was not in accordance with the law; for, while it is true, as our statute declares, that when the killing is proved the burden of showing circumstances that mitigate or excuse the crime devolves upon the accused, where there is nothing in the evidence on the part of the State that tends to mitigate, excuse or justify the killing, still the burden on the whole case is on the State; and when evidence is introduced, either on the part of the State or the defendant, which tends to justify or excuse the act of the defendant, then if such evidence, in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt as to the guilt of the defendant, the jury must acquit. This is settled in this State by the statute which declares that "when there is a reasonable doubt of the defendant's guilt upon the testimony in the whole case, he is entitled to an acquittal." Kirby's Dig. § 2387.

But if this statement of the prosecuting attorney were correct—that when the killing is proved the defendant must show by a preponderance of the evidence that the killing was justifiable—the jury would have to reject his defense whenever it was not supported by a preponderance of the evidence. This would limit the doctrine of a reasonable doubt to the fact of the killing, and when that was established beyond a reasonable

doubt it would put the burden on the defendant of establishing justification by a preponderance of the evidence, and if he failed to do so the jury would be required to convict him, even though the evidence adduced by him was sufficient to raise a reasonable doubt as to his guilt. But it cannot be said that the defendant must make out his defense by a preponderance of the evidence, and also that he is entitled to an acquittal if on the whole case the jury have a reasonable doubt of his guilt, for the two propositions are to some extent inconsistent. Testimony not sufficient to establish a fact by a preponderance of the testimony may be sufficient to raise a reasonable doubt as to the existence of the fact. To tell the jury that they must convict unless the fact of self-defense is established by a preponderance of the testimony, and also that they must acquit if they have a reasonable doubt as to whether the defendant acted in self-defense, is telling them to follow two rules which may lead to very different results.

The statute, it will be noticed, says nothing about preponderance of evidence. It says that, the killing being shown, the burden is on the defendant to show facts that justify or excuse his homicide. When, however, he introduces his proof, the question, says Mr. Wharton, arises: "Is it sufficient for him if he raises a reasonable doubt as to the defense he advances? Or must he establish this defense by a preponderance of proof, in order to entitle him to an acquittal?" He answers the question by saying that when the defense traverses some essential ingredient of the indictment, such as malice or premeditation, it is sufficient if the proof raises a reasonable doubt. If the defendant undertakes to show that the act was done in necessary self-defense, this tends to rebut the allegation of malice; and if the jury have a reasonable doubt on that point, they should acquit, for that is a reasonable doubt as to whether an essential charge in the indictment is true or not. It is otherwise when the defense does not traverse any essential averment of the indictment; for instance, when former conviction or acquittal of the same offense is set up. Wharton's Crim. Neg. § § 331-334.

Our statute, as before stated, has answered the question for this State in the same way by declaring that when there is a reasonable doubt on the whole case the jury must acquit; thus

showing that the defendant is not required to make out his case by a preponderance of the evidence. The statement of the law made by the prosecuting attorney was clearly wrong; and when objection was made to it, the court should have stopped him, and told the jury to disregard that statement. *Tanks* v. *State,* 71 Ark. 459. But the court did not do so, and, in effect, told the jury that while, if they had a reasonable doubt on the whole case, they should acquit, yet that as to matters of mitigation the defendant must furnish a preponderance of the evidence. We have already shown that this statement of the law is contradictory, and is not correct. As defendant did furnish the evidence of several witnesses tending to show that the killing was in self-defense, he had the right to have the jury told that it was not necessary for his acquittal that the evidence on this point should preponderate in his favor, but that, if it only raised a reasonable doubt of his guilt on the whole case, he was entitled to an acquittal. The court so stated the law to the jury in his general instructions, but permitted the prosecuting attorney to argue to the contrary before the jury. This ruling of the court upon objection to the argument was, we think, erroneous and prejudicial to the defendant, for which the judgment must be reversed, and a new trial ordered.

It is so ordered.

DAVIS v. TRIMBLE.

Opinion delivered June 17, 1905.

76 115
189 326

1. APPEAL—SUFFICIENCY OF EVIDENCE.—In testing the sufficiency of evidence to support a verdict the appellate court gives to it the strongest probative force of which it is susceptible in favor of the verdict. (Page 117.)

2. ATTORNEY—IMPLIED CONTRACT TO PAY FOR SERVICES.—Attorneys employed by the general manager of an insolvent railroad company to defend a suit against it cannot hold the trustees of an estate holding bonds issued by the railroad company, who were also stockholders and directors of the railroad company, liable for their fee merely because

they knew the services were being performed, or because they manifested a proper interest in the defense of the suit. (Page 119.)

Appeal from Faulkner Circuit Court.

SAM FRAUENTHAL, Special Judge.

Reversed.

Ratcliffe & Fletcher, for appellants.

An attorney cannot recover a fee from a party who has not employed him. 5 La. Ann. 481; 20 So. 862; Thompson, Stockholders, § 4; 13 Metc. 539; Cook, Corporations, § 243. In the absence of an express contract appellants had a right to presume that appellees looked to the principal. Mech. Ag. § 558; 21 Conn. 627; 44 N. Y. 349; 48 N. Y. 300; 68 N. Y. 400; 84 Mo. 578; 46 N. Y. 70; 6 Har. & J. 418; 101 U.S. 392. Appellants could not be liable except upon the express contract. 11 Ark. 212; 64 Ark. 462; 45 Ark. 67; 12 Ark. 174; 34 Ark. 613; 37 Ark. 164. The seventh instruction should have been given. Wood, Stat. Fr. § 150; 155 U. S. 28; 65 Ark. 278. A verdict should have been instructed for appellants. 57 Ark. 461; 61 Ark. 621; 62 Ark. 159; 66 Ark. 505; 67 Ark. 154; 69 Ark. 497.

Joe T. Robinson, for appellees.

Under the facts, the law will imply a contract. Weeks, Attys. 666; 21 Fed. 169; 132 Ill. 543; 106 N. Y. 82. The retainer may be inferred from facts and circumstances. Weeks, Attys. 686. The absence of an express promise will not prejudice recovery, if employment is fairly apparent from the circumstances. 4 Am. & Eng. Enc. Law, 985; 3 Wash. 755; 61 Ill. 96; 37 Ohio St. 479; 40 S. W. 155; 34 Ga. 328; 9 Johns. 142; 70 Ill. 19; 29 Minn. 129; 111 Mass. 504; 20 N. H. 205; 69 Fed. 216. The verdict was reasonable. Weeks, Attys. 694, 697, 698. The peremptory instruction was properly refused. 37 Ark. 164, 259, 580; 35 Ark. 146; 33 Ark. 350; 36 Ark. 451; 34 Ark. 409, 743. The existence and terms of the contract was a question for the jury. 112 Pa. St. 371; 66 Md. 444; 70 Ia. 609.

McCULLOCH, J. Appellees, Thomas C. Trimble, J. M. McClintock and Eugene Lankford brought this suit against R. W. Worthen, Oscar Davis, Zeb Ward, Jr., George R. Brown and W. B. Worthen to recover $2,500 alleged to be owing them by the defendants for services as attorneys at law rendered for the defendants in an action in the Prairie Circuit Court, wherein S. L. Harr was plaintiff and said R. W. Worthen and the Mississippi & Little Rock Railroad Company were defendants.

R. W. Worthen failed to answer, and judgment was rendered by default against him. The cause was dismissed before trial as to W. B. Worthen and George R. Brown.

Appellants, Davis and Ward, answered, denying specifically each allegation of the complaint. A trial by jury was had upon the issues raised by their answer, which resulted in a verdict in favor of the plaintiffs for $2,000, and defendants appealed to this court.

Appellants asked a peremptory instruction to the jury to return a verdict in their favor, and they now urge that the verdict against them is without testimony to support it. In testing the sufficiency of the evidence we must give it the strongest probative force of which it is susceptible in favor of the verdict of the jury.

The suit in which the services of appellees were performed was against a railroad corporation and R. W. Worthen, its principal stockholder and manager. He employed appellees as attorneys to defend the suit; and it is not claimed that either of appellants had anything to do with the employment of attorneys, or that any mention was ever made to them, until after the termination of the suit, that they would be expected to pay any part of the fee.

Appellants each owned stock of the face value of $100 in the railroad corporation, but which was of no value at the time of the pendency of the suit in question, as the corporation was then insolvent. They were directors in the corporation, and this stock was given them by R. W. Worthen, who owned substantially all the stock, to qualify them as directors. They were also trustees of the estate of Zeb Ward, deceased, which estate held a large amount of bonds issued by the railroad company. Appellant Zeb Ward, Jr.,

and the wife of appellant Davis were two of the five heirs of Zeb Ward, deceased.

Col. Trimble and Mr. Lankford, of appellees, both testified that they were employed by R. W. Worthen in 1893 to defend the suit, and that some time between that time and the trial of the case in 1896 they consulted with Davis in Little Rock concerning the suit; that Davis manifested considerable interest in the suit, and attended the trial. They say that he was sworn as a witness in the case, and claimed the privilege, as a party in interest, of exemption from the rule of the court excluding the witnesses from the court room during the trial. Neither of them testify, however, that he employed them in the suit, or agreed before the trial to pay the fee, or that anything was said about the fee or employment. Col. Trimble testified that some time after the trial he approached Davis about payment of the fee, and the latter declined to pay it, but said that the attorneys ought to have something, and that he (Davis) was going to get together Worthen and others, who were interested, and consult about it.

Mr. Lankford testified that a short while after the trial he called to see appellant Davis in Little Rock about the fee, and he relates the substance of the interview with Davis, as follows: "I remember when I saw Mr. Davis he put me off by saying he would have to see Mr. Worthen; that they had some matters to fix up, and said for me to see Worthen. I told him I needed the money. He said: "We have got to have a little straightening up, the Wards and Worthen; and I don't know whether we ought to pay it or he. Wait and see him."

It is further shown that, after the trial of the Harr suit, a bill of exceptions was filed preparatory to appeal to this court, but the appeal was not perfected, and Davis and the other trustees of the Zeb Ward estate paid the fees of the stenographer, something over $200, for services in the trial and in making a transcript of the testimony. Some time during the period mentioned, the precise date not appearing, the railroad was, in a suit instituted by the bondholders in the Federal court, placed in the hands of receivers, and Davis and W. B. Worthen were appointed receivers.

This is all the evidence throwing any light upon the connection of appellants with the Harr suit or the employment of appel-

lees as attorneys. Is there sufficient to warrant a finding that either of the appellants expressly or impliedly undertook to pay any part of the fee due appellees for services? We think not.

It is admitted that neither of appellants made any contract with appellees, and that appellees had been employed by Mr. Worthen, the manager of the railroad corporation, before the pendency of the suit was brought to the attention of appellants. It is not contended that they ever did more than to manifest such interests as was consistent with their duties as directors in the railroad corporation, and as trustees of the Zeb Ward estate. They had a right to display that much concern in the suit, without impliedly making themselves personally liable for the fees of the attorneys who had already been employed by one in authority to conduct the defense of the suit for the railroad company.

Learned counsel for appellees contend that appellants were interested in the result of the suit, and knew of the services being performed by appellees, and that this fact is sufficient to bring the case within the rule that where an attorney performs services for another with his consent, and there is no agreement for compensation, the law will imply a contract to pay what the service is reasonably worth. This is a familiar principle, and has been repeatedly applied by this court. *Ford* v. *Ward,* 26 Ark. 360; *Hogg* v. *Laster,* 56 Ark. 382; *Lewis* v. *Lewis,* 75 Ark. 191.

It does not, however, always follow that because one receives the benefit, directly or indirectly, of the services of another, the law implies a contract to pay therefor. *Roselius* v. *Delachaise,* 5 La. Ann. 481; *Rives* v. *Patty,* 20 So. (Miss.) 862. Each case must stand upon its own peculiar facts.

But the facts of this case lack the essentials for an application of this principle, for the reason that appellants were not parties to the suit, and appellees were employed by another. If appellants had by their course of conduct induced appellees to render the service, or if they had been parties to the suit, and remained silent and accepted the services of appellees, even though employed by another, the law would imply an agreement on their part to pay for the service. But, inasmuch as they had already been employed to defend the suit, appellants had the right to assume that a display of interest in the suit on their part would not

be taken as an implied agreement to pay the fee; and, on the other hand, appellees, after having been previously employed by Worthen, the manager of the railroad, to defend the suit brought against him and the railroad, had no right to assume from such display of interest by appellants that they would pay the fee. Appellants were acting in a representative capacity as directors of the railroad corporation, and had the right, and it became their duty, to manifest a degree of interest in the suit without incurring personal liability for the fee. No intimation was given them during the pendency of the suit that they would be called upon to pay any part of the fees, and nothing was said or done, so far as appears from the testimony, to call for a disclaimer of any willingness to become responsible for the fee. We see nothing whatever in their conduct from which an agreement to pay for the services of the attorneys can be implied. It is not contended that appellants are bound by the statements or assurances made by Davis to appellee after the trial concerning payment of the fee. There was no consideration for a contract made at that time after the performance of the service for payment of the fee.

Giving to the evidence its fullest probative force in favor of the cause of action of appellees, it fails entirely to establish any contract, either express or implied, on the part of appellants to employ appellees, or to pay them for services performed in the suit named. It proves neither a contract nor facts or circumstances from which one can be implied.

The verdict not being sustained by sufficient evidence, the judgment must be reversed and remanded for a new trial. It is so ordered.

HILL, C. J., (dissenting.) S. L. Harr brought suit for about $77,000 against the Mississippi and Little Rock Railway Company and R. W. Worthen, its president. Worthen employed McClintock & Lankford, a firm of lawyers, to defend the suit, and, later, Trimble, to assist them. The services were performed, and that the amount recovered is a reasonable fee is not disputed. The railway company was hopelessly insolvent, a fact known to all parties in this litigation. Worthen was a large stockholder and bondholder, and his bonds were pledged to the Ward estate for borrowed money. Appellees have an unsatisfied judgment against

him for their fees, and presumably he is insolvent. Shortly after the employment of these lawyers they got into communication with Oscar Davis, the appellant, who evinced much interest in the litigation. He was a nominal stockholder of the railroad company, and its receiver. His wife was one of the heirs of Ward, the principal creditor of the road, and he was a trustee of the Ward estate. He had such conferences with the attorneys as any client would have, and they looked to him to bring the necessary witnesses to the trial (which he did) and pay the expenses thereof. He attended the trial, claimed the privilege of staying in court as a party in interest, instead of being excluded as a mere witness. He paid part of the expenses of the trial, his brother-in-law Ward paid the witnesses, and Davis paid, after the trial, the stenographer's fees for making the transcript. After the trial he assured both Lankford and Trimble that their fee would be paid.

The whole course of proceedings indicated he was the real client, and his interest would naturally make him so, while the nominal parties were the insolvent railroad and its bankrupt president. Under these circumstances, where the services were for the benefit of the party, and he knowingly accepts them, very slight evidence is required to raise an implied contract to pay for them.

The evidence which the jury credited on all conflicting matters was sufficient, in our opinion, to raise an implied contract, and the judgment ought to be affirmed.

Mr. Justice WOOD concurs in this opinion.

ANGLIN v. CRAVENS.

Opinion delivered June 17, 1905.

1. ABATEMENT AND REVIVAL—CASES ON APPEAL.—Kirby's Digest, § § 6298, 6300, 6314-5, relating to the revival of actions on the death of a party *pendente lite,* applies to cases pending in the Supreme Court on appeal, as well as to cases pending in trial courts. (Page 123.)
2. SAME—TIME OF REVIVAL.—Under Kirby's Digest, § 6314, providing that an action shall not be revived in the name of the representative or successor of a plaintiff without the consent of the defendant after the expiration of one year from the time the order might have been first made, an order of revivor may be made as soon as the court in which the action is pending convenes after the death of the plaintiff, and must be made within a year thereafter except by consent. (Page 123.)

Appeal from Marion Chancery Court.

E. G. MITCHELL, Judge.

Appeal dismissed.

STATEMENT BY THE COURT.

W. M. Anglin and H. H. Hilton brought this suit in chancery against appellees to foreclose a deed of trust on real estate executed by appellees to appellant Hilton, as trustee, to recover payment of an alleged debt to Anglin, and also to declare a lien for an amount paid by Anglin in redemption of the lands from tax sale. The lands were sold for taxes, and purchased by one Layton, and Anglin bought and received a deed from Layton, paying him $300 therefor, but only claimed it to be a redemption.

The chancellor declared a lien in favor of the plaintiff Anglin for the taxes and interest found to have been paid on the lands, amounting to the sum of $233.03, but denied the prayer of the complaint for a foreclosure of the mortgage, and the plaintiffs appealed to this court.

Appellant Hilton was only a formal party by reason of being trustee in the deed, and he has no interest in the suit.

Appellees file their motion to strike the case from the docket of this court, and for grounds show by affidavit that appellant W. M. Anglin died on April 5, 1904, since the appeal was taken, and that the cause has not been revived. W. W. Taylor, as administrator of the estate of Anglin, responds to the motion, showing that letters of administration upon said estate were issued to him by the probate court of Marion County on August 2, 1904, (no administration upon said estate having been previously commenced), and he asks that the cause be now revived. The parties also file briefs upon the whole case, which is submitted with the motion.

S. W. Woods and *J. C. Floyd,* for appellants.

Horton & South, for appellees.

McCULLOCH, J., (after stating the facts.) The question to be first considered is whether or not the case can now be revived.

The statute provides that where either of the parties to a pending action dies, the cause may, on motion of any party interested, be revived in the name of a special administrator, if there is no general administrator. Kirby's Dig. § § 6298-6300. It is further provided that "an order to revive an action in the name of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made." Kirby's Dig. § 6314. And that "when it appears to the court by affidavit that either party to an action has been dead * * * for a period so long that the action cannot be revived in the names of his representatives or successors without the consent of both parties, it shall order the action to be stricken from the docket." Kirby's Dig. § 6315. This statute applies to cases pending in this court on appeal, as well as to cases pending in trial courts. *State Fair Association* v. *Townsend,* 69 Ark. 215.

The statute is mandatory in its terms, and the revivor, to be effective, must be applied for within the time pointed out. An action, after the death of either of the parties, can proceed

no further until it has been properly revived; and the object of the statute is to fix a time within which those interested in the suit may have it revived, and, if not revived within the time prescribed, to require an abatement. When the plaintiff dies during the pendency of the action, any person interested in the further prosecution thereof may have a revivor in the name of the administrator or executor, if there be such, and the right of action be one that survives in favor of the personal representative; and if there be no general administrator or executor, the revivor shall be in the name of a special administrator appointed by the court in which the action is pending. The order to revive may be made forthwith—as soon as the court in which the action is pending convenes after the death of the plaintiff, and must be made within one year after that time, except by consent of parties. The limitation of time in the statute applies equally where there is no general administrator or executor as where there is one, because in such event the persons interested may have a revivor in the name of a special administrator.

Appellant Anglin died on April 5, 1904, and more than one year has elapsed since the order to revive might have first been made, and it cannot be now made.

The motion to dismiss the appeal and strike the case from the docket of this court is sustained, leaving the decree appealed from in full force. It is so ordered.

STATE v. WESTERN UNION TELEGRAPH COMPANY.

Opinion delivered June 17, 1905.

TELEGRAPH COMPANY — REFUSAL TO DELIVER MESSAGE — PENALTY.—Kirby's Digest, § 7946, imposing upon telegraph and telephone companies the duty to transmit messages, without discrimination as to charge or promptness, under a penalty of five hundred dollars for each and every refusal so to do, intended to provide a penalty only for a willful or intentional refusal to transmit a message, not for a refusal resulting from negligence on the part of the company's agent in ascertaining whether or not the company had an office at the place to which the message was directed.

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

Affirmed.

STATEMENT BY THE COURT.

Action brought by the State of Arkansas against the Western Union Telegraph Company to recover the statutory penalty of $500 for refusal to transmit a message. The court, sitting as a jury, found for the defendant, and rendered judgment accordingly, and the plaintiff appealed.

Robert L. Rogers, Attorney General, for appellant.

William F. Kirby, for appellee.

MCCULLOCH, J., (after stating the facts.) The statute (Kirby's Dig. § 7946) provides that "every telegraph and telephone company doing business in the State must, under a penalty of five hundred dollars for each and every refusal to do so, transmit over its wires to locations on its lines, for any individual or corporation or other telegraph or telephone company such messages, dispatches or correspondence as may be tendered to it, or to be transmitted to any individual or other telegraph or telephone companies, at the price customarily asked and obtained for the transmission of similar messages, dispatches or correspondence, without discrimination as to charge or promptness."

The undisputed testimony shows that a message was tendered to appellee's agent at Texarkana for transmission to Wayne, Ind. Ter., where appellee had established, and was then maintaining, an office, but that such agent negligently and erroneously examined an obsolete monthly tariff book or list of offices of appellee, instead of the current list, and, finding no such office on the list (the office having been recently established), declined to receive and transmit the message for the reason that the company had no office at the point to which the message was directed.

The court declared the law to be: "That, even though the defendant did refuse to transmit the message to Wayne, Ind. Ter.,

a station and locality on its lines where it had a telegraph office, and even though it refused to do so after it was notified that the sender claimed to have been in its office at that place, and while its tariff sheet and rate book in the office at Texarkana, Ark., showed that it had an office at said place, still plaintiff cannot recover because defendant's agents refused to transmit the message solely because an old rate book and tariff sheet, inadvertently examined by them, failed to show that Wayne had a telegraph office, and they honestly believed there was none there, the statute not meaning to provide a penalty unless defendant willfully refused to transmit the message, knowing there was an office at the place of destination. And this is so even if the agents of defendant were negligent in not knowing or ascertaining that there was a telegraph office at the place to which the message was directed."

A decision of the case calls for a construction of the statute, whether only a willful refusal by a telegraph company to receive and transmit a message will authorize a recovery of the penalty, or whether the penalty may be recovered for a failure or refusal as a result of negligence to receive or transmit a message.

This court, in *Brooks* v. *Western Union Tel. Co.*, 56 Ark. 224, in construing this statute as to whether or not it inflicted a penalty for refusing to deliver a message, said, speaking through Chief Justice COCKRILL: "The statute is penal, and its terms cannot be extended beyond their obvious meaning. Where there is a doubt, such an act ought not to be construed to inflict a penalty which the Legislature may not have intended."

The former statute on this subject (Mansfield's Dig. § 6419) which was expressly repealed by the statute now under consideration (act of March 31, 1885), prescribed a penalty of $100 for "every neglect or refusal by a telegraph company to receive and to transmit a message." The omission of the word "neglect" from the new statute is noteworthy in discovering the legislative intent, and is clearly indicative of an intention not to provide a penalty for mere negligent acts. It is also worthy of consideration that in § 7 of this statute (Kirby's Dig. § 7943) it is required that messages shall be correctly transmitted without unreasonable delay in the order of their delivery and kept in strict confidence; and section 8 (Kirby's Dig. § 7944) provides that any officer or agent of the company who willfully violates the provisions of the

preceding section is guilty of a misdemeanor, and that the company shall be liable for the damage incurred.

In the case of *Frauenthal* v. *Western Union Tel. Co.,* 50 Ark. 78, this court held that where a message was received by the telegraph company for transmission from Conway, Ark., to Carthage, Mo., and was transmitted as far as Kansas City, but was lost between that place and Carthage by the negligence of the defendant, there could be no recovery of a penalty under this statute. The court then said: "Under the act of 1885, no penalty is recoverable for a mere negligent omission to transmit or deliver a message. For the redress of such injuries, the party aggrieved is remitted to his remedy for damages."

We think that the case at bar is controlled by the decision last above cited. It is clear that the Legislature meant to provide a penalty only for a willful or intentional refusal to transmit a message, not a refusal resulting from negligence on the part of the agent in ascertaining whether or not the company had an office at the place to which the message was directed. The manifest purpose was to prevent, by penalty, any discrimination against individuals, corporations or competive companies by willful or intentional refusal to receive and transmit without delay, and at the customary price, any message tendered.

The Supreme Court of Indiana, in construing a statute in substantially the same language and form as our statute, said: "The statutory duty as respects telegraph companies is to transmit messages with impartiality and in good faith, and in the order of time in which they are received, without discrimination. The statutory penalty is incurred when its acts or omissions are characterized by or result from partiality or bad faith, or when it postpones messages out of the order of time in which they are received, or when it discriminates in rates charged or in the manner and conditions of service between its patrons. Each and all of the acts which involve the company in penal consequences proceed from some aggressive violation of statutory duty imposed, and not from a merely negligent omission to act according to the obligation of its contract as a public carrier of messages." *Western Union Tel. Co.* v. *Swain,* 109 Ind. 406.

The finding and judgment of the circuit court is correct, and is therefore affirmed.

JOHNSON v. DOWNING.

Opinion delivered June 17, 1905.

1. NOTE—WAIVER OF DEMAND AND NOTICE.—A debtor who transfers a note as collateral security to his creditor waives any liability to him as indorser by reason of the creditor's failure to make demand and give notice of nonpayment by subsequently executing a note and mortgage to the creditor for the full amount of his debt. (Page 130.)
2. COLLATERAL SECURITY—NEGLIGENCE.—A creditor is bound to use only reasonable diligence to collect a collateral security, and is liable only for gross negligence in failing to take proper steps to effect a collection and protect the debtor from loss. (Page 130.)
3. SAME—EFFECT OF DELAY IN COLLECTING.—A creditor is not liable for mere delay in enforcing collateral security, especially where there has been no demand upon him to sue the makers of the note. (Page 131.)
4. NOTE—RATE OF INTEREST.—Where a note stipulates that it should bear interest from date at the rate of ten per cent. per annum, without stipulating for interest after maturity, it bears interest at the rate of ten per cent. from date until maturity, and thereafter at six per cent. (Page 131.)

Appeal from Poinsett Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

Reversed.

STATEMENT BY THE COURT.

Appellants, Johnson, Berger & Company, a firm of merchants at Jonesboro, Ark., brought this suit in chancery to foreclose a mortgage executed to them by appellee, A. R. Downing, on January 3, 1899, upon certain land in Poinsett County, to secure payment of a debt in the sum of $521.31, evidenced by promissory note. The greater part of the note is admitted to have been paid, the only dispute being as to two credits claimed by appellee which, if allowed, extinguished the balance of the debt. These disputed credits are as follows: That appellee indorsed and delivered to appellants as collateral security the negotiable promissory note of one Cox and two other persons

for the sum of $100, dated September 27, 1898, due and payable forty-nine days after date, but which was never paid, nor the amount credited to appellee, though the appellants could, so it is alleged by appellee, by proper diligence, have collected said note; and he alleges that appellants neglected to present said note at maturity to the makers and to notify appellee, as indorser, of the nonpayment thereof. Also that appellee indorsed and delivered to appellants, as collateral security, the note of one Cahoon for the sum of $80, secured by chattel mortgage, and that appellants, without the knowledge or consent of appellee, permitted Cahoon to sell the mortgaged chattels to other parties, who assumed payment of the note, but paid only $70 thereof, and that the balance of $10 and interest should be credited on appellee's note. These two credits, if allowed, are sufficient to extinguish the balance claimed by appellants to be unpaid on appellee's notes.

The chancellor found in favor of the defendant, allowing the credits, and entered a decree accordingly, from which decree the plaintiffs, Johnson, Berger & Co., appealed.

Frierson & Frierson, for appellants.

Downing transferred the Cahoon note, without indorsement, as collateral, and was not entitled to notice as an indorser. 2 Dan. Neg. Inst. § § 995*a*, 1176; 7 Cyc. 1076; 2 Rand. Com. Pap. § 760; Tied. Com. Pap. § 367; 2 How. 445; 1 Dan. Neg. Inst. § 821. Downing was a guarantor of payment of the Cox and Cahoon note, and not entitled to require demand or notice. 7 Cyc. 660; 4 Am. & Eng. Enc. Law, 494; Brandt, Suretyship & G., 210; 11 Metc. 563; 24 Ark. 511; 4 Ark. 85; 29 L. R. A. 612; Tied. Com. Pap. § 270; 2 Dan. Neg. Inst. 1765; 14 Am. & Eng. Enc. Law, 1136; 59 Ark. 86; 68 Ark. 423; 71 Ark. 585; Brandt, Suretyship & G. § 175. Demand was duly made, and notice to Downing duly given. 2 Dan. Neg. Inst. § § 1150, 1156; 2 Rand. Com. Pap. § 1316; Tied. Com. Pap. § 365; 7 Cyc. 1134; 4 Am. & Eng. Enc. Law, 464; 26 Ark. 155; 7 Ark. 542; 13 Ark. 401. Downing's defense is precluded by an account stated. 1 Cyc. 364-381; 1 Am. & Eng. Enc. Law, 436-456; 68

Ark. 538; 41 Ark. 502; 53 Ark. 155. Demand and notice was waived by Downing. 7 Cyc. 1124; 2 Dan. Neg. Inst. § § 1090, 1147-1168; 4 Am. & Eng. Enc. Law, 453-466; 2 Rand. Com. Pap. § § 1316, 1356; Tied. Com. Pap. § 363; 26 Ark. 155; 13 Ark. 401; 45 Conn. 246; 14 Me. 48.

N. F. Lamb and *J. F. Gautney,* for appellee.

The indorser of a note binds himself to pay upon condition of the failure of the maker to pay after demand and notice. 24 Ark. 263; 7 Cyc. 904; 11 Ark. 504; 14 Ark. 127, 334; 69 Ark. 270.

McCULLOCH, J., (after stating the facts.) According to the pleadings and testimony in the case, the Cox note was delivered by appellee to appellants as collateral security for debt owing by the former to the latter. The note bears date of September 27, 1898, and was payable in forty-nine days after date, and therefore fell due on November 15, 1898. The evidence is conflicting as to whether appellants presented this note to the makers, and in due time notified appellee of its nonpayment; but it is undisputed that the note was indorsed and delivered to appellants by appellee before maturity, or at least some time before the date of the execution of appellee's note to appellants, December 13, 1898. This being true, appellants cannot be held liable for a failure to make demand of payment and give notice of nonpayment. Appellee, by subsequently executing to appellants his note and mortgage for the full amount of his debt, waived any liability of appellants to him as indorser by reason of their failure to have made demand and given notice of nonpayment. If he intended to insist upon a credit of the amount of the Cox note, he should have claimed it before executing his note to appellants for the full amount of his debt.

By retaining possession of the Cox note as collateral security to appellee's note to them, appellants were bound only to use reasonable diligence to collect it, and are liable only for negligence in failing to take the proper steps to collect the note and protect appellee from loss. Colebrooke on Col. Securities, § 114; Jones on Pledges & Col. Securities, § § 692, 693; 22 Am. & Eng.

Enc. Law, pp. 901, 902; *Hanover Nat. Bank* v. *Brown* (Tenn.), 53 S. W. 206; *Reeves* v. *Plough,* 41 Ind. 204; *Cooper* v. *Simpson,* 41 Minn. 46, 42 N. W. 601, 4 L. R. A. 194, 16 Am. St. Rep. 667.

The evidence in this case does not show (the burden of proof being upon the appellee to establish that fact) that appellants failed to exercise due diligence to collect the note, or that any loss resulted from appellants' alleged failure to present the note for payment and promptly notify appellee of the nonpayment. Appellants were not liable for mere delay in enforcing the collateral, especially where there has been no demand upon them to sue the makers of the note. Colebrooke on Col. Securities, § 208; *Friend* v. *Smith Gin Co.,* 59 Ark. 86; 26 S. W. 374.

Appellee had a perfect right to pay off the debt to appellants at any time, and require a surrender of the collateral note; but, having failed to do this, or make demand upon appellants to sue on the note, he cannot complain of mere delay on the part of appellants in forcing payment of the collateral note. The same may be said of the Cahoon note. The evidence does not show that appellants ever accepted the note as a *pro tanto* payment, or otherwise than as collateral security, or that they ever consented to a sale of the mortgaged chattels. At most, they were only guilty of delay in bringing suit to enforce the security. We think the chancellor erred in allowing appellee credit for either of these notes.

The note sued on stipulated that it should bear "interest from date at the rate of ten per cent. per annum," without any stipulation for interest after maturity. Under the rule established by many decisions of this court, interest must be computed at the rate of ten per cent. from date to maturity, and thereafter at six per cent. *Newton* v. *Kennedy,* 31 Ark. 626, 25 Am. Rep. 592; *Pettigrew* v. *Summers,* 32 Ark. 571; *Gardner* v. *Barrett,* 36 Ark. 476; *Johnson* v. *Myer,* 54 Ark. 437, 16 S. W. 121. Computing interest according to this rule, and after allowing appellee all credits for payments made, including the payment of $56.09 made since the commencement of this suit, we find that appellee is still indebted to appellants in the sum of $124.38, with interest at six per cent. per annum from February 4, 1902, the date of the last payment.

The decree is therefore reversed and remanded, with directions to enter a decree in favor of appellants for the above amount and interest aforesaid, and costs of suit, and that the mortgage be foreclosed.

---

76 132
p77 436
77 438

76 132
f79 13
f80 295

76 132
f89 278
89 279
f90 251

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. COOMBS.

Opinion delivered June 17, 1905.

1. FIRE—COMMUNICATION BY SPARKS FROM ENGINE.—Evidence that a building thirty-four feet distant from a railway track was discovered to be on fire a few minutes after a locomotive engine passed, and that no other means appeared whereby the fire could have been communicated, justifies a finding that the fire was communicated from sparks emitted by the engine. (Page 134.)

2. SAME—NEGLIGENCE.—Where a finding of the jury that fire was communicated to a building by defendant's engine was sustained by evidence, a presumption of negligence on the part of defendant arises, which is not rebutted by proof that the engine was equipped with proper appliances that, if operated with due care, would prevent the emission of sparks of sufficient size to ignite inflammable material, if there was no evidence as to the manner in which the engine was operated when it passed the building which was consumed. (Page 135.)

3. INSTRUCTION—CONCLUSIVENESS OF TESTIMONY.—It was not improper to instruct the jury that they were not bound to accept as conclusive the statement of witnesses that the engine which is charged to have communicated the fire was in good order and carefully operated, although there might be no direct evidence to contradict them, but that they should consider all the evidence bearing upon the condition of the engine and the mode of operating it and the circumstances under which the fire took place. (Page 137.)

4. RAILROAD—APPLIANCES TO PREVENT FIRE—SUFFICIENCY.—A railroad company discharges its duty, so far as its liability for fires communicated by its engines is concerned, if it exercises reasonable care in providing the engines with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks, and such appliances are in good condition. (Page 138.)

Appeal from Independence Circuit Court.

FREDERICK D. FULKERSON, Judge.

Affirmed.

STATEMENT BY THE COURT.

Appellee Coombs was the owner of a cotton compress plant, consisting of building and machinery in the city of Batesville, near the track of appellant's railroad, which was destroyed by fire on May 5, 1902, between 3 and 4 o'clock in the afternoon. It was not then in operation as a compress, and had a lot of hay stored in the building, some of it scattered loose over the floor, and there were cracks about two inches wide in the walls. The property was insured in the sum of $1,200 against loss by fire under a policy issued by appellee, Sun Insurance Company, and that company paid Coombs the sum of $1,193.41 in satisfaction of claim under the policy for loss on the property.

This suit was brought by Coombs and said insurance company against appellant to recover the value of said property, which is alleged to be the sum of $4,000. It is alleged that the fire was caused by sparks which were by appellant's servants negligently permitted to escape from its locomotive while passing near the building.

Appellant in its answer denied that it had been guilty of negligence, and denied all the other allegations of the complaint.

The jury returned a verdict in favor of plaintiffs for $1,000, and the defendant appealed.

B. S. Johnson, for appellant.

Railway companies are not liable for damages by fires caused by sparks from an engine, if the company was guilty of no negligence in the construction, maintenance or operation of its engine. 114 Fed. 133; 15 Com. 124; 80 Pa. St. 182; 67 Ill. 68; 18 Kan. 261; 41 Wis. 78; 36 N. J. L. 553; 31 Ia. 176. The statutory presumption of negligence was overcome by the

proof in the cause. 49 Ark. 535; 33 Ark. 816; 53 Ark. 96; 66 Ark. 439; 67 Ark. 514.

Neill & Neill and *Arthur Neill,* for appellees.

Defendant's exceptions were not properly saved, and will not be considered. 28 Ark. 8; 32 Ark. 223; 38 Ark. 532; 39 Ark. 337; 50 Ark. 348; 54 Ark. 16; 59 Ark. 312, 370; 60 Ark. 316; 44 Ark. 264.

McCULLOCH, J., (after stating the facts.) Appellant challenged the sufficiency of the evidence to support a verdict for plaintiffs by a request to the court for a peremptory instruction in its favor.

The plaintiffs introduced several witnesses who testified that a short while before the building was discovered to be on fire (the precise time, according to these witnesses, varies from ten to twenty minutes) they saw the engine pass near the building. This is denied by the engineer and brakeman, who testified that they did not go down the track as far as the compress building that day; but the preponderance of the evidence seems to be against them, and the jury, in returning a verdict in favor of the paintiffs, necessarily found that the engine did pass the building, and, there being a substantial conflict in the testimony, we are concluded on this point by the verdict.

The building is shown to have been about 34 feet from the track on which the engine is said to have passed, and no other means appears by which the fire could have been communicated. The fire occurred on Monday, and no person had been seen in the building since the preceding Saturday, when the man in charge securely fastened it.

In order for the railroad company to be held liable for the damage, the fire must have been communicated by sparks from the engine, and the escape of the sparks must have resulted from negligence on the part of the company or its servants, either in the construction or operation of the engine.

This court held that, from proof that an engine passed near inflammable material immediately before the discovery of fire, there being no evidence to explain its origin, the jury may infer

that the fire originated from sparks from the engine. *Railway Company* v. *Dodd,* 59 Ark. 317. In that case the court said: "The cotton was liable to take fire from these trains, and communicate it to the depot. One of them passed ten or fifteen minutes before it was destroyed. The cotton caught fire, and the depot was consumed by it. These were facts from which the jury might have inferred that the fire originated in sparks from the engine of the train which had just passed, there being no evidence to explain its origin upon any other theory. All these facts tended to show that the property of appellees was destroyed through the negligence of appellant, and are sufficient to sustain the verdict of the jury in this court." This enunciation is in line with many adjudged cases on the subject. *Burke* v. *L. & N. Ry. Co.,* 7 Heisk. (Tenn.) 451; *Karsen* v. *M. & St. P. Ry. Co.,* 29 Minn. 12; *Woodson* v. *M. & St. P. Ry. Co.,* 21 Minn. 60; *Hagan* v. *Railroad Company,* 86 Mich. 615; *Johnson* v. *Railway Company,* 77 Iowa, 667; *Barron* v. *Eldredge,* 100 Mass. 455; *Smith* v. *London & Southwestern R. Co.,* L. R. 6 C. P. 14; 3 Elliott on Railroads, § 1243.

When it is proved that the fire originated from an engine of the defendant railroad company, a *prima facie* case is made for the plaintiff, and it then devolves upon the railway company to exonerate itself from the charge of negligence. *Little Rock & F. S. Railroad Company* v. *Payne,* 33 Ark. 818; *Tilley* v. *S. L. & S. F. Ry. Co.* 49 Ark. 535; 3 Elliott on Railroads, § 1244.

The jury having found, upon legally sufficient evidence, that the fire was communicated by sparks escaping from the engine, the next inquiry presented, is, whether appellant overcame the presumption of negligence arising therefrom.

The engineer and yard watchman and the regular fireman, who was off duty the day of the fire, testified that they examined the engine immediately after the fire, and found the spark arrester in good condition. Three days later the engine was examined at Newport by an expert from the shops of appellant at Baring Cross, who testified that the spark arrester was of the most approved pattern in use, and was then in good condition. Mr. Luttrell, the superintendent of locomotives of appellant company, testified that the kind of spark arrester on the engine in question

was the most approved in practical use, and that, "if it was in good condition at the time, the parts all tight in their places, screwed up as they belong, and no holes or apertures that were not made in them," sparks or cinders of sufficient size to ignite anything could not, in his opinion, escape. He said: "I do not think it possible for sparks from an engine equipped like this to set fire to hay from a spark falling 35 or 40 feet." The engineer testified, also, to the effect that an engine equipped with that kind of spark arrester would not, unless there was some defect or break in it, throw sparks large enough to set fire to anything. There was no testimony on the part of appellant as to the manner in which the engine was being operated when it passed the building, as the witnesses introduced denied that they passed down by the compress at all.

So the case stands thus: From the fact that the engine passed near the building a few minutes before the fire, and that its origin cannot be accounted for upon any other theory, a conclusion is warranted that it was communicated from the engine; and it is shown by said agents of appellant that a spark arrester of approved pattern, in good condition, such as is in common use, will not emit sparks of sufficient size to ignite inflammables. Against this the witness introduced by appellant testified, without contradiction by direct testimony, that the engine was provided with a spark arrester of the most approved kind in use. Therefore, when it was established that fire had been communicater from the engine, and there was testimony tending to show that an engine equipped with proper appliances and operated with due care would not emit sparks of sufficient size to ignite inflammable material, the jury were warranted in finding either that the engine was not so properly equipped, or that it was not operated with due care, and that appellant had not rebutted the presumption of negligence raised against it. Upon this state of the proof it cannot be said that the verdict of the jury was without evidence sufficient to support it.

The Supreme Court of Iowa in the case of *Johnson* v. *Railway Company, supra,* similar to this, said: "Counsel for defendant maintain that there is an utter failure of proof that the defendant's engines, said to have set out the fire, were negligently handled or were not in good repair and condition. In reply to

this position, it need only be said that one of defendant's witnesses, a locomotive engineer who was in charge of one of the engines from which it was claimed the fire escaped, testified that an engine in good repair could not throw fire a distance from the track to the place the fire caught in the grass. As has been said, the fires could have originated from no other source. The jury were authorized to infer from this evidence that the engines were not in good repair."

In *Hagan* v. *Railroad Company, supra,* a case similar to this, where the origin of the fire was unexplained except by the proximity of the engine, and the railroad operatives had testified that the engine was properly equipped and skilfully operated, and that such an engine, when so operated, could not throw sparks, the court held that there was sufficient evidence to go to the jury, saying: "Testimony cannot be said to be undisputed when inconsistent with some other fact or circumstance, either established or regarding which testimony has been admitted. The court very properly declined to take the case from the jury or to pass upon the conclusiveness of the testimony offered by the defendant."

The Supreme Court of Minnesota in the case of *Karsen* v. *M. & St. P. R. Co., supra,* which was quite similar to this on the facts, said: "A verdict cannot be said to be unsupported by the evidence, when, taking the entire evidence together, it will fairly and reasonably warrant the conclusion arrived at. Neither is a jury necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skilfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the facts and circumstances in evidence bearing upon the condition or mode of operating the engine and upon the accuracy of witnesses." See also *Solum* v. *Great Northern Ry. Co.,* 63 Minn. 233; *Burud* v. *Great Northern Ry. Co.* 62 Minn. 243.

Error is assigned by counsel in the giving of several instructions by the court, but we find no error in them. It is especially urged that the court erred in giving the seventh instruction asked by plaintiffs, wherein the jury were told that they were not bound to accept as conclusive the statement of witnesses that the engine was in good order and carefully operated, although there might

be no direct evidence to contradict them, but that they should consider all the circumstances and evidence bearing upon the condition of the engine and mode of operating it and the circumstances under which the fire took place. We think this instruction correctly stated the law, and follows the language used in some of the decisions we have cited herein.

Complaint is also especially urged against the oral instruction of the court, on the ground that it holds the railroad company to the absolute duty of providing the most approved appliances for preventing the escape of fire, instead of holding them merely to the duty of exercising ordinary and reasonable care and diligence in providing the best known appliances in practical use. We do not think that the instruction is open to that objection. The instructions, taken as a whole, correctly state the law to the jury that the company had discharged its duty if it "had exercised reasonable care in providing its engines with the most approved appliances and contrivances in general use by railroads throughout the country for the prevention of the escape of sparks, and said appliances and contrivances were in good condition."

The judgment is affirmed.

BATTLE, J., dissents.

---

76 138
f81 328
82 547
76 138
87 370
76 138
f89 227

BEAVERS v. SECURITY MUTUAL INSURANCE COMPANY.

Opinion delivered June 24, 1905.

1. APPEAL—SUFFICIENCY OF ABSTRACT.—Under rule 9 appellant is required to abstract the entire case, so far as it is material to the issues raised on appeal, and not merely the testimony relied upon to sustain his version of the case; and, in case of a difference of opinion as to what is necessary to a determination of the issues the appellee may abstract such further matters as he sees proper. (Page 139.)

2. SAME—REVIEW OF INSTRUCTIONS.—The substance of the evidence is always material in testing the instructions; and if it is not set out, the only question before the court is whether any facts would justify them. (Page 140.)

Appeal from Yell Circuit Court.

WILLIAM L. MOOSE, Judge.

Motion to dismiss overruled.

R. C. Bullock, for appellant.

Murphy & Mehaffy, for appellee.

HILL, C. J. This case is set for July 10, and appellant filed abstract and brief in apt time, and the appellee, instead of filing its abstract and brief, has invoked the ruling of the court on the sufficiency of the abstract of appellant in a motion to dismiss for noncompliance with Rule IX.

The court cannot take time to read the record and briefs in advance of submission to settle questions determinable in the trial, and confines its ruling to the matters appearing in the motion and response thereto. The appellee says that five witnesses testified for appellant on material issues, and nineteen testified on behalf of appellee, and that the testimony is material and bearing on the issues, and that brought out by appellee on cross-examination of appellant's witnesses goes to sustain the verdict and justify the instructions, and that appellant omits this testimony and all reference to it, except an excerpt from appellant's testimony. The appellant responds that he has abstracted the pleadings and all other matters in the record necessary to a full understanding of all questions presented to the court. It appears that the instructions of the trial court are the matters here complained of, and appellant, having set them forth fully, says this testimony is immaterial, and most of it was brought out by appellee, and that it is its duty to abstract its own testimony under the rule. In this appellant is mistaken. He must abstract the entire case, so far as it is material to the issues raised on appeal, and the rules do not contemplate that each side abstract its own version of the case, but that the appellant abstract all that is necessary. In case of difference of opinion as to what is necessary to a full determination of the issues presented, the appellee can abstract such further matters as he sees proper.

The substance of the evidence is always material in testing the instructions; and if it is not set out, then the only question on the instructions before the court is whether any facts would justify the instructions. It does not by any means follow that the appellant must set out all of a vast volume of testimony. On the contrary, the rules contemplate an abridgment of it, except when its sufficiency is raised; but it is necessary to set out the substance of all matters to which testimony was adduced in order to properly determine whether the instructions are correct. If counsel regards this testimony as immaterial, he can dispose of it in a very short way by stating that evidence was adduced tending to prove certain facts, and give appropriate references to the witnesses and the pages of the record where such testimony may be found. Then, if appellee conceives that this statement of the effect of the testimony is not full enough or not accurate, it is his duty to abstract so much of it as he may deem necessary to present his view of it. Appellant offers, if, in the opinion of the court, his abstract is not sufficient, to file an additional one; and the court, believing appellant has in good faith tried to comply with the rule, will not dismiss the cause, but grants him one week in which to further abstract the case.

---

76 140
f76 241
f78 589
f82 225

76 140
f86 200
s86 537
88 385

GRAHAM v. REMMEL.

Opinion delivered June 24, 1905.

PROMISSORY NOTE—CONDITION IN PAROL.—In a suit on a note executed in payment of the first premium of a policy of insurance it is competent in defense to prove by parol evidence that the note was executed on condition that it should not be binding unless the policy, when it arrived, was satisfactory.

Appeal from Jackson Circuit Court.

WILLIAM L. MOOSE, Judge.

Reversed.

H. L. Remmel sued the firm of Graham Brothers, consisting of Henry C., J. R., T. J., Nimrod, Nathan, Josephus S. and James Graham, on the following note:

"Tuckerman, Ark., Feb. 27, 1902.

"On the delivery, or thirty days thereafter, of a joint life policy of the sum of thirty-five thousand dollars ($35,000), on the ten-year distribution plan, in the Mutual Life Insurance Company, of New York, on the lives of Henry C. Graham, J. R. Graham, T. J. Graham, Nimrod Graham, Nathan Graham, Josephus S. Graham and James Graham, known as the Graham Brothers, we promise to pay to the order of H. L. Remmel the sum of four thousand seven hundred and fifty-three and seventy-hundredths dollars ($4,753.70). Should the policy not be issued, then this obligation to be null and void.

(Signed.) "GRAHAM BROTHERS."

Plaintiff recovered judgment, from which defendants appealed.

John W. & Joseph M. Stayton and *Morris M. Cohn,* for appellants.

Rose, Hemingway & Rose and *S. D. Campbell,* for appellee.

HILL, C. J. In Jackson County there were seven brothers, named Graham, engaged in merchantile and farming business, and all in prosperous condition; and it developed in argument of the case at bar that they were each over six feet tall—fine specimens of Arkansas manhood. Mr. H. L. Remmel, the general manager in the State of one of the large insurance companies, knowing them, and recognizing the advantage to his company of securing a policy on the joint lives of these gentlemen, undertook personally to secure such a policy, and to that end visited them. The result was, an application was signed for a $35,000 policy on the lives of the seven Grahams, and a note for $4,753.70, payable to Mr. Remmel, was executed and delivered to him. Later, a ten-year distribution plan for $35,000 was sent to the Grahams.

It was not accepted, and negotiations were had between Mr. Remmel and some of them looking to the securing of a different policy than the one sent. Mr. Remmel tried to get the one desired, and failed, and tendered a policy according to what he claims was the contract when the note was executed, and, on the refusal of the Grahams to accept it, he brought suit on the note.

The testimony of Mr. Remmel is to the effect that an absolute agreement was reached when the application was signed and the note executed, and the policy tendered as in full and complete fulfillment of the contract as called for in the note, which will be set out in the statements of facts by the Reporter. Mr. Remmel was supported in his statements by a letter written to him during the negotiations for the different policy, in which Graham Brothers stated: "Will say we are pleased with contract, and have no objection whatever, but would like to have it changed the five-year distribution plan, as we have changed our minds on taking it on the plan applied for." They explain this letter by saying that it was dictated by Mr. Remmel himself to their attorney. This is admitted; and they further say it was written merely to facilitate Mr. Remmel in his effort to obtain from his company the policy they desired.

The court excluded evidence offered by the appellants contradictory of Mr. Remmel's as to the execution of the note. The record reads as follows:

"The defendants thereupon offered to prove by Thomas Graham that the plaintiff requested that they execute the note; that it might be necessary to attach the note to the application to show their good faith, but would not be binding upon them, except that, if the policy when it arrived was satisfactory, and they accepted it, the note would be binding; otherwise it would be void. This was a condition which went with its execution. The evidence so offered having been ruled out, defendants excepted."

Several other Grahams were offered on the same point. The court directed a verdict for Mr. Remmel on the note sued upon, judgment was rendered accordingly, and the Grahams have appealed.

The appellee relies upon *Findley* v. *Means,* 71 Ark. 289, and the authorities therein cited, to sustain the action of the circuit court in excluding this testimony. The syllabus of that case is as follows: "A deed, note or other instrument of writing delivered to the grantee or obligee to take effect when certain conditions are performed becomes operative and binding from the time of delivery, though the conditions be not fulfilled." The authorities cited are *Pope* v. *Latham,* 1 Ark. 66; *Inglish* v, *Breneman,* 5 Ark. 377; *Scott* v. *State Bank,* 9 Ark. 36; *Chandler* v. *Chandler,* 21 Ark. 95; *Campbell* v. *Jones,* 52 Ark. 493. With the exception of *Chandler* v. *Chandler,* all these cases were cases of escrow, where the point decided was that there could be no delivery in escrow to the obligee of a bond, note or other written instrument. *Chandler* v. *Chandler* holds that where a bond or other writing is delivered conditionally to the obligee himself, it is operative and binding from the time of the delivery, though the conditions be never performed; and to the same effect is the ruling in *Findley* v. *Means.* The technical character of an escrow is not mentioned in these two cases. Where conditions subsequent are to be performed in order to render the note or bond operative, and when operative the written instrument is expressive of the entire contract, then it must be delivered to a third person, or the delivery to the obligee in escrow will be a good delivery, and the instrument cannot be contradicted by parol varying its terms. It is a completed contract, subject to conditions subsequent not in writing. But where the delivery would defeat the real contract between the parties, then it is competent to prove by parol (1) the whole contract, and that the writing was only part of the contract, or (2) to explain the consideration, or (3) to show that it was part of the contract that the writing was delivered, but not to become operative until another part of the contract—condition precedent—was fulfilled. Of the first class is *Kelly* v. *Carter,* 55 Ark. 112, where a deed did not evidence the entire contract, and parol evidence was admitted to show the entire contract. Of the second class is the recent case of *St. Louis & N. Ark. Rd. Co.* v. *Crandell,* 75 Ark. 89, where the authorities in this State are cited to show that the consideration is, under certain circumstances, open to parol proof, not to defeat, but to effectuate the real contract;

and of the third class is *State* v. *Wallis,* 57 Ark. 64, and *Ware* v. *Allen,* 128 U. S. 590, which is approved in *State* v. *Wallis.* In *State* v. *Wallis,* Mr. Justice HEMINGWAY, speaking for the court, said: "Proof that such of the defendants as subscribed the bond did so upon the condition that other persons named in it as sureties would sign it was not incompetent. It was not designed to vary the terms of a written instrument, but to show that there never was a complete execution of such instrument. For this purpose it was competent. *Ware* v. *Allen,* 128 U. S. 590." In *Ware* v. *Allen,* the Supreme Court of the United States held: "Parol evidence is admissible, in an action between the parties, to show that a written instrument, executed and delivered by the party obligor to the party obligee, absolute on its face, was conditional, and was not intended to take effect until another event should take place."

Following *Ware* v. *Allen,* the Supreme Court of the United States, in *Burke* v. *Dulaney,* 153 U. S. 228, carried the application of the doctrine into a case identical in principle and analogous in fact with the one at bar. Mr. Justice HARLAN, for the court, said:

"And the evidence offered by the appellant, and excluded by the court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not—except in a named contingency—to become a contract or promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract, entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion

of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is undoubtedly *prima facie*—indeed, should be deemed strong—evidence that the instrument came to the hands of the payee as an obligation of the maker, enforcible according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing *as the promissory note of the maker,* payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract."

After citing many authorities supporting these views, the court concluded:

"For the reasons stated, and without considering the case in other aspects, we are of the opinion that it was error to exclude the evidence offered by the defendant tending to show that the writing sued on was not delivered to or received by Dulaney as the promissory note of the defendant, binding upon him as a present obligation, enforcible according to its terms, but was delivered to become an obligation of that character when, but not before, the defendant examined and, by working them, tested the mining properties purchased by the plaintiff, and elected to take the stipulated interest in them. According to the evidence so offered and excluded, the writing in question never became, as between Burke and Dulaney, the absolute obligation of the former, but was delivered and accepted only as a memorandum of what Burke was to pay in the event of his electing to become interested in the property, and from the time he so elected, or could be deemed to have so elected, it was to take effect as his promissory note, payable according to its terms. His election within a reasonable time to take such interest was made a condition precedent to his liability to pay the stipulated price. The minds of the parties never met upon any other basis,

and a refusal to give effect to their oral agreement would make for them a contract which they did not choose to make for themselves."

Following these authorities, and approving the reasoning in *Burke* v. *Dulaney,* above quoted, the court is of opinion that the circuit court erred in excluding the evidence offered and directing a verdict. The evidence raised an issue of fact determinable by a jury.

The judgment is reversed and cause remanded.

---

76 146
81 456
81 462
82 56

76 146
87 210

COWLING v. NELSON.

Opinion delivered June 24, 1905.

1. VENUE—PARTITION SUIT.—Where the estate of a deceased person has been wound up, an action for partition of the land among the heirs should be brought in the county where the land, or some part of it, is situated, as provided by Kirby's Digest, § 6060, and not in the county where deceased's personal representatives qualified, as provided by Kirby's Digest, § 6064. (Page 148.)

2. PARTITION—AMBIGUITY IN DESCRIPTION.—Parties to a partition suit cannot in a subsequent suit take advantage of any obscurity in the judgment in describing the land if they have sold the interests partitioned to them, and the purchaser has gone into possession, and is not made a party to the subsequent suit. (Page 148.)

3. JUDICIAL SALE—CONFIRMATION.—Where a commissioner, ordered by the court to sell a tract of land, produced a deed to the purchaser which was "approved and confirmed" by order of the court, the confirmation, though irregular, is sufficient. (Page 149.)

4. LIMITATION—VOID JUDICIAL SALES.—While proceedings based on void judgments cannot be validated, it is competent for the Legislature to prescribe therefor a shorter period of limitation than the general statute. (Page 150.)

5. SAME—PERIOD.—Where a judicial sale is confirmed, and the court had jurisdiction over the parties, the five years' statute of limitations runs in favor of the purchaser at such sale against the parties to the suit, although the sale is void. (Page 150.)

6. SAME—MINORS AND INSANE PERSONS.—Minors and insane persons are entitled to recover land sold at a void judicial sale, notwithstanding

the lapse of time. subject only to the purchaser's right to betterments under Kirby's Digest, § 2754. (Page 150.)

7. PARTITION—WHEN SALE AUTHORIZED.—Kirby's Digest, § 5785, providing that where the commissioners in a partition suit report that partition of the land cannot be made without great prejudice to the owners, the court may, if satisfied that such report is correct, order the land sold and distribute the proceeds, does not authorize a sale of land involved in a partition suit merely to pay the costs. (Page 150.)

8. JUDICIAL SALE—PARTITION—VALIDITY.—A judgment in a partition suit, not based upon the pleadings or the consent of the parties, which directs a part of the land to be sold to defray the costs of the suit and attorney's fees, is beyond the court's jurisdiction, and a sale under it is void on collateral attack. (Page 152.)

9. VOID JUDICIAL SALE—RIGHT TO BETTERMENTS.—A purchaser at a void judicial sale is entitled to recover only the improvements made by him after his deed was confirmed. (Page 152.)

Cross appeals from Hempstead Chancery Court.

JAMES D. SHAVER, Chancellor.

Reversed in part.

Feazel & Bishop, for appellants.

D. B. Sain and *W. C. Rodgers*, for appellee.

HILL, C. J. In 1895 Bettie Jones owned an undivided half interest, and her nephew and niece, Willie and Ola Jones, owned the other half, of a tract of land containing about 330 acres, lying partly in Hempstead County and partly in Howard County. They inherited the land. Bettie Jones was then and is now an insane person, and confined in the State Asylum. Ola Jones was born August 3, 1875, and Willie Jones was born July 15, 1882. On the 19th day of August, 1895, the then guardian of Bettie Jones filed a partition suit in the Hempstead Circuit Court against Ola Jones and Willie Jones, alleging the latter to be a minor, and set forth the respective interests of the parties, and prayed a partition of the land, and, in the event it was not found susceptible of partition, a sale thereof, and a division of the proceeds. Constructive service was had against the defendants therein, and decree rendered, finding the respective interests of

the parties, and ordering partition, and appointing commissioners to make partition. The commissioners made partition, and reported their proceedings, partitioning all the land except a 48-acre tract which was afterwards sold to appellee J. L. Reed. The report was confirmed. Before discussing the principal contention, which is over the 48-acre tract, the other questions presented attacking the whole proceeding will be disposed of.

It is contended that under § 6064, Kirby's Digest, providing that an action for the distribution of the estate of a deceased person, or its partition among his heirs, etc., must be brought in the county where his personal representative qualified, as there was an administration of the estate of the ancestor in Howard County, the suit should have been brought there, and the Hempstead Court was without jurisdiction. The section just preceding this (6063) provides that an action to settle the estate of a deceased person must be brought in the county in which the personal representative qualified. These sections were taken from the Civil Code, which was adopted when the Constitution of 1868 was in force, and under it the probate jurisdiction was exercised in the circuit courts, and there were no separate probate courts. These sections, therefore, were intended to bring into the forum where the administration was pending actions settling, distributing, and partitioning estates. Under the changed jurisdiction, the excellent reasons for the enactment of these statutes ceases, and, if given force, must not be extended. The evidence shows that the administration on the estate of the ancestor was wound up and the administrator discharged before the partition suit was brought, and the reason, even under the former law, for applying this statute would not be applicable, and *a fortiori* it is not applicable under the present system. Section 6060, Kirby's Digest, provides that actions to partition lands shall be brought where the land, or some part of it, is situated. The Hempstead Circuit Court had jurisdiction of the partition suit.

The next objection is to the insufficiency of the description of the land partitioned. The tracts (other than the 48-acre tract) are described obscurely, to say the least of it; but the parties have sold their interests in them, and the purchaser is in possession, and is not made a party to this suit. Whatever difficulties

there may have been in locating the tracts from the description is removed by putting the purchaser into possession. The question is not open here.

That leaves only for consideration the 48-acre tract. The commissioners, in their report partitioning the land, after reporting that the parties had no other property, suggested that a certain tract described therein, and containing 48 acres, be set aside and sold to defray the expenses of the proceedings, which they understood would be about $150. They reported that they had an offer of $150 for this tract, which they considered a fair price. The court confirmed their proceedings in setting aside the various tracts, and approved their suggestion, and ordered this tract sold to Reed for $150, to pay costs and expenses, including an attorney's fee of $75 for the attorneys for the plaintiff in the suit. The commissioners then sold the tract to Reed for said sum, and executed him a deed therefor in December, 1895; and he went into possession and placed improvements on the lands, and has held it since. At the April term, 1896, of the Hempstead Circuit Court, their deed was presented to the court, and an order was made in the case reciting that the commissioners produced to the court their deed to J. L. Reed for the land, and described it, and concluded, "which it in all things approved and confirmed by the court." While this related to the deed, yet it identified the prior transaction wherein the sale to Reed at this price was ordered, and must be treated as a confirmation of the sale. It is irregular and improper, because formal confirmation should always be entered of record, yet the court has said that it was not necessary that confirmation appear by a formal order to that effect, if it can be gathered from the whole record. *Ousler* v. *Robinson*, 72 Ark. 339, 80 S. W. 227. Taking the whole record, the sale must be treated as confirmed. This precludes Ola Murphy from maintaining this action to set aside the sale on the ground of the want of jurisdiction to render the judgment ordering this land sold to pay costs and attorney's fees. The court had jurisdiction of the parties, and the other parts of the decree were valid, and the exceptions to the application of the five-year statutes of limitations on the part of purchasers at judicial sales do not apply. She was of full age when the decree was rendered, and this action was brought more than five years thereafter.

While proceedings based on void judgments cannot be validated, yet it is competent to curtail actions to set them aside by shorter statutes of limitations than the general statutes. Freeman on Void Judicial Sales, § § 58, 58*a*.

This court has held that the five-year statute does not apply to judicial sales unless they are confirmed, because there is no sale until that act. *Lumpkins* v. *Johnson,* 61 Ark. 80, 32 S. W. 65; *Morrow* v. *James,* 69 Ark. 539, 64 S. W. 269. When confirmed, and the court has jurisdiction over the parties, the five-year statute runs in favor of the purchaser at such sale against the parties thereto, although the sale is void. It is a statute of repose, and if valid the purchaser needs no limitation to ripen his title, and the manifest purpose of the Legislature was to apply it to void sales within the limitations mentioned.

The lower court allowed Willie Jones to redeem on account of his minority, but refused to allow Bettie Jones, the insane person, to maintain the action. On the theory of a redemption from the sale, that decree may be right, but the case goes farther. Was the sale of the 48 acres void? If so, then the insane party and the minors both ought to be permitted to recover the land, not redeem it, subject only to Reed's right to betterments under section 2754, Kirby's Digest.

At common law there was no right in a tenant in common or other tenant to obtain in partition proceedings a sale of the property. The courts had no jurisdiction to order a sale, but partition could be had as of right, even if partition was ruinous and inconvenient to and undesired by all the other parties. Freeman on Cotenancy & Partition, § § 536, 539. To obviate hard cases the various States have passed statutes permitting sales when partition would be prejudicial to the rights of the parties. Kirby's Digest, § 5785, provides that, when commissioners report that partition cannot be made without great prejudice, the court may, if satisfied that such report is true, order the land sold to the highest bidder at public auction. Such sales are made on terms prescribed by the court, and have to be reported to and confirmed by the court, and deed is then ordered made. Sections 5786, 5792. The proceeds, after deducting costs and expenses, are distributed according to the respective interests.

Section 5793. These statutes confer the only jurisdiction which the court has to order the sale of real estate in partition proceedings, as it is not an inherent right of the parties to have it, and no jurisdiction existed to order it prior to these statutes, and hence the jurisdiction must be exercised conformably to the the statutes. In this case the tract in question was not sold because the land was incapable of partition without great prejudice, but, on the contrary, for the sole purpose, appearing on the face of the record, of paying the costs of the proceedings and the fees of the plaintiffs' attorneys, taxed as part of the costs. The utmost that can be said of the attorneys' fees are that they were part of the costs; and as to whether the court has, in amicable suits, any right to tax them as costs is a question that the courts are divided upon, but all agree that in adversary proceedings they cannot be so taxed. 21 Am. & Eng. Enc. Law, (2d Ed.), 1177, 1178. Costs are debts, and do not constitute liens, other than general judgment liens, when they enter into a judgment. They are not enforceable by sale of property, other than other debts are enforceable by execution after proper proceedings. The statutes prescribe methods to collect debts from minors and insane persons, but as to any person they are no more than other debts, and exemption and homestead and bankruptcy proceedings may avoid their collection. The officers have full protection from performing any service until their fees are paid in advance. It is clear that in partition suits the land cannot be sold to pay costs, and the only question of moment is the effect, on collateral attack, of the judgment ordering it done. In *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81, 84 S. W. 1044, in referring in an order of probate court selling lands to pay costs of administration, the court said: "But where its judgment shows affirmatively on the face that the court was proceeding in a matter over which it had no jurisdiction, or acting beyond its jurisdictional limits, such judgment is void. * * * The confirmation cures all irregularities in the sale or the order therefor, but not jurisdictional defects. The order of sale here shows affirmatively that it was made to pay expenses of administration, and not debts of the decedent, and is therefore void." The analogy between the cases is strong. In *Falls* v. *Wright,* 55 Ark. 562, 18 S. W. 1044, 29 Am. St. Rep. 74, dower was assigned

in lands of an estate not presented to the court in the petition for assignment of dower, and the action of the commissioners was confirmed. This court held, so far as the land outside the petition was concerned, that it was aside from the issue, confirmation did not cure it, and the sale was void. The court approved this definition of jurisdiction: "First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; third, the point decided must be, in substance and effect, within the issue." The sale for costs is not an issuable fact in partition suits, and, when the court entertains it, it is going beyond its jurisdictional limits. In a case in Indiana the court ascertained an amount as attorney's fees, and decreed it a lien on the lands, and sale was had thereunder. It was held the sale was void, as courts have no power to adjudicate matters not in issue, and which could not be brought in issue. *Hutts* v. *Martin,* 134 Ind. 587, 33 N. E. 676.

It is insisted that the guardian of Bettie Jones had authority to bring the suit, and his action within the limits of his express authority would bind her. This is true, and his action bound her in everything which the partition suit could validly accomplish—a partition of the lands, and, where it is found incapable of partition without great prejudice, then a sale. These are the only issuable matters to be presented. On them she is bound. Beyond them she is not. The Indiana court in the case *supra* said: "Litigants do not place themselves for all purposes under the control of the court, and it is only the interests involved in the particular suit that can be affected by the adjudication. Over other matters the court has no jurisdiction, and any decree or judgment relating to them is void."

The court, in finding the amount for Willie Jones to pay for improvements, seemed to have allowed for improvements made in 1895. Reed's deed, while dated December 9, 1895, was not approved and the sale was not confirmed till April 6, 1896. As the commissioners procured its approval and presented it to the court, it is evident that it was not intended to deliver the deed till it was approved by the court, and he had no color of title until the deed was delivered to him. He had color of title after the deed was approved and delivered to him, and he is

entitled to improvements as prescribed by the betterment act.

The decree as to Ola Murphy (nee Jones) is affirmed, because she is barred. As to Willie Jones it is reversed as to the amount he is chargeable with, and as to Bettie Jones is reversed. The cause is remanded, with directions to enter judgment in favor of Bettie and Willie Jones for their respective interests, subject to proper allowance for betterments.

NIAGARA FIRE INSURANCE COMPANY *v.* BOON.

76 153
76 255
76 153
178 212

Opinion delivered June 24, 1905.

1. APPEAL—COMPETENCY OF TESTIMONY IN CHANCERY CASES.—As a chancellor is presumed to have considered only competent testimony, questions as to the competency of testimony will not be considered on appeal. (Page 156.)
2. ARBITRATION AND AWARD—PRESUMPTION.—Every reasonable presumption is in favor of an award, and it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers. (Page 156.)
3. ARBITRATION—WITHDRAWAL OF ARBITRATOR.—An arbitration cannot be defeated, after it is properly submitted, by the withdrawal of one of the arbitrators during the investigation. (Page 157.)
4. AWARD—EXCESSIVE VALUATION.—An award will not be set aside as being an excessive valuation unless it was so grossly erroneous as to indicate bad faith or other grounds to set it aside. (Page 158.)

Appeal from Lee Circuit Court.

S. H. MANN, Special Judge.

Affirmed.

Terry & Terry, for appellants.

The court erred in considering incompetent evidence. The award was invalid because: First, the refusal of Rawes to proceed on the improper basis insisted on by Hampton and the umpire operated, in law, as a revocation of the reference. Morse, Arb. 236; 46 Atl. 92. That the submission may be revoked

before award, see 3 Cyc. 610, 613. Second, the refusal of the appraiser and umpire, who assumed to act, to make separate statements as to the "sound value" of the wall before the fire and the damage thereto was a departure from the terms of the submission, and vitiated their award. Ostrander, Ins. § § 269, 273; 38 S. E. 687, 690. Third, because the *umpire* acted as an *original appraiser,* and both of those who did act did so upon an improper basis of appraisal. 38 S. E. 689; 35 Atl. 15. Fourth, the umpire was without jurisdiction, as no such "difference" had arisen as called his functions into play. 38 S. E. 687-8; 3 Cyc. 659. Fifth, the award omitted important subject-matter, towit: the sound value of the property before the fire. Ostrander, Ins. pp. 647, 674. Sixth, the award was not made in accordance with the terms of the policy and agreement of submission. May, Ins. § 1101; Ostrander, Ins. 674. Seventh, the award included damage to the awning, which was no part of the realty. Ostrander, Ins. 609, 615, 616, and § 278, p. 627. Eighth, the umpire and the one arbitrator who assumed to act resorted to Boon's attorney in preparing the award and in resuming consideration after they had disagreed. Morse, Arb. 275; 10 Ky. Law Rep. 935; 3 Cyc. 646. Ninth, the appellee communicated with the appraisers, and furnished them certain documents, in the absence of appellant. 3 S. E. 13; 13 Grat. 535; Ostr. Ins. 617. Tenth, the arbitrators had consented to adjournment of the board. 68 Ark. 583. Eleventh, there was no such "disagreement" as called into play the functions of the umpire. 38 S. E. 688; 3 Cyc. 659; 38 S. E. 638. Twelfth, the umpire did not really participate in the examination of all matters embraced in the report. 2 Cyc. 541; 29 N. Y. 293; 4 Gr. Ev. 468; 1 Dall. 364; 14 B. Mon. 294. Thirteenth, the amount of the award was excessive. The court erred in its rulings upon the evidence as to the amount of damage. 58 N. Y. Sup. Ct. 727; 59 Ark. 110; 68 Ark. 224; 70 Ark. 406. Upon the failure of the original board to agree, appellee should have acceded to the demand of appellant for a new one. 10 Daly, 535; 116 N. C. 491.

P. D. McCulloch, for appellees.

The award should be sustained. The law favors arbitrations,

and every intendment will be indulged in favor of their validity. 3 Cyc. 586; 57 Com. 105; 87 Ind. 457; 31 Kan. 656; 51 Ind. 83; 70 Mich. 469; 47 Mo. 488; 50 N. J. Eq. 103. An award made in accordance with the terms of the submission is conclusive upon the parties. 44 Ark. 166; 48 Ark. 522; 57 N. J. Eq. 511. Substantial compliance is sufficient. 57 Com. 105. An award by a majority of the board is sufficient. 78 N. W. 256; 62 N. J. Eq. 73. Every presumption will be indulged in favor of the regularity and integrity of the award, and same will not be set aside for anything except fraud. 41 C. C. A. 170; 54 Ala. 78; 15 Ala. 398; 10 Cal. 615; 28 Fla. 209; 108 Ill. 194; 78 Ill. 286; 87 Ind. 457; 120 Ia. 272; 31 Kan. 656; 70 Mich. 469; 47 Mo. 488; 40 Minn. 164; 59 N. H. 536; 25 N. J. L. 281; 50 N. J. Eq. 103; 57 N. J. Eq. 511; 111 N. Y. 679; 119 Pa. St. 495; 74 Wis. 577. An agreement, upon consideration, for submission to arbitration, or a submission made pursuant to the terms of an original contract between the parties, such as appears in all insurance policies, is not revocable. 197 Pa. St. 404; 187 Pa. St. 487; 62 N. J. Eq. 73; 37 Me. 504; 40 N. H. 130; 57 Ind. 349. A written submission cannot be revoked orally. 3 Cyc. 614; Morse, Arb. 232; 26 Me. 251; 2 Wend. 602; 3 Johns. 125; 4 Sneed, 262; 10 Vt. 91; 21 Wis. 406; 57 Ind. 349; 19 Ind. App. 619. After one submission had failed, neither party is bound to consent to another. 116 N. C. 491, s. c. 31 N. E. 410; 46 S. W. 1131; 72 N. W. 665; 115 Pa. St. 416. The decree is correct on the amount found due.

HILL, C. J. Boon had a policy of insurance in appellant's company on his store building, and the adjoining building burned, injuring the intervening brick wall, the roof and front of his building. The adjuster of the insurance company and Boon failed to agree on the amount of damage, and the company invoked the arbitration clause of the policy. The clause was in the usual form of such clauses in standard fire insurance policies, providing that each party select a competent and disinterested appraiser, and the appraisers to select a competent and disinterested umpire. The appraisers were required to estimate the loss, stating separately the sound value and damage, and, failing to agree, to submit their differences to the umpire, and

the award of any two in writing should be binding. The appraisers were selected, and they selected an umpire.

The preponderance of the evidence establishes the facts to be that the appraisers radically disagreed, one demanding an estimate based on a new wall, and the other based on a slight damage to the wall. The appraiser selected by the insurance company then called in the umpire, and it seems that he and the appraiser for the company differed more radically than he and the other appraiser. Then the appraiser for the insurance company withdrew, and the umpire and the other appraiser made the award in conformity to the policy. This suit was brought on the award, and the company had it transferred to chancery on allegations impeaching the award and seeking to set it aside. The case was tried by the chancellor, and there is much conflict in the evidence; but, as stated, a preponderance sustains the facts briefly outlined above, and which version comes accredited by the chancellor.

1. Objections are made to much testimony: to some because elicited by leading questions; to other because opinion evidence was admitted from witnesses not properly qualified as experts; and for some other reasons. The case was heard before the chancellor, and he is presumed to have disregarded all incompetent testimony; and on trial *de novo* here the case is weighed solely on the competent testimony. Hence there is no profit in discussing these objections.

2. It is insisted that the appraisers selected by the insured did not estimate on the basis required by the policy, and thereby departed from the terms of the submission.

The point turned on whether the old wall was to be treated as worthless, or an estimate made on its damaged condition. There is much evidence to sustain the appraiser in his opinion that it would have to be taken down, and the value of it would not compensate the expense of tearing it down. Even if wrong in his opinion on that subject, there is not sufficient evidence against it to set aside the award as founded in mistake. Judge Sanborn thus stated the rule:

"An agreement of appraisal is a contract. Appraisers who make an award under such an agreement are presumed to have acted in accordance with the law and the terms of the contract,

and the burden of proof is on those who attack their award to establish the contrary by convincing evidence. Every reasonable intendment and presumption is in favor of the award, and it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers." *Bernard* v. *Lancashire Ins. Co.,* 41 C. C. A. 170.

The evidence satisfies the court, as it did the chancellor, that the award was fairly made. Certainly, it cannot be said that it clearly appears that it was the result of fraud, mistake, misfeasance or malfeasance of the appraiser or the umpire. The evidence against it on material questions is that of the appraiser selected by the company and the adjuster, and they are contradicted by the other appraiser and umpire and other testimony strongly sustaining the latter.

3. There is much said about the bias and partisanship of the appraisers, but no evidence is apparent to sustain a disqualification of them on this account, within the rule on that subject recently announced by this court in *National Fire Ins. Co.* v. *O'Bryan,* 75 Ark. 198.

4. It is contended that the arbitration was dissolved by the appraisers, and the award made by the umpire and one appraiser, acting as appraisers after the appraisers had agreed to dissolve, and that this was contrary to the terms of submission, which provided for the umpire to only act when the appraisers submitted their differences to him.

The evidence satisfies the court that the appraiser selected by the insurance company called upon the umpire to settle the differences, and, finding him more difficult to agree with than the appraiser, then withdrew. There is some evidence that the withdrawal was under the direction of the adjuster, who learned of the situation of affairs. That is not important here; for it is thoroughly settled that an arbitration cannot be defeated, after it is properly submitted, by the withdrawal of one of the appraisers during the investigation. Ostr. Fire Ins. § 291; *Bradshaw* v. *Agricultural Ins. Co.,* 137 N. Y. 137.

Other questions are discussed as to the revocation of the arbitration by the withdrawal of the appraiser on account of the arbitrary action of the other appraiser, and other questions based

on the theory of appellant that the appraiser acted without the scope of the submission and improperly. But the court is satisfied from the evidence that the appraisers' conduct was not within any of the grounds for impeaching the award; hence it is unnecessary to pursue the subject further. There was sufficient evidence to sustain the award as to the value. Even if it was not an accurate valuation, it would not be open to attack unless so grossly erroneous as to indicate bad faith or other grounds to set aside the award.

The judgment is affirmed.

Mr. Justice McCULLOCH disqualified and not participating.

MARTIN v. BACON.

Opinion delivered June 24, 1905.

1. WITNESS—EXEMPTION FROM PROCESS.—A party cannot be lawfully served with civil process while he is in attendance on a court in a State other than that of his residence either as a party or a witness, or while going thereto or returning therefrom. (Page 160.)
2. SAME.—Where a nonresident was attending court in order to avoid a forfeiture of his bail bond, service on him of process in a civil suit will be quashed. (Page 161.)

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Reversed in part.

Greaves & Martin, for appellant.

Wood & Henderson, for appellee.

BATTLE, J. James T. Grubb in his lifetime brought an action against C. H. Bacon for damages caused by an assault and battery made upon him by the defendant. The action was commenced on the 16th of November, 1901. The plaintiff died, and the action was revived in the name of W. H. Martin, as special administrator.

The defendant moved the court to quash the summons, setting out the grounds in his motion; and the plaintiff replied, stating facts. The court sustained the motion, and dismissed the action, and the plaintiff appealed.

The motion was heard and sustained upon the following agreed statement of facts:

"The alleged assault for which this action was brought was made on the 6th day of May, 1901, in the city of Hot Springs, Garland County, Arkansas. Upon said date the defendant was a visitor to the city of Hot Springs, and was not present in said city under compulsion of any judicial process, but was here voluntarily.

"Said defendant, C. H. Bacon, is, and was on the said 6th day of May, 1901, a resident of the State of Tennessee.

"That upon a preliminary examination being made and held, in which said alleged assault was investigated, the defendant was held to await the action of the grand jury of Garland County, and was permitted to, and did, give bond in the sum of one thousand dollars for his appearance on the 1st day of the October, 1901, term of the circuit court of Garland County, next ensuing.

"That afterwards, to wit, on the 19th day of October, 1901, said grand jury returned a bill of indictment charging the said Bacon with assault with intent to kill, committed upon the person of the said J. T. Grubb, and on the ——day of ——, 1901, an order was made by the circuit court of Garland County permitting the said Bacon to remain upon the bond already given by him until the further order of the court; and the case was set for trial on the 19th day of November, 1901, the same being also a day of said October term of said court.

"That the defendant left his home, in Tennessee, and came to the city of Hot Springs, arriving here on the 15th day of November, 1901—coming here for the purpose of being present at said trial, and of making his arrangements for said trial—and was served with summons herein on the 16th day of November, 1901, and came here in obedience to his said bail bond, requiring him to be present at said trial, and for the purpose of being tried under said indictment, and that said defendant was in this county for no other purpose than to be present and

submit himself to the orders and judgment of this court in said cause."

It is well settled by the great weight of authority that a party cannot be lawfully served with civil process while he is in attendance on a court in a State other than that of his residence, either as a party or a witness, or while going to and returning therefrom. *Murray* v. *Wilcox* (Iowa), 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263; *Powers* v. *Arkadelphia Lumber Company,* 42 Cent. Law J. 397, and note; note to *Mullen* v. *Sanborn,* 25 L. R. A. 721. In this State a party, in civil actions and criminal prosecutions, can testify as a witness, and may be exempt from service of civil process in both capacities. Judge Elliott, in *Wilson* v. *Donaldson,* 117 Ind. 356, 20 N. E. 250, 3 L. R. A. 266, 10 Am. St. Rep. 48, gives the reason for the exemption as follows: "If citizens of other States are allowed to come into our jurisdiction to attend court as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defense. The principle of State comity, too, demands that a citizen of another State who submits to the jurisdiction of our courts, and here wages his forensic contest, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions. It is an evidence of respect for our laws and confidence in our courts that he comes here to litigate, and the laws he respects should give him protection. If he can come only under the penalty of yielding to our jurisdiction in every action that may be brought against him, he is deprived of a substantial right because he is willing to trust our courts and our laws without removing his case to the Federal courts, or refusing to put himself in a position where a personal judgment may be rendered against him. High considerations of public policy require that the law should encourage him to freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him

with the obligation to submit to the writs of our courts if he comes within our borders."

Judge Trent, in *Small* v. *Montgomery* (C. C.), 23 Fed. 707, said: "All the United States circuit judges who have passed upon the question of late, as well as *dicta* by the Supreme Court of the United States in respect thereto, reach this result, viz, that where a party in good faith is brought within the jurisdiction of the State, or detained therein, being a nonresident, either as party to the suit, or as witness in another suit, he is not subject to service. And the reason—the main reason—is very potential, so far as our country is concerned. There are many States, stretching from Maine to Oregon, and a man who is required to go from one to the other, either as a witness or as a party to a suit, should not be pursued by writ while abroad, instead of being sued at his own residence; otherwise every one, as is stated in many of these opinions, would avoid as far as possible being subjected thousands of miles away to suits of this character." *Atchison* v. *Morris* (C. C.), 11 Fed. 582.

Upon the same principle of justice, good faith, and comity, and to subserve the due administration of justice, it has been held that "a person who has been brought within the jurisdiction of a court from another State upon a requisition, as a fugitive from justice, and has been tried for or discharged as to the offense against him, is not subject to arrest on a civil process until a reasonable time and opportunity have been given him to return to the State from which he was taken." *Moletor* v. *Sinnen* (Wis.), 44 N. W. 1099, 7 L. R. A. 817, 20 Am. St. Rep. 71; *Blair* v. *Turtle,* 1 McCrary, 372, 5 Fed. 394; *Compton* v. *Wilder,* 40 Ohio St. 130; *People* v. *Judge,* 40 Mich. 630; *Cannon's Case,* 47 Mich. 482, 11 N. W. 280.

The appellee comes within the spirit of the rule which exempts persons from service of civil process, and is entitled to its benefit. He is a nonresident of this State—a resident of the State of Tennessee—and was bound to attend the Garland Circuit Court, in this State, to avoid the forfeiture of his bond. He was also entitled to attend as a witness in his own behalf. His attendance was compulsory. While in attendance in obedience to his bond, process in this case was served upon him. The service, on his motion, should be set aside. *Murray* v.

Wilcox (Iowa), 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534.

Judgment as to the service of process is affirmed, and in other respects is reversed.

WAGNER v. ARNOLD.

Opinion delivered June 24, 1905.

APPEAL—REVERSAL—UNDETERMINED ISSUE.—Where the record shows that the court below did not dispose of an issue raised by the complaint, and there is no showing that it was abandoned by the plaintiff, who on other issues obtained a judgment which was not sustained on appeal, the cause will be reversed, not with directions to dismiss the complaint, but to proceed, if plaintiff desires, to pass upon the undetermined issue.

Appeal from Little River Chancery Court.

JAMES D. SHAVER, Chancellor.

Reversed.

J. M. Carter, for appellant.

E. F. Friedell and *W. H. Arnold,* for appellee.

WOOD, J. This is a suit by appellee against appellant to quiet title to the northwest quarter of section 24, township 13 south, range 32 west, in Little River County. Appellee deraigned title through various parties from the United States to himself. He also deraigned title to the south half of the northwest quarter, *supra,* through John B. Jones, from the State of Arkansas. Under the overdue tax law the appellant claimed title by virtue of a donation deed executed June 21, 1871. The chancellor tried the issue upon facts precisely similar to those set forth in *Wagner* v. *Arnold,* 72 Ark. 371, 80 S. W. 577, and held that appellee's title was valid and superior to the title of appellant, and canceled appellant's donation deed, and quieted the title of appellee to the land in controversy. For the reasons given in *Wagner* v. *Arnold,*

supra, that was error, for which the judgment must be reversed. As to the north half of the northwest quarter of said section, the decree will be entered here for appellant, dismissing the complaint of appellee as to said tract. But as to the south half of the northwest quarter, *supra,* it appears that the court did not pass upon appellee's claim of title through the overdue tax decree set up in his complaint. Appellant claims in his brief that this claim was abandoned. Appellee claims that it was not abandoned. The record is silent upon the question. The chancellor found "that the plaintiff, John H. Arnold, claims said tract of land [the northwest quarter, *supra*] and deraigns his title in the following manner, towit: The State of Arkansas to the heirs of George W. Underhill, deceased; Virginia Diamond, as sole surviving heir at law of George W. Underhill, deceased, to John B. Jones; John B. Jones to the Pulaski Land Company; and the Pulaski Land Company to John W. Arnold, the plaintiff." The chancellor, having found that this title to the whole tract was "valid, and superior to the title of defendant," deemed it unnecessary to proceed to pass upon the claim of title also set up by plaintiff to the south half of the northwest quarter, above mentioned. But the record only shows that the court did not pass upon this claim. It does not show that plaintiff abandoned it. Inasmuch as it appears that the lower court did not pass upon and determine whether this claim of appellee to the south half was superior to the title of appellant, we will remand the cause as to that claim, with directions to the lower court to proceed, if the plaintiff so desires, to pass upon that issue.

CARPENTER v. JONES.

Opinion delivered June 24, 1905.

1. EJECTMENT—TITLE.—Plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of defendant's. (Page 164.)
2. LOST DEED—PAROL PROOF.—Parol evidence that an original deed has been lost and was not recorded is admissible. (Page 164.)

3. SAME—HOW PROVED.—In determining whether a deed claimed to have been lost was executed, the jury may consider who claims to be the owner of the land; how long such claim has been set up; whether the land had been held adversely to such claim; and, if wild and uncultivated, who has paid the taxes. (Page 165.)
4. SAME—CERTAINTY OF PROOF.—The court properly refused to instruct the jury that all the facts and details of a lost deed must be clearly proved. (Page 166.)
5. APPEAL—OBJECTION NOT RAISED BELOW.—Failure of the trial court to give instructions upon the burden of proof and credibility of witnesses cannot be complained of on appeal when no request was made that such instructions should be given. (Page 166.)

Appeal from Arkansas Circuit Court.

GEORGE M. CHAPLINE, Judge.

Affirmed.

H. A. & J. R. Parker, for appellants.

Thomas & Lee, for appellees.

WOOD, J. This is an action in ejectment brought by C. B. and J. W. Jones against Wm. N. Carpenter and others for the possession of the east half of the southeast quarter, and the northwest quarter of the southeast quarter of section 27, township 2 south, range 3 west, in Arkansas County, Arkansas.

The abstract of the evidence and the instructions show that the only questions presented and determined by the court below were whether or not Matilda Heigh, through whom both parties claim title, has deeded the land in controversy to John W. Jones, the ancestor of appellees, and, if so, could appellees, upon the deed being lost, prove its execution and contents by parol evidence. The lower court gave the following instructions:

"1. The plaintiff in this suit, in order to recover the land in controversy, must rely upon the strength of his own title, and not on the weakness of the title of the defendant; and before you can find for the plaintiff in this suit you must find the legal title to said land to have been vested in the plaintiff at the commencement of this suit.

"2. The plaintiff in this suit claims that a conveyance of the lands in controversy from Matilda Heigh to John W. Jones was made; that a deed duly executed was delivered to John W. Jones, and that said deed was not recorded, and that the original

was lost. The court instructs you that the best evidence of a title is the original deed of conveyance, and the next best evidence is a certified copy of the record. When the original deed was lost and not put of record, the plaintiff may show by oral testimony that a deed was made, and the title was conveyed to said Jones by Matilda Heigh; and, in determining whether or no such a conveyance was made, you may take into consideration oral evidence that such a deed was made; and in connection with said oral evidence you may consider who claims to be the owner of said land, how long such claim has been set up, whether the said land was held adversely to said claim, if wild and cultivated, who paid the taxes on said land, and whether or not said land has been recognized and known as the Jones land since the time it is claimed said land was conveyed from Matilda Heigh to said Jones. And if you find from all the evidence in this case that the title to said land never passed from Matilda Heigh to John W. Jones, then the plaintiff is not entitled to recover in this suit, and the form of your verdict will be, 'We, the jury, find for the defendant.' If you find the title to the land in controversy to be in the plaintiff, the form of your verdict will be, 'We, the jury, find for the plaintiff.' "

The court refused the following instructions, which were asked for the defendants:

"3. The court instructs the jury that, in order to prove a lost deed, its existence must be proved with great clearness; that the signatures by the parties signing it must be proved to have been legal; that the consideration in said deed must be proved; that the lands conveyed in said deed must be proved; that the approximate date of said deed must be proved; that the granting clause in said deed must be proved.

"4. The court instructs the jury that all the facts and details of a lost deed must be so clearly proved that the proof will supply the place of the instrument itself, in order that the defendant may except to any legal defects therein; and unless plaintiff so makes said proof, you will find for defendant."

There was no error in the giving or refusing of instructions. The questions at issue in the court below were properly presented. The questions of law involved here are ruled by the principles announced in *Calloway* v. *Cossart,* 45 Ark. 81, and *Steward* v.

Scott, 57 Ark. 153.

Appellants cannot complain here of the failure of the court to give instructions on the burden of proof and credibility of witnesses, when no request was made by them of the court below for such instructions. Had appellants asked such instructions, they would have doubtless been given. No question of that kind was raised in the court below, and can not be raised here for the first time.

We find no prejudicial error in the rulings of the court upon the admissibility of evidence. Upon the question of fact there was evidence sufficient here to support the verdict.

The judgment is therefore affirmed.

---

76 166
f80 274

ST. LOUIS, MEMPHIS & SOUTHEASTERN RAILWAY COMPANY

v. SHANNON.

Opinion delivered June 24, 1905.

RAILROAD—STOCK CASE—DEFECTIVE HEADLIGHT.—Where the engineer in charge of a locomotive which killed plaintiff's cattle one night testified that he could not have stopped the train under 200 yards, and that his headlight enabled him to see only 100 feet ahead, and there was evidence that a good headlight would have enabled him to see 200 yards ahead, a verdict against the railroad company will be sustained.

Appeal from Randolph Circuit Court.

JOHN W. MEEKS, Judge.

Affirmed.

L. F. Parker and *Orr & Luster*, for appellant.

C. H. Henderson, for appellee.

RIDDICK, J. This was an action by A. K. Shannon against the railway company to recover damages for the loss of two cows and a calf killed by the train of the company. He recovered judgment for $45. The accident happened on a dark and rainy night. The engineer testified that the train consisted of an engine, a baggage car and passenger coach. He said that he was keep-

ing a careful lookout, and discovered the cattle when they were about 90 or 100 feet ahead; that the headlight on the locomotive was a common oil headlight, and on such a night did not light up the track for more than 90 or 100 feet; and that he could not have discovered the cattle sooner than he did. He further testified that the train was running about fifteen or eighteen miles an hour, and that, though there were only two cars attached to the engine, he could not have stopped under about 200 yards. But a witness for plaintiff testified that, though he had never ridden on an engine, he knew how far a common headlight would light up a track; that he had stood by the side of engines on rainy nights, and in that position could see the track for 200 yards ahead. While this evidence was not very satisfactory, we think it was competent, and it tended to show that the headlight on the engine of defendant, which only gave light for 90 or 100 feet ahead, was of a very inferior kind, and that the company was guilty of negligence in using such a light. For this reason, we think it cannot be said that the verdict is without evidence to support it.

One of the instructions given by the court, if it stood alone, might be misleading; but, when the whole charge is considered. we are of the opinion that it was substantially correct.

Judgment affirmed.

BUNCH v. TIPTON.

Opinion delivered June 24, 1905.

STATE CHARITABLE INSTITUTIONS—CONTRACT FOR SUPPLIES—ENFORCEMENT.—A contract entered into by the board of trustees of the State charitable institutions for the furnishing of supplies for those institutions for a period of three months will not be enforced; Kirby's Digest, § 4130, requiring such contracts to be let monthly on the first Monday in each month.

Appeal from Pulaski Chancery Court.

JESSE C. HART, Chancellor.

Affirmed.

Morris M. Cohn, for appellant.

Bradshaw & Helm, for appellee.

RIDDICK, J. This is an action to compel H. C. Tipton and others, comprising the Board of Trustees of the State Charitable Institutions, to specifically perform and carry out a contract for the purchase of coal from the plaintiff for such institutions during the months of December, 1902, and January, February and March, 1903. Plaintiff alleged that, after having made such contract with him, and after he had given bond and prepared to fully carry out the contract on his part, the board, in January, 1903, arbitrarily and without cause rescinded the contract, and refused to accept or pay for coal from the plaintiff. The defendant demurred to the complaint, and the demurrer was sustained and the complaint dismissed.

We are of the opinion that this judgment must be affirmed, for the reason that under the statute the board had no right to contract for coal for a longer period than one month. The statute requires that the board, through its purchasing agent, shall advertise monthly for such supplies "for ten days before the first Monday in each month, upon which day the contract for the succeeding month shall be awarded to the lowest and best bidder for the furnishing of said supplies." Kirby's Dig. § 4130.

This statute is mandatory, and shows that the board had no right to make the contract which it made with plaintiff. The action of the board in making the contract and then refusing to comply with it no doubt caused inconvenience and loss to plaintiff; but, as the contract was contrary to the statute, the courts cannot enforce it.

Judgment affirmed.

STATE v. SONGER.

Opinion delivered June 24, 1905.

1. LICENSE TO SELL LIQUORS—PRESUMPTION.—The introduction of a license to sell liquors raises the presumption that the county judge, before issuing the license, found that a majority of the votes on the question of license at the last State election was cast in favor of license, which presumption cannot be overturned by the abstract of such vote filed by the election commissioners, to which no certificate covering the vote on the question of license is attached. (Page 170.)
2. WRITING—PAROL PROOF OF CONTENTS.—The contents of the original returns of an election from the different precincts of the county cannot be shown by parol, in the absence of proof that such returns have been destroyed, or cannot be procured. (Page 171.)

Appeal from Sharp Circuit Court, Northern District.

JOHN W. MEEKS, Judge.

Affirmed.

The grand jury of Sharp County, for the Northern District, indicted Will Songer for keeping a saloon and dramshop and selling intoxicating liquors without license. On the trial the sale was admitted, and the defendant, to show his right to sell, introduced a license issued by the county court authorizing him to keep a saloon for the sale of intoxicating liquors in the town of Hardy, in that county. To show that the county court had no authority to issue this license, and that it was void, the State then offered to introduce a certificate of the result of the election filed in the office of the county clerk by the county election commissioners. This certificate purports to be an "Abstract of all votes cast for all executive, legislative and judicial officers at the election held in Sharp County on the 1st day of September, 1902." Following this heading are the names of the different voting precincts, and the number of votes cast in each for the different candidates voted for at that election, and also the number of votes cast for and against license, the total of which votes figured up 523 for license and 575 against license. To this abstract was attached the certificate of the commissioners, in which, after reciting that they had opened and compared the returns of the election from the different precincts of the county,

they certify "that it appears from the returns aforesaid that each person named in the foregoing abstract received at said election the number of votes in each precinct set down opposite his name for the office stated therein." But they do not certify or refer to the vote on the question of license, either in the caption or in the certificate attached to such abstract of the votes. The circuit judge sustained the objection made by the defendant to this evidence, and refused to allow it to be read in evidence. The State then introduced G. B. Ferguson, one of the election commissioners, and who acted as such at the general election held in September, 1902, and offered to prove by him that he opened and canvassed the returns of said election, and that a majority of the votes cast on the question of license at that election, as shown by the returns, was against license. The presiding judge sustained an objection made by defendant to the introduction of this testimony, and the State excepted. The State introduced no further evidence, and the court directed a verdict for the defendant, and entered judgment accordingly, from which the State appealed.

Robert L. Rogers, Attorney General, for appellant.

Sam H. Davidson, for appellee.

RIDDICK, J. (after stating the facts.) This is an appeal from a judgment acquitting the defendant of the charge of selling liquors without license. The defendant proved that he sold under a license issued by the county court, and the State undertook to show that at the previous general election the majority of the votes cast in that county were against license, and that the county court had no authority to issue the license. Now, under the law, the returns of the elections from the different voting precincts are required to be forwarded to the election commissioners of the county, and they are required to lay such returns before the county court at the next term thereafter. Kirby's Dig. § 5119. From these returns the county court must, before granting a license for the sale of intoxicating liquors, determine whether a majority of the votes of the county have been cast in favor of license or not. *Freeman* v. *Lazarus,* 61 Ark. 252, 32 S. W. 680.

The license introduced in this case raises the presumption

that the county judge, before issuing this license, found that the majority of the votes on the question of license were cast in favor of license, for otherwise the court had no authority to grant the license. Now, while this finding of the county court is not conclusive, still it cannot be overturned by the abstract of the vote filed by the election commissioners, to which no certificate covering the vote on the question of license is attached. The certificate offered in evidence purports to certify the votes cast for the different candidates for office, and the number of votes received by such persons, but makes no reference to the vote on the question of license. The court, therefore, in our opinion, did not err in excluding it.

The testimony of the election commissioner offered by the State was also clearly incompetent, for there was no showing that the original returns of the election from the different election precincts of the county had been destroyed, or that they could not be procured; and, in the absence of such proof, parol evidence of their contents was not admissible.

Finding no error, the judgment is affirmed.

DYER v. JACOWAY.

76 171
f86 297

Opinion delivered June 24, 1905.

1. SURETY—RIGHT TO RELEASE SECURITY.—Where a mortgage is executed by a debtor to indemnify a surety and also to secure the payment of the debt, the creditor has an interest therein which the surety cannot release. (Page 176.)
2. SAME.—Where a mortgage is executed by a debtor merely to indemnify his surety, whatever equity may arise in favor of the creditor arises afterward and in consequence of the debtor's insolvency; and until this equity arises, the surety has a right to release the security, and this right continues even after the debtor's insolvency, if the release was made in good faith, and before any claim is made upon him for it. (Page 176.)
3. MORTGAGE—TO DECEASED SURETY—EFFECT.—By a mortgage to indemnify a deceased surety no legal interest passed, either to the estate of deceased or to his heirs. (Page 176.)

4. SUBROGATION—PARTIES.—A creditor cannot secure any rights through a deceased surety to whom in his lifetime the debtor had executed a mortgage to indemnify him against liability if neither the heirs nor the legal representatives of such surety were made parties to the proceeding. (Page 177.)

5. SAME—LACHES.—Creditors who have waited for twenty years after a release of a mortgage was executed by the sureties of their debtor before asking to be subrogated to the rights of the sureties under the mortgage, and until *bona fide* purchasers have acquired the land, are guilty of laches. (Page 177.)

Appeal from Yell Circuit Court in Chancery.

WILLIAM L. MOOSE, Judge.

Affirmed.

STATEMENT BY THE COURT.

W. D. Jacoway was on the 16th of March, 1867, appointed administrator of the estate of Samuel Dickens, who had died in Yell County on the 2d day of the same month. Jacoway gave bond as administrator, and entered upon the discharge of his duties as administrator of that estate. Afterwards, in 1875, the estate still being in his charge as administrator, he executed to the sureties on his administrator's bond a mortgage on certain lands owned by him.

The conditions of this mortgage are as follows, towit:

"Provided, nevertheless, that whereas the said R. P. Parks, Jacob Graves, Hiram Dacus, Joseph Gault, J. M. Cole and L. T. Brown did on the 16th day of March, A. D., 1867, become the sureties of the said W. D. Jacoway on his bond as administrator of the estate of Samuel Dickens, deceased; and whereas said sureties did on the same day sign, seal and deliver said administration bond; and whereas said bond was filed and recorded on the 16th day of March, A. D. 1867, and the same is now of record in letters of adminstration, Record A, pp. 227, 228; and whereas the administration of said estate is unsettled, and the said W. D. Jacoway is desirous that his said securities shall entertain no reasonable fears or sustain any loss in the premises.

"Now, know ye, if the said W. D. Jacoway shall make full, complete and perfect settlement of said estate, and shall them, his said securities, save harmless from any and all judgments

and decrees of any court which may be rendered against them as such securities on said administration bond, then in that case the foregoing deed of mortgage shall be void; otherwise to be and remain in full force and effect."

Afterwards, on the 15th day of April, 1875, Jacoway filed in the probate court his fifth account current and final settlement, showing a balance of $7,216.64 in his hands. This account was confirmed by the court in July, 1875, and on the 15th day of July, 1875, the court entered an order directing Jacoway as administrator to distribute this sum *pro rata* on all fourth-class claims probated against the estate, and pay to the owners of such claims 39 cents and 8 mills on each dollar of their respective claims.

Jacoway, in pursuance of this order, subsequently distributed the same to all of the fourth-class creditors, except A. J. Dyer and Isabella Johnston. He tendered to each of them also the sum required, but did so on condition that they execute to him a receipt in full of all demands against the estate. They declined to give a receipt in full, and no part of their claims was paid.

In 1876 A. J. Dyer and Isabella Johnston filed a suit against Jacoway and his bondsmen to surcharge and falsify his fifth account current and final settlement. This suit was brought in the wrong district of the county, and was in 1877 dismissed for want of jurisdiction. In 1878 the same parties brought a similar action in the other district of the county against Jacoway and his sureties. On the 19th of July, 1878, Jacoway executed another mortgage to his securities to protect them against liability on his bond, the conditions therein being substantially the same as the mortgage to them executed in 1875. One of the sureties was dead at the time the first mortgage was executed, and two were dead when the last mortgage was executed. The suit in equity was dismissed for want of equity, and this judgment was reversed on appeal. See *Dyer* v. *Jacoway,* 42 Ark. 186. Afterwards a decree was rendered against Jacoway and his bondsmen in that action, and this judgment was again reversed by the Supreme Court, and the cause remanded for further proceedings. See *Dyer* v. *Jacoway,* 50 Ark. 217.

A final decree in said case was entered in the Yell Circuit Court in chancery under the directions of said mandate at the August term, 1893, thereof, surcharging and falsifying the

account of the administrator in accordance with the aforesaid opinion of the court. Said decree further provides as follows:

"And it is further ordered that the administration of the estate of the said Samuel Dickens be remanded back to the probate court, to be administered in due course of law, and that this decree be certified by the clerk under the seal of this court to the probate court of Yell County in and for the Danville District, and the proceedings in the due course of administration of said estate be continued there upon the basis of the said Jacoway's fifth annual settlement, as the same is corrected and reformed by this decree."

Afterwards the probate court entered an order making a final settlement in the case, from which judgment an appeal was taken to the circuit court. That court made some changes in the judgment of the probate court, and both parties appealed from the judgment of the circuit court to the Supreme Court. The judgment of the circuit court was reversed, and the clerk of the Supreme Court was ordered to restate the account in accordance with the opinion. See *Jacoway* v. *Hall,* 67 Ark. 340.

In pursuance to the mandate of the Supreme Court, the circuit court of Yell County for the Danville District, at its August term, 1900, found that Jacoway was due the estate of Dickens the sum of $2,350.32. But this indebtedness of Jacoway to the estate is made up almost entirely of amounts which had been found due from Jacoway by probate court in 1875, and which he had been ordered to pay over to the fourth-class claimants in that year, and the interests on such amounts as of the date of April 15, 1895, with interest at 6 per cent. until paid, and judgment was entered against Jacoway in favor of plaintiff A. J. Dyer for $120.90, and in favor of the estate of Isabella A. Johnston for something over $2,000. After the recovery of this judgment A. J. Dyer and the administrator of the estate of Isabella A. Johnston brought this suit to be subrogated to the rights of the sureties in the mortgage of April, 1875, and to foreclose the same. The complaint alleged that Brooks, Neely & Company were in possession of the lands mortgaged, and they were made defendants to the action. The complaint further alleged that W. D. Jacoway had conveyed certain lands to his children in fraud of his creditors, and asked that such conveyances be set aside, and the lands subjected to the payment of the claims of plaintiffs.

The defendants, Brooks, Neely & Company, who now claim the land mortgaged to the sureties, filed an answer showing that the sureties to whom the mortgage was executed had executed a written release of this mortgage to Jacoway in 1882. That afterward Jacoway had in 1882 conveyed a part of this land to one Atwood, who in turn conveyed it to James K. Perry, and that the remainder of the land had been sold and conveyed by Jacoway to said Perry in 1886, and that Brooks, Neely & Company hold under Perry.

Defendants alleged that Atwood and his grantor, by virtue of said release and conveyance, acquired title to the property free from the lien of the mortgage, and they further set up the statute of limitations and laches in bar of the action. Jacoway and his children filed an answer, in which they deny that the conveyance to his children, referred to in the complaint, was made to defraud creditors, or that Jacoway is the owner of such land.

Upon the hearing the chancellor found that Jacoway, at the time he conveyed the lands to his children referred to in the complaint, was perfectly solvent, and owned much more property than was required to pay his debts, and that no right of subrogation was shown, and that on the whole case there was no equity in the complaint, and dismissed the same.

From this judgment plaintiffs appealed.

Ratcliffe & Fletcher, for appellants.

Sellers & Sellers, J. M. Parker and *Moore & Smith,* for appellees.

RIDDICK, J., (after stating the facts.) This is a suit in equity by certain creditors of the estate of Samuel Dickens to be subrogated to the rights of the sureties on the bond of the administrator of that estate in a mortgage executed by the administrator to them to indemnify and protect them from liability on such bond. The complaint also set up that certain conveyances made by the administrator to his children were fraudulent, and asked that they be set aside. The chancellor found against the plaintiffs on both issues, and in the brief and argument in this court counsel for plaintiff do not ask us to review the finding of the chancellor as to the conveyances made by the adminstrator to

his children many years ago. But they insist that under the facts they are entitled to be subrogated to the rights of the sureties in the mortgage executed to them by the administrator.

Now, there seems to be a distinction between those conveyances made by a principal to a surety both for the purpose of protecting him and to secure the payment of the debt and those executed merely to indemnify the sureties against liability. If the conveyances are made to the surety for the purpose of securing the payment of the debt, the creditor has an interest therein which the surety cannot destroy. But if the conveyance to the surety is only to indemnify him, then such security does not, in the first instance, attach to the debt, and whatever equity may arise in favor of the creditor with regard to the security arises afterwards, and in consequence of the insolvency of the parties principally liable for the debt. Until this equity arises, the surety has a right in equity as well as at law to release the security. Even after such insolvency the mortgagee may surrender the security, if he does it in good faith, and before any claim is made upon him for it. The application of it for the benefit of third persons can only be accomplished by the interposition of a court of equity, and in case the mortgagee still claims the security, or when he has conveyed it under circumstances tending to show bad faith or collusion betwen him and the mortgagor. *Jones* v. *Quinnipiack Bank,* 29 Conn. 25; *Daniel* v. *Hunt,* 77 Ala. 567; *Fertig* v. *Henne,* 197 Pa. 560; *Pool* v. *Doster,* 59 Miss. 258; *Steward* v. *Welch,* 84 Me. 308; Jones, Mort. (6th Ed.) § 387; Harris, Subrogation, 591, 594.

But in this case the mortgage was executed in 1875 to the six sureties on the bond of Jacoway. At the time the mortgage was executed, J. M. Cole, one of the sureties named therein as a grantor, had been dead three years, and neither he or his heirs took any legal interest by virtue of the mortgage. Brown, another one of the sureties, died in 1876. Afterwards, in 1882, the four remaining sureties executed a release to Jacoway, in order that he might sell the land. The facts show that this release was executed in good faith, and that afterwards the land mortgaged passed into the hands of parties who paid a valuable consideration therefor, and came through mesne conveyances into the possession of the defendants, Brooks, Neely & Company, who are *bona*

fide holders for value. The only surety who took any interest by such mortgage that did not join in the execution of the release was Brown, who had been dead six years before the release was executed. But plaintiffs can secure no rights through him in this proceeding for the reason that none of his heirs or legal representatives were made parties to this action. *Bond* v. *Montgomery*, 56 Ark. 563; *Harris* v. *Watson, Ib.* 574.

The release of the other sureties was executed in 1882, and it was twenty years afterwards before it was questioned, and before the creditors brought this action to be subrogated to the rights of their sureties. Even if the cerditors originally had the right to enforce this mortgage for the payment of these debts, we think that it is too late to do so now, twenty years after the execution of such release. The recent case of *Wallace* v. *Swepston*, 74 Ark. 520, is conclusive on that point, on the doctrine of laches, and we refer to the opinion in that case for a full discussion of the question.

Finding no error on the points presented, the judgment is affirmed.

---

76 177
84 353

J. F. HARTIN COMMISSION COMPANY *v.* PELT.

76 177
186 458
187 51

Opinion delivered June 24, 1905.

1. APPEAL—BRINGING UP INSTRUCTIONS.—Where the bill of exceptions recites that the court modified instruction numbered one asked by plaintiff, and gave certain numbered instructions asked by defendant, without copying them or directing that they be copied, such instructions will not be noticed on appeal, even though there be found in other parts of the transcript what purports to be the instructions of the court of corresponding numbers. (Page 178.)
2. ABSENCE OF INSTRUCTIONS—PRESUMPTION.—In the absence of the instructions of the court, it will be presumed that the jury were properly instructed. (Page 178.)
3. SALE OF GOODS BY DESCRIPTION—IMPLIED WARRANTY.—In the case of a sale of goods by description no warranty of grade or quality will be implied where the seller expressly refuses to warrant. (Page 179.)

4. SAME.—In a sale of specific articles then in the hands of the seller, and described to be of certain grades and quality, there is no implied warranty as to grade or quality. (Page 179.)

Appeal from Columbia Circuit Court.

CHARLES W. SMITH, Judge.

Affirmed.

Action by J. F. Hartin Commission Company, a corporation against J. S. Pelt to recover damages for alleged breach of implied warranty of the grade of cotton purchased by the plaintiff from the defendant.

Judgment was rendered in favor of the defendant, and plaintiff appealed.

Stevens & Stevens, for appellant.

Smead & Powell, for appellee.

McCULLOCH, J. Appellant assigns error committed by the court in modifying the first instruction asked in its behalf and in giving over its objection several instructions asked by the defendant. The bill of exceptions recites that the court modified instruction numbered 1, asked by the plaintiff, and gave instructions numbered 2, 3, 4, 5, 6 and 7 asked by defendant, to which the plaintiff excepted; but the instructions are neither copied nor called for in the bill of exceptions, and cannot therefore, be noticed, even though there is found in other parts of the transcript what purports to be instructions of the court of corresponding numbers. *Newton* v. *Russian,* 74 Ark. 88. We must therefore presume that the jury were properly instructed; and as the testimony was sufficient to sustain the verdict, and no other error of the court is pointed out, the judgment must be affirmed. It is so ordered.

ON REHEARING.

Opinion delivered July 15, 1905.

McCULLOCH, J. The appellant files a petition for rehearing, alleging that the bill of exceptions contained proper calls for the instructions of the court, but that the clerk failed to copy same in this record, and asking that the judgment of affirmance

be set aside, and a writ of certiorari be issued to bring up the original bill of exceptions, which is exhibited with the petition.

It is not alleged that there was an express warranty of the grade of the cotton. On the contrary, it is undisputed that appellee, the seller, expressly refused to warrant the grade. But it is contended that, in cases of sales of commodities by description, a warranty of the described grade or quality is implied, and that is the question sought to be raised by this instruction asked by appellant, which was modified by the court. We do not deem it necessary to pass upon that question in this case; for, if the law is as contended by counsel for appellant, that rule cannot be applied where the seller has expressly refused to make the warranty. The rule is concisely stated as follows: "In the sale of goods by description, there is a warranty that they shall answer the description, where it is given by way of indicating the character or quality of the article sold, and not for the purpose of identifying it merely, and when the buyer relies upon it as a warranty. It is not an implied warranty, but is construed, under such circumstances, as constituting an express undertaking that the article shall be as described." 30 Am. & Eng. Enc. Law, 153, and cases cited. In order to imply a warranty from the language or contract of the seller, an intention to warrant must be found, and it would be anomalous to hold that a warranty of grade or quality will be implied from the sale of a commodity by description where the seller expressly refuses to warrant. Such refusal negatives any intention to warrant. *Tabor* v. *Peters,* 74 Ala. 95; *Jones* v. *Quick,* 28 Ind. 125; *Figge* v. *Hill,* 61 Iowa, 430; *Maxwell* v. *Lee,* 34 Minn. 511; *Henson* v. *King,* 48 N. C. 419. "Whether language of description is to be construed as a warranty of quality must depend essentially upon the intention and understanding of the parties as collected from their entire contract." *Maxwell* v. *Lee, supra.*

There is a difference between a contract for the sale of articles to answer to certain description and a sale of certain specific articles then in the hands of the seller, and described to be of certain grade and quality. In the former case there is, until acceptance by the purchaser, a warranty that the article shall answer the description; whilst in the latter case no warranty is implied unless an intention to warrant appears. The

case at bar falls within the latter rule. Appellee had on hand at various times three lots of cotton which he sold to appellant, but refused to warrant the grade. We find, therefore, that, treating the record as if properly containing the instructions of the court, no error is shown.

The petition for rehearing is denied.

PHŒNIX INSURANCE COMPANY v. STATE.

76 180
77 48

Opinion delivered June 24, 1905.

76 180
85 171

76 180
86 544

1. INSURANCE—REFORMATION OF POLICY.—An insurance policy which, by reason of a mistake in its execution, does not conform to the real agreement of the parties as to the name of the assured and the location of the insured property may be reformed in a court of equity. (Page 182.)

2. NOTICE OF CANCELLATION OF POLICY—WAIVER.—A stipulation in a policy of fire insurance for five days' notice to the assured before cancellation of the policy is made for the benefit of the assured, and may be waived by him. (Page 182.)

3. INSURANCE AGENT—AUTHORITY TO ACT FOR BOTH PARTIES.—An agent authorized to write policies of insurance may also act as agent of an assured in keeping his property covered with insurance and in selecting the companies in which the policies should be written. (Page 183.)

Appeal from Cleveland Chancery Court.

JOHN M. ELLIOTT, Chancellor.

Affirmed.

STATEMENT BY THE COURT.

This is a suit brought in the chancery court by the State of Arkansas for the use of the Saline River Shingle & Lumber Company, a domestic corporation, against the Phœnix Insurance Company, of Brooklyn, a foreign insurance corporation doing business in the State, and the sureties on its bond, to reform a policy and to recover the amount thereof, $2,000 and interest, on account of loss by fire. Reformation of the policy is sought in two respects, viz.: First, that it was by mistake written to and in the name of W. S. Amis, the president of the Saline River

Shingle & Lumber Company, and manager of its business, when it should have been written to and in the name of said corporation; second, that it was by mistake written "on a stock of lumber on the premises," when it should have been written "on a stock of lumber situated at and in plaintiff's loading shed." The undisputed facts of the case are as follows:

The Saline River Shingle & Lumber Company was the owner of a mill and lot of lumber at a switch sometimes called "Poole," on the St. Louis Southwestern Railroad. W. S. Amis was the president of the company, and the manager of its business. A. B. Banks, an insurance agent at Fordyce, Ark., and agent of appellant and other insurance companies, had previously insured the property of the lumber company at the instance of Mr. Amis, the manager. On or about April 10, 1902, Amis applied to Banks for insurance on the property of the lumber company—$2,500 on the mill and $2,000 on lumber in the shed—which Banks agreed to write, and in a day or two wrote the policies by mistake in the name of Amis, and, instead of writing the lumber policy on lumber in loading shed, wrote it "on a stock of lumber on the premises." This policy was written by the Greenwich Insurance Company, and both policies were mailed to Amis at Rison, Ark., where he resided. On April 21, 1902, Banks received instructions from the Greenwich Insurance Company to cancel the policy or increase the rate of premium to 10 per cent., and on that date he wrote and mailed a letter to Amis, informing him of the requirement of the Greenwich Company, and saying: "I am cancelling the lumber policy and rewriting same in the Phœnix, of Brooklyn, and shall send you policy at once." He wrote the policy on April 23, 1902, which is the one in controversy, carrying into it the same mistakes hereinbefore set forth as to name of assured and description of property, and mailed it to Amis at Rison on that day. The lumber in the loading shed, shown to be of the value of $2,047, was destroyed by fire on the evening of April 23, 1902, at 7:30 or 8 o'clock. Mr. Amis testified that he received the policies of April 10 by mail, but did not discover the mistake therein until he received, on April 22, Mr. Banks' letter concerning cancellation of the Greenwich policy, and that he intended to go to Fordyce the next day (April 23) to have the policies rewritten so as to correct the

mistakes, but was unavoidably detained by other engagements; and that he received the Phœnix policy by mail on April 24, the same having arrived at the postoffice at Rison the afternoon preceding. The defendant answered, denying all the allegations of the complaint, and pleading that the policy sued on was issued by the agent, Banks, without authority from the insured, and was not accepted by the insured until after the fire. The chancellor decreed a reformation of the policy and recovery of the amount thereof with interest, and the defendant appealed.

Alexander & Thompson, for appellant.

W. S. Amis, Crawford & Gantt and *Taylor & Jones,* for appellee.

McCULLOCH, J., (after stating the facts.) An insurance policy, like any other contract, which by reason by mistake in its execution does not conform to the real agreement of the parties, may be reformed in a court of equity. *Thompson* v. *Insurance Company,* 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Snell* v. *Insurance Company,* 98 U. S. 85, 25 L. Ed. 52; *Jamison* v. *State Insurance Company,* 85 Iowa, 229, 52 N. W. 185. The proof fully warranted the decree of the court reforming the policy in the particulars specified. The testimony is undisputed that a mistake was made in writing the policy to and in the name of Amis, instead of the lumber company, and in writing it on all the lumber, instead of on the lumber in the loading shed. This disposes of the contention of appellant as to the coinsurance clause in the policy. Treating it as reformed so as to insure only the lumber in the shed, the insurance thereon was more than the percentage of value required in the policy, and the terms of this clause were complied with.

It is contended on behalf of appellant that, because of the stipulation in the Greenwich policy requiring five days to the assured before cancellation, the policy was not legally canceled, and that the substitution by the agent of the Phœnix policy was unauthorized. We cannot sanction this view. The stipulation for five days' notice of cancellation was made for the benefit of the assured, and could be waived by the assured. *Southern Ins. Co.* v. *Williams,* 62 Ark. 382, 35 S. W. 1101; *Kirby* v. *Ins. Co.,* 13 Lea, 340; *Buick* v. *Mechanics' Ins. Co.,* 103 Mich. 75, 61

N. W. 337. The policy was in fact canceled by the agent, and his act in so doing was ratified as soon as brought to the attention of the assured. The stipulation was a part of the Greenwich policy, and appellant had no interest therein or concern therewith. Appellant's agent issued a policy on the property in question, which was in force at the time of the fire. The agent wrote the assured: "I am cancelling the lumber policy and rewriting same in the Phœnix of Brooklyn, and shall send you policy at once. * * * Please return the lumber policy in Greenwich at once." He mailed the policy to the assured before the fire, and same reached the postoffice at Rison, the home of Mr. Amis, before the fire, but was not taken from the office until the next day. Meanwhile the fire occurred. The proof shows that a previous agreement existed between Amis and Banks, the agent, that the property of the lumber company should be kept insured. No particular insurance company or companies were mentioned, and Amis gave no concern to that matter. He constituted Banks his agent for the purpose of selecting the company or companies, and, pursuant to this arrangement, Banks, without notice to Amis, canceled the Greenwich policy, and substituted therefor the Phœnix policy, and mailed it to Amis before the fire occurred. Banks, though the agent of the insurance companies, could be and was made the agent of the insured for those purposes. Ostrander on Insurance (2 Ed.), § § 41, 42; *Schauer* v. *Queen Ins. Co.,* 88 Wis. 561, 60 N. W. 994; *Mich. Pipe Co.* v. *Mich., etc., Ins. Co.,* 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; *Dibble* v. *Northern Ins. Co.,* 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470; *Arnfeld* v. *Guardian Ins. Co.,* 172 Pa. 605, 34 Atl. 580; *Huggins, Croker & Cowdy Co.* v. *People's Ins. Co.,* 41 Mo. App. 530. We see no escape from the conclusion that the Phœnix policy was in force when the fire occurred, and that that company is liable for the loss.

Decree affirmed.

ST. LOUIS & NORTH ARKANSAS RAILROAD COMPANY v. MATHIS.

76 184
76 234
77 12

76 184
84 366

Opinion delivered June 24, 1905.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Evidence that a section hand was killed while endeavoring, under command of the section foreman, to remove a handcar from the track in front of an approaching train did not call for a direction to the jury to return a verdict for the defendant on the ground of plaintiff's contributory negligence. *St. Louis, Iron Mountain & Southern Railway Co.* v. *Rickman,* 65 Ark. 138, followed. (Page 188.)

2. CONSTITUTIONAL LAW—RESTRICTION OF APPELLATE POWERS.—A statute which limits the power of the circuit court to set aside a verdict for excessiveness of damages is a restriction upon the appellate powers of the Supreme Court, which reverses law cases only for errors of the trial court. (Page 190.)

3. SAME—POWER OF LEGISLATURE.—The appellate jurisdiction of Supreme Court, conferred by the Constitution, cannot be enlarged or divested by the Legislature. (Page 191.)

4. SAME—REGULATION OF APPELLATE POWERS.—Const. 1874, art. 7, § 4, conferring appellate jurisdiction on the Supreme Court, "under such restrictions as may from time to time be prescribed by law," does not confer upon the Legislature the power to limit the right of appeal, but only the power to prescribe regulations as to the manner of taking appeals and the time within which the same may be taken and prosecuted. (Page 191.)

5. SAME—INVALIDITY OF STATUTE RESTRICTING APPELLATE POWERS.—Kirby's Digest, § 6217, providing that "the verdict of any jury for the recovery of damages, where the measure thereof is indeterminate or uncertain, shall not be held to be excessive, or be set aside as excessive, except for some erroneous instruction, or upon evidence, aside from the amount of the damages assessed, that it was rendered under the influence of passion or prejudice," and further requiring the losing party to enter a release of errors as a condition of a remittitur of excessive damages, is an unconstitutional limitation on the appellate powers of the Supreme Court. (Page 192.)

6. EXCESSIVE DAMAGES—LIMIT.—While the damages to infant children by loss of the care, attention and moral training of their father are measurable by no fixed rules, but are left to the sound discretion of the jury, yet there is a limit to the amount to be allowed, and it is the duty of the appellate court to see that such limit is not exceeded. (Page 192.)

7. SAME—HOW ASCERTAINED.—While no amount of money can fully compensate children for the distress of mind suffered by them in the violent and painful death of their father, and in the loss of his af-

fectionate care and attention, it is the duty of the court, in determining whether the amount awarded was excessive, to ascertain what amount would constitute fair compensation for the injury. (Page 193.)

Appeal from Carroll Circuit Court.

JOHN N. TILLMAN, Judge.

Affirmed on remittitur.

G. J. Crump, for appellant.

Deceased was guilty of contributory negligence. 71 Ark. 590; 66 Ark. 238; 62 Ark. 156; *Ib.* 164; *Id.* 239; 57 Ark. 461; 69 Ark. 380; 48 Ark. 106; 56 Ark. 457; 54 Ark. 431, *et seq.* The verdict was excessive. As to right of deceased to rely upon instructions of foreman, see 65 Ark. 140.

Festus O. Butt and *Charles D. James,* for appellee.

The instructions were correct, and the evidence sustains the verdict. The sixth instruction correctly stated the law of contributory negligence, and the deceased, under the rule therein laid down, was not guilty thereof. 16 S. W. 397; 24 L. R. A. 719; 17 L. R. A. 291; 14 Am. & Eng. Enc. Law, 857; 65 Ark. 139. The verdict was not excessive. 58 Ark. 473; Kirby's Dig. § 6290; 60 Ark. 559.

MCCULLOCH, J. This is a suit brought against appellant railroad company by the administrator of the estate of John Gunn, deceased, for the benefit of the widow and the next of kin of said decedent for damages occasioned by reason of the alleged negligent killing of deceased by a train of appellant. Damages are laid in the sum of $25,000, and plaintiff recovered a judgment for $10,000, from which the defendant appealed.

Appellant claims that the evidence is insufficient to sustain the verdict, and that the court erred in refusing to instruct the jury peremptorily to return a verdict in its favor, but concedes that, if the testimony is legally sufficient, there was no error in the instructions or other proceedings. Deceased was a section hand employed by appellant, and worked under one Lisk as foreman. On the morning of September 12, 1901, deceased and the foreman, and gang, of which he was a member, started on a handcar from Coin, a station on appellant's road, to the place of their labor of the day. After running only about one-fourth of a mile they discovered the approach of a local freight train,

and hastily stopped the handcar, and endeavored to remove it from the track. It is contended on behalf of appellee that Gunn was killed while assisting, under orders of the foreman, in the removal of the handcar from the track, and while so engaged appellant was guilty of negligence, through its foreman, in failing to warn him of the imminent danger. Appellant claims, on the other hand, that Gunn was duly warned of the near approach of the train, and, pursuant to the warning, left the track, but voluntarily returned to secure his dinner pail, and in so doing was struck by the engine and killed. On this point there is a sharp conflict in the testimony, and it is not the province of this court to determine where the weight lies. The foreman and several of the section hands testified that, when they discovered the approaching train, they, with deceased, stopped the handcar, and tried to lift it off the track, and partially succeeded, but one end of the car was against a stump, and they failed to get it off; that the foreman then called out to the hands to leave the car, and they all ran up the hill, and across a ditch about twelve feet away from the track, when deceased returned to the car to get his dinner pail, and was struck by the train. George Carson, a witness introduced by the plaintiff, testified that he was about 200 yards away, and saw the accident, which he described as follows: "There was one man standing at the left corner of the car, and when they went to throw the car off they throwed the car this way—one side—and there were three at that end, and two at this, and when it caught that way, the car dropped down, the hind end, and they seemed to give away, and let it drop two or three times before they got it off. About the time I thought they had shoved the car off the track, two of these men run right around the car there this way, and this man left at this corner had never raised up out of a stooping position, and these two men, just as they passed by, the engine struck the car, they just got away."

"Q. Before the car was struck, had any of these men left the track and gone back?

"A. No, sir; I never saw any come back; no man at all."

George Gunn, a son of deceased, testified that the accident occurred in his view, and he described it as follows:

"Well, like this way: the track (indicating) and the car running up that way, and they were all on there running. He was right there on the front end, and when they got ready to get off the car, why, three of them got off at one end, and two at the other end, and they moved the car around, and got it across the track that way, and then went to lifting the car and got it, it looked to me like, pretty near off, and part of the men started to run up the bank, and two of them stayed with that end of the car, and it looked to me like, I know it got one of them, and it looked like the other one just got away.

"Q. Which way were you looking?

"A. I was looking right up the track.

"Q. Was there anything in the track to obstruct your view?

"A. No, sir; he was struck at this corner of the car (indicating).

"Q. And the other man ran around the car, and ran up the bank?

"A. Yes, sir.

"Q. Had any of these men prior to that time left the handcar before that?

"A. They left when the train was pretty close.

"Q. They left just about the time the train struck the man?

"A. Yes, sir.

"Q. Did you see anybody before the train struck the car and the man; did you see any one run up the bank and come back?

"A. No, sir; no, sir."

Two of the witnesses, John Bridgeford, and T. L. Plummer, who were passengers on the train, testified that they looked out of the car window, and saw the engine strike the handcar and a man who appeared to be trying to get it off the track, and that several of the men were running up the hill. The testimony of both these witnesses tended to show that deceased did not leave the handcar and return after crossing the ditch. The jury was therefore warranted in finding from the testimony that deceased was struck while at work, under order of the foreman, removing the car, and that he did not leave the track and then return in the face of danger. Treating it as thus established that the deceased did not leave the handcar or track and return after receiv-

ing warning of the danger, there is no testimony tending to show contributory negligence on his part. Joining his fellow workmen at the accustomed meeting place that morning, he and they proceded, by direction and command of the foreman, toward the place at which they were to work. If the train was thus expected, and due care was not observed in awaiting its passage, it was the negligence of the foreman, who was vice-principal, and not the negligence of the section hands. They met the train in a curve, and there is evidence that no signal was given from the approaching train by whistle or bell. When the party discovered the approach of the train, they hastily descended from the handcar, and endeavored to remove it before the train reached them.

The language of the court in *St. Louis, I. M. & S. Ry. Co.* v. *Rickman,* 65 Ark. 138, is particularly applicable to the facts here: "What the plaintiff did was manifestly done in obedience to the orders of the foreman to get the car off quick. Plaintiff had a right to presume that the foreman, who was in a position to devote his whole attention to the approaching train and the efforts of his men to get the handcar off the track, could better determine than he what was best to be done under the circumstances. We do not think that the danger was so apparently imminent but that he could reasonably rely upon the direction of the foreman. He did so, and was injured. He should not be charged with contributory negligence under the circumstances."

We think there was sufficient evidence to sustain a verdict for the plaintiff, and the court did not err in refusing to take the case from the jury.

It is set forth as a further ground for new trial that the verdict is excessive. The testimony fairly establishes the fact that deceased contributed to the support of his family as much as $350 per annum, in addition to his earnings in supervision of his farm, and that the present value of an annuity in that sum for his expectancy would be $4,690. He owned a small farm of eighty acres of land, and was out of debt. It is also shown by undisputed testimony that he was a very industrious man of good moral character, and was especially solicitous as to the mental and moral training of his children. That he was a kind and indulgent father, provided well for his family, and gave much attention to

the proper instruction and education of his children. He had five children, the youngest being only two years of age at the time of the accident. This is a well-recognized element of damages in suits of this kind for the benefit of minor children, and it is held to be for the jury to say, from all the facts and circumstances found, what will be a fair compensation to the children for the pecuniary loss of the care and attention of the father in the way of training and instruction. *Railway Co.* v. *Sweet,* 60 Ark. 559; *Railway Co.* v. *Maddry,* 57 Ark. 306.

The amount of damages of this kind being of an indeterminate character, and left largely to the sound discretion of the jury, we cannot say as a matter of law that the verdict is so excessive as to appear to have been given by the jury under passion or prejudice.

The judgment is therefore affirmed.

ON REHEARING.

Opinion delivered January 6, 1906.

J. M. Moore and *W. B. Smith* for appellant, on petition for rehearing.

1. The act of April 25, 1901, is unconstitutional (1) because it limits the circuit judges in the exercise of their rights to control and regulate procedings in their courts so as to do justice between litigants, by restricting the exercise of the discretion to two events; (2) because it prohibits the circuit judge from entering remittitur except upon the losing party waiving his constitutional right of appeal.

2. If the act was intended to apply to the Supreme Court, it is unconstitutional, being an encroachment on the functions of the judiciary. Art. 4, § § 1 and 2,Const.; 49 Ark. 160; 44 Ark. 273; 16 Ark. 384; 24 Ark. 91; 5 Ark. 710; 6 Ark. 71; 14 Ark. 568; 39 Ark. 82. The Legislature can only prescribe the mode and manner that shall be pursued in bringing cases before the Supreme Court. 25 Ark. 489; art. 7, sec. 4, Const.; 5 Ark. 362, 365.

3. If intended to be limited to circuit courts only, it is unconstitutional for reasons *supra,* and because it is a denial of the complete justice intended by sec. 13, art. 2, Const. See also 10 Lea (Tenn.), 366; 49 Ark. 495.

4. The verdict was excessive. 57 Ark. 384; *Ib.* 306.

Festus O. Butt and *Chas. D. James,* for appellee.

McCULLOCH, J. Counsel for appellant ask a reconsideration by the court of the question of excessiveness of the verdict, and in doing so they necessarily attack the validity of the act of April 25, 1901 (Kirby's Digest, § 6217), which is as follows:

"An act to regulate the practice in the circuit courts in certain cases."

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. The verdict of any jury rendered in any action for the recovery of damages, where the measure thereof is indeterminate or uncertain, shall not be held to be excessive, or be set aside as excessive, except for some erroneous instruction, or upon evidence, aside from the amount of the damages assessed, that it was rendered under the influence of passion or prejudice; provided, that the circuit judge presiding at the trial may, on motion for a new trial filed by the losing party, if he deems the verdict excessive, indicate the amount of such excess, and thereupon, if the losing party shall offer to file and enter of record a release of all errors that may have accrued at the trial if the prevailing party will remit the amount so deemed excessive, and the prevailing party shall refuse to remit the same, the verdict shall be set aside."

It is contended by learned counsel, first, that the statute applies only to practice in the circuit court, and not to this court on appeal; and, next, that, if it does apply to this court, it is void because it is an unauthorized curtailment by the legislative branch of government of the appellate jurisdiction vested by the Constitution in the court.

It seems plain to us that, if the statute is binding upon the circuit court, unless it be held to be unwarranted restriction upon the appellate jurisdiction of this court, it is also binding here on appeal, for the reason that this court only searches for errors in the proceeding below, and will reverse cases only on account of errors, either of omission or commission, of the trial court.

Our inquiry, then, is whether the statute in question is valid so far as it attempts to control this court in the determination

of cases on appeal. If it is, the effect of it is to prevent a review by this court of an erroneous assessment of damages made by a jury, and the failure of the trial court to correct the error. The right of appeal is, to that extent, cut off by the statute, if it be given full force. The statute also imposes upon an unsuccessful litigant, before he can accept a reduction of an excessive verdict, the penalty of surrendering his right of appeal.

The Constitution of the State confers upon this court, in the broadest terms, appellate jurisdiction co-extensive with the State. It provides that the Supreme Court shall have a general superintending control over all inferior courts of law and equity.

The section fixing jurisdiction of the court is as follows:

"The Supreme Court, except in case otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and other remedial writs, and to hear and determine the same, Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs." Const. 1874, art. 7, § 4.

It has been often held by this court that the appellate jurisdiction conferred by the Constitution upon the court cannot be enlarged or divested by the Legislature. *State* v. *Ashley,* 1 Ark. 279; Ex parte *Woods,* 3 Ark. 532; Ex parte *Anthony,* 5 Ark. 358; *State* v. *Jones,* 22 Ark. 331; Ex parte *Batesville & Brinkley R. Co.,* 39 Ark. 82; *Simpson* v. *Simpson,* 25 Ark. 487; *O'Bannon* v. *Ragan,* 30 Ark. 181.

It follows, then, that, unless the Constitution empowers the Legislature to limit the appellate jurisdiction of the court, it cannot be done. It is contended on behalf of appellee that it was meant, by the use in the Constitution of the words "under such restrictions as may from time to time be prescribed by law," to confer upon the law-making body the power to limit the right of appeal. Placing this construction upon the language used, the

effect of the constitutional provision would be to give to the court only such appellate jurisdiction as the law-making body should see fit to leave to it. Bearing in mind our scheme of constitutional government, both State and National, and the policy of dividing it into three co-ordinate branches of equal dignity and power within defined limits, we cannot believe that the framers of the present Constitution meant to thus subordinate the jurisdiction of the highest court of the State to the will of the Legislature. For, if it be held that the Legislature may limit the power of the court to review the decision of an inferior court in one respect, it may do so in another; and if it may prohibit the court from reviewing one question in a case, it may prohibit the review of all questions, and may cut off the right of appeal altogether. Thus by the process of elimination the Legislature could strip the court of all appellate jurisdiction, and deny to litigants the right of appeal, which is guarantied by the Constitution. The manifest intention of the framers of the Constitution was, primarily, to give a right of appeal to the Supreme Court from all final judgments of circuit and chancery courts, but to vest in the Legislature the power to prescribe regulations as to manner of taking appeals and time within which the same may be taken and prosecuted. This is, we think, what is meant by the words "under such restrictions as may from time to time be prescribed by law." To construe it otherwise would be to make it read that the Supreme Court shall have only such appellate jurisdiction as may from time to time be prescribed by law. If the framers of the Constitution had intended to so limit the jurisdiction of the court, doubtless they would have employed a more appropriate and less ambiguous form of expression to convey that meaning. We therefore hold that it was beyond the power of the Legislature to prohibit an inquiry in this court as to the sufficiency of the evidence to sustain the amount of damages assessed by a jury, or require a litigant to surrender his right of appeal as a condition upon which he may accept the reduction by the trial court of an excessive verdict.

After careful reconsideration of the evidence in the case, we are constrained to believe that the verdict is for an excessive amount of damages. We said in the former opinion that the evi-

dence warranted a verdict for $4,690 damages to cover the probable contributions of the deceased to the support of his family. This is certainly the utmost limit to which the jury could have gone upon this element of damages. If we indulge in the presumption that the jury confined the verdict to the limits warranted by the evidence as to this element, it leaves the sum of $5,310 which must have been assessed to cover damages for loss of the care, attention and moral training of the father to his children. It is difficult to determine what amount should be allowed upon this element of damages. It is indeterminate, and is ascertained by no fixed rules for admeasurement, and is left to the sound discretion of the jury. Yet there must be some limit to the amount to be allowed, and it is the plain duty of the appellate court to see that the just limits are not exceeded. It is often said that where loss of limb is sustained and great suffering endured, no amount of money will compensate therefor; that no amount of money might induce a person to voluntarily undergo the loss of limb and consequent suffering; yet that would be a highly improper basis upon which the damages should be estimated. It is the duty of courts and juries to allow such a sum as will fairly compensate for the pecuniary loss. So, in a case of this kind no amount of money can fully compensate children for the distress of mind suffered by them in the violent and painful death of the father, and in the loss of his affectionate care and attention, but the court must ascertain some just amount to allow a fair compensation for the injury. *Railway Co.* v. *Robbins,* 57 Ark. 384; *Railway Co.* v. *Maddry,* 57 Ark. 306; *Railway Co.* v. *Sweet,* 60 Ark. 550.

Believing, as we do, that the amount allowed by the jury, either upon one or the other of the two elements of damages, was excessive, it becomes our duty to remand this case for a new trial, or to require the plaintiff to remit the judgment down to such an amount as we can say the evidence fully warranted, there being no errors of law in the proceedings.

We think that upon the whole proof, considering the earning capacity of the deceased and the amount of contribution he would probably have made to his family, together with the proof upon the other element of damages, $8,000 will compensate for the loss as fully as pecuniary compensation can be rendered. So, if the

plaintiff will within fifteen days after this day, remit $2,000 of the judgment, the same will be affirmed as to the remainder; otherwise it will be reversed, and the cause remanded for a new trial.

It is so ordered.

HILL, C. J., (dissenting.) When this case was decided last term, I participated in the decision, and was in full accord with the opinion affirming the case.

On motion for re-hearing the question of the damages, and the effect of the act of April 25, 1901, attempting to preclude inquiry into the amount of damages under certain circumstances, were resubmitted to counsel, with other similar cases, for further argument. My health has enforced my absence from the court, and I have not participated in any of the proceedings on the motion for rehearing, and am writing this dissenting opinion in Arizona, and am dependent upon memory alone for the facts in the record.

My impressions of the act of April 25, 1901, were that it was a valid exercise of the legislative power, and did not impair the constitutional jurisdiction of the court, but merely regulated the practice in appeals in a certain class of cases. But I have not seen the briefs of counsel, nor heard the argument on this subject, and am not prepared to discuss the constitutionality of that act, and such is not the purpose of this dissent. It is a mooted question whether dissenting opinions are proper, but I think the better thought on the subject is that they serve an useful purpose. If the majority opinion is fundamentally sound, the minority opinion will demonstrate it by lacking the basic elements itself, and the truth is thereby justified by the weak attack upon it. If the majority opinion is not fundamentally sound, and the minority is, those who come after have the better reason pointed out, and can, and should overturn the erroneous decision. It is in the hope that the reasons that I give will commend themselves to those who sit in judgment after we pass from authority, so that this case will not become fixed in our jurisprudence as a precedent, that this dissent is written.

The judgment reversed was for the sum of $10,000. The evidence of the earnings of the deceased, reduced under the ordin-

ary and usual rules of computation, sustains a verdict for a few hundred dollars less than $5,000. I do not recall the exact figures, but approximately $5,000. The only other item to sustain the other $5,000 of the verdict was the loss to the children of a father's care and instruction. The law on this subject was correctly presented to the jury, and the only question is whether $5,000 on this account is excessive. The evidence showed that the deceased was quite a poor man, with a large family of children, most of whom were minors, and several of tender years. He was a hard-working, sober, upright, Christian man. He took active part in church work, and required his children to attend Sabbath school, and was devoted to them, and was spending his life laboring for them and trying to raise them properly. While recognizing that money cannot compensate for such a loss, yet the law authorizes juries to assess a sum supposed to be an equivalent, as near as money could make it, of the loss of parental care and instruction. It is, at best, an elusive and uncertain element, to be requited in coin of the realm; but when the courts take from juries the determination of such questions, which from their very nature can best be determined by twelve men from the body of the county of "reasonable information and fair intelligence", then the confusion becomes confounded. All the courts should do with verdicts in such cases is to let them alone unless they are so grossly disproportionate to the subject-matter as to evidence having been produced by passion and prejudice. Then they should promptly be set aside, and a new trial granted, and not pared down. I am aware of the fact that there are several decisions of this court which are direct precedents for the order herein. The leading case on the subject was delivered, if I recall it correctly, between 15 and 20 years ago, and the limit in dollars and cents was pretty plainly indicated. Other cases have followed it, but it cannot be said that there has ever been any settled amount or maximum for this element of damage. Each case has stood on its own facts, and has not sought to go beyond them.

There are two reasons why I do not think these cases should control this one. (1). They settle no principle of law, and are merely the opinions on the amounts in the given cases before the court, and should not be of much weight in another case where

the facts are necessarily different. The opinion of judges on such propositions should not be considered as settling principles like decisions affecting title to real estate or rules of commercial paper. These amounts held excessive or not excessive in individual cases are but applications of principles, and not principles themselves, and hence should not carry the weight of *stare decisis,* and were not intended by their authors as carrying weight beyond the peculiar facts of the case then before the court.

(2.) Even if these decisions are regarded as precedents, yet the change in the earning power of money in the last 20 years must be considered. Twenty years ago ten per cent. was the prevailing rate in Arkansas, and usury was exacted all over the State, notwithstanding the heavy penalty against it. Today six per cent. is considered a splendid investment for large sums. The object in awarding damages for the death of a husband or father is to attempt to pecuniarily compensate for the revenue lost by reason of his death, and for his children this additional sum to compensate for parental care and instruction. Therefore in calculating the amount the revenue-producing quality is the point of view, and a decision holding $1,000 to be reasonable 20 years ago should be authority today for $2,000.

For these reasons prior decisions of the court on this question do not seem to me should be controlling. But, beyond all question of precedent, I put the correct view upon the broader proposition that the jury did right in allowing at least $5,000 to these minor children for loss of parental care. The evidence shows the father was giving, and doubtless would have continued to give, them instructions which would lead them to be Christian men and women and members of one of the great religious denominations, and was sending them to school, and was educating them as his means permitted. Of course, no sum can compensate such loss, and it will not do to say, because no sum will compensate it, that no verdict is excessive. There must be reason and moderation in all things, and only a sum sustained which may appear to the court to be rendered responsive to evidence justifying the sum awarded. The character of the man, what he was doing for his children as earnest of what he would do for them, are the principal matters to consider in approximating a

sum to represent this intangible, yet substantial, element of damage. Under the evidence in this case, I think the amount awarded by the jury was moderate; certainly not so grossly disproportionate to the subject-matter as to induce the belief that passion and prejudice, and not an honest endeavor to fairly approximate the money value of such loss, swayed them.

Unless the verdict appears to be improperly produced, I take it to be the duty of the court to let it alone. It is the essence of our law, and has been for many centuries, to leave such matters in the sound discretion of the jury, and to cut down this amount from $5,000 to $3,000 on this account is to substitute the judgment of the judges of this court for that of the jury, and against this order I dissent.

STATE v. MOORE.

Opinion filed June 24, 1905.

76 197
77 257

76 197
78 462
81 564

76 197
84 395

1. STATUTES—CONSTITUTIONALITY.—The power of courts to declare an act of the Legislature void because in conflict with the Constitution, either from want of power to enact it or from lack of observance of some of the forms or conditions imposed by the Constitution, should be exercised with great caution, and only when the terms of the Constitution have plainly been violated. (Page 199.)

2. SAME—PRESUMPTION.—The same presumption is indulged in favor of the validity of a legislative enactment with reference to its form and the constitutional prerequisites and conditions as with reference to the subject-matter of the legislation. (Page 201.)

3. LEGISLATURE—POWER TO DETERMINE NECESSARY EXPENSES OF GOVERNMENT.—While the power of the Legislature to determine what are "the necessary expenses of government," for which an appropriation may be made by a majority vote merely, under Const. 1874, art. 5, § 31, is not beyond control by the judicial department, yet, when an expense is such as may fall within that classification, and the Legislature has made appropriation, by a majority vote, to defray the same, the courts must accept as final the legislative determination that it is a necessary expense, even though it is not one of the ordinary expenses, of government. (Page 201.)

4. LEGISLATIVE APPROPRIATION—EXPENSES OF GOVERNMENT.—Under Const. 1874, art. 11, declaring what shall constitute the militia and providing

that the militia "shall be organized, officered, armed, equipped and trained in such manner as may be provided by law," and authorizing the Governor in certain contingencies to call out the militia to enforce the laws, etc., an appropriation "to promote the efficiency of the Arkansas State Guard" is an appropriation to meet "the necessary expenses of government" within Const. 1874, art. 5, § 31, which may be passed by a majority vote simply. (Page 203.)

5. APPROPRIATION BILLS—EMBRACING ONE SUBJECT.—The act of March 17, 1905, making an appropriation for the State Guard, in making an appropriation for the Adjutant-General, does not violate the provision of Const. 1874, art 5, § 30, to the effect that bills for appropriations other than the ordinary expense of the executive, legislative and judicial departments of the State shall be made by separate bills, each embracing but one subject. (Page 205.)

Appeal from Pulaski Chancery Court.

JESSE C. HART, Chancellor.

Affirmed.

Robert L. Rogers, Attorney General, and *Jas. H. Stevenson,* for appellant.

Charles Jacobson, for appellee.

MCCULLOCH, J. The Attorney General brought this suit in the Pulaski Chancery Court to restrain the Auditor of State from drawing his warrant upon funds appropriated by an act of the General Assembly approved March 17, 1905, the title and preamble of which read as follows: "An act to promote the efficiency of the Arkansas State Guard, and for other purposes. Whereas, the strength of the Arkansas State Guard, shown by official roster, active force, aggregates 2,141 officers and men; and whereas, said organization has heretofore been recognized by the national government, receiving therefrom all allotments, under section 1661, Revised Statutes, as amended, or other laws: and whereas, it is essentially required of the organized militia, if same shall have further support of the national government, that certain duties be actually performed according to the laws of Congress relating thereto; and whereas, in order to carry out the provisions of the act of Congress approved January 21st, 1903, it is necessary that the State render financial aid to its citizen soldiery: Therefore, be it enacted by the General Assembly of the State of Arkansas," etc. The act then proceeds to appropriate the sum of $25,000, or

so much thereof as may be necessary, for the purposes provided for, specifying the items for which the same shall be expended, viz., salaries and contingent expenses of officers of the State Guard, for expenses of military encampments, practice, etc., rent of armories and storage rooms, and for other expenses in maintaining the organization of the State Guard, and handling and preserving the military equipments. The validity of the act is called in question on the ground that in neither branch of the Legislature, on the vote for final passage, did the bill receive in its favor the votes of two-thirds of the members of each house, as required by section 31 of article 5 of the Constitution of the State. That section of the Constitution and the preceding section read as follows:

"Sec. 30. 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.

"Sec. 31. No State tax shall be allowed, or appropriation of money made, except to raise means for the payment of the just debts of the State, for defraying the necessary expenses of government, to sustain common schools, to repel invasion and suppress insurrection, except by a majority of two-thirds of both houses of the General Assembly."

It is conceded that the bill received in its favor the votes of a majority, but not two-thirds, of the members of each house. The Attorney General contends that the subject-matter of the appropriation does not fall within either of the exceptions expressed in section 31, and required for its passage the affirmative vote of two-thirds of both houses of the General Assembly. We are therefore asked to declare that on account of the failure to receive the necessary affirmative vote the bill never became a law. On the other hand, it is contended for appellee that the appropriation was for the "necessary expenses of government."

The duty and power of courts to declare an act of the legislative body void because in conflict with the Constitution, either from want of constitutional power to enact it or from lack of observance of some of the forms or conditions imposed by the Constitution, is so plain and well established that we indulge in no discussion of that question at this time. It is equally well

established, however, that such power should be exercised by the courts with great caution, and only when the terms of the Constitution have been plainly violated. Chief Justice MARSHALL, who first authoritatively announced the doctrine that courts possess such power, subsequently said: "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher* v. *Peck,* 6 Cranch, 87, 3 L. Ed. 162. A similar expression is given by the same learned court in the case of *Ogden* v. *Saunders,* 12 Wheat. 213, 6 L. Ed. 606, where Mr. Justice WASHINGTON said: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory indication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." Judge COOLEY, in treating the same subject, says: "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise and oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but the courts cannot assume their rights. The judiciary

can only arrest the execution of a statute when in conflict with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." Cooley's Const. Lim. (7th Ed.) p. 236. The same learned author at another place (page 255) says: "The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the Legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. For, as a conflict between the statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the court, if possible, must give the statute such a construction as will enable it to have effect."

The same presumption is indulged in favor of the legislative enactment with reference to the form of the statute and the constitutional prerequisites and conditions as to the subject-matter of the legislation. *Waterman* v. *Hawkins,* 75 Ark. 120; Cooley, Const. Lim. p. 195.

This court, in the case of *State* v. *Sloan,* 66 Ark. 575, 53 S. W. 47, in upholding the validity of an act providing for the building of a new state capitol, the bill for which had not received the votes of two-thirds of both houses of the Legislature, said: "There is nothing in the Constitution of this State defining what is a necessary expense of government, or denying or limiting the right of the Legislature to determine the question. On the contrary, the right is impliedly delegated to it; for the power to appropriate money to defray the necessary expenses of government carries with it the right to determine what is a necessary expense. Upon this principle local and special laws have been upheld by this court, notwithstanding the Constitution denies to the Legislature the power to pass a special or local law in any case where a general law, which would afford the same relief, could be enacted; holding that the power to pass a special or local act under given circumstances empowered it to determine when the circumstances existed"—citing *Davis* v. *Gaines,* 48 Ark. 370, 3 S. W. 184; *Boyd* v. *Bryant,* 35 Ark. 73, 37 Am. Rep. 6; *Carson* v. *Levee District,* 59 Ark. 513, 27 S. W. 590; *Powell* v. *Durden,*

61 Ark. 21, 31 S. W. 740. To the same effect, see *St. Louis S. W. Ry. Co.* v. *Grayson,* 72 Ark. 119. The court in the Sloan Case did not mean to lay down the doctrine, nor do we now, that the power of the Legislature to determine what is a necessary expense of government is arbitrary, bounded by no limitations, and absolutely beyond control by the judicial department. We can readily call to mind subjects for appropriattion so obviously beyond the scope of what may be deemed necessary expenses of government that the courts could, and in duty should, ignore a legislative determination, and declare as a matter of law that the same do not fall within that class. The words "necessary expenses of government," as employed in the Constitution, do not refer to the necessity, expediency, or propriety for the amount of the appropriation, but are intended as a classification of a character of expenses which may be provided for by appropriations without the concurrence of more than a majority of both houses of the Legislature; and when the expense is such as may fall within that classification, and the Legislature has made appropriation to defray the same, the courts must accept as final the legislative determination that they are necessary expenses of government. The preceding section of the Constitution regulating appropriations to defray the ordinary expenses of government, when read with the section now under consideration, makes a distinction between the "ordinary expense of government" and other necessary expenses, and is a distinct recognition by the framers of the Constitution of the fact that there may be necessary expenses of government which are not ordinary expenses, and that the Legislature may, by a bare majority vote, make appropriations to defray the same. If they be necessary expenses of government—that is to say, proper and necessary expenses incurred in the administration of government—appropriations therefor may be made by a majority vote only, though they be extraordinary, and not incurred as ordinary expenses in the administration of government. The Supreme Court of Indiana, in dealing with a kindred subject relating to the power of the courts in passing upon the constitutionality of a statute, said: "While the power to act does not exist until the contingency arises, the Legislature must of necessity be left with large discretion in determining whether or not the contingency has arisen which calls

forth the exercise of the power. When it has in fact arisen, or when, in the exercise of its sound discretion, the Legislature, without any apparent purpose to evade the Constitution, determines that it has, and authorizes a debt to be contracted, unless it is apparent at first blush that the condition did not exist which justified the exercise of the power, the action of that body is not subject to review, or liable to be controlled by the judicial department." *Hovey* v. *Foster,* 118 Ind. 502, 21 N. E. 39. The Supreme Court of California, in speaking of the conclusive presumption to be indulged in favor of a statute, said: "In the exercise of their [the Legislature's] rightful authority, they have decided that the exigency has arisen demanding the exercise of the power, and they have directly declared that the object of the law and the debt created by it is to aid in repelling invasion, suppressing insurrection, enforcing the law, and preserving and protecting the public property: and this decision cannot be reviewed or set aside by the court." *Franklin* v. *State Board,* 23 Cal. 173.

The question, then, arises: Is the appropriation in question for the purpose of "defraying the necessary expenses of government," within the meaning of the Constitution, or is it obviously not what may be deemed a necessary expense of government? Since an early day the establishment, organization, and maintenance of the State militia as a citizen soldiery, instead of a large standing army maintained by the National government, has been the object of governmental solicitude and encouragement, both State and National. No useful purpose can be served by a discussion of that policy at length, as it is a part of the history of the republic. Suffice it to say that in each Constitution adopted by the people of this State an organized militia is provided for, and is distinctly recognized as a part of the executive branch of the State government. Article 11 of the present Constitution, which is similar to the provision on that subject in the former Constitutions of the State, declares what shall constitute the militia, and contains a mandatory provision that the same "shall be organized, officered, armed and equipped and trained in such manner as may be provided by law;" and that "the Governor shall, when the General Assembly is not in session, have the power to call out the volunteers or militia, or both, to execute the laws, repel invasions, repress insurrections and preserve the public peace in such man-

ner as may be authorized by law." Pursuant to the several Constitutions of the State, laws have at all times been written upon the statute books of the State providing for the organization of the militia and volunteer companies, and for the equipment and maintenance of the same as a part of the executive branch of the State government in the enforcement of the law and preservation of the public peace. We think it is therefore plain that the framers of the Constitution, in providing how appropriations should be voted "to defray necessary expenses of government," did not mean to exclude from that term the organization and maintenance of the militia, which was by that instrument, and which had ever been by the organic law of the State, recognized as an arm of the executive department of the State government. The legislative determination that the expense of maintenance of the organization was a "necessary expense of government" is conclusive, and cannot be reviewed by this court.

It is conceded by the Attorney General that the militia is a necessary part of the government; that the designation of the militia as "all able-bodied male persons, residents of the State, between the ages of 18 and 45 years," etc., constitutes the militia a branch of government, but it is insisted that the State Guard as a volunteer organization forms no part of the militia, nor of the State government. It will be observed, however, that the Constitution in the same article provides for the organization of volunteer companies, and provides that the Governor may call out either the volunteer or militia, or both, to execute the laws, etc., thus manifesting an intention to treat them both alike as a part of government. Stress is laid in the argument on the part of the State that the preamble of the act recites that, "in order to carry out the provisions of the act of Congress approved January 21, 1903, it is necessary that the State render financial aid to its citizen soldiery," and that this language negatives any intention on the part of the lawmakers to provide for the appropriation as a necessary expense of government. It is manifest, however, that the primary object of the Legislature was, as the title of the act plainly states, "to promote the efficiency of the Arkansas State Guard" by supplementing the funds offered for that purpose by the National government with an appropriation of the State's funds. Regardless of the forms and recitals of the act, it was an appropriation to maintain

the State Guard, and, as we hold that that is a part of the necessary expenses of government, the act must be sustained. We cannot look to the motives which influenced the members of the Legislature to determine the object and validity of a statute, nor can we review the legislation as to its propriety or expediency.

It is further urged against the validity of the act that it violates the provision of the Constitution (section 30, art. 5) to the effect that bills for appropriations other than the ordinary expense of the executive, legislative, and judicial departments of the State shall be made by separate bills, each embracing but one subject. It is argued that the part of the act making an appropriation for the use of the Adjutant General, in effect, repeals section 5295, Kirby's Dig., providing that the duties of Adjutant General shall be performed, without compensation, by the private secretary of the Governor, and that it is foreign to the main object of the bill. It is sufficient to use the language of Judge Cooley, which has been quoted with approval by this court, as follows: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would render legislation impossible." Cooley's Const. Lim. (7th Ed.) p. 205. In *State* v. *Sloan, supra,* this court said: "The unity of the subject of an appropriation is not broken by appropriating several sums for several specific objects, which are necessary or convenient or tend to the accomplishment of one general design, notwithstanding other purposes than the main design may be thereby subserved."

The chancellor concluded that the statute in question was legally passed, and dismissed the complaint for want of equity. The decree is affirmed.

HILL, C. J., (dissenting.) Blackstone says: "An act of parliament * * * is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging, nay, even the King himself, if particularly named therein." 1 Black. Com. c. 2, p. 185. The "long train of abuses and usurpation" causing the Declaration of Independence im-

pelled the signers thereof to declare that "it is their [the people's] duty to throw off such government and to provide new guards for their future security." In the formation of the National government and in the governments of the several States written constitutions were evolved as new guards for future safety, and in them were placed limitations on the paramount power of the legislative department of government. A system of co-ordinate powers, each supreme in itself, and each fettered by the Constitution, was created. "The courts of law, State and Federal, held a place in our system unparalleled in the political system of other countries," says Thorpe in his Constitutional History. The same learned author points out that in the early days of American independence the idea prevailed that the legislature, succeeding to the power of parliament, was supreme; and that in 1787 the Court of Conference of North Carolina declared an act void for taking away the right of trial by jury, and its decision was vigorously assailed. It was, however, followed by other courts, and the principle was imbedded in the Constitution of the United States and the several States. 2 Thorpe, Con. History U. S. pp. 462-465. In 1803 the question came before the Supreme Court of the United States in *Marbury* v. *Madison,* 1 Cranch, 137, 2 L. Ed. 60, and was forever put at rest by the decision of Chief Justice MARSHALL. On this point the opinion is *obiter dictum,* but its reasoning ended all controversy on the subject, and made it clear that it was not only the right, but the solemn duty, of the judiciary to declare void any legislation violative of the Constitution. The chief justice asked: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limitations may at any time be passed by those intended to be restrained?" The answer was obvious. This subject was reviewed by the Supreme Court of the United States in *Mugler* v. *Kansas,* 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, and it was again reiterated, that "the courts must obey the Constitution, rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, those limits have been passed." It is uncontrovertibly true that it is the duty of this court to determine whether the constitutional limitation that "no State tax shall be allowed, or appropriation of money made, except to raise means

for the payment of the just debts of the State, for defraying the necessary expenses of government, to sustain common schools, to repel invasion and suppress insurrection, except by a majority of two-thirds of both houses of the General Assembly," has been overridden by the act in question. The act is sought to be sustained as one "for defraying the necessary expenses of government." The argument is two-fold: (1) That the determination of what constitutes the necessary expenses of government is a matter exclusively for the General Assembly, and not the courts; and (2) that this is a necessary expense of government, within the meaning of the above-quoted clause.

1. Is the Legislature the final arbiter of what is a "necessary expense of government?" The same question in different form has often been before the courts, and a few of the cases may be selected to show the trend of decision. The Constitution of South Carolina provided: "For the purpose of defraying extraordinary expenditures, the State may contract public debts, but such debts shall be authorized by law for some single object to be distinctly stated." The Legislature passed an act authorizing a public debt to be created "for the relief of the treasury." The court said: "The position taken by one of the counsel for appellants that the question whether a debt proposed to be contracted is for the purpose of defraying an ordinary or extraordinary expenditure is one exclusively for the determination of the Legislature, and the fact that they authorized the loan must be regarded as sufficient evidence that its object was to meet an extraordinary expenditure, would, it seems to us, render the constitutional provision wholly nugatory. Such a provision was undoubtedly inserted as a check upon the power of the Legislature to contract public debts, and it follows necessarily that it cannot determine conclusively the limits of its powers in this respect; for otherwise there would be no check upon its powers except its own will." *Whaley* v. *Gaillard,* 21 S. C. 560. This is equally true in this case. If this appropriation is not one "for defraying the necessary expenses of government," then the check upon the Legislature inserted in the Constitution from passing such bills without a "majority of two-thirds of both houses of the General Assembly" is wholly nugatory; for, if a majority of the Legislature is the sole judge of its power, it could declare any appropriation to be

one for "defraying the necessary expenses of government," and leave its own will the sole check upon the treasury. In Georgia the Constitution forbids the Legislature from delegating to any county the right to levy a tax except for purposes therein mentioned, among others, "expenses of the courts." The Legislature passed an act requiring the county commissioners of Fulton County to levy a tax to pay fees claimed by former city solicitors. The court said: "It may be argued, however, that the Legislature has the power to determine and define, under this paragraph, what are expenses of courts, and the courts would be bound by its definition. This may or may not be true. It is unnecessary for us to determine in this case whether the Legislature can enlarge the common and usual meaning of these words or not. It is sufficient for us to say that the Legislature did not say that the claims of the defendants in error were expenses of court." *Adair* v. *Ellis,* 83 Ga. 464, 10 S. E. 117. In Indiana the Constitution says: "No law shall authorize any debt to be contracted on behalf of the State, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the State debts, to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense." An act was passed authorizing a loan for the purpose of carrying on the State government, and making provisions for funding an outstanding temporary loan. The court said: "Governments cannot be conducted without lodging power somewhere. Wherever it may be lodged, it is liable to be abused, or to be imprudently exercised. But, while we assert the power of the courts to decide on the constitutionality of every law that may be passed, we nevertheless recognize the rule is well settled which declares that when an act is passed in the exercise of a power or duty expressly committed to the Legislature, or when the validity of an act depends upon the ascertainment of facts which must have existed antecedent to the law, all that the courts can do is to inspect the act and determine from its scope and tenor and the concurrent history, of which they take judicial notice, whether or not it is apparently within the power conferred, assuming that the requisite facts were ascertained. * * * It by no means follows that the power of the Legislature is without limit or control in respect to creating or contracting debts against

the State. As before remarked, courts are supposed to take cognizance of the current public history of affairs, and to construe enactments of the General Assembly in the light of concurrent history. If, under pretense that an invasion was threatened, or that insurrection was imminent, the Legislature should authorize a loan when it was a known fact to every intelligent person that the assumption was a mere pretense, courts would not hesitate to declare the act void." Other illustrations are given of legislating for one purpose under the guise of another, which the courts must arrest. *Hovey* v. *Foster,* 118 Ind. 502, 21 N. E. 39.

This case plainly marks the limits of the Legislature, and designates the class of cases where the discretion of the Legislature must control; for instance, in determining whether a general law could be made applicable to a matter covered by a special one. The Indiana court, like this court in *Davis* v. *Gaines,* 48 Ark. 370, 3 S. W. 184, holds that no issue can be made on such discretionary matters, which are addressed solely to the discretion of the Legislature. As illustrating the finality of facts determinable by the Legislature may be found cases where the Constitution requires evidence of publication of notice of local bills. This class of cases was recently discussed and the authorities reviewed in *Waterman* v. *Hawkins,* 75 Ark. 120. The appellee urges *State* v. *Sloan,* 66 Ark. 575, 53 S. W. 47, as an authority conclusive on this court that the Legislature is the sole judge of what is necessary expense of government. In that case the then Attorney General called in question an act providing for the erection of a new capitol, and appropriating money therefor, on the ground that it was not a necessary expense of government, and consequently required two-thirds vote in each house. The court held that the Legislature was the proper forum in which the necessity for a new capitol was to be tried, and when it passed a bill in effect so declaring, then such finding was conclusive. Manifestly, this decision is right, for there was a question of fact and of legislative judgment on the necessity for such a public building, and, as aptly said in the Indiana case heretofore quoted from, "courts cannot make an issue of fact, or review the facts as such, upon which the Legislature must be presumed to have passed, in order to determine the validity of an act of the Legislature." Had the General Assembly declared new carpets necessary

for the legislative halls, no question could be raised on that fact. The determination of it is solely with the Legislature. And in no lesser degree the housing of the State government is a matter addressing itself solely to the Legislature, and its determination of the necessity final. But it could not be questioned that if a succeeding Legislature, or several succeeding ones, should appropriate each $1,000,000 for a new capitol, these multitudinous capitols would be a pretext. The language of Mr. Justice HARLAN in *Mugler* v. *Kansas, supra,* would be applicable to such legislation: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority." Other instances are supposed in *Hovey* v. *Foster,* where, even in face of legislative declarations bringing the act within a certain class, if the concurrent history proved it to be an evasion of the Constitution, the courts must annul it. Therefore it is plain that, even in that class of legislation essentially in the discretion of the Legislature, like capitols and public buildings and works and other matters of that class, the legislative authority is not beyond the power of the judiciary when it palpably invades the Constitution, and its own declarations are not conclusive on the subject. In view of these authorities, it cannot be said that the Legislature was, in the class of legislation now before the court, the final arbiter of whether the appropriation was a necessary expense of government.

2. This view brings the act itself for consideration. Read in the light of "concurrent history," it cannot, in these days of profound peace, be sustained as necessary in order to "repel invasion and suppress insurrection." It is gratifying to know that civil process is served and obeyed in the remotest hamlet in the State. The question recurs under the clause that this appropriation must be to defray "the necessary expenses of government," or it is invalid. In the first place, the act bears its death wound on its face. It declares: "Whereas, in order to carry out the provisions of the act of Congress, approved January 21, 1903, it is necessary that the State render financial aid to its citizen soldiery; therefore, be it enacted," etc. This is foreign to a declaration that the appropriation is a necessary expense of gov-

ernment, for the necessity for this legislation is declared to be to render financial aid to the citizen soldiery in order to obtain the benefit of an act of Congress which apportions funds to the State Guards in proportion to the representation when the State Guards hold practice marches for at least five days in each year, and assemble for drill, instruction, and practice at least 24 times a year, and other details. Hence the reason for this bill, as declared on its face, is to provide funds for practice marches, drills, instructions, etc., in order to fulfill the requirement of the acts of Congress in bringing the militia to a standard required in order to obtain more funds to be used for like purposes. The members of the General Assembly could well vote for this bill, deeming it a very proper subject for an appropriation, without ever having their attention drawn to whether it was a necessary expense of government, or merely a proper expense. In fact, the bill negatives the idea that it is a necessary expense of government, and shows on its face a very proper subject for favorable consideration on other grounds; and, if two-thirds of both houses had so regarded it, then no question could be raised, but two-thirds did not regard it either proper or necessary. In the next place, aside from the declaration referred to, it cannot be said of this appropriation that it is a necessary expense of government. It is argued that the Constitution recognizes the militia, and provides for its organization, equipment, and training by the General Assembly, and therefore this appropriation made under its express sanction renders it valid as a necessary expense of government. The conclusion does not follow the premise, because the provision for this organization, equipment, and training carries no intimation or inference that the same is necessary to the government, but merely that it is a proper subject for legislative action. There are many similar provisions in the Constitution. For illustration, it provides that the General Assembly shall pass such laws as will foster and aid the agricultural, mining, and manufacturing interests of the State. Article 10, § 1. If the Legislature passed a law for the agriculturalists to hold county meetings at least 24 times a year, and a State meeting for five days each year, where they were trained and instructed in agriculture, no one would deny that an appropriation to meet the expenses incident to these gatherings would be a proper field for legislation; and

yet bold would he be who asserted, as a legal proposition, that such an appropriation was a "necessary expense of government." It has equal constitutional encouragement, and a more mandatory duty is laid on the Legislature to foster agriculture than there is is to arm, equip, and train the militia. Again, the Constitution provides: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one may receive gratuitous instruction." "The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly." Const. art. 14, § § 1, 4. Certainly, article 11, providing for the organization, equipment, and training of the militia under laws to be passed by the General Assembly, is not as mandatory for such legislation as these provisions requiring the organization and maintenance of free schools under officers to be provided by the Legislature.

It is significant that, when the framers came to provide what appropriations could be made by majority vote, they classed support of the common schools on equal terms as not a part of the necessary expenses of government, and provided that these two objects and expenses to repel invasion or suppress insurrection should be the only three purposes for which money could be voted out of the treasury without a two-thirds vote. A stronger argument could be made on the constitutionality of expenses for the maintenance of free schools as a necessary expense of State government than in favor of the militia, and yet the Constitution makers themselves recognized that it was not within that clause, and expressly put them on equal footing. But it is argued that the militia is part of the executive branch of government, and subject to service as such. In time of invasion and insurrection it is a necessary arm of government, and the Constitution expressly provides that in such times only a majority is required to take money from the treasury to defray the expenses of militia, as well as other expenses incident to such commotions. The Constitution makes the militia of the State consist of all able-bodied male residents between the ages of 18 and 45 years (with a few exceptions), and renders them subject to the call of the General

Assembly, or, in its vacation, the Governor, to execute the laws, repel invasion, suppress insurrection, and to preserve the peace. The sheriff, in the execution of the law, the preservation of peace, and the suppression of riots and insurrection, has like power over the militia, and also over all the male inhabitants of his county. Subdivision 24, c. 49, Kirby's Dig. The reasoning which leads to the conclusion that the training and drilling of the militia is a necessary expense of government would lead to the conclusion that the training of every male inhabitant in the science of war is a necessary expense of government, for every one is subject to the same duty to the State to execute its laws and preserve its peace. The government of Germany considers such training of all its male subjects necessary for its preservation, and the result is that the empire of Germany is one great armed camp, and every citizen a trained soldier, and taxes rest heavily on the people. In consequence of this policy the flower of German youth turn to this country, where experience has taught that this burden is not necessary to government. President Washington, in his sixth annual message to Congress, said: "The devising and establishing of a well-regulated militia would be a genuine source of legislative honor and a perfect title to public gratitude. I therefore entertain a hope that the present session will not pass without carrying to its full energy the power of organizing, arming, and disciplining the militia, and thus providing, in the language of the Constitution, for calling them forth to execute the laws of the Union, suppress insurrections, and repel invasions." 1 Richardson, Messages & Papers of the Presidents, p. 167. Mr. Jefferson, in his first inaugural, in the enumeration of essential principles of government which ought to shape its administration, mentioned these: "A well-regulated militia, our best reliance in peace and for the first moments of war, till regulars may relieve them; the supremacy of the civil over the military authority; economy in the public expense, that labor may be lightly burthened." *Id.* p. 323. In presenting the cause of militia organization for favorable legislation, these greatest of the Presidents fail to present it as a necessary expense of the government, but present it as one well worthy the favorable consideration of the lawmakers. If the case could not be stronger presented when the government was just emerging from the

Revolution, and when civil disorders were prevalent, and Indian warfare a menace on the border, what can be said in its favor as a necessary expense of government in these "piping times of peace?"

The time-honored theory of a free government is that its safety depends on its citizens, not its standing army; and to that end militia organizations have always found encouragement in legislation which has heretofore been generous in titles and sparing in appropriations. Part of the laws now found in Kirby's Digest on militia organization date back to 1845. The first appearance, however, of salaries in time of peace to militia officers, and appropriations for military training and practice, are found in this act and its prototype of 1903. These favorable considerations of militia organization and training, however, find reflection in the statutes of many of the States of the Union, in acts appropriating money for purposes in some respects similar to the act in question. This State in 1903 appropriated $6,220 "to promote the efficiency of the State Guard," of which $4,000 were for military encampments and practice marches. There was no showing on the face of the bill that it was for any other purposes than to promote the efficiency of the militia, and this bill contains the same title, and adds in a preamble the necessity of the appropriation in order to obtain the government aid, presumably to further promote the efficiency of the militia. This is the sole declared purpose of this legislation, and to treat it as necessary expenses of government, when the General Assembly has not so declared, and no one so declared except perchance the presiding officers of the houses in declaring the bill passed on majority votes, would be straining an act belonging to one class into another. The courts always hesitate in differing with a co-ordinate branch of the government, but in this case the hesitation should not be so pronounced, because there is no evidence that the General Assembly has ever considered and determined that this act was a necessary expense of government. The presiding officers of both houses must have so classed it, or else it would not have been declared carried on majority votes. It may be that their attention was not called to this section of the Constitution, or in the hurry of legislative proceedings they did not have time to consider or investigate it. In fact, if they had each ruled that it required two-

thirds votes, a majority could have overruled their decisions, and, without the courts determining it, a bare majority could withdraw money from the treasury, and overrule the Speaker and President, and thus set at defiance the constitutional limitations imposed upon them. The Constitution is committed to the judiciary to preserve, and, in the exercise of that duty, this act ought to be declared void.

CHANCELLOR v. STATE.

Opinion delivered July 1, 1905.

ACCOMPLICE—CORROBORATION.—A conviction of murder upon the testimony of an accomplice was sufficiently corroborated by proof that defendants acted suspiciously before and after arrest, that one of them told the sheriff where to find the spoke with which the fatal blow was dealt, and that when the blood-stained spoke was brought to defendants one of them broke down and cried.

Appeal from Lafayette County.

CHARLES W. SMITH, Judge.

Affirmed.

Chancellor and Malloy were convicted of murder in the second degree, and have appealed.

J. M. & R. L. Montgomery, for appellant.

Robert L. Rogers, Attorney General, for appellee.

HILL, C. J. The appellants were indicted by the grand jury of Lafayette County, charged with the murder of Henry Evans. They were convicted of murder in the second degree, and given seven years each in the penitentiary, and have appealed to this court.

Henry Evans, Cleveland Jones, these appellants, and several other negroes were at Marryman's store, and Evans and Jones left together, and within less than a half hour appellants went in the same direction along the same path taken by Jones and Evans. Evans was never seen alive by any other persons after

he left Marryman's store, and about three weeks afterwards a decomposed body, with the skull crushed, found in the woods about a quarter of a mile from the path pursued by these parties, was identified as his. On the day before he was killed his employer paid him $18.55, consisting of $13.55 in silver and a five-dollar bill. Cleveland Jones was suspected of the murder, and was arrested, and the appellants sent for as witnesses, and their conduct excited suspicion; and later Jones made a statement to the effect that he and Evans stopped on the roadside, and appellants overtook them, and one of them, with a wagon spoke, struck Evans on the head, and afterwards robbed his body, taking therefrom ten silver dollars and two half dollars. He further said that while at the store one of the appellants asked him to take Evans out, and they would hold him up and rob him of his money, and offered him $2.50 if he would do this. It is shown that Evans was not as intelligent as the average darkey. Jones says he got scared when he saw them robbing the body, and ran away, and afterwards appellants came to him, and insisted on him taking $2.50, and told him to say nothing, and that Evans had gone on home. He obeyed this injunction until he was arrested himself, charged with the murder, after the discovery of Evans's body. No money was found on Evans's body. Jones's testimony on the trial was to the same effect as his statement to the deputy sheriff when arrested, as above outlined. This was the chief testimony against the appellants, and the main point argued on this appeal is that there is not sufficient corroboration of the accomplice to sustain the conviction. Conceding, without deciding, that he was an accomplice requiring corroboration, the court is of opinion that the evidence was sufficient. The appellants' suspicious conduct before arrest, and contradictory statements and efforts to manufacture testimony were shown. One of them, in the presence of the other, told the sheriff where to find the spoke with which the blow was dealt, and, when the blood-stained spoke was brought to the group of men where these appellants were, Chancellor broke down and cried. The proximity to the scene of the crime, the circumstance referred to and others in evidence were sufficient testimony to afford the corroboration required by law. *Kent* v. *State,* 64 Ark. 247. The defendants gave

plausible testimony as to their whereabouts, and were corroborated by some witnesses locating their presence at other places in accordance with their testimony; but a reasonable latitude for the approximation of time would not throw this testimony in conflict with Jones's. The defendants also proved good character for themselves. The jury doubtless had some doubts as to the truth of Jones's story, for a belief in it called for the death penalty, not seven years in the penitentiary; but those matters are solely in the province of the jury, and they have accepted Jones's testimony, corroborated as it is by the incriminating conduct of appellants, and these matters are not for review here.

It is insisted that, notwithstanding there was no demurrer to the indictment, nor motion in arrest of judgment, its sufficiency can be raised here; but, as the indictment is good, and the point made against it decided otherwise than contended for by appellants in *Powell* v. *State,* 74 Ark. 335, it is not worth while to pursue the subject further. The instructions were correct, and the appellants' fate settled by the jury. If Jones told the truth, their punishment is far too light; if he did not, it is their misfortune that a jury of their county would not credit their testimony. The judgment is affirmed.

---

76 217
f81 328
82 527

76 217
83 359

76 217
87 370

MERRITT v. WALLACE.

Opinion delivered July 1, 1905.

1. APPEAL—FAILURE TO ABSTRACT EVIDENCE.—Where appellant fails to bring the evidence into his printed abstract, the presumption is that the evidence sustained the findings of the trial court. (Page 218.)
2. GUARDIAN AND WARD—ACCOUNT—BURDEN OF PROOF.—The burden of proof rests upon a guardian to establish the validity of any item of credit in his account which is challenged, and for want of sufficient *prima facie* proof such credit will be rejected. (Page 218.)
3. SAME—INTEREST ON UNLOANED FUNDS.—Where a guardian, after being ordered by the probate court to lend out his ward's money, waited for ten years without lending the money, and without making any report to the court of his failure to do so, it was not error, after allowing him reasonable time to make the loan after being ordered to do so, to charge him with interest thereafter at the legal rate. (Page 219.)

Appeal from Desha Circuit Court.

ANTONIO B. GRACE, Judge.

Affirmed.

F. M. Rogers and *B. F. Merritt,* for appellant.

J. W. Dickinson, for appellee.

HILL, C. J. In 1888 appellant, Merritt, was appointed by the probate court guardian of Lena Crane, a minor, now Lena Wallace, the appellee herein. In 1889 the guardian received from life insurance policies $4,990. January 13, 1890, he filed his first annual settlement, showing a balance on hand of $4,555.49. To this settlement was appended a petition of the guardian for an order to loan $4,000 of the ward's money, and at the April term, 1891, the court made an order directing the guardian to loan said sum on real estate security. There was no proceeding in the guardianship after the April term, 1891, until the January term, 1901, when a petition was filed by Mrs. Wallace, praying that her guardian be required to make a final settlement. On April 5, 1901, the guardian filed his second and final account charging himself with $1,281.26. The appellee filed numerous exceptions to the account, and made out an account as she contended should be made, in which the guardian was charged with interest on the funds in his hands, and other matters differently stated. The probate court sustained some of the exceptions, and charged the guardian with interest since the ward's majority, and rendered judgment against him for $1,861.25. The guardian appealed to circuit court, and the issues were tried anew before the circuit judge. The only evidence was the affidavit of the guardian (treated as a deposition by consent) on the question of interest, and the deposition of Mrs. Wallace. The latter was practically a repetition of her exceptions to the account and statement of the account as it should be. The appellant has failed to bring into his abstract the evidence, and therefore the presumption is that the evidence sustained the finding by the circuit judge. *Shorter University* v. *Franklin,* 75 Ark. 571, and authorities there cited.

Aside from this presumption, however, the guardian did not introduce evidence to sustain his account, where challenged, and

he would fail on that score. Mr. Woerner says: "The *ouns probandi* rests upon the executor or administrator to establish the validity of any item of credit in the account which is challenged, and for want of sufficient *prima facie* proof such credit will be rejected." 2 Woerner, Administration, § 540. See also Schouler on Dom. Rel. § 372.

The circuit judge went through the accounts painstakingly, rejected some credits and allowed others excepted to, and there is no ground to set aside his finding as to the amount due on the account. The principal question in the case is charging the guardian interest on the funds in his hands. The guardian testified: "I gave the statutory notice, and received from H. H. Halley an application to borrow said funds; that in my opinion as such guardian the security offered by said Halley was grossly inadequate; that as such guardian I received no other application for the loan of said fund."

The trial court said: "He was entitled to a reasonable time to make investments or report his failure to do so to the court. Some authorities say three months is all that could be called reasonable; some say six months; and in others even a year is hinted at as not too long under peculiar circumstances. It is extremely liberal to the defendant here to allow him the time from April term, 1891, when the order to lend was made, until the 1st of July, 1893, in which to take decisive action." The court charged him with 6 per cent. interest from the latter date, amounting to $2,061.10.

Section 3804, Kirby's Digest, requires guardians to loan idle money of their wards, under the direction of the court. Section 3805 provides: "If any guardian fail to loan the money of his ward on hand, as aforesaid, under the provisions of this act, he shall be accountable for the interest thereon." The general rule is that the guardian must exercise reasonable skill and diligence to loan the money; and if he fail to do so, he is liable therefor at legal rate of interest; and if the ward can show it could have been loaned at a higher rate, he is chargeable with what he could have obtained. Rodgers, Domestic Relations, § 869; 2 Woerner, Administration, § 511; *Price* v. *Peterson,* 38 Ark. 494.

The guardian rejected one application on account of the

insufficiency of the security, and says he had no further applications.

Section 3808, Kirby's Digest, contemplates, when money of the ward cannot be safely loaned, to have it invested in United States bonds.

The guardian utterly fails to show reasonable diligence to secure a safe loan, and, had he exercised such diligence and failed, then he should have reported it to the court, to the end that the money be invested in bonds. Instead of doing that, he made no report for ten years, and only then when cited into court.

The appellant has no cause of complaint against the judgment, and it is affirmed.

---

76 220
f86 182
f87 302
f88 84

CHOCTAW, OKLAHOMA & GULF RAILROAD CO. v. ROLFE.

Opinion delivered July 1, 1905.

1. CARRIER—DEMAND FOR CARS—SUFFICIENCY OF COMPLAINT.—In a complaint against a railroad company for failure to furnish cars for shipping freight an allegation in the complaint that the plaintiff made demand for cars of defendant's agents at certain stations shows demand of the proper authority, without alleging that these agents had authority to furnish cars. (Page 222.)
2. SAME—SUFFICIENCY OF COMPLAINT.—An allegation, in an action against a carrier for failure to furnish cars as requested by a shipper, that a certain station was the place where demand should be made, as the shipping point had no agent, was not demurrable, as the defendant was notified upon whom the demand was made, and the facts were peculiarly within defendant's knowledge. (Page 222.)
3. SAME—ALLEGATION OF TENDER OF FREIGHT.—An allegation, in a complaint against a carrier for failure to furnish cars for shipment of freight, that plaintiff offered and tendered said freight to the agents of defendant at certain stations for shipment and demanded cars of them during a certain month was sufficient, without alleging the names of such agents or the times and places of said requests. (Page 222.)
4. EVIDENCE—PROOF OF AGENCY.—Statements of persons described as the general manager and the general traffic manager, respectively, of defendant were properly introduced in evidence, without other proof of their official positions than that plaintiff was introduced to the general manager as such by defendant's station agent, and that plaintiff's witness went to the general offices of defendant and secured an

audience with the general traffic manager who was recommended to witness as such, and was in the office doing business. (Page 223.)

5. CARRIER—DAMAGE FOR DELAY SHIPMENT.—A carrier is liable for the depreciation in freight during the time of its negligent failure to furnish shipping facilities. (Page 223.)

6. SAME—SPECIAL DAMAGES FOR DELAY.—Where the general traffic manager of a railroad company, having notice of a contract between plaintiff and his vendee, and that its fulfillment was dependent upon securing cars for shipment, and that delay in furnishing such cars would occasion certain expenses to plaintiff, told plaintiff to make the contract, and the cars would be furnished, plaintiff had a right to rely upon such assurance, and to recover such expenses as were reasonably incurred in reliance thereon. (Page 223.)

Appeal from St. Francis Circuit Court.

ALLEN HUGHES, Judge.

Affirmed.

E. B. Peirce and *T. S. Buzbee,* for appellant.

Norton & Prewett, for appellee.

HILL, C. J. Rolfe was engaged in cutting and shipping logs, and had a quantity of them at Widener and Proctor stations on appellant's line of railroad. Darnall wanted to purchase them delivered on board the cars at these stations, and Rolfe was not willing to enter into the contract until he had assurances that he could get the cars for the shipments. Ward, representing Darnall, went to see the traffic manager of the appellant at Little Rock about the matter, and explained the situation, and he told Ward to make the contract, and the cars would be furnished. Rolfe saw the agent at Forrest City, and he arranged a meeting between Rolfe and the general manager of the road, who was coming over the line in a special car. Rolfe saw the manager, showed him the logs, and explained the situation to him, told him he would have got out the logs before if he had had cars, and about the expenses incident to loading them with teams. The general manager promised he would get the cars, and Rolfe proceeded to get out the logs for shipment to Darnall. Very shortly after the conversation with the general manager in August, he received three cars at Proctor, and then did not receive any more cars till October, when he commenced receiving them again, and received 27 cars from October 11 to some time in January, when his logs

were finally shipped. He kept teams for loading at Proctor during the interval from August to October, and was daily making demands of the various agents and officers of the road, from the agent at Edmondson, where orders for Proctor were taken, to the principal officers of the company. Rolfe sued for damages to the logs by reason of depreciation while loading them for shipment, and for expenses of his teams at Proctor from August to October, alleging that it was necessary to keep them there in order to load the logs when the cars arrived. The uncontroverted evidence placed the damages for depreciation at $264, and the jury gave him that sum and $200 special damages on account of the expenses of his teams.

1. The first point made is that a demurrer to the complaint should have been sustained. The allegation of the complaint assailed by the demurrer is: "The plaintiff had a great number of times demanded of defendant, through its agents at Forrest City and at Widener, and at Edmondson for Proctor, and at other times by letters addressed to the defendant's principal offices at Little Rock, that cars be placed on the side tracks at said stations of Proctor and Widener, that plaintiff might load said logs." The objection is that there was no allegation that these agents had authority to furnish cars, and that it is not stated to what principal offices the letters were addressed. The allegation that he demanded of the agent at Widener for that place shows demand of the proper authority. 1 Elliott on Railroads, § 363. The allegation is that Edmondson was the place to demand for Proctor, there being no agent at Proctor, is sufficient, and apprised the company of the agent upon whom demand was made; and if he was not the agent in control of Proctor, that was a fact peculiarly within the company's knowledge. The demurrer was properly overruled.

2. The appellant asked that the amended complaint be made more specific by setting out, (1) to which of defendant's agents or servants plaintiff tendered the timber, (2) from which of said agents or servants he requested cars and the exact times and places of said requests, (3) the exact number of times he requested cars from defendant's agent at Forrest City, and (4) the dates of the letters and the offices of defendant to which said letters were addressed. The complaint alleged that the plaintiff

placed for shipment at the stations named certain quantities of logs, "and that he offered and tendered for shipment said timber." This allegation shows with reasonable certainty that the tender was to the respective station agents. The allegation is that the tender and demands were made in August, and the company certainly could ascertain from these small stations whether such was a fact. This is not analogous to the duty to furnish names or numbers of trains causing injury, for there are so many trains operated by different crews that it is only fair to definitely designate the train in order that the company may properly learn the facts. The allegation about demand of the principal officers at Little Rock was unnecessary, and, of course, an unnecessary allegation should not be made more definite and certain.

3. Objection is made that incompetent evidence was introduced in the statements of Mr. Wood and Mr. Holden, who were described as general manager and general traffic manager, respectively, without proof of their official positions. The station agent at Forrest City brought about a meeting between Mr. Wood and Rolfe, and Mr. Wood took Rolfe into his special car, and carried him to Memphis, and Rolfe understood from his relations to the company, the statement of the agent, and his actions that he was general manager, or "president of the concern." Mr. Ward found Mr. Holden in the general offices of the company at Little Rock, and secured an audience with him there on the subject of securing cars if he entered into the contract to purchase the logs. "He was recommended to witness as the general traffic manager. He was in the office doing business." The testimony was not incompetent.

4. The elements of damage are assailed. The depreciation in the logs during the time of the negligent failure to ship them is too plain for discussion. See Sutherland on Damages (3d Ed.) § 37. The damage arising from expenses of keeping the teams rests on a different proposition. These constitute special damages, were sued for as such, and specially found as such by the jury. For a breach of an implied contract of carriage, or the breach of any contract, before special damages are recoverable, the facts and circumstances leading to the special damages must be made known to the party to be charged, in order that he may properly avoid them. When thus made known, and the natural

consequences flow from the special circumstances brought home to the contracting party, he is liable for the special damages. This rule, and its application to implied contracts of carriage and delivery, may be found discussed in *Vicksburg & M. Rd. Co.* v. *Ragsdale,* 46 Miss. 458; *Ligon* v. *Ry.* 3 Tex. Ct. of Appeals, Civil Cases, 1; *Western Union Tel. Co.* v. *Hall,* 124 U. S. 444; *Crutcher* v. *C. O. & G. Rd. Co.,* 74 Ark. 358; Hutchinson on Carriers, § 776. Applying the principles to the facts, the uncontroverted evidence shows that the general traffic manager had notice of the intended contract between Rolfe and his vendee, and that it was dependent on securing the cars, and that he told the parties to make the contract, and the cars would be furnished. Rolfe personally showed the logs to the general manager of the road, and explained the method and expense of loading them, and was assured that he would receive the cars, and did receive three cars shortly thereafter. He had a right to rely upon these assurances for a reasonable time, and keep his teams on expense, expecting the fulfillment of the duty to furnish the cars. The evidence shows he was very assiduous in his efforts to get the cars in the time of this delay. The jury gave him much less than his evidence showed his expenses were, and the court is of opinion that there is sufficient evidence of notice to the company of the special circumstances to render it responsible for special damages in keeping the teams for a reasonable time.

The judgment is affirmed.

---

76 224
e78 60
f79 57
j79 145
f79 246
80 20
82 81
76 224
83 70

76 224
f88 530
88 531
88 556

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. *v.* LUTHER HITT.

Opinion delivered July 1, 1905.

1. RAILROAD—ACCIDENT AT CROSSING—DUTY TO LOOK AND LISTEN.—In a suit for an injury received by a traveler in collision with a train at a highway crossing it was error to instruct the jury that mere proof that plaintiff looked and listened as he started to drive upon the track, and that he did not look again, did not alone establish contributory negligence. If there were no exculpatory circumstances, the jury should have been instructed that the duty was upon plain-

tiff to continue to look and listen until the danger was past; otherwise the whole question should have gone to the jury, and no part been determined by the court. (Page 525.)

2. INSTRUCTIONS—EFFECT OF CONFLICT.—The rule that all the instructions should be read together does not apply where the instructions are conflicting, and the jury are left without guidance as to which they should follow. (Page 226.)

Appeal from Nevada Circuit Court.

JOEL D. CONWAY, Judge.

Affirmed.

J. E. Williams and *B. S. Johnson,* for appellant.

McRae & Tompkins, for appellee.

HILL, C. J. This case presents the same questions as to the liability of the appellant which are presented in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Robert Hitt, post* p. 227. This case was tried first in Nevada County, and that case in Clark County, and brought here on separate records, but have been argued together. They arose from the same occurrence. The facts will be found stated in the Robert Hitt case. In this case the court gave on behalf of the appellee the following instruction:

"5. You are instructed that mere proof that the plaintiff looked and listened as they started to drive upon the track, and that they did not look again, does not alone establish the contributory negligence. You should take into consideration all the facts and circumstances in evidence; and if from these you believe that the plaintiff acted as a reasonable, prudent man, then he would not be deemed to have been guilty of contributory negligence."

In *St. Louis, & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 138, the court said: "If he is struck and injured by a train at the crossing, which he might have seen had he continued on his guard, it would not be sufficient on a trial for the injury for the judge to say generally that it is the duty of one about to cross a railroad to look and listen for trains, but he should go further and explain that this means that a traveler should continue to use his eyes and ears until the track and danger are passed."

In *Railway Company* v. *Cullen,* 54 Ark. 431, Chief Justice Cockrill for the court, said: "A failure to look and listen is therefore evidence of negligence on his part; and if the injury is

the consequent result, and his want of precaution is unexplained by circumstances which might mislead an ordinarily prudent man or throw him off his guard, he cannot have reparation for the injury, because his own want of care is the author of his misfortune."

In *Martin* v. *Little Rock & Ft. S. Ry. Co.*, 62 Ark. 156, the court said: "We do not hold that in every case where a traveler fails to look and listen, and is injured by a train while crossing a railway track, the case should be taken from the jury. It is only when it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that his failure to look and listen will necessarily constitute negligence." Applying these principles to the instruction in question, the instruction tells the jury that failure to continue to look and listen does not alone establish contributory negligence. It is held in the Crabtree case that the court must tell the jury that continuing to use the senses is an essential part of the duty of looking and listening, and in the Cullen case that failure to look and listen is evidence of negligence. Therefore the instruction conflicts with these cases. But, as explained in the Martin case, the failure to look and listen is not always negligence. There may be circumstances as there instanced or where there is an invitation by the railroad, express or implied, which might relieve a prudent person from this duty. But all those matters are exculpatory, and the duty to continue to look and listen should be definitely put upon the plaintiff; and if there is sufficient evidence of exculpatory circumstances, then the whole question should go to the jury, and no part of it be determined by the court. This instruction acquits the appellee of negligence in failing to continue to look and listen till danger is past, instead of charging him with such negligence and then leaving it to the jury to determine whether the facts and circumstances in evidence are sufficient to relieve a reasonably prudent person of this essential precaution for his own safety.

It is insisted that if this instruction is erroneous it is cured by other instructions given on behalf of the appellant. None of the other instructions reach to this exact point, while they do state the law, in the main, correctly on the duty of looking and listening; and if they were construed as correctly covering this

important point of the case, then they would be in conflict with this instruction, and leave the jury at large which to follow. In such case the rule that reading the instructions together in order to see if the issues are presented correctly cannot apply. *Fletcher* v. *Eagle,* 74 Ark. 585; *St. Louis & N. Ark. Rd. Co.* v. *Midkiff,* 75 Ark. 263.

For the error in giving the 5th instruction the judgment is reversed, and the case remanded for a new trial.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* ROBERT HITT.

76 227
p76 225
77 12
77 203

76 227
80 20
80 441
82 503

76 227
83 222

76 227
87 281

76 227
f90 22

Opinion delivered July 1, 1905.

1. CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.—Where a traveler stopped at a railroad crossing, and looked and listened, but failed to hear an approaching train which was making little noise on account of the sleet, and was unable to see its headlight by reason of obstructing cars and the converging rays of an arc light and the headlight of a freight train standing near; and where trainmen were standing near, with better opportunity to see and hear than he had, who, so far as he knew, failed to warn him of danger, the question whether, in attempting to cross the track, he was guilty of contributory negligence was properly left to the jury. (Page 231.)
2. SAME.—If from the evidence fair-minded men may draw different conclusions as to whether the care exercised by the injured party was proportioned to the danger to be avoided, and such as the situation called for from men of prudence and caution, the question of contributory negligence is for the jury. (Page 231.)
3. SAME—INSTRUCTION—SINGLING OUT EVIDENCE.—In an action against a railroad company for negligently killing plaintiff's deceased at a street crossing, an instruction that if deceased stopped, looked and listened before driving upon the track, and by reason of the obstructions on the sidetrack, the arc light maintained by the town and the headlight of a freight engine, could not see the headlight of the passenger train in time to avoid the injury, and if no signals were given, and if deceased took such precautions as would have enabled him to see or hear the train if the signals had been given, they might find for the plaintiff on the issue of contributory negligence, was not erroneous as singling out certain parts of the evidence. (Page 232.)

4. INSTRUCTION—WEIGHT OF EVIDENCE.—An instruction that if the death of deceased was caused by defendant's negligence, a recovery will not be defeated on the ground of contributory negligence unless deceased failed to exercise ordinary prudence, and such failure contributed to the injury, was not erroneous as an expression of the court's opinion on the weight of evidence. (Page 232.)

5. SAME—CONTRIBUTORY NEGLIGENCE.—In an action against a railroad company for a negligent killing at a crossing at which a freight train was standing on a sidetrack between deceased and the approaching train, so that such approach could not readily be seen or heard, the court's refusal to give an instruction that deceased had no right to drive on the main track without taking precautions after he passed beyond the sidetrack was not error where the centers of the two tracks were only fourteen feet apart, so that deceased's mules were on the main track before his wagon was clear of the freight train. (Page 233.)

6. EVIDENCE—EXPECTANCY OF LIFE—ANNUITY.—Testimony of a life insurance agent as to the expectancy of life, as shown by the mortality tables, of a man of Hitt's age, and an estimate of the amount required to purchase an annuity equal to his income, was admissible in an action for a wrongful death. (Page 233.)

7. WRONGFUL DEATH—EXCESSIVENESS OF DAMAGES.—In an action for a wrongful death, a verdict for $10,000, which was less by $1,054 than the sum representing the value of decedent's income, was not excessive, though his personal expenses, which would probably have exceeded the difference, were to be deducted, if, in addition to pecuniary damages, there was to be considered the element of the loss of his care and attention to his minor children. (Page 234.)

Appeal from Clark Circuit Court.

JOEL D. CONWAY, Judge.

Affirmed.

STATEMENT BY THE COURT.

These facts are deducible from the evidence most favorable to sustain the verdict: On Sunday night, in January, 1902, the Hitts drove from their home, near the central part of Nevada County, into Prescott, a town of more than 3,000 inhabitants. They were in a covered wagon, and arrived at the crossing at Elm street after dark. The covering extended two feet over them, and on either side, leaving only the view in front unobstructed. This crossing was in the center of the town. It was a cold, windy day, and had been sleeting. The ground was covered with sleet and ice. When they reached the crossing, they found it blocked by a freight train on the side track, 1,200 feet long,

standing a few feet from the main line. A brakeman was standing at the crossing, and they asked him when they could cross. The crossing remained blocked about 10 minutes, when the freight train "cut the crossing." Then they discussed whether it was safe to cross. Luther E. Hitt got up and looked up and down the track; extending his head beyond the wagon cover, thereby enabling him to see both ways. His father called his attention to some cars on the track, and after discussing it they concluded it was safe to cross. In driving across they continued to look forward, but did not extend their heads beyond the covering to see on either side. The town maintained an arc light almost immediately over the crossing, and the headlight of the freight engine was burning, shedding its rays over the crossing. There were cars on both sides of the crossing. The train which struck them came from the southwest, and was about an hour late. Looking from where they were standing, in the middle of Elm street, the view was obstructed by cars on the spur track; a freight train was standing on the passing track; and down the railroad were two large warehouses and a coal house, which completely cut off their view from the direction which the train came. The passenger engine was lighted with an electric headlight, whose beams could be seen a half a mile; but the reflection of this may not have been seen on the crossing in front of them, on account of the light thrown by the arc light and the headlight of the engine. Luther Hitt testifies he did not detect it, although looking ahead. The sleet and ice on the ground deadened the sound of the train, until, as the witnesses stated, it was running rather soft, and did not make as much noise as usual. The train ran in past the crossing at a speed of from 18 to 20 miles an hour, and without ringing the bell or sounding the whistle, struck the wagon in which the Hitts were sitting, killed the father, and injured the son. The point at which they stopped and looked out from under the wagon sheet was 82 feet from the track where they were struck. The center of the side track was 14 feet and 6 inches from the center of the main track, and the spur track was still between the wagon and the side track. They started to drive across slowly. The brakeman at the pilot of the freight engine was standing on the ground, and they passed in front of him, not more than 25 feet away. No watchman was kept at

the crossing. The brakeman made no effort to stop the wagon, and he knew the passenger train was coming.

Among other instructions given were the third and fourth, which are as follows:

"(3) You are further instructed that if you find from the evidence that the deceased or his son stopped, looked, and listened before driving upon the track, and further believe that by reason of the obstructions on the side track—the arc light maintained by the town and the headlight of the freight engine, if you believe these lights were burning—they could not see the headlight of the passenger train, or the reflection thereof, in time to have avoided the injury, and that no signals were given as defined in these instructions, and that the deceased and his son took such precautions as would have enabled them to have seen or heard the train if such signals had been given, you may find for the plaintiff as to the issue of contributory negligence.

"(4) If you believe from the evidence that the death of the deceased was caused by the negligence of the defendant company, a recovery cannot be defeated on the ground of contributory negligence unless it appears from the evidence that the deceased himself failed in the exercise of ordinary prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault. Contributory negligence will not be presumed; but must be proved by a preponderance of the evidence."

The court refused to give the sixth instruction requested by appellant, which is as follows:

"(6) The court instructs the jury that if they find from the testimony in this case that at the time in question a freight train was standing on a track parallel to the track on which the approaching train was, and that such freight train was between plaintiffs on the highway and the approaching train, so that the approaching train could not be seen or heard readily, then the plaintiffs had no right to drive on the track without taking precautions after they passed beyond the freight train, where they could see and hear the approaching train, and there looking and listening before attempting to cross the track in front of the approaching train; and if they failed to do this, and in conse-

quence of such failure were injured, your verdict should be for the defendant."

The appellees received a judgment for $10,000. Hitt was 56 years of age; was making $1,000 per annum, derived from farming, trading, and the mercantile business. He left a wife and nine children, of whom six were minors at the time of his death—the youngest about five years old. He was a stout, healthy man, and shrewd in business affairs. A witness was asked, "What was his character, with reference to attention to and care of his family?" and answered, "It was very good." Again he was asked: "You say he was a man who took good care of his family? A. Yes, sir; as good as any man, I should think."

J. E. Williams and *B. S. Johnson,* for appellant.

McRae & Tompkins, for appellees.

HILL, C. J., (after stating the facts.) 1. The negligence of the company in failing to give the signals required by law was abundantly established, and the conflict in the evidence on this point has been settled by the jury. The next question, and the one most earnestly presented here, is that the evidence showed that Hitt was guilty of contributory negligence in driving on the track under the circumstances set out in the statement. Mr. Justice BREWER, speaking for the Supreme Court of the United States, said: "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. (Citing authorities.)" *Richmond & D. Rd. Co.* v. *Powers,* 149 U. S. 43. The authorities sustaining this doctrine are collected in *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549, 33 S. W. 1070. Testing the evidence upon this principle, it cannot be said that the facts disclose a situation rendering it negligence for Hitt to drive onto the track. At a distance of 82 feet from the track he took the precautions required by law and common sense, and, neither seeing nor hearing anything to indicate a train was coming on the main track, and, the way being made clear, and

employees standing near, with better opportunity of seeing or hearing than he had, who would doubtless warn him for humanity's sake alone, if no duty rested on them, not to cross in front of a rapidly approaching train, and, after consulting with his son, the fatal drive began. While it is true the sheet of the wagon obstructed the vision on either side, and in a measure the hearing, yet they believed from their investigation that the way was clear, and they continued to look ahead and listen. The electric arc light and the headlight of the freight engine, casting their rays on the crossing, might well tend to prevent the discovery of the light from the headlight of the approaching train. The situation confronting Mr. Hitt was not such as requires the court to say, as a matter of law, that it was *per se* negligence, under the circumstances, to attempt to cross the track. The ringing bell or sounding whistle would doubtless have given the warning of the approaching train, which was not otherwise apparent to Mr. Hitt or his son. These are facts from which fair-minded men may draw different conclusions as to whether the care exercised was proportional to the danger to be avoided, and such as the situation called for from men of prudence and caution. When such are the facts of a case, then the question must be settled by a jury, under proper instructions.

2. The next matter assigned as error is the giving of the third and fourth instructions, which are set out in the statement of facts. The point urged against these instructions is that they displayed to the jury an expression of opinion upon the part of the court upon the weight of the evidence. It is further urged against the third that it has singled out certain parts of the evidence in favor of the plaintiff, and disregarded every item of contributory negligence, and, without referring to the same, in a counter statement, has said the weight of this specific evidence is sufficient to set aside all the evidence establishing contributory negligence. If there is evidence to sustain a particular theory of a case, the court should properly instruct the jury as to such theory. *Smith* v. *State,* 50 Ark. 545, 8 S. W. 941. Instructions should declare the law as applicable to any view of the facts which upon the evidence may be taken by either of the parties to the cause on trial. *Luckinbill* v. *State,* 52 Ark. 45, 11 S. W. 963. Every instruction should be hypothetical, *i. e.,* predi-

cated upon the supposition that, if certain evidence be true, then the legal consequence resulting therefrom is one way or the other. *State Bank* v. *McGuire,* 14 Ark. 530; *Collins* v. *Mack,* 31 Ark. 684. It is error to refuse to give a specific instruction correctly and clearly applying the law to the facts in the case, even though the law, in a general way, is covered by the charge given. *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 134, 62 S. W. 64. Applying these settled principles to the instruction in question, it cannot be said that they are open to the objections urged. Each side prayed and was granted many specific instructions, covering phases of the case which they desired drawn sharply to the attention of the jury. The court fails to find error in them, and, taken together, they consistently present the whole case, generally and specifically.

3. Error is assigned in the refusal of the court to give the sixth instruction. The distance from the center of the side track upon which the freight train stood to the center of the main track, upon which the train was approaching, was 14 feet. It was therefore an impossibility to have avoided the accident at that late moment. The mules drawing the wagon were on the main track before the wagon could have cleared the freight train, and the freight train behind them was whistling at that moment. The care is to be measured by the act of going into this danger, not when it is too imminent for avoidance, and when excitement and danger dethrone judgment. The case was properly submitted under instructions fully explaining the care required, and it was not error to refuse to give this one.

4. Objection is made to admission of testimony of a life insurance agent as to the expectancy of life, as shown by the mortality tables, of a man of Hitt's age, and an estimate of the amount required to purchase an annuity equal to Hitt's income. These tables were held admissible, and their uses explained, in *Arkansas Midland Ry. Co.* v. *Griffith,* 63 Ark. 491, 39 S. W. 550. The record fails to show the calculation complained of, but it could not be error, as it was but relieving the jury of the labor involved in it. The court gave the following instruction on the subject: "If your verdict should be for the plaintiffs, you will assess the damage at such sum as will compensate them for their pecuniary loss resulting from the death of the husband and father. In estimating this loss, it is proper for you to take into

consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or decrease of that ability with the lapse of time; his earning capacity; the care and attention, the instruction and training, one of his disposition and character may be expected to give to his family—and thus determine the value of the life. From this amount deduct the personal expenses of deceased, and the balance, reduced to its present value, would be the present amount of your verdict, provided such of the deceased's children as were minors at his death or at this time would not be entitled to any compensation on account of death of deceased for a period beyond the time of their attaining their majority." It is seen, therefore, that the court properly gave the elements to consider in arriving at the compensatory amount. If the calculation was made, it was useful only to reach the probable amount required to purchase the annuity to represent his income, and from such amount personal expenses were directed to be deducted.

5. The verdict is assailed as excessive. It is less, by the sum of $1,054, than the sum representing the present value of his income. Of course, his personal expenses should be deducted —likely much more than said $1,054; but, on the other hand, there was another element proper to enter into the verdict, and that was the loss of his care and attention to his minor children. *St. Louis & N. A. Rd. Co.* v. *Mathis, ante,* p. 184, and cases there cited. The verdict is not excessive.

The judgment is affirmed.

BATTLE and RIDDICK, JJ., dissent.

ON REHEARING.

Opinion delivered July 29, 1905.

HILL, C. J. In their brief on motion for rehearing counsel for the appellant challenge the correctness of various statements in the "Statement by the Court," and also raise anew questions of law determined on the former hearing.

The statement by the court does not purport to decide any conflicts in the evidence, nor detail the testimony of the witnesses, but merely to state facts deducible from the evidence most favorable to appellees, in order to test the sufficiency of them to sustain the verdict.

1. The first statement challenged is that the train on the side track was 1,200 feet long. They quote from the engineer in charge of it to the effect that he had only a couple of cars attached to the engine; but further in his evidence he showed he was going back to couple to the rest of the train, and that it altogether had about twenty cars, and that their average length was 60 feet, which would make the whole train 1,200 feet, as stated. As it was all between the Hitts and the main line, part on either side of the crossing, it was considered by the court as it was presented to the Hitts.

2. The next statement challenged is this:

"They started to drive across slowly. The brakeman at the pilot of the engine was standing on the ground, and they passed in front of him, not more than twenty-five feet away. No watchman was kept at the crossing. *The brakeman made no effort to stop the wagon, and he knew the passenger train was coming.*"

There is some negative testimony to the effect that there was no holloing to the Hitts by the brakeman, but the court did not intend to find that as a fact deducible from the evidence, but merely that no effort to stop them was made which was known to the Hitts. The court was considering the situation entirely as viewed by the Hitts when they started to drive across, and was not sustaining any negligence against the company predicated on the dereliction of the brakeman to stop the Hitts. The court has no doubt that the truth was exactly as stated by the brakeman, as follows:

"You made no effort to get in front of the team and stop them?"

"No, sir, I didn't make any effort to get in front of it."

"Did they reply to you when you holloed to them?"

"No, sir; not that I remember. Whether they noticed it or not, I can't tell."

Counsel argue the point as if the court was predicating negligence against the appellant on the ground that the brakeman made no effort to stop them, and call attention to the abundant evidence of his and other cries to them just before they were struck. As stated, the court did not consider the conduct of the brakeman in considering evidence of the negligence of the appellant, and was considering the situation of the brakeman and

his actions, so far as known to the Hitts, in determining whether or not they were guilty of contributory negligence *per se* in attempting to make the crossing. The brakeman had a few minutes before, when the crossing was blocked by the train, told them it would soon be cleared, and it was soon cleared, and he was seen standing near by and in a position where he could better see and hear than they could. In determining whether the clearing of the way was an invitation to cross, and whether it was safe to cross, the Hitts could properly take into consideration that the brakeman was standing in a favorable position to see any danger, and, as stated in the opinion, aside from any duty resting on him, would doubtless, from humanity's sake, warn them of any danger which his better position would enable him to see and hear. The fact that they did not hear his cries later, which is shown, does not change the situation as presented to them when they started to make the drive across the tracks. While not a factor in determining the negligence of the company, it is a factor in measuring the conduct of the Hitts, and as such alone was it considered by the court. The statement complained of should read: "The brakeman made no effort to stop the wagon *known to the occupants.*"

3. Other matters are presented in the brief, and have been considered, but they are the same matters heretofore presented and considered, and of them counsel say:

"The court's attention was called to all of these facts in the original brief, and the record shows them as we have here quoted them. Are we not entitled to a rehearing? And should not this case be reversed? We have tried, respectfully, to refer the court to the testimony, which has been evidently overlooked; or, if not overlooked, has not been carefully considered by the majority of this court. We deem it our duty to bitterly protest against the ruling of the majority of this court. We deem it our duty to show to this court how it has rendered a judgment directly in violation of the repeated decisions, unbroken, of this court."

The court is unaware of overruling or failing to follow any previous decision of this court, but, on the contrary, believes that it is but applying the principles of many previous decisions. On the chief point in the case—whether the action of the Hitts in making the drive across the track was *per se* contributory

negligence, or whether they exercised the care required by law—the court applied a familiar principle upon which the authorities are collected in *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549, and which is fully stated by the Supreme Court of the United States in *Richmond & D. Rd. Co.* v. *Powers,* 149 U. S. 43.

The motion for rehearing is denied.

Mr. Justice BATTLE and Mr. Justice RIDDICK dissent.

WILLIAM FAIT COMPANY *v.* ANDERSON.

Opinion delivered July 1, 1905.

SALE—BINDING CONTRACT.—Acceptance of an order for a carload of goods, the specifications of which were to be sent later, but were not supplied until after the acceptance has been canceled, did not constitute a binding contract of sale, within the statute of frauds (Kirby's Dig. § 3656).

Appeal from Pulaski Circuit Court, Second Division.

EDWARD W. WINFIELD, Judge.

Reversed.

Marshall & Coffman, for appellant.

Cantrell & Loughborough, for appellees.

BATTLE, J. D. W. and A. G. Anderson sued the Wm. Fait Company for breach of contract. They alleged that on the 29th of May, 1902, they entered into a contract with the defendant, by which the defendant agreed to ship to them a carload of groceries and produce in cases, according to specifications to be furnished by plaintiffs in a reasonable time; that the goods were to be paid for according to their market prices at the time of the agreement; that they furnished the defendant in a reasonable time with a list of the goods to be shipped; and that it wholly failed to ship the same, to their damage of $400.

The defendant denied these allegations, and that it made any contract with the plaintiffs, and pleaded the statute of frauds. They recovered a judgment for $151, and the defendant appealed.

The appellees were merchants doing business in the town of Newport, in this State. Appellant was a corporation engaged in selling produce in the city of Baltimore, in the State of Mary-

land. Dunn & Powell were merchandise brokers, doing business in Little Rock, Ark. On the 29th of May, 1902, Dunn & Powell sent the following telegram to appellant: "Book Anderson Newport assorted car futures same price as others.' To this to it the same day by mail: "We will send you specifications on the Newport car in a few days." Dunn & Powell received from appellant, dated May 29, 1902, a letter, as follows: "We have your telegram which read as follows: 'Book Anderson Newport assorted car futures, same price as others.' To this we wired you this afternoon that we have entered this order which we now confirm [meaning corroborate]. We accordingly have entered this order, and await your letter confirming [corroborating] with specifications." All such orders were subject to the approval of the appellant. On June 9, 1902, Dunn & Powell received a letter from Wm. Fait Company, dated June 7, 1902, as follows: "Referring to your telegram of May 29, which read, 'Book Anderson Newport assorted car future goods same price as others,' we beg to say that up to this present time we have no mail confirmation to this order, nor have we any assortment, and the order is therefore canceled. We cannot have these things remain open indefinitely." On June 10, 1902, appellees, through Dunn & Powell, sent specifications, and on the 13th of the same month appellant declined to ship the goods.

The statute of frauds is in part as follows: "No contract for the sale of goods, wares and merchandise, for the price of thirty dollars or upward, shall be binding on the parties unless, first, there be some note or memorandum, signed by the party to be charged; or, second, the purchaser shall accept a part of the goods ordered, and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part payment thereof." Kirby's Dig. § 3656. There was no compliance with this statute. The only written evidence of a contract was the telegrams and letters set out above. The goods to be sold were not specified. There was no acceptance by appellant of any antecedent definite order. The goods to be purchased were to be selected out of a list of about 162 articles, and the quantity purchased of each was to be designated. Until such specifications were made, there could have been no definite agreement. There

was no direct and unequivocal acceptance of any proposal which by acceptance could have become a complete contract. On the incomplete stipulations nothing could have been recovered at law. There was never an agreement as to the most essential part of a contract of sale, the appellant having declined to treat further with appellees before the specifications were furnished. *Wheeling Steel & Iron Co.* v. *Evans* (Md.) 55 Atl. 373.

The judgment of the circuit court is reversed, and a judgment upon the merits will be entered here in favor of appellant, and for $10 damages by reason of the attachment, which is dissolved.

---

76 239
78 86

MOUNTAIN PARK TERMINAL RAILWAY COMPANY *v.* FIELD.

Opinion delivered July 1, 1905.

1. CONDEMNATION PROCEEDING—DEFENSE.—As the sole object of the special proceeding for the condemnation of land for right-of-way provided by Kirby's Digest, c. 58, is to ascertain the amount of damages for which the railroad company is liable to the owner, the owner cannot defend on the ground that the company is not entitled to bring the action. (Page 242.)
2. INJUNCTION—ABUSE OF CORPORATE POWERS.—It seems that equity will restrain an abuse of corporate powers, as where a railroad company seeks to condemn the property of individuals solely and exclusively to a private use. (Page 244.)

Appeal from Pulaski Circuit Court.

EDWARD W. WINFIELD, Judge. Reversed.

H. M. Armistead and *John McClure,* for appellants.

Under sections 6545-6 of Kirby's Digest, the sole power of determining whether a particular railroad will be for the benefit of the public is vested in the board of railroad incorporation, and its decisions thereon are final and conclusive. The answer of defendants should have been stricken from the files. See, generally, upon the right of railroad companies to take private property under condemnation proceedings, and the procedure necessary therein: Const. art. 17, § 1; *Ib.* art. 2, § 22; *Ib.* art. 12, § 9; *Ib.* art. 9, § 12.

The proceeding for condemnation being a statutory one, no issues can properly be raised save those provided for by the

statute. Hence in this suit at law the only proper issues were the value of the land and the damages to the owner from taking same. Kirby's Dig. § § 2947, 2952, 2955; 52 Ark. 340; 81 Mo. 135; 45 Ark. 280; 105 Ill. 511; 38 N. J. L. 18; 13 Mo. App. 32; 43 Ark. 120; 42 Neb. 327; 3 Ore. 95.

For statutes of other States allowing other issues to be raised, see R. S. Wis. 1361; 3 R. S. N. Y. ch. 282, 1869. The right of a railroad corporation, duly organized, to exercise the right of eminent domain cannot be assailed in a condemnation proceeding. 57 Ark. 364; 32 Cal. 253; 71 Ill. 333; 30 Gratt. 799; 56 S. W. 833; 33 Oh. St. 436; 161 Mo. 305; 133 N. C. 136; 92 N. C. 578; 69 Pac. 572; 32 N. J. Eq. 759; 23 Cal. 325; 112 Ill. 601; 3 Ore. 165; 43 Ark. 120. There was no testimony before the court sufficient to authorize it to find that the railroad was not a public corporation, even if it had jurisdiction to enter upon such an inquiry.

Rose, Hemingway & Rose, and *J. W. & M. House,* for appellees.

The action of the board of railroad incorporation was not conclusive. This board is an unconstitutional body. *Cf.* Const. Ark. art 12, § § 2-6; *Ib.* art. 17, § 1. The facts in this case show a clear abuse of a public franchise. The court properly refused to strike the answer. 33 Am. Ry. Cas. 99; 24 Am. & Eng. Ry. Cas. 261; 43 N. Y. 137; L. R. A. 680, 690; 59 Am. Rep. 379; 20 Am. & Eng. Ry. Cas. (N. S.) 619, 620; Lewis, Em. Dom. § 393; 83 N. W. 294, s. c. 107 Wis. 192.

BATTLE, J. On the 20th of April, 1904, Mountain Park Terminal Railway Company filed a petition for condemnation of a right of way through certain lands of W. H. Field and others. "The petition is in the usual form, alleging the incorporation of the railroad company; the route of said railroad; that its road is surveyed and located in Pulaski County; that the defendants are the owners of certain lands, which are described; that said lands are unimproved; that it has failed to obtain the right of way over the said land by an agreement with the owner thereof; that it is desirous of beginning work on its railroad; and asks the court to designate a sum of money to be deposited by plaintiff for the purpose of making compensation, etc., and that a jury be impaneled to ascertain the amount of compensation to which the

owners of said land may be entitled, and that an appropriate order and judgment be entered, vesting the petitioner with a right of way one hundred feet in width through said land, etc.

"Notice was only served on the defendants, notifying them that on a certain date the plaintiff would apply to the judge of the second division of the Pulaski Circuit Court for an order fixing the amount of the possible damages that would result from the construction of said railroad over the land of the defendant."

On the 7th day of May, 1904, the defendant filed an answer as follows:

"The defendants deny the right of the plaintiff to maintain this condemnation proceeding, and say that the plaintiff was not organized in good faith for the purpose of building a railroad, nor for any public purpose, but is organized solely to carry out the private enterprise of one Charles M. Newton, who has subscribed for substantially all of the stock of said company. The fact is that on the south side of the Choctaw, Oklahoma & Gulf Railroad, along where the line of plaintiff is sought to be constructed, there is a high hill, composed entirely of stone, that is valuable for crushing into small fragments of stone, suitable for ballasting railroads, making macadam highways, the construction of concrete and other like purposes. The front of these hills cannot be utilized, because any rock blasted from them would fall upon the track of the Choctaw, Oklahoma & Gulf Railroad; but at a point where the plaintiff seeks to condemn there is a narrow gorge, penetrating said hill, up which a railroad track can be built, for a short distance, but the part of said hills, adjacent to the right of way of said railroad, belongs to defendants, who contemplate the erection of a crushing plant in said gorge. A part more remote, and further up said gorge, belongs to said Newton, who also desires to put in a crusher; but said gorge is so narrow that, if a railroad track is constructed up said gorge, so as to reach the property of said Newton, it will preclude these defendants from the erection of any crusher for their own use, and will also destroy the value of the great rock deposits which they may possess in that vicinity. The sole purpose of said Newton in seeking to condemn a right of way is merely to traverse the defendant's land in order to get to a crusher of his own, at the sacrifice of the property of these

defendants. It is impossible to build said railroad, as laid out, because the grade up to the said property, known as Mountain Park, is so steep that no railroad train could be run upon any railroad that might be built. The said Newton has caused a railroad to be surveyed, only for a distance of about 1,700 feet, just far enough to bring it to the site of his proposed crusher, and at this point the railroad survey sinks to a depth of twelve feet, into the hill, and further progress is impossible. Defendants deny that said plaintiff ever contemplates building any further or doing more than to construct a switch to reach a crusher of said Newton, and they deny that any public purpose will be subserved by the building of the proposed railroad. The railroad of the plaintiff is laid out to run from the city of Little Rock to said Mountain Park; but these defendants say this is merely a pretense and a scheme to perpetrate a fraud upon the law and upon this honorable court, and that the plaintiff has taken no steps to acquire the right of way, save the few feet that are necessary to reach from the Choctaw, Oklahoma & Gulf Railroad, to the site of the proposed crusher of the said Newton."

Plaintiff filed a motion to strike the answer from the files of the court, and on the 21st of May, 1904, the court overruled the same. After hearing the evidence, the court found that the proposed construction is for private purposes, and the right of eminent domain does not exist in this case, and dismissed the petition.

Did the court err in overruling the motion to strike the answer from the files?

The proceeding prescribed by statute for the condemnation of land for right of way for a railroad is special. Section 2947 of Kirby's Digest provides: "Any railroad * * * company, organized under the laws of this State, after having surveyed and located its lines of railroad, * * * shall, in all cases where such companies fail to obtain, by agreement with the owner of the property through which said lines of railroad * * * may be located, the right of way over the same, apply to the circuit court of the county in which said property is situated, by petition, to have the damages for such right of way assessed, giving the owner of such property at least ten days' notice in writing of the time and place where such petition will be heard."

Section 2952 provides: "It shall be the duty of the court to impanel a jury of twelve men, as in other civil cases, to ascertain the amount of compensation which such company shall pay, and the matter shall proceed and be determined as other civil causes." Section 2955 provides: "Where the determination of questions in controversy in such proceedings is likely to retard the progress of the work on or the business of such railroad company, the court, or judge in vacation, shall designate an amount of money to be deposited by the company." Section 2954 provides: "In all cases where damages for the right of way for the use of any railroad company have been assessed in the manner hereinbefore provided, it shall be the duty of such railroad company to deposit with the court or to pay to the owners the amount so assessed, and pay such costs as may, in the discretion of the court, be adjudged against it, within thirty days after such assessment; whereupon it shall and may be lawful for such railroad company to enter upon, use and have the right of way over such lands forever." From these statutes it appears that the sole object of the proceedings provided for by them is to ascertain the damages that the railroad company shall pay for right of way. They seem to assume that the railroad company is entitled to the right of way upon making compensation for same.

In *Neimeyer & Darragh* v. *Little Rock Junction Railway,* 43 Ark. 111, the appellants sought to enjoin the railroad company from building its road along a certain alley and taking certain lots, alleging in their complaint "that the organization of the company was a fraud upon the State, in this, that it was not a *bona fide* company organized to build and operate a railroad company as pretended, but in effect a bridge company, taking the guise and semblance of a railroad company for the purpose of building, using, and deriving service from the bridge with the exemption from taxation accorded by statutes to the bridges of railroads," etc. One of the questions in that case was, was not the appellants barred from maintaining their suit by the proceedings instituted by the railroad company for right of way? The court said: "Nor is it at all clear to our minds that the appellants have a full, complete remedy at law, to be obtained by way of defense to the special proceedings in the circuit court for condemnation. The Junction Company, in all purely legal

aspects, is a proper corporation, clothed with franchise of eminent domain to the extent of its necessities. The proceeding under our statutes is a special one, directed solely to the object of determining the compensation to be paid the owner of property proposed to be taken. No provision is made for any issue upon the right to condemn. It could not there be proved that the Junction Company was not a corporation. To attack its existence collaterally is not permissible. A plea in the nature of *nul tiel corporation* would not be safe, in the face of complete articles of association. Besides, it is plain that the Legislature never contemplated any such defense as a want of right to condemn in the corporation. For, where the proceedings are liable to delay, it is made the duty of the court to fix a sum to be deposited by the company, and to allow the property to be taken and used, in anticipation of the settlement of damages." See also *Bentonville Railroad* v. *Stroud,* 45 Ark. 280.

It follows, then, that the court erred in overruling plaintiff's motion, and trying the issue presented by the defendants' answer.

But are the defendants without a remedy? Property cannot be taken from its owner without his consent, even under an act of the Legislature, and appropriated solely and exclusively to the private use of another person or corporation. Courts have the power to determine whether a particular use for which private property is authorized by the Legislature to be taken is in fact a public use. *Shoemaker* v. *United States,* 147 U. S. 298; *Moore* v. *Sanford,* 151 Mass. 285, 288; *Welton* v. *Dickson,* 22 L. R. A. 496, 500, 501; *Chicago & Eastern Illinois Railroad Co.* v. *Wiltse,* 116 Ill. 449; Cooley's Constitutional Limitations (7th Ed.) 774; 1 Lewis, Eminent Domain (2d Ed.) 158; 3 Elliott on Railroads, 962. As an incident to this power, in the absence of a statutory remedy, a court of equity has the power to restrain a railroad corporation from taking property for a private use.

In *Neimeyer & Darragh* v. *Little Rock Junction Railway,* 43 Ark. 120, the court said: "Further, with regard to corporations not acting under special charters of legislative grant, but voluntarily organized under general laws, although their existence as corporations cannot be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers under circumstances and for purposes not

within the scope and purpose of legislative intent, and the corporators, under shelter of their articles, are about to exercise powers oppressive to the individual, they may be restrained by private suit of those injured or about to be. Fraud has no immunity anywhere in any guise. * * * This is the course that in this case has been pursued. We think that the chancery court properly entertained the bill, and had jurisdiction to enjoin the company, if the merits of the case required that relief."

So, individuals cannot combine as a railroad corporation, and convert property of individuals solely and exclusively to their private use. That would be an abuse of the power to form such corporations under the statutes, and contrary to their spirit and intent, and "may be restrained by private suit by those injured or about to be."

The judgment of the circuit court is reversed, and the cause is remanded, with leave to appellees to amend their answer so as to invoke equitable relief; and with directions to the court, when so amended, to transfer the cause to the proper chancery court.

BANK OF FAYETTEVILLE v. LORWEIN.

76 90 245 55

Opinion delivered July 1, 1905.

1. DECREE RENDERED BY MISTAKE—EFFECT.—Upon the equitable principle that he who asks equity must do equity, one who seeks to enforce rights based upon a decree rendered in his favor by mistake must stand, not upon the letter of the decree in his favor, but upon the merit in the cause of action upon which this decree was based. (Page 248.)
2. SUBROGATION IN CASE OF SURETYSHIP—PARTIAL PAYMENT.—Under the rule that a surety who has paid only a part of the debt for which he is liable cannot ask to be subrogated to the creditor's securities held for payment of the debt, an indorser of five notes given for the purchase money of land who has paid three of them to the holder is not entitled to enforce a lien on the land, as against the holder of the other two notes, until they also are paid. (Page 249.)
3. PROMISSORY NOTE—INDORSEMENT AFTER MATURITY.—An indorsee of a promissory note after maturity takes no greater rights than his indorser had. (Page 249.)

Appeal from Washington Chancery Court.

T. H. HUMPHREYS, Chancellor.

Affirmed.

STATEMENT BY THE COURT.

On January 19, 1895, Nugent sold and conveyed to Jones a tract of land in Washington County for $500, payable in five equal annual installments evidenced by five promissory notes bearing interest. The vendor's lien was expressly reserved in the face of the deed.

Nugent sold, indorsed and delivered the notes before maturity to Haupman, who in turn sold, indorsed and delivered them before maturity to appellee Lorwein. Lorwein brought suit in the Washington Circuit Court in chancery at the fall term, 1898, against Jones, Nugent and Haupman to recover on the notes, and subject the land to sale under the lien; and at that term, having failed to get service on Jones, he (Lorwein), recovered a personal decree against Nugent and Haupman, as indorsers, for the amount of the first three of the notes which were then due, and interest, and the cause was continued as to the other two notes not then due. Nugent and Haupman stayed the decree, and the same was subsequently paid, and the record satisfied. The payment was made for Haupman by the surety on the stay bond, and the three notes were surrendered to Haupman, who delivered them to appellant Bank of Fayetteville as collateral security for a debt owing by him to the bank. After the maturity of the two last notes, Lorwein caused summons to be served on Jones, Nugent and Haupman (whether in the suit which had been continued or a new suit brought in the same court, the record does not clearly disclose), and at the April term, 1900, of that court, on May 25, 1900, a decree was rendered in favor of Lorwein against Jones, Nugent and Haupman for $246.90, the amount of the two last notes and interest, a lien was declared on the land, and the commissioner of the court ordered to sell the land to satisfy the decree.

On July 31, 1900, during the same term, a decree, upon the intervention of appellant, was entered, without reference to the former decree, in favor of Lorwein for the two notes and interest, and of appellant for $326.25, the amount of the first three notes and interest which had been embraced in the satisfied decree of

1898, and the commissioner was ordered to sell the land to pay both debts, no preference being provided for in the decree.

The land was in 1901 duly advertised and sold by the commissioner under the decree of May 25, 1900, rendered in favor of Lorwein alone, and was purchased by Lorwein for $250, who gave his note for the amount in accordance with the terms of sale, with one Brown as surety. At a subsequent term the sale was by the commissioner reported to the court and confirmed, and a deed to Lorwein duly executed and delivered, and the note surrendered to Brown, the surety. Lorwein subsequently sold and conveyed the land to appellee Hall.

Appellant commenced the present suit against Lorwein, Brown and Hall, asserting a right, under the decree of July 31, 1900, to participate *pro rata* in the distribution of the proceeds of sale of the land, and asking a decree in its favor to that effect and a lien on the land.

It is shown by testimony that appellant's attorney had no information of the decree of May 25, 1900, and the sale thereunder, until after the confirmation of the sale to Lorwein; and that neither Lorwein nor his attorney had any information of the decree of July 31, 1900, until after the confirmation. This peculiar situation was brought about in the following manner, as explained in the testimony: Lorwein was originally represented in the suit commenced in 1898 by Messrs. J. V. & J. W. Walker, a firm of attorneys. The partnership existing between these gentlemen was dissolved while the Lorwein suit was pending, and in the division of the firm's business this case fell to Mr. J. W. Walker, and the other member thereafter had no connection with it. The decree of May 25, 1900, was procured by J. W. Walker, who was absent from the county during the remainder of the term of the court. Mr. Gregg, the attorney for appellant, had no information of the decree of May 25, 1900, and, believing that Mr. J. V. Walker was still acting for Lorwein, submitted the draft of the decree of July 31, 1900, to him for approval, and Mr. Walker, as an act of courtesy to Mr. Gregg and his former partner, assumed the authority of approving a decree about which, so far as the record shows, he had no information as to any controversy. The chancellor dismissed the complaint in this suit for want of equity, and the plaintiff appealed.

L. W. Gregg, for appellant.

Appellant was entitled to its *pro rata* portion of the fund, and the courts erred in giving the appellee priority. 47 Ark. 296; 38 Mo. 496; 36 Miss. 419; 1 N. J. Eq. 388; 26 N. H. 317; 55 Tex. 243; 58 Tex. 371; 51 Ark. 105.

J. Wythe Walker, for appellees.

The court properly held that, the appellant having acquired the notes after maturity and after they had been paid off, the appellee was entitled to priority. 1 Jones, Mortg. § § 943, 944, 945; 30 Ark. 755.

McCULLOCH, J. There is no equity in the complaint, and the same was properly dismissed. Appellant's contention is that the decree of July 31, 1900, during the same term of court operated as a vacation of the former decree, and that, as no preference was given in that decree, the bank must be permitted to share in the proceeds of sale. Conceding that such was the effect of the last decree, it does not follow that appellant is entitled to the relief asked. It has come into a court of equity asking the exercise of the peculiar powers of that court to grant affirmative relief, and it must "do equity." In other words, it must stand, not upon the letter of the decree in its favor which was entered through a mistake, but upon the merit or lack of merit in the cause of action upon which the decree was entered.

Was appellant entitled, upon its intervention in the original suit, to a decree declaring a lien in its favor sharing equally with Lorwein in the sale of the land? That is the question presented. Learned counsel for appellant contends that the bank was entitled to so share, under the ruling of this court in *Penzel* v. *Brookmire,* 51 Ark. 105, that, in a controversy between the several holders of separate notes secured by the same mortgage, whether the notes be transferred before or after maturity and regardless of the order of maturity, they "stand *aequali jure,* and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all." The facts are essentially different here, however, and a different rule must prevail. The three notes now held by appellant were merged in the decree of 1898 in favor of Lorwein against Nugent and Haupman, and the latter, though by payment of the decree he

became subrogated, as against the maker and prior indorsers of the notes, to the rights of Lorwein, cannot assert those rights against Lorwein's lien for the other two notes, because he is liable to Lorwein as indorser for payment of all the notes. So long as the other two notes and the lien on the land for payment thereof remained unsatisfied and his liability to Lorwein continued, he is postponed in the assertion of a lien on the land, and cannot claim the right to participate in the proceeds of sale.

A surety or indorser on a note who has paid only a part of the debt for which he is liable, leaving the balance unpaid, cannot claim, by subrogation, the right to participate in the securities held for the payment of the debt. He must first pay the whole debt. *McConnell* v. *Beattie,* 34 Ark. 113; *Schoonover* v. *Allen,* 40 Ark. 132; Sheldon on Subrogation, § 127; *Columbia Finance Co.* v. *Kentucky Union Ry. Co.,* 60 Fed. 794; *Magee* v. *Leggett,* 48 Miss. 139; *Gannett* v. *Blodgett,* 39 N. H. 150; *Child* v. *New York, etc., Ry. Co.,* 129 Mass. 170; *Bartholomew* v. *Salina First Nat. Bank,* 57 Kan. 594; *Receivers of New Jersey Midland Ry. Co.* v. *Wortendyke,* 27 N. J. Eq. 658. The New Jersey court in the case last cited said: "The right of subrogation cannot be enforced until the whole debt is paid; and until the creditor be wholly satisfied, there ought [to] and can be no interference with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim."

Appellant received the notes from Haupman after maturity and charged with notice of the decree rendered upon them. It succeeded only to the rights of Haupman, and can assert no greater rights.

It appears that the land was fairly sold by the commissioner, and the sale was confirmed by the court, and it brought no more than enough to satisfy Lorwein's decree for the amount of the two notes held by him, interest and cost of suit. Therefore appellant shows no right to any of the fund.

Decree affirmed.

76 250
f86 365

DEWITT v. LACOTTS.

Opinion delivered July 1, 1905.

1. MUNICIPAL ORDINANCE—DECLARING DRUNKENNESS A NUISANCE.—A town ordinance declaring it a nuisance for any person to appear or be found on any street, alley or public square of the town, in a state of intoxication or drunkenness, is not in conflict with Kirby's Digest, § § 2550, 2552, 2553, providing for the arrest and punishment of drunken persons, and is a valid exercise of the power given to cities and towns by Kirby's Digest, § 5438, to prevent by ordinance injury or annoyance within the limits of the corporation from anything dangerous, offensive or unhealthy," and § 5461, *Id.*, authorizing the publication of such ordinances as are necessary for the suppression of "disorderly conduct." (Page 250.)

2. SAME—NUISANCE AND DISORDERLY CONDUCT.—Drunkenness in a public place is a nuisance and disorderly conduct within Kirby's Digest, § § 5438, 5461, authorizing the prevention of nuisances and suppression of disorderly conduct. (Page 251.)

Appeal from Arkansas Circuit Court.

GEORGE M. CHAPLINE, Judge.

Reversed.

H. Coleman and *John F. Park,* for appellant.

L. C. Smith, for appellee.

MCCULLOCH, J. Appellee was tried and convicted by the mayor of the incorporated town of DeWitt upon a warrant of arrest charging him with violation of an ordinance of the town providing that "it shall be unlawful and it is hereby declared a public nuisance for any person to appear or be found on any street, alley or on the public square of DeWitt in a state of intoxication or drunkenness." He appealed to the circuit court of Arkansas County, where the case was tried before a jury upon an agreed statement of facts to the effect that he was drunk on the streets of the town on the day named and as charged in the warrant of arrest. The court held that the ordinance was void, and directed the jury to return a verdict of not guilty, which was done, and the town appealed to this court.

We are not favored with a brief or argument in behalf of appellee in support of the decision of the court, but it is disclosed

in the bill of exceptions that the ordinance was adjudged to be void on the grounds that it is in conflict with sections 2550, 2552 and 2553 of Kirby's Digest. Those sections of the statutes provide that "it shall be the duty of all peace officers to arrest any drunken person whom they may find at large and not in the care of some discreet person, and take him before some magistrate of the county, city or town in which the arrest is made," who may "order him to be confined until he becomes sober." The next section provides that the magistrate may require of such person "security for his good behavior, and for keeping the peace for a period of not exceeding one year." Municipal corporations are by statute given the power to prevent by ordinances "injury or annoyance within the limits of the corporation from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated within the jurisdiction given to the board of health." Kirby's Dig. § 5438. In the case of Ex parte *Foote,* 70 Ark. 12, 65 S. W. 706, 91 Am. St. Rep. 63, this court said that "these statutes endow municipal corporations with power to prevent and abate nuisances, but they do not authorize the declaration of anything to be a nuisance which is not so in fact." But the court in that case upheld an ordinance declaring the keeping of a stallion or jack within the limits of the corporation to be a nuisance, and punishable by fine. Kirby's Digest, § 5461, is as follows: "It is made the duty of the municipal corporation to publish such by-laws and ordinances as shall be necessary to secure such corporations and their inhabitants against injuries by fire, thieves, robbers, burglars and other persons violating the public peace; for the suppression of riots, and gambling, and indecent and disorderly conduct; for the punishment of all lewd and lascivious behavior in the streets and other public places; and they shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof." These statutes undoubtedly authorize the ordinance in question. A municipality may, by ordinance, declare drunkenness in a public place to be either a nuisance or disorderly conduct, and punish it as such. It

is a matter of common knowledge that drunkenness in a public place is offensive to all who come in contact with the person in that condition. It is a nuisance and disorderly conduct, within the meaning of the statute, and may be declared to be such. Nor is the ordinance in any wise conflicting with the statute authorizing the arrest by a peace officer of the State of a drunken person found in a public place. *Brizzolari* v. *State,* 37 Ark. 364.

The judgment is reversed, and remanded for a new trial.

---

76 252
84 230
84 231

WATERS v. MERIT PANTS COMPANY.

Opinion delivered July 1, 1905.

1. HUSBAND AND WIFE—DEALINGS BETWEEN.—While an insolvent husband, when justly indebted to his wife, may, without fraud, prefer her claim to that of other creditors, and make valid appropriation of his property to pay it, even though the result be to deprive other creditors of the means to satisfy their claims, such transactions are viewed with suspicion, and the perfect good faith of the transaction must be established. (Page 254.)

2. SAME.—Where a wife asserts a claim against her insolvent husband for money loaned to him many years previous as consideration for a conveyance of his property to her, the alleged debt having become stale by long lapse of time, her bare statement should be corroborated by some other evidence of the existence of a valid debt. (Page 254.)

3. EQUITY—IMPROPER TESTIMONY.—A chancery case will not be reversed for failure to exclude improper testimony if, without it, the decree is supported by a preponderance of the legal testimony. (Page 255.)

Appeal from Howard Chancery Court.

JAMES D. SHAVER, Chancellor.

Affirmed.

W. C. Rodgers, for appellants.

Mrs. Waters was entitled to what her husband owed to her; and on this point her evidence, being uncontradicted, must control. 53 Ark. 96; 66 Ark. 513, 522; 66 Ark. 439, 441; 55 S. W. 940; 61 Ga. 202. The statute of limitations is a plea personal

to the debtor, and no one else can interpose it for him, 11 Ark. 512; 33 Ark. 491; 36 Ark. 476, 479; 68 Iowa, 132; 63 Me. 326; 53 Ark. 178. And it must be pleaded by the party entitled to its benefits before it can be available. 83 Pac. 404; 44 W. Va. 342; 48 La. Ann. 1538; 86 Md. 400; 122 N. C. 663; 86 Pac. 1026. That a husband may legally prefer his wife's claim, see, 67 Ark. 37, 101; 73 Mich. 101; 103 Ind. 494; 30 Fed. Rep. 401; 72 Iowa, 137; 115 Ind. 474; 40 Kan. 5; 69 Mich. 49; 68 Wis. 563; 84 Ala. 592; 9 Kan. 473.

W. D. Lee, for appellee.

The allegations of insolvency, etc., not being denied, must be taken as true. 66 Ark. 422. The allegation of fraud was sufficiently proved. 33 Ark. 762; *Ib.* 425. Stricter proof is required to prove the *bona fides* of a transaction when it is had between near relatives. 93 Ala. 97; 9 So. 548; 52 Ark. 458. Where a conveyance by a husband to his wife is assailed for fraud by his creditors, the burden is upon her to show by clear and satisfactory evidence the good faith of the transaction. 27 S. E. 435; 94 Va. 716, 27 S. E. 751; 39 Fla. 489, 22 So. 751. Having allowed her husband to use her property as his own for over twenty years, the wife will not be permitted to claim it now. 50 Ark. 42; 62 Ark. 26; 55 Ark. 117; 66 Ark. 419; 69 Ark. 351. The creditors of the husband have prior equities in the land, and equity will treat the wife in this case as a trustee for the benefit of the husband's creditors. 42 Ark. 305; 55 Ark. 122; 67 Ark. 338.

McCULLOCH, J. This is an action brought by appellee, Merit Pants Company, against appellants, H. M. Waters and wife, in which appellee seeks to subject certain lands to the payment of a debt in the sum of $380.75 due appellee by said H. M. Waters. It is alleged that H. M. Waters, being insolvent and indebted to appellee, purchased the land in controversy from one McClure, and, with intent to defraud his creditors, caused the title to be conveyed to his wife. The proof in the case consisted only of the testimony of McClure and Mrs. Waters, and it appears therefrom that McClure sold the land to H. M. Waters at a fixed price of $300, which was paid by delivery to McClure of a lot of cattle and a small stock of merchandise, a remnant of the stock

carried by Waters as a merchant, and that, at the request of H. M. Waters, McClure made the deed to his wife. McClure testified that the cattle were taken at a valuation of either $64 or $67. Mrs. Waters testified the value of the cattle were fixed at $80, and that they were her separate property. She also testified that her husband owed her about $1,000 for a lot of cattle and horses which she had sold him when they were married twenty years previously, and for proceeds of sale of her farm thirteen years previously; that no note or other evidence of the indebtedness was executed by the husband, and that she had given him credit on the debt for $220, the estimated value of the stock of merchandise used in payment of this tract of land. The chancellor found that the conveyance to Mrs. Waters was fraudulent, but that her property, the cattle, of the value of $80, had been used in the purchase, and decreed a lien in favor of appellee for $220, the value of the stock of merchandise. The defendants appealed.

It is settled by the decisions of this court that an insolvent husband, when justly indebted to his wife, may, without fraud, prefer her claim to that of other creditors, and make valid appropriation of his property to pay it, even though the result be to deprive other creditors of the means to satisfy their claims. But such transactions between husband and wife are viewed by the courts with suspicion, and the perfect good faith of the transaction must be established by proof. Where the wife asserts, as a consideration for conveyance of his property to her, a claim of debt against her insolvent husband for money loaned to him many years previous, no note or other written evidence of an agreement to repay being shown to have been executed, and the alleged debt having become stale by long lapse of time, as in this case, her bare statement should be corroborated by some other evidence of the existnce of a valid debt, before the courts can accept it in support of the conveyance. For a discussion of the law on this subject reference is made to the recent case of *Davis* v. *Yonge,* 74 Ark. 161; and nothing need be added here on the subject. See also, *Godfrey* v. *Herring,* 74 Ark. 186; *Driggs* v. *Norwood,* 50 Ark. 42. We think the evidence in this case is far from satisfactory as to the existence of a valid debt, and that the chancellor was right in his conclusion.

Appellants complain that the court erred in allowing witness McClure to testify that, of the merchandise received from Waters, about one hundred and twenty-five dollars' worth bore the marks and name of appellee, thus tending to show that these goods were bought by Waters from appellee. The witness was allowed to examine the itemized account sued on, and after examination state that he recognized the number of suits of clothes and the prices thereof on the account as the same he purchased from Waters. The decree was not dependent on this testimony for sufficient evidence to support it; and, if it be held to be incompetent, the presumption must be indulged that the chancellor was not controlled by it in reaching his conclusion. A chancery case will not be reversed for the failure to exclude improper testimony where, without it, the decree is supported by a preponderance of the legal testimony. *Niagara Fire Ins. Co.* v. *Boon, ante* p. 153; *Allen* v. *Ozark Land Co.*, 55 Ark. 549.

Counsel for appellant also contends that the proof of insolvency is not sufficient; but we think that fact is satisfactorily established by the proof on the subject, in connection with the undenied allegation of insolvency at the time of the commencement of this suit.

Decree affirmed.

LUSTER v. ROBINSON.

Opinion delivered July 1, 1905.

JUDGMENT—CONSTRUCTION.—Where a note was executed to a person named, followed by certain initials constituting his official title in a certain society, and a judgment thereon was rendered in his favor which followed the language of the note, the judgment was rendered in his favor individually, and not as representative of the society.

Appeal from Pulaski Circuit Court.

EDWARD W. WINFIELD, Judge.

Affirmed.

STATEMENT BY THE COURT.

In 1893, D. A. Robinson was a member of an incorporated society known as the "United Brothers of Friendship and Sisters of the Mysterious Ten." He held the office of Grand Master for Arkansas in that society. While he held this office, J. T. Thompson, Bryant Luster and John Beverly executed to him a promissory note in words and figures as follows:

"Ninety days after date we promise to pay to the order of D. A. Robinson, G. M. U. B. F. & S. M. T., fifty dollars, for value received, negotiable and payable without defalcation or discount at the office of the Citizens' Bank of Little Rock, Ark., with interest from date at the rate of ten per cent. per annum from date until paid."

Robinson brought suit on this note against the defendants, who were duly summoned, and judgment by default was rendered against them by T. W. Wilson, justice of the peace, for the amount of the note and interest. The judgment commences by reciting that "On April 20, 1894, the plaintiff, D. A. Robinson, as G. M. U. B. F. & S. M. T., heretofore filed his complaint against the defendants," etc. It then recites that the defendants came not, but made default, and that the action was founded on a promissory note, which is set out in full in the judgment. The judgment then proceeds as follows: "Whereupon it is considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendants the sum of fifty dollars for the principal debt, and the further sum of two dollars interest to this debt, and all costs herein expended, and have execution therefor; this judgment to bear interest at the rate of ten per cent. per annum until paid."

In March, 1903, Robinson brought suit on this judgment against Bryant Luster. On the trial the defendant set up that the note upon which this judgment was based was executed to Robinson as Grand Master of the "United Brothers of Friendship and Sisters of the Mysterious Ten," in payment of a debt which J. T. Thompson owed to that society, and that Robinson had no personal interest in the note or in the judgment based thereon; that afterwards the defendant compromised and paid off the judgment to the successor of Robinson in the office of Grand Master.

Robinson claimed that the note was executed for an individual debt, in which the society had no interest. The justice found in favor of plaintiff, and in a trial *de novo* in the circuit court the same judgment was rendered, from which the defendant appealed.

L. J. Brown, for appellant.

The evidence does not sustain the verdict and judgment. The suit was begun in the representative or official capacity of appellee, and it was error to permit an amendment substituting the appellee in his individual capacity as a party. 5 Watts (Pa.), 176; 64 Tex. 375; 1 Black, Judg. § 158; 69 Ark. 52; 33 Ark. 454; 32 Ark. 454; 33 Ark. 475.

Marshall & Coffman, for appellee.

The initials following appellee's name were mere descriptions of person, and did not render the suit one by him in a representative capacity. 5 Ark. 475; 3 Ark. 266, 478; 1 Ark. 240; 7 Ark. 103; 13 Ark. 399; 42 Am. Dec. 376; 62 Ark. 622; 25 Ark. 20; 55 Am. Dec. 387; 47 *Id.* 145.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment of the circuit court, in a case tried before the judge of that court without a jury. The court was not asked to make any declarations of law, and the only question presented by the appeal is whether the evidence is sufficient to support the finding and judgment of the court in favor of plaintiff. The note upon which the judgment sued on was based was made payable to D. A. Robinson, G. M. U. B. F. & S. M. T. The evidence shows that these letters stand for Grand Master, United Brothers of Friendship and Sisters of the Mysterious Ten. But this title, following the name of the payee in the note, was only a designation of the person to whom it was to be paid, and, considered in connection with other parts of the note, shows that the note was to Robinson in his own right. The suit in which the first judgment on this note was rendered was brought before a justice of the peace, and no complaint was filed except the note itself. The note shows on its face that it was due to Robinson in his own right, and not as the representative of the society, and was set out in full in the judgment. When the judgment is considered as a whole, we do not think that it

shows that it was rendered in favor of Robinson in his representative capacity. The evidence as to whether the plaintiff or the society was the real owner of this judgment was conflicting, and the finding of the court that he was the owner has evidence to support it.

Though the case is a close one on the evidence, the finding of the circuit court settles the case, so far as the facts are concerned; and, as no error of law appears, the judgment must be affirmed. It is so ordered.

ARKANSAS CENTRAL RAILROAD COMPANY. v. CRAIG.

Opinion delivered July 1, 1905.

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

Appeal from Logan Circuit Court, Northern District.

JEPTHA H. EVANS, Judge.

Affirmed.

Oscar L. Miles and *Lovick P. Miles,* for appellant.

The court erred in propounding questions to the witness, and in aiding counsel for appellee to try their cause, in that such questions indicated to the jury the court's opinion of the facts. 51 Ark. 154, 157; 80 N. Car. 483; 1 Whart. Ev. § 496; 60 Ark. 429; 24 Mich. 244. The court also erred in its rulings upon the evidence and instructions.

Robert J. White, for appellee.

There was no abuse of the trial judge's powers and discretion, in the questions propounded by him to the witnesses. 4 S. W. 934; 65 S. W. 445; 68 S. W. 564; 83 S. W. 1093; 81 S. W. 908; 30 L. R. A. 730; 57 L. R. A. 878.

RIDDICK, J. This is an appeal from a judgment against a railroad company in favor of the plaintiff for damages for killing his horse. We do not find any error in the admission of evidence or in the instructions, and are of the opinion that the evidence is sufficient to support the judgment. Counsel for appellant contends with much force that the judgment should be reversed because the presiding judge during the trial propounded questions to the witnesses for plaintiff and defendant. The contention is not that these questions were improper, had they been propounded by counsel for plaintiff; but the contention is made that, by propounding a number of questions, the judge thereby assumed the role of attorney, and in that way indicated to the jury his opinion of the evidence, and prejudiced the rights of the defendant. It is true that a judge, under our law, should neither directly nor indirectly indicate to the jury his opinion of the facts in the case, when the same are in dispute, and when the jury are to determine what the facts are. Our Constitution forbids this, and such conduct on the part of a trial judge would be ground for reversal; but we cannot concur in the contention that it is impossible for a judge to propound questions, when counsel objects, without indicating his opinion of the facts to the jury. In a recent and very able work on the Law of Evidence, the author says: "One of the natural parts of the judicial function, in its orthodox and sound recognition, is the judge's power and duty to put to the witnesses such additional questions as seem to him desirable to elicit the truth more fully. This just exercise of his function was never doubted at common law; the judge could even call a new witness of his own motion, and could seek evidence to inform himself judicially; much more could he ask additional questions of a witness already called but imperfectly examined. Fortunately," he says, "the tradition of the common law has never been lost; the right of the judge to interrogate as he thinks best has always been preserved in theory. It has, however, been necessary more frequently to maintain and vindicate it and to resist encroachment upon it." 1 Wigmore on Evidence, § 784. "A circuit judge presiding at a trial," said the Supreme Court of Indiana, "is not a mere moderator between contending parties; he is a sworn officer, charged with grave public duties.

In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice." The court held that there was nothing wrong in the judge "asking the witness any question, the answer to which would likely throw any light upon his testimony." *Huffman* v. *Cauble,* 86 Ind. 591.

It seems to be the general rule, well supported by the decided cases, that the trial judge has the right to propound such questions to witnesses as may be necessary in order to elicit pertinent facts, in order that the truth may be established. Of course, this must be done in a reasonable and impartial way, so as not to indicate his opinion of the facts, and thereby prejudice the rights of the parties. Counsel say that it is "impossible for a lawyer worthy of the name" to propound questions to witnesses in a case without indicating an interest in the result of the trial, and he contends that therefore a judge cannot do so. But a lawyer is usually, in fact, interested in the success of his client. If he were not, he would indeed be hardly worthy of the name. Men who have strong feelings in favor of one side are apt to manifest such feelings by their conduct, but a judge worthy of the name should be interested only in establishing the truth. His questions should be propounded, not to support the case of either litigant, but with the sole desire to elicit and bring out the truth, that justice may prevail. Having, in fact, no feeling for or against either party, it should not be difficult for him to refrain from exhibiting such feeling. It is the primary duty of the parties to bring out their own evidence. It is not usually necessary that the judge should propound many questions to witnesses, and for the judge to take the case out of the hands of counsel, and take the lead in the examination of witnesses might at times be improper and prejudicial. But it would be a reproach to the law if he were required to sit still in either a civil or criminal trial, and see justice defeated through the failure of counsel to ask a witness a pertinent question. *Sharp* v. *State,* 51 Ark. 154; *South Covington & Cinn. St. Ry. Co.* v. *Stroh,* 57 L. R. A. 875, and note. We have carefully read the bill of exceptions in this case, and see nothing in the questions propounded by the judge calculated to prejudice the rights of the defendant.

Judgment affirmed.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY v. EVINS. 76 186 261 96

Opinion delivered July 8, 1905.

1. DEED—DESCRIPTION OF LAND.—A deed describing the land conveyed as "N. E. fr. quarter of the N. E. fr. quarter, section 22-8-22 W," situated in the county of Johnson in this State, is a sufficient description. (Page 261.)

2. EVIDENCE—MARKET VALUE.—Evidence held to be sufficient to sustain a finding as to the market value of land. (Page 261.)

Appeal from Johnson Circuit Court.

JEPTHA H. EVANS, Judge.

Affirmed.

Oscar L. Miles, for appellant.

The description of the land in the deeds introduced in evidence was insufficient to identify the land. 3 Ark. 18; 15 Ark. 297; 48 Ark. 419; 60 Ark. 487; 56 Ark. 175; 68 Ark. 150. The court erred in admitting testimony as to the measure of damages for the right of way across the land. 54 Ark. 140; 42 Wis. 538; 55 Ark. 70; 59 Ark. 110; 62 Ark. 7; 70 Ark. 403; 68 Ark. 224.

Cravens & Covington, for appellee.

The description contained in the deeds was sufficient. 64 Ark. 580; 66 Ark. 422. The judgment as to damages was proper. 41 Ark. 202; 51 Ark. 324.

BATTLE, J. Joseph Evins sued the Little Rock & Fort Smith Railway Company for damages caused by the use and appropriation of his lands by the defendant for a right of way for its railway. The defendant denied the appropriation and damage. Plaintiff recovered judgment against the defendant for $380, and the defendant appealed.

It is contended by appellant that the description of the land in the deed adduced by the appellee in the trial of this action as evidence of his title to the land appropriated for right of way was not sufficient to identify the land. It is described in one deed as N. E. fr. quarter of the N. E. fr. quarter, section 22-8-22 W., and in the other, N. E. fr. N. E. quarter of section 22, township 8 N., range 22 W. It was described in both deeds as situated in the county of Johnson, in this State. It was

admitted by the parties that the tract in controversy contained seven and nine-hundredths acres. We understand from this description that the land meant is the northeast fractional quarter of the northeast quarter of section twenty-two, in township eight north, and in range twenty-two west, situated in the county of Johnson, in the State of Arkansas. This description is sufficient. *Chesnut* v. *Harris,* 64 Ark. 580; *Boles* v. *McNeil,* 66 Ark. 422.

It is contended by the appellant that the evidence admitted to prove damages was incompetent, because it did not show the market value of the land.

The testimony of Joseph Evins in the trial of the action, by question and answer, was in part as follows:

"Q. State what you think is the difference between the value of the tract of land before the railroad was changed and after the change?"

The defendant objected, and the court said, "He can state what he thinks was the market value of the land before and after taking."

"A. I think the land for a quarry would be cheap at $250 per acre, the land used; the other part would be damaged at least one-half, north of the railroad; all would be destroyed south of the railroad."

"Q. The fair market value of that land before this proposed change and since—what is the difference in your judgment?"

"A. I think it is worth more today than it was ever before, because the work that has been done on it was a benefit to it; it is in a better condition to-day for a quarry than ever."

The witness, being asked a question, said: "I ask the court to enlighten me," and the court asked, "What is the difference between the value of that land before the railroad took this right of way and after the road appropriated the right of way?"

The witness answered: "About half the whole piece of land; and I think the front land is worth $250 per acre; and the other perhaps one-half—$125—south of the proposed new line."

"Q. Now, Mr. Evins, you have estimated the value of the land taken in the right of way at $250 per acre. If the balance

of the land is damaged, what is the difference between the market value of the whole tract before the railroad was moved and the value of the whole tract since? For instance, you estimate the value of the land taken and the damage, if any, to the balance. What do you think is the market value of the land?

"A. I think the land is worth to me, a fair valuation would be, $800 before they went on it this time, like it was before they went on it, and after they occupied that front, $200 would be a big estimate of the value.

"Q. That would make a difference of $600 damages?

"A. That is as low a valuation as I can put on it.

CROSS-EXAMINATION.

"Q. Now, Mr. Evins, has that kind of land any market value in this State?

"A. It has a value.

"Q. I am not talking about that. I am talking about the market value—what the general public who desired to purchase that kind of land would pay?

"A. That would be guesswork on my part. That is the only land of that character.

"Q. Do you know of any land of that kind selling in this State per acre?

"A. I don't know that I do.

"Q. The values you gave to the jury are just your own personal estimate of it?

"A. That is what I consider it worth.

"Q. You consider it worth that, but you know of no market value for that kind of land?

"A. That land is valuable, but I do not know what it is worth.

"Q. I am talking about the market value of the land; what would such land as this bring placed upon the market in the ordinary course of trade, a reasonable time given in which to effect a sale; has it a market value?

"A. It certainly has.

"Q. Tell us where any such land can be or has been sold in the market?

"A. I don't think there is a man living who has got any money that would see it but what would buy it."

C. A. Holt was asked and answered, in part, as follows:

"Q. Tell what you think its market value is, that is, before the new road was put there?

"A. I think it is worth $800.

"Q. From your knowledge of the market value of that land, what is the difference between the value of that tract of land as a whole, considering the vaue of the land that is in the right of way and the damage to the other, if there is any damage to the other—what is the difference in the fair market value of the land before the railroad appropriated this particular right of way and afterwards?

"A. I placed the market value before at $800. I think $100 would be a poor price for it, that is a difference of $700.

CROSS-EXAMINATION.

"Q. You state the difference in the market value was $700?

"A. Yes, sir.

"Q. Know of any such lands selling in the market of this State?

"A. Yes, sir.

"Q. Do you know of any land such as that selling in the market of this State?

"A. This same piece of land sold for $800.

"Q. When.

"A. 1870 some time.

"Q. To whom?

"A. The railroad company.

"Q. Don't you know there was a house on that land which was torn down and destroyed which entered into the value of that land?

"A. Not of my own knowledge.

"Q. Do you know what the market value per acre of rock quarry land is in the State of Arkansas?

"A. I don't know, I am not in that business. I suppose if it was worth that twenty-five years ago it is worth that today."

S. M. Brown: "Q. Tell the jury what your idea is of the fair market value of the two and one-half acres of land embraced in this proposed right of way?

"A. I think a fair valuation of it as a rock quarry would be $250 or $300 per acre.

"Q. As a quarry?

"A. Yes, sir.

"Q. You are making your own personal estimate of these values?

"A. Yes, sir."

This was the sum and substance of all the evidence as to the damages.

On motion of the defendant, the court instructed the jury as follows:

"In estimating the damages for this appropriation, the jury are not bound by figures testified to by any witness, but must take the entire testimony, and from the entire testimony in the case arrive at a just conclusion themselves."

Evins's testimony is in confusion, and to some extent contradictory. He testified that the land in question had a market value, and would readily sell in market. It does not appear that he was so ignorant of the market value of land as to be unable to give an opinion as to the same. Values of lands are not certain, and at best are matters of opinion. His opinion may be worth little, but, taking his testimony as a whole, it may be fairly inferred that his estimate of the land in question was based upon what he knew about the market value of lands generally, one of the modes of asserting the market value of land.

Holt based his estimate upon the sale of the same land to appellant twenty-five years before. Appellant paid $800 for it, and it is worth as much now as then. This is in the nature of an admission as to its value. He did not remember of any house upon it at that time. No evidence to show that there was was adduced. It does not appear that Brown did not know the market value of such land as was in question.

The jury returned a verdict in favor of the appellee for $380. No witness estimated the damages so low. They seem to have followed the instructions given at the request of the appellant, discarded the estimates of witnesses, and found one of their own. It certainly can not complain of their following its instructions.

Judgment affirmed.

EVANS v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered July 8, 1905.

APPEAL—TIME FOR PROSECUTING—DEATH OF PARTY.—Under Kirby's Digest § 1199, providing that "an appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, order or decree sought to be reviewed, unless the party applying therefor was an infant or of unsound mind at the time of rendition," no exception was made in the case of a party dying during the year.

Appeal from Jefferson Circuit Court.

ANTONIO B. GRACE, Judge.

Appeal dismissed.

S. J. Hunt, N. T. White and *Ben J. Altheimer,* for appellant.

The peremptory instruction of the court was error. 62 Ark. 154. The appellee was guilty of negligence in making the running or drop switch at the time and place made. Thomp. Neg. 412; 32 N. Y. 597; 94 Mo. 150; 18 L. R. A. 66; Shearman & Red. Neg. § 466; 19 S. W. 738; 55 Ill. 379; 31 L. R. A. 855; 32 L. R A. 530; 139 U. S. 469; 33 C. C. A. 644; 64 Ark. 535; 78 S. W. 220. Appellant was not a trespasser. 57 Ark. 151; 69 Ark. 294; 63 Ark. 638; 69 Ark. 294; 13 L. R. A. 634; 31 L. R. A. 855; 69 Ark. 496. The question as to whether Venna Evans was guilty of contributory negligence should have been submitted to the jury. 62 Ark. 159; 54 Ark. 164; 12 L. R. A. 184; 18 *Id.* 60; 8 *Id.* 793; 52 *Id.* 352; 60 S. W. 996; 68 Miss. 355; 67 N. Y. 419; 13 C. C. A. 608; 78 S. W. 220.

B. S. Johnson, for appellee.

The appeal was not taken in due time. Kirby's Dig. § 1199; 74 Ark. 181; 73 Ark. 37; 69 Ark. 281; 70 Ark. 83; 48 Ark. 148. The bill of exceptions is insufficient. 42 Ark. 490; 39 Ark. 258; 52 Ark. 554. The deceased's contributory negligence bars recovery. 36 Ark. 46, 371; 46 Ark. 513; 56 Ark. 459; 54 Ark. 435; 3 L. R. A. 44; 65 Ark. 238; 61 Ark. 555, 559.

S. J. Hunt and *White & Altheimer,* for appellant in reply.

BATTLE, J. Appellee, St. Louis, Iron Mountain & Southern Railway Company, moves the court to dismiss the appeal herein because it was not taken within the time prescribed by law.

The judgment appealed from was rendered on the 15th day of April, 1902. The appeal in this case was taken on the 6th day of June, 1903, more than one year after the rendition of the judgment. The plaintiff, against whom the judgment sought to be reviewed was rendered, died on the 17th day of October, 1902. This did not extend the time of appeal for revivor beyond the year. The statute absolutely provides: "An appeal or writ of error shall not be granted except within one year next after the rendition of the judgment, order or decree sought to be reviewed, unless the party applying therefor was an infant or of unsound mind at the time of its rendition, in which cases an appeal or writ of error may be granted to such parties or their legal representative within six months after the removal of their disabilities or death." Kirby's Dig. § 1199. The appeal must be taken within one year, unless the party applying therefor was an infant or of unsound mind at the time of the rendition of the judgment, order or decree. Only two exceptions are made, and the applicant for the appeal in this case does not come within either of them. No authority is given the court to extend the time.

The appeal granted is dismissed.

HENSON v. STATE.

Opinion delivered July 8, 1905.

INDICTMENT FOR RAPE—CONVICTION OF CARNAL ABUSE.—An indictment for rape of a female under the age of sixteen years will sustain a conviction of carnal abuse.

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Judgment modified.

John D. Shackleford, for appellant.

Two offenses were improperly joined in the indictment. 59 Ark. 326; 48 Ark. 94; 71 Ark. 82; Kirby's Dig. § § 2230, 2231; 36 Ark. 55; 5 Am. Cr. Rep. 1; 9 *Id.* 343; 38 Ark. 555; 32 Ark. 203; 50 Ark. 305; 33 Kan. 538. The offense must be named and described in the indictment. 161 U. S. 29; 96 U. S. 360; 57 Hun, 367; 106 N. Y. 505; 4 N. Y. Cr. Rep. 193; 98 Ky. 143.

Robert L. Rogers, Attorney General, for appellee.

The conviction of carnal abuse under an indictment for rape is proper. 54 Ark. 664; 96 Ky. 573; 2 Met. 193; 2 Whar. Cr. Law, 539; 2 Allen, 163.

BATTLE, J. Dave Henson was indicted by a grand jury of the Pulaski Circuit Court for rape committed upon the person of Lula Hoheimer, a female under the age of sixteen years, and was convicted of carnal abuse of a female under the age of sixteen years, and his punishment was assessed at five years' imprisonment in the penitentiary, and he appealed.

The indictment against him is as follows:

"The grand jury of Pulaski County, in the name and by the authority of the State of Arkansas, accuse Dave Henson of the crime of rape, committed as follows, towit: The said Dave Henson, in the county and State aforesaid, on the 18th day of February, A. D. 1905, in and upon one Lula Hoheimer, a female under the age of sixteen years, forcibly, violently and feloniously did rape and assault and her, the said Lula Hoheimer, then and there violently, forcibly and against her will, feloniously did ravish and carnally know, against the peace and dignity of the State of Arkansas. (Signed), Lewis Rhoton, Prosecuting Attorney."

Could appellant be lawfully convicted of carnal abuse of a female under sixteen years of age under this indictment?

Section 2005 of Kirby's Digest defines rape as follows: "Rape is the carnal knowledge of a female forcibly and against her will."

And section 2008 provides: "Every person convicted of carnally knowing or abusing unlawfully any female person under the age of sixteen years shall be imprisoned in the penitentiary

for a period of not less than one year nor more than twenty-one years."

Section 2413 is as follows: "Upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment."

In *Davis* v. *State,* 45 Ark. 464, this court held: "Under an indictment for murder the accused may be convicted of an assault with intent to kill, provided the indictment contain all the substantive allegations necessary to let in proof of the inferior crime, and the proof show that the offense of which he is convicted and the one charged in the indictment are the same." The court said: "An assault with an intent to kill, though a felony by our law, is not one of the degrees of homicide, but it is an attempt to commit murder, and is virtually included in every murder that is committed with violence. All the elements of murder, except the actual killing, must conspire to constitute the crime."

Carnal knowledge of a female is necessary to constitute rape; and when the female is under sixteen years of age, carnal abuse is included in that offense.

Mr. Bishop says: "Though a man cannot commit rape of his own wife, except as principal in the second degree, the indictment need not negative a marriage between the defendant and the injured woman. Still, in prudence, it may be well, when fornication and adultery are indictable, to insert this sort of negative; then, if the proof of force should fail, there may be a conviction for one of the other offenses." 2 Bishop on Criminal Procedure, (3d Ed.) § 956.

Under a statute which provides: "Whenever any person indicted for a felony shall, on trial, be acquitted by verdict of part of the offense charged in the indictment, and convicted of the residue thereof, such verdict may be received and recorded by the court, and thereupon the person indicted shall be adjudged guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly," the court held in *Commonwealth* v. *Goodhue,* 2 Met. (Mass.) 193, that "a defendant,

indicted for rape alleged to have been committed upon his daughter may be convicted of incest, if the jury find the criminal connexion, but that it was not by force and against the will of the daughter." It was alleged in the indictment in that case "that the defendant unlawfully had carnal knowledge of the body of his daughter."

In Kentucky they have a statute which reads as follows: "Whoever shall carnally know a female under the age of twelve years, or an idiot, shall be confined in the penitentiary not less than ten nor more than twenty years." In *Fenston* v. *Commonwealth,* 82 Ky. 549, it was held that a defendant charged with committing a rape upon a female under twelve years of age could be convicted of the offense described in the statute quoted. *Young* v. *Commonwealth,* 96 Ky. 573.

The carnal knowledge of a female is an essential element of rape. In this case the defendant was charged with carnal knowledge of a female under the age of sixteen years, and that was the offense defined in section 2008 before quoted, and is clearly charged in the indictment against the appellant. And, inasmuch as it was not committed forcibly and against the will of the injured female, the appellant was properly found guilty of that offense.

The majority of the judges are of the opinion that the punishment assessed against the appellant is excessive, and should be reduced to two years' imprisonment in the penitentiary, and it is ordered that the judgment herein be modified accordingly.

McCULLOCH, J., dissents.

MILLER v. GRADY.

Opinion dielivered July 8, 1905.

1. EXECUTION SALE—FAILURE TO RETURN EXECUTION.—One who purchases at execution sale is not precluded from setting up his rights as purchaser by the failure of the officer to make proper return of the execution showing what has been done under it. (Page 273.)

2. EXECUTION—PRIORITY OF LEVY.—By making a prior levy of an execution on personal property a constable secures a prior lien as against the sheriff subsequently levying upon the same property under execution. (Page 273.)

Appeal from Sevier Circuit Court.

JAMES S. STEEL, Judge.

Reversed.

STATEMENT BY THE COURT.

This is an action in replevin, brought by appellant against appellee. Appellee claimed the property by virtue of a levy made by him as sheriff under an execution issued by the circuit clerk of Sevier County on June 16, 1902. Appellant claimed the property in controversy by purchase at an execution sale made by a constable of Sevier County on July 2, 1902, under an execution issued by a justice of the peace for said county on June 16, 1902, and levied upon the property in suit before the appellee, as sheriff, levied upon same.

It appears that certain laborers filed before one J. L. Flanigan, a justice of the peace of Sevier County, their claims against the Star Antimony Company for work and labor performed by them for said company, amounting to $74. They prayed and were granted a writ of attachment, which was issued and executed by the constable on the 3d day of June, 1902, by taking possession of the property in controversy, and duly serving the writs on the Star Antimony Company, and summoning it to appear and answer the plaintiffs' claims. On the 16th day of June, 1902, the return day of the summons, judgment by default was rendered in favor of the plaintiffs for the amounts claimed, but the record does not show what disposition was made of the attachments. The record shows, however, that on the 16th day of June, 1902, execution was issued by the justice, made returnable on the 2d day of July, 1902, and delivered to the constable. The justice's docket shows the above. It also contains this entry, "Return of execution satisfied." "On the 2d of July, 1902, the constable returned the execution satisfied in full, John L. Flanigan, J. P." A copy of the execution is set forth in the record, and it does not show any return indorsed upon it. Flanigan, who rendered the judgment and issued the executions, testified that the

constable to whom he delivered the executions advertised the property for sale on the 2d of July, 1902, and did sell the same to the appellant for a cash consideration of $400, the appellant being the highest bidder at the sale. He further testified that he thought it was several days after the executions were placed in the hands of the constable that the appellee, sheriff, came out to the mines and levied his execution on the property. The appellant introduced in evidence a bill of sale from the constable to appellant for the property in controversy, showing a consideration of $400 in hand paid. Appellant also introduced one Paul Knod, Sr., who testified, without objection, "that defendant (appellee), Sheriff Grady, did not come out to the mine and levy his execution upon the property involved in this suit for several days after the constable, John E. Dorsey, had levied on said property and advertised it for sale."

The appellee showed by the clerk of Sevier County that he issued an execution in favor of Smith, Allen & Company against the Star Antimony Company on the 16th day of June, 1902, and on the same day delivered it to R. M. Grady, the sheriff. Appellee testified that he, as sheriff of Sevier County, "levied the execution on the property involved in this suit as the property of the Star Antimony Company." He did not remember what day he levied the execution, but thought it was soon after it was delivered to him. He returned the execution to the clerk. The clerk further testified that the execution which he issued had been lost.

S. A. Downs, for appellant.

The law presumes, in the absence of a controverting affidavit, that the attachment was sustained by the justice. 45 Ark. 274. The intention of the parties will be given effect in a lease of this kind. 56 Ark. 55; 27 Ark. 332, 648; 29 Ark. 270; 66 Ark. 87; 13 Am. & Eng. Enc. Law, 633; 73 Ark. 227. Appellants were entitled to satisfaction out of the property levied upon. 60 Ark. 397; 11 Am. & Eng. Enc. Law, 683.

Lake & Wingo, for appellee.

The burden of proving title to the property in question was upon appellant. 42 Ark. 313; 22 Ark. 397. The laborers had no lien upon the mines, machinery, etc. 43 Ark. 170; 68 Ark. 180. The attachment proceedings were void. 51 Ark. 322. There

was no legal service. 69 Ark. 430; 62 Ark. 431. The bill of exceptions is insufficient. 59 Ark. 178; 38 Ark. 319.

WOOD, J., (after stating the facts.) No question was raised in the court below as to the manner in which the levy was proved, nor as to the proof of the satisfaction of the execution directed and delivered to the constable, Dorsey, from whom appellant claims. Appellee virtually concedes that appellant would not be precluded from setting up his rights as a purchaser at the execution sale by the constable by any failure of the constable to make proper return of the execution showing what had been done under it. It clearly appears that the constable levied on the property in controversy prior to the levy that was made by the appellee, and, under the decision of this court in *Derrick* v. *Cole*, 60 Ark. 397, secured the prior lien, and it is also reasonably clear from the evidence that appellant purchased at the sale made by the constable under this levy. Appellant's claim to the property in controversy is, therefore, prior and superior to the claim of appellee.

The judgment is therefore reversed, and the cause is remanded for new trial.

---

76 273
d82 350

NEAL v. CONE.

Opinion delivered July 8, 1905.

1. SALE OF CHATTEL—SPECIFIC ATTACHMENT.—The statutory remedy authorized Kirby's Digest, § § 4966, 4967, in favor of a vendor of chattels, to enforce payment of the purchase money, is not a lien, and cannot be enforced where the property has passed into the hands of purchaser for value, even though they may have had notice before their purchase that the purchase money had not been paid. (Page 275.)
2. SAME—RESERVATION OF TITLE.—An understanding between a vendor and vendee that the former was to have the purchase money before the property was sold is not tantamount to a reservation of title. (Page 276.)
3. SAME—INCONSISTENT CLAIMS.—An action to enforce a specific attachment for the purchase money of chattels proceeds upon the theory that

the title passed to the vendee, and is inconsistent with a claim that the title was reserved until the purchase money was paid. (Page 276.)

Appeal from Calhoun Circuit Court.

CHARLES W. SMITH, Judge.

Reversed.

STATEMENT BY THE COURT.

The appellee filed the following affidavit before J. S. Newton, J. P.:

"The plaintiff, R. H. Cone, states the defendant, Gray Rogerson, by a verbal promise agreed to pay to the plaintiff two cents apiece for all the pipe staves and one cent apiece for all the West India staves he should make on the northeast quarter, northwest quarter, section 32, township 15 south, range 14 west, as the purchase price of the timber used in manufacturing said staves, which the plaintiff sold and delivered to the defendant, which is of the value of $63.66, which staves were sold by the defendant Rogerson to defendant Neal with notice of this lien, and which are now in the possession of said O. F. Neal and in said county. The purchase price of said timber is herewith filed, and plaintiff says that no part of the sum specified therein has been paid, and that he has a lien on said pipe and West India staves to secure the payment of said sum, with interest due thereon. He therefore prays for an order directing the constable to take said staves and hold them subject to the order of this court, and for judgment for the amount due on said account.

R. H. CONE.

"Subscribed and sworn to before me October 28, 1898.

"J. S. NEWTON, J. P."

On the return day of the writ there was a trial and judgment in favor of Cone for $5, and a lien declared on the staves. From this judgment Neal appealed to the circuit court.

In the circuit court the record shows that issue was joined "upon the affidavit of plaintiff and the answer of the defendant," but the answer does not appear in the record. So we presume that no written answer was filed in the justice's or circuit court. The cause was submitted to the jury upon the evidence and instructions, to which there was no objection, and they returned a verdict

in favor of appellee "for the staves in controversy," and judgment was entered accordingly, from which this appeal is prosecuted.

Thornton & Thornton, for appellant.

A vendor's lien can only be enforced while the property is in the hands of the vendee. 43 Ark. 464; 54 Ark. 450; 49 Ark. 290; 45 Ark. 136. Proof without an allegation is as bad as an allegation without proof. 41 Ark. 400. Instructions should not be given unless there is evidence to support them. 24 Ark. 251; 26 Ark. 513; 16 Ark. 629; 5 Ark. 184; 29 Ark. 151; 42 Ark. 57; 54 Ark. 336; 71 Ark. 350.

C. L. Poole, for appellee.

Appellee's lien followed the property. Kirby's Dig. § § 4966-7; 43 Ark. 464; 52 Ark. 450. Title in fact did not pass until the staves were paid for. Beach, Mod. Contr. § § 135, 136, 188; 57 Ark. 270; 49 Ark. 160. And a *bona fide* purchaser could acquire no title as against the vendor. 49 Ark. 63; 42 Ark. 473; 62 Ark. 84; 62 Ark. 88; 16 Am. & Eng. Enc. Law, 828. No proper exceptions were saved to the instructions. 41 Ark. 535; 44 Ark. 527; 62 Ark. 431; 75 Ark. 182. The verdict is supported by the evidence. 84 S. W. 786; 74 Ark. 16.

WOOD, J., (after stating the facts.) The affidavit of the appellee, and his evidence, and that of the only other party to the contract out of which the suit arose, shows that the suit was an effort upon the part of appellee to enforce a specific attachment in favor of the vendor of a lot of staves for the purchase price of the timber that was used in the manufacture of the staves. It appears that appellee asked and was granted on his affidavit an order directing the officer to take the staves designated, which was duly executed, and in this way appellee seeks to establish a vendor's lien upon the staves under sections 4966-67 of Kirby's Digest. This statute only gives the vendor of personal property in an action brought for the recovery of the purchase money the right to seize the property purchased while it is in the possession of the vendee. It does not give him a lien which he can enforce at law by seizing the property after it has passed into the hands of third parties who have purchased the same for value, although such parties may have notice before their purchase that the purchase money has not been paid.

An effort to enforce a specific attachment for the purchase money is inconsistent with a claim of title to the property itself. It is true that appellee testified that it was the understanding between him and the party to whom he sold the timber that he was to have the money for the purchase thereof before the staves were sold. But this was not tantamount to a reservation of title, and all the other evidence shows conclusively that title was not reserved.

But, if title had been reversed, then the action founded upon the affidavit in suit was improper. This action could not be converted from an action to recover purchase money under the statute *supra* into an action of replevin to try the title and right of possession to the property.

The verdict and judgment were not responsive to the pleadings and proof in the case. Reversed and remanded for further proceedings.

MAXEY v. STATE.

76 276
f 83 38

76 276
f85 430

76 276
86 315
f88 137

Opinion delivered July 8, 1905.

1. CHANGE OF VENUE—DISCRETION.—An order overruling a motion for a change of venue upon the ground that the court examined the witnesses who signed the affidavit in support of the motion and found that they were not informed as to the condition of the minds of the inhabitants of the county, except at the county seat, was not an abuse of discretion. (Page 279.)

2. SAME— RULE OF CIRCUIT COURT.—*It seems* that a rule of the circuit court that, "before the change of venue shall be granted in any case pending on the criminal docket of this court, written notice of the application therefor shall be given to the attorney for the State at least three days prior to the day upon which the application is made" is arbitrary. (Page 279.)

3. EVIDENCE—EFFORT TO SUPPRESS.—It was competent for the State to prove that defendant, on the day previous to the trial assaulted one of the State's witnesses and used abusive language toward him, as tending to prove an effort to suppress testimony against himself. (Page 279.)

4. APPEAL—QUESTION NOT RAISED BELOW.—The competency of evidence admitted without objection in the trial court will not be considered on appeal. (Page 280.)

5. ADMISSION OF EVIDENCE—PREJUDICE.—The erroneous admission of testimony is not prejudicial if the fact which it tends to prove is otherwise established by evidence admitted. (Page 280.)

6. EVIDENCE—GENERAL EXCEPTION.—A general exception to evidence introduced is insufficient to point out a specific reason for its rejection. (Page 280.)

7. ESCAPE—CONVEYING INSTRUMENT TO PRISONER TO FACILITATE.—The offense of conveying into jail any instrument, arms or other thing useful to aid any prisoner in his escape, with the intent to facilitate the escape of such prisoner, is complete, under Kirby's Digest, § 1676, when the instrument or other thing is conveyed into the jail, with the intent mentioned, whether the escape is effected or attempted or not, and whether the prisoner acquiesces or co-operates in the crime or not. (Page 280.)

8. TRIAL—PROPRIETY OF ARGUMENT.—Where the evidence showed that defendant assaulted one of the State's witnesses, hit him on the head, and knocked him down, and that from the effect of such blow he was in bad condition at the trial, and suffered from nervousness, it was not prejudicial error for the attorney for the State to assert that defendant intended to kill the witness. (Page 280.)

Appeal from Independence Circuit Court.

FREDERICK D. FULKERSON, Judge.

Affirmed.

STATEMENT BY THE COURT.

The amended record brought here by the Attorney General shows that appellant was convicted before a justice of the peace of Independence County on a charge made by the affidavit of the prosecuting attorney under the following statute:

"Every person who shall convey into any jail or place of confinement any disguised instrument, arms or other thing proper or useful to aid any prisoner in his escape, with the intent thereby to facilitate the escape of any prisoner lawfully committed to or detained in such jail or place of confinement for felony or other criminal offense, or detained therein for any violation of any penal statute, or in any civil action, whether such an escape be *effected* or *attempted* or not, shall be deemed guilty of a misdemeanor, and on conviction be fined in any sum not less than one hundred dollars, and be imprisoned not less than six months." Kirby's Dig. § 1680.

He appealed to the circuit court, was tried by jury, again convicted, and fined in the sum of $100 and six months in jail,

and appealed to this court. In the circuit court appellant moved for change of venue, supporting his motion by the affidavits of himself and four others to the effect that the minds of the inhabitants of Independence County were so prejudiced against him that he could not obtain a fair and impartial trial. The prosecuting attorney objected to the hearing of the motion for change of venue because no written notice of such motion had been served upon him as provided by the rules of the circuit court, as follows: "That, before a change of venue shall be granted in any cause pending on the criminal docket of this court, written notice of the application therefor shall be given to the attorney for the State at least three days prior to the day upon which the application is made. Upon hearing of any application for a change of venue, the defendant will be required to produce in court the persons making the supporting affidavit."

The court, after examining three of the witnesses who signed the supporting affidavit for change of venue, called upon appellant to produce the fourth, but appellant was unable to do so. The court then overruled the motion for change of venue, reciting in the order "that the court, after hearing the cross-examination of the supporting affiants, is of the opinion that such affiants were not informed as to the condition of the minds of the inhabitants upon the matter except about the city of Batesville, and for this reason, and that no notice of this application had been served upon the prosecuting attorney as provided by the rule of this court, the court is of the opinion that the said motion be and the same is hereby overruled."

Other facts will be stated in the opinion.

Horton & South, for appellant.

No jurisdiction appears from the record. 45 Ark. 145; 34 Ark. 650; 31 Ark. 725. The change of venue should have been granted. Kirby's Dig. § § 2317, 2318. The evidence as to the difficulty between Hall and defendant was improperly admitted. 52 Ark. 309; 39 Ark. 278; 14 Ark. 555; 7 Ark. 470; 5 Ark. 66. The testimony of S. C. Mankriss was improperly admitted. 62 Ark. 495; 56 Ark. 330; 16 Ark. 628. The testimony of J. W. Six should have been excluded. 3 Green. Ev. § 192; 32 Ark. 119; Kirby's Dig. § 1680. Statutes creating crimes are strictly

construed. Bish. Stat. Cr. § § 193-4; 53 Ark. 334; 43 Ark. 413; 40 Ark. 99; 38 Ark. 519; 13 Ark. 407; 6 Ark. 132. The remarks of J. C. Yancey were improper. 61 Ark. 130; 58 Ark. 368; 48 Ark. 106.

Robert L. Rogers, Attorney General, for the State.

The petition for change of venue was properly denied. 54 Ark. 243.

WOOD, J., (after stating the facts.) 1. The record brought here by certiorari on motion of the Attorney General shows that an appeal was taken by appellant from a judgment of conviction before the magistrate. The circuit court therefore had jurisdiction.

2. The circuit court did not arbitrarily overrule appellant's motion for change of venue, but examined three of the witnesses signing the supporting affidavit, and found that they were not informed as to the conditions of the minds of the inhabitants concerning the matter, except about the city of Batesville. This alone was sufficient to justify the court in refusing the motion for change of venue. The court gave, as an additional reason for refusing the change, noncompliance by the appellant with its rules. This was no legal reason for refusing a motion for change of venue where the statute had been complied with, and, had this been the only reason for the court's ruling, it would have been error. But, having examined the witnesses and ascertained the facts as found in the court's order overruling the motion, which finding is sustained by the evidence, the court's ruling in refusing the motion cannot be considered arbitrary, and therefore erroneous.

3. The court permitted the State's witness, Hall, to testify that the appellant had, on the day previous to the trial, assaulted him and used abusive language toward him. The appellant's testimony shows that the assault on and abusive language to Hall was because of what Hall had sworn before concerning appellant's connection with the crime charged. Hall was to testify, and did testify, the next day. The testimony tended to show the animus of appellant toward the prosecuting witness, Hall, on account of the testimony he had previously given, and which he might be expected to give again on the morrow. It

tended to show a disposition on the part of appellant to browbeat or intimidate the witness, Hall, on account of his testimony, and in that sense might be regarded as an effort on the part of appellant to suppress testimony against him.

4. Appellant urges that it was error for the court to permit witnesses to testify to conversations with Hall in the absence of appellant, in which he made statements damaging to appellant, but appellant failed to reserve exceptions to the ruling of the court in admitting this testimony, and the objection made here for the first time cannot avail.

5. The testimony of J. W. Six that he examined the charge of incest against W. J. Hall, and committed him to jail, without producing the commitment or record, or accounting for same if erroneous, was not prejudicial, for the witness, W. J. Hall, had already testified, without objection, that he had been committed to jail on a charge of incest, and appellant himself testified that witness Hall had been in jail on that charge.

6. The fact that W. J. Hall, whom appellant is alleged to have intended to assist in escaping from jail, had been tried and acquitted was irrelevant to the charge against appellant, but we do not consider it prejudicial. However, if it was relevant and prejudicial, appellant saved only a general exception to it, failing to point out the specific reason for its rejection. This was not sufficient. *Vaughan* v. *State,* 58 Ark. 353.

7. The offense is complete under the statute when any person shall have conveyed into the jail or place of confinement anything proper or useful to aid any prisoner in his escape with the intent to facilitate the escape of any prisoner, whether such escape be effected or attempted or not. The acquiescence or co-operation of the prisoner, which appellant contends is necessary, does not seem to be contemplated by the act. The express language is to the contrary.

8. The bill of exceptions contains the following: "Be it remembered that upon the trial of the above-entitled cause J. C. Yancey, attorney for the State, made the following improper and prejudicial remarks: 'Bob Maxey knew that dead men tell no lies,' and saying that 'Maxey, the defendant, intended to kill Hall on his escape,' and saying 'they [meaning the defendant's attorneys] ask you to believe that Morgan would be guilty of

such a scheme as this, and you must believe that Morgan would stoop to instigate a scheme of this kind, or that Bob Maxey is guilty,' to which remarks the defendant at the time excepted, and asked the court to exclude the same from the jury, which was by the court overruled, to which ruling of the court defendant at the time excepted, and asked that his exceptions be noted of record, which was accordingly done."

The above record shows that the circuit court regarded the remarks of the attorney as "improper and prejudicial," but, notwithstanding this, he overruled the motion for a new trial, setting up such remarks as the fifteenth ground in such motion. This record presents the somewhat anomalous condition of the circuit judge expressing an opinion as to the effect of the remarks objected to, but failing to give the appellant the benefit of his opinion by granting his motion for a new trial. As the learned trial judge, notwithstanding his declaration that the remarks of the attorney set out above were "improper and prejudicial," refused the appellant's motion for a new trial, the question is presented to us as to whether the remarks were really "improper and prejudicial," the declaration of the circuit judge to the contrary notwithstanding. The witness, Hall, had testified that the appellant had hit him on the head, and knocked him down, and that from the effect of such blow he was in bad condition, and suffering from nervousness at the time of giving his testimony. There was nothing beyond this to indicate the character of the assault that was made by the appellant on the witness, Hall, and this was hardly sufficient to justify the attorney in reaching the conclusion that it was the intention of the appellant, by this assault, to kill the witness, Hall, in order to get rid of his testimony, as indicated by the language which the attorney used. Still, the facts upon which he predicated his opinion were before the jury, and, as sensible men, we must assume that they gave the opinion of the attorney as to these facts no more or greater consideration than the facts themselves justified. In this view we do not see how the remarks concerning the assault could have been prejudicial. Likewise, as to what was said as to Sheriff Morgan. The facts were all before the jury, upon which the attorney was expressing his opinion. It was no more than an opinion which he was expressing. The learned counsel for

appellant say "that the proof on the part of the State showed conclusively that the sheriff was a party to the scheme to induce the defendant to violate the law by committing the act for which he was tried in this case." This being the opinion of counsel for appellant as to the conduct of Sheriff Morgan in connection with the transaction, it was certainly legitimate argument for counsel for the State to express the opinion that what the sheriff did in connection with the matter must be attributed to innocent and proper motives, and, if so, the appellant was guilty. We do not find the remarks complained of prejudicial to appellant.

Having considered all the assignments of error in the order presented in appellant's brief, and finding no reversible error, the judgment is affirmed.

SHEEKS-STEPHENS STORE COMPANY v. RICHARDSON.

Opinion delivered July 8, 1905.

1. LIENS ON CROP—PRIORITY.—The lien of a laborer who produced a crop is superior to that of a mortgagee who furnished the supplies necessary to raise the crop. (Page 284.)
2. MORTGAGE ON CROP—NOTICE OF LABOBER'S LIEN.—One who takes a mortgage on a crop to be thereafter produced takes with notice of the liens of any laborers for labor required to produce it, and subject thereto, especially where the contract for the labor was made and the labor was commenced prior to the execution of the mortgage. (Page 285.)
3. BONA FIDE PURCHASER—WHEN MORTGAGEE HELD NOT TO BE.—A mortgagee who purchases the mortgaged property and pays for it by crediting the purchase money on the past due account secured by the mortgage is not a purchaser for value. (Page 285.)

Appeal from Clay Circuit Court, Western District.

ALLEN HUGHES, Judge.

Affirmed.

STATEMENT BY THE COURT.

James Mulholler rented a farm in Clay County from one McGrew for the year 1901. In February of that year he hired

Joseph Carter to assist him in making the crop, agreeing to pay him about $15 per month and board. On March 16, 1901, Mulholler executed a mortgage on the crop to be grown on the land during that year to the Sheeks-Stephens Store Company, of Corning, Arkansas, to secure them for supplies to be furnished to him during that year. This mortgage was recorded on the 6th day of May, following.

Carter worked on the crop until the latter part of June. Mulholler only paid him $1.90, and was at the time he quit owing him over $40. Mulholler delivered two loads of cotton to Sheeks-Stephens Company in September, and on the 3d of October, 1901. Before this cotton was delivered, McGrew, who had a lien on it for his rent, notified Sheeks-Stephens Store Company to hold the amount of his rent out of the cotton delivered.

Afterwards Carter brought suit before a justice of the peace to enforce his laborer's lien on the crop, and had the cotton which had not been delivered to Sheeks-Stephens Store Company attached. He procured a judgment and an order of sale. But before the cotton was sold Richardson, the constable to whom the order of sale was delivered, and Hopson, the attorney for Carter, made an agreement with the Sheeks-Stephens Store Company that the attached cotton might be delivered to Sheeks-Stephens Store Company, and sold by it, and, after paying the cost of picking and the amount due for rent, it was to pay the remainder of the proceeds to Richardson, to be applied on the judgment of Carter against Mulholler. Hopson and Richardson testified to facts tending to show that Mr. Sheeks, who represented the Store Company in making this contract, represented to them, as an inducement for them to make it, that there were only about $100 unpaid on the rent note, and they say, in substance, that they understood from him that the two loads of cotton previously delivered had been applied on the rent, and that only the balance of the rent was to be paid from the proceeds of the attached cotton.

Five more loads of cotton was delivered to the Store Company in pursuance of this agreement. The Store Company paid the rent note and costs of picking the cotton, but claimed that the proceeds of the cotton were not sufficient to pay those charges, and

refused to pay Richardson anything for Carter. Richardson brought this action before a justice of the peace to recover about $45 which he claimed had been received by the Store Company over and above the costs of the rent and picking. The evidence for the plaintiff tended to show that the proceeds of this cotton, after deducting cost of picking, was to be paid by the Store Company on the rent note of McGrew. For the defendant it tended to show that there was no such agreement, and that it was placed to the credit of Mulholler on his account due the Store Company.

The justice gave judgment in favor of plaintiff, and, on trial *de novo* in the circuit court, a judgment was rendered in favor of plaintiff for $44, from which judgment the defendant appealed.

G. B. Oliver, for appellant.

The laborer's lien was not prior to the mortgage. Kirby's Dig. § § 5011, 5012; 71 Ark. 337. As to all sums paid out previous to the issuing of the attachment, appellant was a *bona fide* purchaser. Cobbey, Chat. Mort. 152; 23 Am. & Eng. Enc. Law, 476; 82 S. W. 836.

D. Hopson, for appellees.

A laborer's lien is superior to a prior mortgage. Kirby's Dig. § § 4995, 5006; 62 Ark. 435. Appellant was not a *bona fide* purchaser. 34 Ark. 383; 82 S. W. 836; 69 Ark. 306; Sand. & H. Dig. § 4776. The judgment is right upon the whole case. 10 Ark. 9, 53.

RIDDICK, J., (after stating the facts.) This action was brought by a constable, who had attached cotton, against a mercantile firm to whom, by consent of the parties, he had delivered it for sale, to recover the proceeds of the cotton. The plaintiff in the attachment suit was a laborer who claimed a lien on the cotton. While the action is brought in the name of the constable, it is for the use and benefit of the laborer, and the action is, in effect, a contest between a laborer who claims a lien on cotton for the price of his labor in producing it and a firm of merchants who claim a lien thereon by virtue of a mortgage for supplies furnished the owner of the crop.

In the first place, we are of the opinion that the act of March 11, 1895, did not change the law, so far as such a laborer is con-

cerned. The prior act of July 23, 1868, gave laborers a lien on the production of their labor. The act of 1895 extended this law so as to give laborers who perform work on any object or thing a lien thereon for the price of their labor, whether their labor produced the thing upon which the labor is expended or not. When the work of the laborer does not produce the thing upon which he labors, he takes a lien, but it is subject to prior liens. But when the labor for which a lien is claimed produces the thing upon which a lien is claimed, then no lien can, under the statute, be prior to that. No lien upon a crop can be prior to that which the statute gives the laborer who prepares the ground, plants and produces the crop, for his lien attaches as soon as the crop comes into existence, which is as soon as any lien can attach. The lien of a mortgagee does not attach to a crop until it is produced, and therefore cannot be prior to the lien which the statute gives the laborer who produces it. The lien of the landlord for his rent is by the statute made superior to that of the laborer. But, in order to make this mortgage a superior lien to that of the laborer who produced the crop, it would, under any view of the statute, be necessary to show that it was a prior lien, which, as we have shown, cannot be done. The court, we think, properly held that the lien of this laborer was superior to that of the mortgagee who furnished the supplies to raise the crop.

Again, the facts here do not show that the defendant was a *bona fide* purchaser without notice. One who takes a mortgage on a crop to be thereafter produced must know that it requires labor to produce it, and, under the statute, laborers have liens for their work. He, therefore, takes his mortgage with notice of such liens, and subject thereto, especially when, as in this case, the contract made by the owner of the crop with the laborer, and the commencement of his labor, were prior to the execution of the mortgage.

Of course, if appellant had subsequently bought and paid for this cotton without notice of such lien, it would be protected; but it paid nothing out on the purchase of the cotton. Only two loads were delivered to it before the attachment was levied, and it admits that it credited the price of that on a past due account. This was not sufficient to make defendant a *bona fide* purchaser of the two loads. The laborer then had a lien for his wages on all the cotton

delivered to defendant, subject to the lien of the landlord for rents, and we think the evidence justified the jury in finding that, under the agreement with the plaintiff, defendant had the right to retain only that portion of the proceeds of the cotton required to pay the balance due on the rent note, and for picking, after applying the proceeds of the two loads of cotton which defendant received before the attachment. That question was submitted to the jury, and was found against defendant, and we find no error in the instructions that would justify a reversal. While these instructions are not quite so clear as they might have been, we think that those asked by defendant were, under the facts proved, erroneous and misleading, and were properly refused. On the whole case, we think the judgment should be affirmed, and is so ordered.

BYRD v. STATE.

Opinion delivered July 8, 1905.

1. EVIDENCE—OPINIONS OF NONEXPERTS.—Nonexpert witnesses who have detailed the facts upon which their opinions are based may be allowed to testify their opinions as to defendant's sanity. (Page 288.)
2. MURDER IN SECOND DEGREE—DRUNKENNESS.—As the specific intent to kill is unnecessary in murder in the second degree under our statute, if one voluntarily becomes too drunk to know what he is about, and then without provocation assaults and beats another to death, he commits murder in the second degree, just as if he were sober. (Page 289.)
3. EXCLUSION OF EVIDENCE—PREJUDICE—While it was error to exclude the opinions of nonexpert witnesses that defendant was temporarily insane from drink when he killed the deceased, yet the exclusion of such evidence was not prejudicial if the evidence showed that he voluntarily became drunk, and that the insanity which he manifested was only his ordinary condition when drunk, and if the jury found him guilty only of murder in the second degree. (Page 289.)
4. TRIAL—ARGUMENT OF PROSECUTING ATTORNEY.—A statement of the prosecuting attorney in his closing argument that "the case is so cruel and barbarous that it is without a parallel in the history of crime" was

not objectionable, being merely the expression of his opinion as to the gravity of the offense. (Page 290.)

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

Affirmed.

C. L. Poole and *J. S. McKnight,* for appellant.

Robert L. Rogers, Attorney General, for appellee.

RIDDICK, J. This is an appeal from the judgment of the Ouachita Circuit Court convicting the defendant, Tom Byrd, of murder in the second degree for killing one Mr. Burnsides in Calhoun County, the venue having been changed to the former county before trial.

The evidence shows that on the 4th day of September, 1904, at the town of Woodbury, the defendant, Tom Byrd, became intoxicated from drinking whisky. While in this condition, he met Burnsides on the street. Burnsides was a man of fifty-nine years old, weighed about 115 pounds, and was very weak, even for a man of his age, while the defendant was twenty-eight years old, weighed about 170 pounds, and was a strong man physically. Byrd was cursing at the time he met Burnsides, and one of the witnesses testified that Burnsides requested him "to have respect for the ladies, if not for the men." Whereupon Byrd caught Burnsides by the collar, and said to him, "You God damned old son of a bitch, you told a lie on me, and caused me to pay out $27, and I am going to kill you." Burnsides asked him not to strike him, but the defendant struck him, and then threw him to the ground, and sat down astride him, and commenced to beat and pound him in the face with his hands and fists, occasionally catching him by the neck or shoulders, and then raising his head from the ground, and pounding it back against the ground. Some moments intervened before any one attempted to interfere and stop the furious and brutal attack of the defendant upon the helpless old man. When they did attempt to separate them, Byrd frustrated their attempt by putting his hand in his pocket as if he was about to draw a pistol and threatening to kill any one who should interfere. After he had pounded Burnsides into unconsciousness some one went to him and told him he had killed the old man, and induced him to desist and leave. Byrd went home.

When he reached home, he met his wife, and told her that he had killed Burnsides. Soon after that he left his home, and was a fugitive from justice for several days, when he surrendered to the officers. His victim was also taken home where he lingered from Sunday afternoon, the time of the assault, until early on the morning of the following Wednesday, and then died without having gained consciousness. The only excuse for the assault that caused his death, presented at the trial, was that the defendant was insane. But the testimony on this point shows, in our opinion, nothing more than that the defendant occasionally drank intoxicating liquors to excess, and that when he did so he was more than ordinarily violent and unreasonable, even for a drunken man. When in this condition, he sometimes threatened to kill himself, and acted in a fitful, unreasonable way, as drunken men often do. Several of the witnesses who detailed these acts of the defendant were then asked by his counsel whether they considered him insane or not, but the presiding judge refused to permit these questions to be answered. In this ruling we think the judge erred, for such testimony has often been held to be competent by this court. *Green* v. *State,* 64 Ark. 523; *Shaeffer* v. *State,* 61 Ark. 241.

But, if we assume that these witnesses would have answered that the defendant was insane, this testimony would have shown nothing more than that the use of intoxicating liquors had a very bad effect on the defendant, and that they produced in him a species of temporary insanity; but this kind of insanity is ordinarily no excuse for crime.

"The law," says Mr. Bishop, "deems it wrong for a man to cloud his mind or excite it to evil by the use of intoxicating drinks; and one who does this, then, moved by the liquor while too drunk to know what he is about, performs what is ordinarily criminal, subjects himself to punishment; for the wrongful intent to drink coalesces with the wrongful act done while drunk, and makes the offense complete." He goes on to say that there is an exception to this rule where a necessary ingredient in the offense charged is a specific intent, and the intoxication is to such an extent as to render the defendant incapable of forming such an intent. In other words, when it is necessary to show a specific intent to make out the crime, anything that rebuts the fact that there was such an intent is competent evidence to be considered.

If the man was too drunk to form such an intent, that may be considered. Bishop's New Crim. Law, § § 398-400.

In this case the fact that the defendant was intoxicated at the time he assaulted Burnsides may have raised in the minds of the jury a reasonable doubt as to whether there was a specific intent to kill, and led them to reduce the crime to murder in the second degree. But no specific intent to kill is necessary to constitute the crime of murder in the second degree, under our statute, and the law is that "the intention to drink may fully supply the place of malice aforethought;" so that, if one voluntarily becomes too drunk to know what he is about, and then without provocation assaults and beats another to death, he commits murder the same as if he was sober. 1 Bishop, New Crim. Law, § 401.

Now, in this case defendant was not at the time of the killing laboring under delirium tremens or other form of more or less fixed insanity caused by continued intoxication. The insanity that he was laboring under, if any, was the immediate result of the intoxicating liquor he drank on the day of the homicide. In other words, he was simply drunk from the effects of liquor which he had voluntarily taken. While in that condition, he met this infirm old man, towards whom it seems that he entertained some grudge on account of a suspicion that the old man had instigated a prosecution against him, and, with passions inflamed and excited by the drink he had taken, he assaulted him and beat him into unconsciousness without any provocation whatever. It is no doubt true that if he had been sober this deed would not have been done. While his passions were inflamed by drink, his subsequent conduct shows that defendant was not so drunk that he did not know what he was doing. The fact that a few minutes afterward he told his wife what he had done, and made preparations to escape, and did elude the officers for several days, shows that he at once appreciated the gravity of the crime he had committed. But, if we concede that he was insane, it was not delirium tremens, but only his ordinary condition when drunk. He voluntarily drank the whisky, and became drunk. The books are full of cases holding that such insanity, which is only another word for drunkenness, is no excuse for crime. *Casat* v. *State,* 40 Ark. 511; *People* v. *Garbutt,* 17 Mich. 9.

The statement of the prosecuting attorney in his closing argument that "the case is so cruel and barbarous that it is without a parallel in the history of crime" was only the expression of his opinion as to the gravity of the crime as shown by the evidence, and the ruling of the court that it was proper furnishes no ground for reversal.

On the whole case we find no reason to overturn the judgment of the circuit court, and it is therefore affirmed.

WILLIAMS v. STATE.

Opinion delivered July 8, 1906.

SIXTEENTH SECTION LANDS—PROVINCE OF COUNTY COURT.—Where a sale of sixteenth section land has been made at the request of a majority of the adult inhabitants of the Congressional township in which it lies, the county court should investigate the facts as to the regularity of the advertisement, appraisement and sale, the fairness of the sale and adequacy of the price, and then either confirm the sale or reject it and order a new sale.

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

Affirmed.

S. H. Mann and *Rose, Hemingway & Rose,* for appellant.

Authority to reject or confirm sales must be exercised according to legal principles, and the court's action is subject to correction upon appeal to the circuit court, where the question is tried *de novo.* Kirby's Dig. § 1492; 33 Ark. 508; 43 Ark. 42; 34 Ark. 240. A bidder at a judicial sale has rights which a court of equity will protect. 36 Ark. 591; 17 Am. & Eng. Enc. Law, 996. The sale will not be set aside for inadequacy of price, unless it is so great as to shock the conscience. 124 Fed. 133; 65 Ark. 152; 44 Ark. 502; 47 Ark. 518; 56 Ark. 242. And this was not established. 163 U. S. 110; 50 Ark. 511.

Robert L. Rogers, Attorney General, for appellee.

The county court had authority to set aside the sale for inadequate price and order another sale. 74 Ark. 361.

McCULLOCH, J. This is an appeal from the judgment of the circuit court rejecting and refusing to confirm a sale of school lands made by the collector. Exceptions to the collector's report of sale were filed in the county court by certain citizens, and that court sustained the exceptions, and rejected the sale. On appeal, the circuit court heard the cause upon oral testimony establishing the market value of the lands, and found that it was sold for an inadequate price, and for that reason rejected the sale.

It cannot reasonably be contended that the finding of the court as to the value of the land is not sustained by the evidence, but appellants urge that, the sale having been properly and regularly made on petition of a majority of the adult inhabitants of the township, as provided by statute (this fact being admitted), it was the duty of the county court to confirm it, notwithstanding the inadequacy of the price. They invoke the application of the rule that a judicial sale which has been regularly and fairly made will not be set aside for mere inadequacy of price unless the inadequacy be so great as to shock the judicial sense of justice. But a sale of school land by the collector upon petition of the inhabitants of the township is not a judicial sale, though the statute requires that it must be confirmed by the county court. It is purely a statutory proceeding, and the statute alone must be looked to in ascertaining its terms and effect.

The statute provides that the collector, after having advertised, appraised and sold the land, shall "report all sales to the county court, which may reject or confirm the same," and that, "if any sale be rejected, the county court may direct the collector to again advertise and offer the land, and may specify the minimum price at which the tract or tracts may be sold, not to be less than two-thirds of the appraised value." Kirby's Digest, § 7707.

This court in a recent opinion concerning the power and duty of the county court with reference to such sales, said: "The authority to order the sale being in the male inhabitants, the jurisdiction of the county court is confined to protecting the inhabitants against a sacrifice of the land. The inhabitants decide when the land shall be sold. All that remains for the county court to do is

to prevent a sacrifice by the sale of the land below its true value." Ex parte *Young*, 74 Ark. 361. In the case at bar, both the county and circuit courts found from the evidence introduced that the land had been sold for an inadequate price, and it became the duty of the court to prevent the sacrifice by rejecting the sale and ordering a new sale either with or without fixing a minimum price. We have no doubt, from the language used in the statute, that it was intended to give the court authority to reject the sale on account of inadequacy of price as well as on account of irregularities or unfairness. In no other way could the court completely protect the interest of the public. The power of the court to either "reject or confirm" the sale is not to be exercised arbitrarily, so as to amount to the prohibition of a sale which the statutes authorize the inhabitants of the township to order. That is what we held in Ex parte *Young, supra*. The court should investigate the facts as to the regularity of the advertisement, appraisement and sale, the fairness of the sale and adequacy of the price, and then either confirm the sale or reject it and order a new sale. We find that this is precisely what was done by the court below in this case, and, there being sufficient evidence to sustain the finding, the judgment must be affirmed.

HILL, C. J., absent and not participating.

---

76 292
83 263

76 292
89 324

LONG v. McDANIEL.

Opinion delivered July 8, 1905.

STATUTE OF FRAUDS—PROMISE TO PAY ANOTHER'S DEBT.—A promise to pay a debt of another antecedently contracted, where the primary debt still subsists, is original, and not within the statute of frauds when it is founded on a new consideration moving to the promisor, and benecial to him, and is such that the promisor thereby comes under an independent duty of payment, irrespective of the ability of the principal debtor.

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

Affirmed.

STATEMENT BY THE COURT.

E. A. Long was the owner of a building in Forrest City, Ark., known as the "Imperial Hotel." One of the lower rooms of the building was rented by Long to D. F. Keath to be used as a barber shop. S. P. McDaniel, a plumber, fitted up this room with bath tubs, a range, boiler and heater, drain pipes, etc. He afterwards brought his action against Long, the owner of the building, to recover $186.40, the value of his work and labor, and for material and merchandise furnished in making such improvements. The defendant denied that the plaintiff had done any work or labor or furnished any materials or merchandise at his instance or request. He further denied that he had any control over the barber shop at the time the improvement was made, or that he has any interest in the bath tub, boiler and heater, etc., for which suit is brought.

On the trial the plaintiff testified in substance that Keath wanted the bath tubs and other improvements put in his barber shop. That he agreed with Keath upon the price, but that, before he ordered the material or did the work, he went to see the defendant, Long, and asked him what he thought about it. Long replied, "You go ahead and put the stuff in, and if Mr. Keath don't pay for it I will, but don't say anything about my agreement, for I don't want him to know about that; but I want the fixtures to stay in the house." He further testified that, but for this agreement on the part of Long, he would not have ordered the material unless Keath had "put up the money for it." In other parts of his testimony he spoke of Long as being "security" for the debt, but said that he ordered the goods on the promise of Long to pay for them. The plaintiff was corroborated by testimony of the traveling salesman through whom the material was purchased by McDaniel. He said: "I was showing plumbing goods to Mr. Keath in the presence of Dr. Long and S. P. McDaniel, and, after explaining same to both Mr. Keath and Dr. Long, I named the price of these goods. Dr. Long turned to McDaniel, and said, 'Mack, you had better order the goods.' "

On the other hand, the testimony of the defendant tends strongly to show that the material was purchased and the work done by McDaniel for Keath, and that Long took no part in the transaction, and made no promise in reference thereto.

After being instructed by the court, the jury returned a verdict in favor of the plaintiff for $96.45, and defendant appealed.

S. H. Mann, for appellant.

The alleged undertaking of Long was collateral, and within the statute of frauds. 12 Ark. 174; 45 Ark. 67.

John Gatling, for appellee.

The statute of frauds does not apply. 40 Ark. 429; 12 Ark. 174.

RIDDICK, J., (after stating the facts.) The question presented by this appeal is whether the promise of the defendant upon which the plaintiff seeks to recover comes within the statute of frauds, and is invalid because not in writing. Counsel for defendant contends that, conceding the testimony of plaintiff to be true as the jury has found it, the substance of the whole transaction was an agreement by the defendant Long to pay the debt of the barber Keath, and that such an agreement is within the statute, and must be in writing in order to bind the defendant. But, while the price of the work and the material had been agreed on between McDaniel and Keath, McDaniel did not order the material nor commence the work until Long promised to pay for it if Keath did not. The bath tubs, fixtures and other improvements were to be put in a building owned by Long, and the jury were justified in finding that it was beneficial to him to have such improvement made, and that, in order to induce McDaniel to order the material and do the work, he made the promise. If the testimony of McDaniel was true, he was induced to order the material and do the work by virtue of this promise of Long that he would see that plaintiff was paid. It was then a debt of Long, as well as of Keath, and the promise of Long to pay was founded on a consideration directly beneficial to him, and the statute does not apply.

"Where," says the Court of Appeals of New York, "the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such

that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor." *White* v. *Rintoul,* 108 N. Y. 222.

No objections are urged against the instructions; and while the case is a close one on the facts, we think the evidence sufficient to support the judgment.

The newly discovered evidence for which the defendant also asked a new trial was cumulative, and on the whole case we are of the opinion that the judgment should be affirmed.

BURNETT v. STATE.

Opinion delivered July 8, 1905.

1. CONSTITUTITIONAL LAW—SUSPENSION OF SEDUCTION PROSECUTION—RIGHT TO SPEEDY TRIAL.—Where one who was being prosecuted for seduction married the female alleged to have been seduced before the prosecution was terminated, and thereby caused it to be suspended, under Kirby's Digest, §2044, and subsequently deserted her without cause, whereupon the prosecution was reinstated, he is in no attitude to complain that the suspension of the prosecution by his marriage was a deprivation of his constitutional right to a speedy trial when he at no time demanded a speedier conclusion of the trial. (Page 297.)
2. SAME—FORMER JEOPARDY.—Where a prosecution for seduction was suspended on account of the marriage of the accused and the prosecutrix after the jury had been sworn and the testimony introduced, and was subsequently reinstated upon his desertion of her, no jeopardy attached by the former trial, unless the suspension was ordered without the consent of the accused, either express or implied. (Page 298.)
3. SEDUCTION—PRESUMPTION OF CONSENT TO SUSPENSION OF PROSECUTION.—Where the record of the former trial for seduction, which was suspended by marriage of the accused and the prosecutrix, shows that the marriage took place in open court, and that the cause was thereupon continued, it will be presumed that the accused consented to the suspension of the trial, and it will be unnecessary for the State to prove an express consent. (Page 299.)
4. SAME—CORROBORATION OF PROSECUTRIX.—It was not error in a seduction case to instruct the jury to the effect that there must be corrobora-

tion of the prosecutrix as to the promise of marriage, as to its falsity, and as to the fact that the defendant obtained carnal intercourse with her by virtue of such false promise. (Page 300.)

Appeal from Pope Circuit Court.

DANIEL B. GRANGER, Special Judge.

Affirmed.

STATEMENT BY THE COURT.

Appellant was indicted, tried and convicted of the crime of seduction, alleged to have been committed by obtaining carnal knowledge of Fannie Bruton, an unmarried woman, by virtue of a false promise of marriage.

The case was here on a former appeal (72 Ark. 398), and after it was reversed and remanded he was again tried and convicted, and again appeals to this court.

C. C. Reid and *Sellers & Sellers,* for appellant.

Section 2044 of Kirby's Digest is unconstitutional. 24 Ark. 91; 46 Ark. 110; 76 Ala. 482; 4 Am. & Enc. Pl. & Pr. 825; Cooley, Const. Lim. 95; 5 Pick. 70; 16 Mass. 326; 7 Mass. 389; 1 Ark. 121; 2 Vt. 175; 3 Vt. 361; 5 Scam. 465; 3 Scam. 465; 10 Yerger, 59; 13 Ark. 729; 26 Am. St. 470. The section is also unconstitutional, because its effect is to put one in jeopardy twice for the same offense. Const. Ark. art. 11, § 8; 54 Am. Rep. 511; 56 Am. Rep. 235; 26 Ark. 269; 42 Ark. 38; 48 Ark. 36; 35 L. R. A. 238; 83 S. W. 929. A continuance should have been granted on account of absent witnesses. Const. Ark. art. 11, § 10; 50 Ark. 161. Testimony as to defendant's consent to the suspension of the first trial should not have been admitted. 32 Ark. 117; 60 Ark. 141; 1 Green. Ev. § 563*b*. Instruction No. 1 was unintelligible, and did not state the law. 40 Ark. 485; 83 S. W. 911. It was error to refuse instruction No. 5, requested by the defendant, as to the testimony of an accomplice. Kirby's Dig. § 2384. It was error to refuse instruction No. 8, requested by appellant on the ground of abandonment. 81 S. W. 382. The closing remarks of the prosecuting attorney were improper. 70 Ark. 305.

Robert L. Rogers, Attorney General, for appellee.

There can be no jeopardy in a bad indictment. 33 Ark. 129; 42 Ark. 35; 48 Ark. 36; 59 Ark. 113. Nor when the defendant

consents to a suspension of the proceedings. 11 Am. & Eng. Enc. Law, 950-952. The instruction upon the testimony of an accomplice was correct. 1 Whar. Cr. Law, § 593.

McCULLOCH, J., (after stating the facts.) 1. During a former trial of appellant for the offense, and after the jury had been impaneled and sworn and the testimony introduced, appellant and the prosecuting witness, Fannie Bruton, procured a license, and were duly married in open court, and the court thereupon suspended the trial, discharged the jury, and continued the case. In the last trial, in which the judgment of conviction was rendered from which he now appeals, he interposed a plea of former acquittal, and introduced in support of the plea the record of the former suspended trial.

Section 2044, Kirby's Digest, is as follows: "If any man against whom a prosecution has begun, either before a justice of the peace or by indictment by a grand jury, for the crime of seduction, shall marry the female alleged to have been seduced, such prosecution shall not then be terminated, but shall be suspended; provided, that if at any time thereafter the accused shall willfully, and without such cause as now constitutes a legal cause for divorce, desert and abandon such female, then at such time such prosecution shall be continued and proceed as though no marriage had taken place between such female and the accused."

Learned counsel for appellant contend that the above-quoted statute is unconstitutional, in that the suspension provided for serves to deprive the defendant under indictment of a speedy trial; and that, even if the statute is held to be valid, so as to suspend a prosecution at all, it does not apply after jeopardy has attached. They say that to apply it after jeopardy has attached would be to put the defendant in jeopardy twice for the same offense, which is forbidden by the Constitution. It is argued that if the statute is valid, the marriage of the defendant and the female alleged to have been seduced would *ipso facto* deprive the court of jurisdiction to proceed further, even though the marriage was without reference to the prosecution, and the defendant was demanding a speedy trial, notwithstanding the marriage. We are not confronted with such a state of facts here. The statute can be held to be void in so far as it

denies an accused person a speedy trial where he demands it, notwithstanding the marriage, and yet be held valid and enforcible in a case where no demand for trial is made.

In *Stewart* v. *State,* 13 Ark. 720, this court quoted, with approval, the following language of the Supreme Court of Mississippi in the case of *Nixon* v. *State,* 2 S. & M. 507: "By a speedy trial is there intended a trial conducted according to fixed rules, regulations and proceedings of law, free from vexatious, capricious and oppressive delays manufactured by the ministers of justice." And this court in the same case said: "We think the spirit of the law is that, for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on record in the attitude of demanding a trial, or at least of resisting postponements." The statute in question, providing for a suspension of the prosecution upon the intermarriage of the parties, was designed for the benefit alike of the person accused of the offense and of society; and, as a protection to society against an insincere show of repentance on the part of the accused, it further provides that if he shall thereafter willfully desert the female whom he has, by the marriage, rescued from the disgrace brought upon her by his criminal act, the prosecution may be renewed. He is not bound to marry the female, nor to invoke the benefit of the statute, if he does so before the termination of the prosecution; but if he does so, he cannot thereafter complain because of a suspension of the prosecution on that account when he has never demanded a speedier conclusion of it.

Nor can it be said that the suspension of the trial before verdict on account of the marriage and subsequent trial anew after the desertion is putting the accused twice in jeopardy of his liberty. If the trial be suspended by the act of the accused himself, or for his benefit, or at his own request, no jeopardy has attached by reason of that trial. Mr. Bishop, in speaking of this constitutional guaranty, says: "This guaranty of immunity from a second prosecution is, in its nature, a restraint on the courts, not on the party. It would be absurd to promise a man protection from his own act, but reasonable to make the like promise as to the act of another." 1 Bishop, Crim. Law. § 1043.

In *Atkins* v. *State,* 16 Ark. 568, Chief Justice English, speaking for the court, said: "Lord Coke seems to have been of the

opinion that a jury charged in a capital case could not be discharged without giving a verdict, even though with the consent of the prisoner and Attorney General. 1 Inst. 227*b*; 3 Inst. 110. But the doctrine was fully discussed in the case of the *Kinlochs*, Foster, 16, and the law settled to be that where the jury is discharged by the consent and for the benefit of the prisoner, he cannot avail himself of such discharge as ground to be released from further prosecution."

This court held in *Whitmore* v. *State*, 43 Ark. 271, that jeopardy attached from the time that the jury was impaneled and sworn, and that the discharge of a juror without the consent of the accused, except for death or illness of a juror or other overruling necessity, operates as an acquittal; but the court said that, "while there is no right of challenge for cause after the jury is sworn, the court might, upon the demand of the prisoner, have stopped the trial and called another jury, without its having the legal effect of an acquittal." Citing *Stewart* v. *State*, 15 Ohio St. 155. And the court further said that "if the jury is discharged without an obvious necessity, and without the defendant's consent, express or implied, he cannot be again placed upon trial for the same offense." The effect of the statute is to provide grounds for suspension of the trial at any time before verdict, and there is no jeopardy unless the suspension be ordered without the consent of the accused, either express or implied.

The special plea of former acquittal was properly overruled.

2. In the hearing of appellant's plea of former acquittal, the State was permitted, over his objection, to prove by oral testimony that he had in the former trial consented to the suspension of the trial and discharge of the jury. This is assigned as error. The record of the former trial, which was introduced by appellant in support of his plea, recites that he and the prosecuting witness procured a marriage license, and were married in open court, the presiding judge performing the marriage ceremony, and "whereupon the jury in this case was by the court discharged, and this cause continued until next term." The record does not show that appellant objected to the suspension of the trial, and, the same being for his benefit, his consent will be implied. Hence, the record, standing alone, was insufficient to sustain the appellant's plea of former jeopardy, and it was unnecessary for

the State to prove by parol an express consent. The testimony was, therefore, immaterial and not prejudicial, as it did not tend to impeach or contradict the record.

3. It is contended by counsel that the court erred in its instruction as to the necessity for corroboration of the testimony of the female seduced, and in refusing to give the instruction on that subject asked by appellant. The court instructed the jury on this point as follows: "You are instructed that you cannot convict the defendant upon the uncorroborated testimony of the prosecuting witness, and the corroboration must be upon every material fact testified to by her necessary to constitute the offense charged; and if you find that her testimony is uncorroborated upon any material fact necessary to constitute the offense, you will acquit the defendant." We find no valid objection to this instruction. It is equivalent to an instruction that there must be corroboration as to the promise of marriage, its falsity, and that the defendant obtained carnal intercourse with the female by virtue of such false promise.

Other rulings of the court are assigned as error, all of which we have considered, but are not deemed of sufficient importance to discuss in this opinion. None of them are sufficient to warrant a reversal of the case.

The instructions of the court upon the whole correctly and fully declared the law applicable to the case. The evidence was sufficient to sustain the charge made against the defendant in the indictment. It shows that he falsely promised to marry the prosecuting witness, Fannie Bruton, and by virtue of that promise seduced her. She bore a child as the result of the illicit intercourse, and afterwards, during his trial for the offense, he married her, but soon afterwards commenced a course of conduct towards her which necessarily rendered the relations between them intolerable to her, and caused her to consent to a separation.

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

HILL, C. J., absent and not participating.

ACKERSON *v.* STATE.

Opinion delivered July 8, 1905.

CARRYING WEAPONS—INSTRUCTION—PREJUDICE.—One convicted of carrying a pistol cannot complain that the court erred in defining what constitutes a journey, within the statutory exception, if the undisputed testimony showed that he had returned from his journey, and stopped at the home of his mother-in-law, where he loitered an hour or more.

Appeal from Monroe Circuit Court.

GEORGE M. CHAPLINE, Judge.

Affirmed.

H. A. & J. R. Parker, for appellant.

Robert L. Rogers, Attorney General, for appellee.

McCULLOCH, J. This is an appeal from a judgment of conviction of carrying a pistol. Appellant admitted carrying the pistol at the time and place named, but set up a defense that he was on a journey at the time. He complains of the instructions given by the court defining what constitutes a journey, within the meaning of the exception in the statute. The undisputed testimony establishes the fact that appellant was armed with a pistol at the home of his mother-in-law in the immediate neighborhood of his own home. He was not then on a journey, if it be conceded that his peregrinations of the day constituted a journey, within the meaning of the statute. He had returned from his alleged journey, and stopped at the home of his mother-in-law, where he loitered an hour or more, drunk and disorderly. He cannot, under those circumstances, claim the benefit of the exception in the statute. *Holland* v. *State,* 73 Ark. 425. The essential facts constituting appellant's guilt of the offense charged being undisputed, no error in the instructions could have been prejudicial. Judgment affirmed.

Hill, C. J., absent and not participating.

76 302
f81 597

HOT SPRINGS STREET RAILWAY COMPANY v. BODEMAN.

Opinion delivered July 8, 1905.

1. PERSONAL INJURY SUIT—EVIDENCE—HABITUAL TRESPASS.—Where, in a suit against a street railway company for personal injuries received in alighting from defendant's car, the issue involved was whether the injury was caused by the negligence of defendant's servants, or was the result of plaintiff's own negligence, testimony tending to show that plaintiff had been in the habit of jumping on passing cars to steal rides was immaterial. (Page 303.)
2. WITNESS—IMPEACHMENT.—A witness cannot be impeached on immaterial collateral facts. (Page 303.)

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Affirmed.

E. W. Rector, for appellant.

Wood & Henderson, for appellee.

McCULLOCH, J. Appellee, a boy 9 years of age, by his next friend, brought this suit against appellant to recover damages for personal injuries received in alighting from appellant's street car. The testimony introduced on the part of the appellee tended to establish the fact that he and his brother were passengers on the street car, and gave a signal to the motorman to stop the car at a regular stopping place; that the car was brought to a stop, but appellee was delayed in getting off by other passengers ahead, and, before he could alight, the motorman started the car; that as soon as the car started he told the motorman that he wanted to get off, and the motorman told him that he would have to jump off, which he did, and was thrown down and hurt.

The testimony introduced by appellant tended to show that appellee alighted from the car when it stopped, but undertook to jump on the rear end of the car as it passed, to steal a ride, and that while so doing he was thrown down and hurt. The motorman testified that he did not tell the boy to jump, that he had no recollection of seeing either of the boys on the car during that trip, and did not know of the accident until he had reached the end of his run and returned. The jury accepted the version offered by appellee, and returned a verdict in his favor.

Appellee and his brother were asked by appellant's counsel whether or not they were in the habit of jumping on passing cars to steal rides, to which they both answered in the negative, and appellant then offered testimony to contradict them, showing that they were in the habit of jumping on cars, and that the brother had done so on the day of the accident, and was driven from a car by the manager. The court refused to permit the introduction of this testimony, and error is assigned in that particular. This testimony was properly excluded, as the issue involved in the trial was as to whether the injury was caused by negligence of appellant's servants, or was the result of the plaintiff's own negligence. The testimony was sharply in conflict on this question, and the habit of appellee in jumping on cars upon other occasions had no legitimate bearing on this issue. Appellee and his brother could not, as witnesses, be contradicted on immaterial collateral matters.

No error is found in the instructions of the court, the evidence is sufficient to sustain the verdict, and the judgment is affirmed.

HILL, C. J., absent and not participating.

76	303
81	538
f81	545
81	546
81	547
81	549
82	316

76	303
f85	282

HARTFORD FIRE INSURANCE COMPANY v. STATE.

Opinion delivered July 15, 1905.

1. ANTI-TRUST ACT—FOREIGN INSURANCE COMPANY—RIGHT TO DO BUSINESS IN STATE.—The act of January 23, 1905, provides, *inter alia,* that any corporation which shall enter into or become a member of or party to any pool, trust, agreement, combination, confederation or understanding, whether made in this State or elsewhere, with any other corporation, partnership or individual to regulate or fix in this State or elsewhere the premium to be paid for fire insurance shall be guilty of a conspiracy to defraud, and be subject to the penalties provided by the act. *Held,* that the act prohibits a foreign insurance corporation from doing business in Arkansas while a member of a pool, trust, or combination to fix fire insurance rates anywhere,

although such pool, trust, or combination is not created or maintained in Arkansas, and does not attempt to fix rates in this State. (Page 305.)

2. FOREIGN INSURANCE COMPANIES—RIGHT OF STATE TO EXCLUDE.—The Legislature may constitutionally enact that foreign insurance corporations shall not do business within the State if they are members of any pool, trust, or combination, entered into in this State or elsewhere, to affect insurance rates anywhere in the world. (Page 307.)

Appeal from Pulaski Circuit Court, Second Division.

EDWARD W. WINFIELD, Judge.

Affirmed.

The State brought this action against the Hartford Fire Insurance Company, and alleged that defendant was an insurance corporation organized under the laws of Connecticut, and on January 23, 1905, and on March 25, 1905, transacting and conducting the business of insuring property in this State, and was a member of and party to a pool, trust, agreement, combination, confederation and understanding with other insurance corporations to regulate and fix the price and premium to be paid for insuring property against loss and damage by fire, lightning and tornadoes; that on the 27th day of March, 1905, while a member of and party to such pool, etc., defendant conducted in Pulaski County, in this State, the business of insuring property against loss and damage by fire, lightning and tornado, and while then and there transacting and conducting such business was, on the 27th day of March, 1905, a member of, and party to, such pool, etc., contrary to the statute; wherefore judgment was prayed that defendant's right to do business in the State be forfeited, and that plaintiff recover the sum of $5,000.

Defendant filed a motion to require the plaintiff to make the complaint more specific, in this,

"First, that the complaint should allege whether the defendant was a member of and party to such pool, trust, agreement, etc., in this State or without the limits of the State.

"Second, that the complaint should allege whether the being a member of, and a party to, such pool, trust, agreement, etc., was to fix and regulate the price and premium to be paid for insuring property in this State or without the limits of the State.

"Third, that the complaint should allege specifically as to which one of the several combinations mentioned the defendant belonged."

The motion was overruled, and defendant answered, alleging that it is not, and was not, a member of, or party to, any pool, etc., made and entered into in this State, to regulate or fix the price or premium to be paid for insuring property anywhere, and that it was not on the dates mentioned in the complaint nor at any time since the passage of the act a member of, or party to, any pool, etc., made and entered into in the State or elsewhere to fix or regulate the price or premium to be paid for insuring property in this State against loss or damage by fire, lightning or tornadoes, or which in any manner affected or affects the price or premium to be paid for insuring property within the State.

It was agreed between the parties that, in the event defendant's answer herein should be held or adjudged insufficient as a defense to plaintiff's action, judgment shall at once be rendered in the circuit court in plaintiff's favor against defendant for recovery of a penalty of $200 and costs, and that if said judgment is not reversed by the Supreme Court of Arkansas, the penalty and costs, including costs in said Supreme Court, should be paid by defendant upon the determination of said cause in said Supreme Court of Arkansas, and that defendant was to take no appeal from the Supreme Court of Arkansas in this cause.

A demurrer to the answer was sustained, and defendant appealed.

J. W. & M. House, for appellant; *J. M. Moore & W. B. Smith, Morris M. Cohn* and *Ashley Cockrill,* of counsel.

Robert L. Rogers, Attorney General, for appellee; *W. L. Terry, W. M. Lewis* and *Lewis Rhoton,* of counsel.

HILL, C. J. On the 6th of March, 1899, the General Assembly passed an act, commonly called the "Rector Anti-Trust Act." It was construed by this court in *Lancashire Insurance Company* v. *State,* 66 Ark. 466, and is found in sections 1976-1982, Kirby's Digest.

On the 23d of January, 1905, an act repealing this act and "providing for the punishment of pools, trusts and conspiracies to control prices, and as evidence and prosecution in such cases,"

was approved. This is a prosecution instituted by the State under the latter act against the appellant, which is a foreign insurance corporation, for doing an insurance business in the State without complying with the provisions of said act of 1905. The Reporter will set forth the issues framed by the pleadings and the agreed statement of facts. The circuit court held the appellant liable to the penalty of the act, and gave judgment accordingly, and the appellant brings the case here, and it involves the construction of the act.

The defining and controlling part of the act is found in the first section thereof. The body of the first section is a copy of the first section of the Rector act, with certain words and phrases inserted therein. It is here given with the inserted words and phrases placed in brackets, so that the eye may detect the additions to the Rector act:

"Section 1. Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association or persons whatsoever, who [are now, or] shall [hereafter] create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, [whether the same is made in this State or elsewhere], with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix [either in this State or elsewhere] the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or tornado, or to maintain said price when so regulated, or fixed, [or who are now], or shall [hereafter] enter into, become a member of, or a party to any pool, agreement, contract, combination, association or confederation, [whether made in this State or elsewhere], to fix or limit, [in this State or elsewhere,] the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partner-

ship, individual or association of persons aforesaid, shall be deemed and adjudged guilty of conspiracy to defraud and be subject to the penalties as provided by this act."

Other sections are added to the act not contained in the Rector act, but all of the sections of the Rector act are retained, the only changes in them being that clauses are inserted where necessary to make the other parts conform to the first section. These new sections throw no light on the construction, and are not involved in this case.

These are the questions involved:

1. Does the act prohibit, under the penalty named therein, a foreign insurance corporation from doing business in Arkansas while such corporation is a member of a pool, trust or combination to fix insurance rates anywhere, although such pool, trust or combination is not created or maintained in Arkansas, and does not affect or fix, or attempt to do so, rates of insurance in Arkansas? To state the proposition by illustration: Assume that the appellant is a member of a trust—called a rating bureau—created and maintained in New York City to fix insurance rates in New York City and St. Petersburg, but which does not fix or affect rates in Arkansas, is it guilty of a violation of the act if it transacts an insurance business in Arkansas upon complying with all the statutes of this State except the one at bar?

2. If the act reaches to and makes unlawful the transaction of an insurance business in Arkansas by a foreign insurance corporation while belonging to a trust, pool or combination to fix or affect rates in other places than Arkansas, but not in Arkansas, is the act constitutional, and is it within the power of the State to enact it?

1. The State contends for the affirmative of both propositions above stated, the appellant for the negative. The insurance company contends that the act renders unlawful the doing of business in this State by a foreign corporation while it belongs to a trust or pool made in this State or elsewhere to regulate or fix the rates of insurance on property in this State. It admits that it belongs to a trust, within the definition of the act, but says that such trust is created and maintained without the State to fix prices at places without the State, and that it does not belong to such trust created or maintained anywhere to fix or affect insur-

ance rates on property within this State. These different constructions have been pressed upon the court in strong and plausible oral arguments and in able and exhaustive briefs, and the court has laboriously and painstakingly examined, discussed and deliberated upon the arguments presented by counsel.

If the act itself was clearly and properly drawn, and free of obscurity and ambiguity, this case would not, in all probability, be here, or, if perchance it were, the work of the court would have been easily and speedily done, for it is elemental that the act itself furnishes its construction; or, rather, when it is plain there is nothing to construe. The law on that subject is thus stated: "The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from reading its provisions, and all its parts may be brought in harmony therewith, that intent will prevail, without resorting to other aids for construction." 2 Lewis' Sutherland on Stat. Con. § 348. Therefore the first duty of the court is to ascertain, if it can, from the act itself the intent of the law-makers, and when that is found then declare it; and the act is enforced as so declared, if otherwise valid.

The first matter to attract attention is the connection in which the words "in this State or elsewhere" are inserted into the body of the Rector act. The first connection is descriptive of "the pool, trust, agreement, combination, confederation or understanding" (hereafter for brevity's sake this clause will be called a "trust"), "whether made in this State or elsewhere." The second connection is with the persons confederating to regulate or fix, "either in this State or elsewhere," prices, etc. The third connection is with the trust, "whether made in this State or elsewhere," "to fix or limit in this State or elsewhere" the amount or quantity of production, the rates or premiums of insurance, etc. These terms should qualify the clauses to which they are annexed grammatically and in fact, if possible. When so considered, they indicate that they refer to the trust made in this State or elsewhere to regulate prices, either in this State or elsewhere, or to become a member of a trust to fix or limit production (or prices) in this State or elsewhere, and not merely doing business in this State under a trust agreement created in this State or elsewhere to fix prices in this State.

To construe the act as making unlawful alone the doing of business in this State while a member of a trust fixing prices in this State, though the trust might be made elsewhere to fix prices here, would be rendering unnecessary and meaningless these words "in this State or elsewhere," so often used, for the Rector act was construed to be just such an act as this would then be. The natural construction is to make the doing of business in this State while a member of a trust formed anywhere to regulate prices anywhere unlawful. This gives full force to each word and phrase employed, eliminates none, and creates nothing by implication or construction, but gives force and effect to each and every part of the section, and that is a primary duty in construction. 2 Lewis' Sutherland, Stat. Const. § § 368, 369. While the foregoing seems the natural construction of the act, yet the plausibility and force with which the other has been pressed, and the fact that members of this court see in it yet another construction, calls for hesitation and doubt as to the true construction to be placed upon it from the language alone. In such cases it is the duty of the court to turn to the "history of the times" to collect the intention of the Legislature from the occasion or necessity of the law; "from the mischief felt, and objects and remedy in view."

To ascertain the legislative intention, the courts must look to public events which are sufficiently notorious to be known to all men of reasonable information; to public documents, executive messages, proclamations and recommendations; to legislative proceedings and journals, but not to individual views, votes or speeches of legislators; to the result of elections and political issues therein determined; to a well-defined and crystallized public sentiment, when so notorious as to be part of the well-known events of the day. In short, the courts may, and, when the statute is not clear, must, take cognizance of the trend of public events which make the "history of the times," in so far as the same touches or furnishes the moving cause for the statute under review. These principles are well established. 2 Lewis' Sutherland on Stat. Con. § § 462, 470, 471; 1 Elliott, Evidence, § § 53, 59, 65, 67; *U. S.* v. *Union Pac. Ry. Co.* 91 U. S. 72; *U. S.* v. *Trans-Missouri Freight Assn.* 166 U. S. 290; *Redell v. Moores,* 63 Neb. 219; *State* v. *Schoonover,* 135 Ind. 526; *State* v. *Downs,*

148 Ind. 324; *Stout* v. *LaFollette,* 64 Ind. 553; *Prince* v. *Skillin,* 71 Me. 361, 36 Am. Rep. 325; *Swinnerton* v. *Columbian Ins. Co.* 37 N. Y. 188.

Turning then, under the requirement of the law, to the "history of the times," derived from the sources mentioned, these facts throw light on the act:

When the Rector act was before the court in *Lancashire Ins. Co.* v. *State,* 66 Ark. 466, the court thus stated the contentions of the respective parties: "The Attorney-General contends that no insurance company, while a member of a trust or combination to fix rates in any part of the world, can do business here, without becoming liable to a penalty under our statute. The defendant, on the other hand, denies that the language of the statute in question carries the meaning contended for by the Attorney-General, and the question before us has reference, not to the power of the Legislature, for that is conceded—but to the proper construction and meaning of the statute." The court then fully discussed the contentions and the act, and reached this conclusion: "Our conclusion is that this statute does not apply to pools or combinations formed outside of this State, and not intended to affect, and which do not affect, persons, property, or prices of insurance in this State. In other words, we are of the opinion that the Legislature by this act did not intend to prohibit or punish acts done or agreements made in foreign countries by corporations doing business here when such acts or agreements have reference only to persons, property or prices in such foreign countries."

When the court failed to construe the Rector act as contended for by the Attorney-General, he dismissed all prosecutions which had been instituted under it, and the act has since then been but an incumbrance on the statute book. The next General Assembly following this decision, that of 1901, had before it a bill called the "King bill," which was generally supposed to embody into law the views pressed upon the court by the State in the Lancashire case. This bill was defeated in 1901, and again in 1903. In 1904 the dominant political party in this State, through its party platform, demanded of the next General Assembly the passage of the King Bill, and of the purpose of said bill said:"

"Whereby all foreign corporations shall be prevented from doing business in this State if they are members of any trust, pool,

combination or conspiracy against trade, whether such trust, pool, combination or conspiracy affects, or is intended to affect, prices or rates in Arkansas or not." The General Assembly elected in 1904, composed almost entirely of members of the political party whose platform is quoted, with remarkable unanimity and rapidity, passed the King bill, which had been rejected by the two preceding General Assemblies, and in less than a fortnight of its organization it was approved, and it is the statute now at bar. Reaching back to the construction sought by the State in the Lancashire case, an act is now before the court supposed to embody that theory, demanded by the dominant party as containing it, and speedily passed by the General Assembly elected on the platform demanding it. These facts render the conclusion irresistible that the General Assembly intended to render unlawful the doing of business in this State by any corporation when such corporation belonged to any trust to fix prices anywhere, when it passed this act. Whether the moving cause for this demand was wise or foolish, whether the act will promote the general welfare or bring wreck and disaster in its enforcement, are questions with which the courts cannot deal. These questions are addressed to the other departments of the government; and when the intention of the law-makers is discovered, either in the language employed or from the language aided by a search into the intention from the history of events, the duty of the court is plain. When this history is considered in connection with the language used in the act, then the ambiguity, uncertainty and obscurity resulting from the confused terms of the statute are cleared away, and the construction heretofore indicated made certain to be the construction intended, and such construction is conformable to the language employed, and not in violence to any part of it. It being plain that the General Assembly intended by this act to subject to the penalty of it any foreign corporation doing business in this State while a member of a trust formed to fix prices anywhere, it remains to consider the constitutionality of it.

2. In *Lancashire Ins. Co.* v. *State,* 66 Ark. 466, the court, in construing the Rector act, said: "As the Legislature has the power to entirely exclude foreign insurance companies from doing business in this State, it can, of course, dictate the terms upon which such companies may do business here. The whole

matter rests in the discretion of the Legislature." This act requires every corporation doing business in this State to annually make affidavit that it does not belong to any trust described in the first section of it to fix prices in this State or elsewhere; provides for prosecutions against them for a failure to make such affidavit and for the right to do business to be forfeited; and in other ways clearly indicates that it shall be unlawful to do business in this State while belonging to a trust to fix prices anywhere. It gave sixty days to corporations then doing business to come within its terms, and thereafter it was unlawful to transact any business in the State while maintaining a membership in a trust anywhere to fix prices anywhere. In the language of the Lancashire case, the State has dictated these terms upon which foreign insurance companies can do business in this State. Limiting the decision entirely to the facts before the court, it is held that the State has declared, and possesses the right to declare, that foreign insurance corporations cannot do business in this State while belonging to a pool, trust, combination, conspiracy or confederation to fix or affect insurance rates anywhere.

The judgment is affirmed.

BATTLE, J., (dissenting.) I do not agree with the court as to the construction of the act in question.

The title of the act is "An act providing for the punishment of pools, trusts and conspiracies to control prices, and as evidence and prosecution in such cases." If the act is ambiguous, it (the title) can be considered for the purpose of construing it. Cooley's Constitutional Limitations (7 Ed.), 202.

The first part of section 1 of the act enumerates those to whom it applies as follows: "Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual or other association or other persons whatsoever."

The remainder of the section specifies the acts it makes a crime, and is as follows: "Who are now, or shall hereafter create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State or elsewhere, with any other corpo-

ration, partnership, individual, or any other person or association of persons, to regulate or fix, either in this State or elsewhere, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or tornado, or to maintain said price when so regulated or fixed, or who are now or shall hereafter enter into, become a member of, or a party to any pool, agreement, contract, combination, association or confederation, whether made in this State or elsewhere, to fix or limit, in this State or elsewhere, the amount or quantity of any article of manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by any corporation, partnership, individual or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties as provided by this act." The acts made penal consist *solely* of the creating, entering into, becoming a member of, or a party to any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State or elsewhere, with any other corporation or association of persons, to regulate or fix, either in this State or elsewhere, prices of articles and things and premiums for insurance. It is insisted that doing business in this State after the formation of such pools, trusts and combinations is made necessary to constitute the offense. The name given to the offense indicates that this is not true. It is called a conspiracy to defraud. Again, the words *transacting or conducting business,* used in this section of the act, are not used in connection with, and do not apply to, partnerships, individuals, associations or persons, any more than the words "organized under the laws of this or any other State or country," used in the same connection, and are obviously not elements of the offense when committed by those classes. To make the transacting or doing business necessary to constitute the offense when committed by a corporation, and unnecessary when committed by individuals, partnerships and associations, would make it necessary to place upon the same words two different constructions,—

a construction which would make the act unreasonable and absurd. The Legislature certainly did not intend that the ingredients of the crime should be different when committed by individuals, partnerships, and associations and when committed by corporations. Why should the transacting or conducting of business be treated as a part of the offense or conspiracy in one case and not in the other? There is no reason, and there is nothing in the act, as I understand it, to indicate that such was intended; and it cannot be made to do so without transposing the words "transacting or conducting any kind of business in this State" to another part of the section and adding other words—something that cannot lawfully be done by the courts. Those words, "transacting or conducting any kind of business in this State," like the words, "organized under the laws of this or any other State or country," used in the same connection, are *descriptio personae,* and the former are used to confine the operation of the act to such corporations as are going, "and not defunct, dead concerns, out of business, and, for all practical purposes, out of existence."

Sections two and three of the act make the offense defined in the first section punishable by a fine of not less than $200 nor more than $5,000 for each day the offense is continued, and, if the offender be a foreign corporation, by the forfeiture of its right and privilege thereafter to do any business in this State. The effect of the act, if valid, is to make certain acts done outside of this State penal offenses, punishable by fine and forfeiture, which is beyond the power of the Legislature. To that extent, at least, the act is void, and of no effect.

The judgment of the circuit court, I think, should be reversed, and the demurrer to the appellant's answer should be overruled.

WOOD, J., (dissenting.) Nowhere in this act has the Legislature made the mere innocent act of doing business in this State, without reference to prices fixed by a trust, a crime. They have not made it unlawful for foreign corporations, who are in a trust here or elsewhere, to do business in this State, provided such business has no connection with a trust or trust prices. They have nowhere prohibited such innocent acts of doing business. Until this is done, it is palpably wrong for the court to invoke the aid of the "history of the times" or the mandates of political plat-

forms or executive messages, or any other extraneous matters, to ascertain the intent of the Legislature. No rules of construction are better settled than that crimes will not be created by intendment or implication, and that penal statutes must be strictly construed. As early as the Sixth Arkansas this court said: "It is a rule never to be departed from that criminal statutes must be strictly construed. The rule is founded alike upon policy as well as humanity, designed for the protection of the citizen; unless he is clearly charged and proved guilty of a *positive* enactment of law," he cannot be punished. *Hughes* v. *State,* 6 Ark. 134.

In *Stout* v. *State,* 43 Ark. 415, this language was used: "Penal statutes in declaring what acts shall constitute an offense, and in prescribing punishment to be inflicted, are to be construed rigorously. The general words shall be restrained for the benefit of him against whom the penalty is inflicted. The case of an offender must fall within the words and the mischief to be remedied." In *Casey* v. *State,* 53 Ark. 336, Chief Justice COCKRILL said: "No case should be brought within a penal statute unless completely within its words, and every reasonable doubt about the meaning of the language should be resolved in favor of the accused."

In *State* v. *Lancashire Ins. Co.,* 66 Ark. 466, Judge RIDDICK said: "To determine the meaning of a statute, the courts must look mainly to the language of the act itself, for that is the final expression of the legislative will, and therein must such will and intention be sought. Whatever the Legislature may have intended, such intention can have no effect unless expressed in the statute; for this, being a penal statute, cannot be extended by implication. It would be in the highest degree unjust to punish conduct not clearly forbidden by the law itself, and, to quote the words of a recent opinion of the Supreme Court of the United States: "We are left to determine the meaning of this act as we determine the meaning of other acts from the language used therein." *United States* v. *Trans-Mississippi Freight Assn.,* 166 U. S. 318. Again this court, through the same learned judge, in *Little Rock & F. S. Ry. Co.* v. *Oppenheimer,* 64 Ark. 271, 289, speaking of a penal statute, said: "It shows that the language of the statute does not plainly express what appellees say it means. But this is a penal statute, and cannot be extended by implica-

tion. * * * The statute should not, of course, be defeated by a forced or overstrict construction; but the intention of the Legislature must be gathered from the words, and they must be such as to leave no reasonable doubt upon the subject." *Berry* v. *Ry. Co.* 41 Ark. 517; *Watkins* v. *Griffith,* 59 Ark. 344-356; *Basham* v. *Toors,* 51 Ark. 309-315; *Little Rock, H. S. & T. Ry. Co.* v. *Spencer,* 65 Ark. 183. These excerpts, out of many to be found in our reports from the first to the last, of same purport, show how tenaciously this court has adhered to these fundamental rules of construction. Indeed, so important are they in conserving personal liberty and the rights of property they have always been considered as inviolable as the Constitution itself.

To the everlasting credit of this high tribunal, not a single case can be found, so far as I am aware, where these rules have ever been departed from. Why should we ignore them now? In the opinion of the majority, after reciting that the dominant political party in this State in its platform had demanded the passage of the King bill, and after quoting what the convention construed to be the purpose of the bill, Chief Justice HILL continues as follows: "The General Assembly elected in 1904, composed almost entirely of members of the political party whose platform is quoted, with remarkable unanimity and rapidity, passed the King bill, which had been rejected by the two preceding General Assemblies, and in less than a fortnight of its organization it was approved, and it is the statute now at bar. Reaching back to the construction sought by the State in the Lancashire case, an act is now before the court supposed to embody that theory, demanded by the dominant party as containing it, and speedily passed by the General Assembly elected on the platform demanding it; these facts render the conclusion irresistible that the General Assembly intended to render unlawful the doing of business in this State by any corporation when such corporation belonged to any trust to fix prices anywhere, when it passed this act."

In view of what I have already said, I submit that no consideration whatever should be given to the demands of a partisan organization in arriving at the proper meaning of this act, especially when the Democratic convention approved the King bill exactly in the words as written to carry out its expressed purpose. To follow such a recommendation as that would be for this court

to yield the authority vested in it by the Constitution and the laws to the behests of a political convention.

But, if matters extraneous to the language of the act itself must be looked to, then I protest that it would be more in keeping with the dignity, authority and independence of this court, and less derogatory to the Legislature, to say that, having the decision of this court before them construing the former law, they were guided and controlled by the principles and rules therein announced, rather than by the demands of any party platform, or any executive message. For, if not, we must impeach them either of imbecility of mind or worse. If, as the majority intimates, this legislation, in the unconstitutional and therefore vicious form upheld by this court, is in response to the demands of the dominant political party in this State, as evidenced by the "remarkable unanimity and rapidity" with which it was passed by the Legislature "elected on the platform demanding it," then I feel constrained to say that this is all the greater reason why this court should observe those time-honored rules of construction which have been formulated by the ministers of justice through all ages, and are found to be wise and useful canons at all times for the preservation of the sacred rights of personal liberty and property, and especially useful in times of great political excitement and craze in saving the people themselves from the evil result of their own ignorance or folly, and ofttimes from the wicked designs of selfish and unscrupulous politicians.

Attributing then to the Legislature only a desire to observe these well-known rules of construction, which were announced by this court in passing upon the Rector law in the decision which they had before them, and only a desire to conform their last enactment to the Constitution, as they were sworn to do, I shall proceed from that viewpoint to discuss the construction that should be given the present anti-trust law upon the case presented by this record.

First. *As to the meaning of the words "and transacting or conducting any kind of business in this State."* The issue as to the meaning of these words is precisely the same as it was in the case of *State* v. *Lancashire Ins. Co., supra.* The words themselves are the same, used in the same connection, and the added

words, in other connections, in no manner change the sense in which these are used.

That this is true is shown by the pleadings in the two cases, and the contention of counsel for the State in each case. In the case of the *State* v. *Lancashire Ins. Co.*, counsel for the State, in presenting the issue as to the proper meaning of these words, "and transacting or conducting any kind of business in this State," said: "The conjoint act of being a member of a pool or trust and the doing of business in Arkansas constitutes the gist of the offense. One cannot be separated from the other. But it is when the conjoint act is consummated by the appellees that the sting of the law attaches, and they are prohibited from coming into our borders for the purpose of carrying on their nefarious business." And again: "The matter upon which the sting of the law is placed consists in the two concurring elements: (1) Participating in an agreement to regulate or fix prices or rates; and (2) at the same time, or in reference thereto, doing business in the State." (Brief of Attorney General in former cases.)

In the present case counsel for the State say: "What reason can there be for holding that the act makes either membership in a pool alone, or doing business in itself, the gravamen or gist of the offense? Is it not a sensible and reasonable construction of the act that it takes both to constitute the offense?" We thus quote from the briefs of counsel to show that counsel in both cases understood and contended that the doing of business as set forth by the words "and transacting or conducting any kind of business in this State," as used in the statute, prescribed an essential element in the offense.

In answer to the contention of counsel on this issue in the Lancashire case, I said: "The proposition, when analyzed, is exceedingly simple. The Legislature has no extra-territorial power to punish crime. The crime specified in this act is the "entering into, becoming a member of, or a party to, any pool, etc., to fix or limit the prices or premiums to be paid for insuring property against loss or damage by fire," etc. If a foreign corporation, doing business in this State, enter into, or become a member of, this pool or trust beyond the limits of the State, then the crime is clearly committed beyond the limits of the State, unless the pool or trust is to fix the premiums for insuring property in Ar-

kansas, in which event the crime put in motion in the foreign State takes effect and becomes complete in Arkansas. Just as in the cases cited by the Attorney-General, where a man in one State throws a stone, or shoots a gun across the line, and kills a man in another State, or forms a conspiracy in one State to burn or destroy property in another State, the crime in such cases becomes complete where the person is killed or where the property is dstroyed. But where the foreign corporation enters into, and becomes a member of, a pool or trust in a foreign State which does not purport to, and does not in any manner, affect the property of the people of the State, of course no crime is committed in this State.

"The Legislature certainly did not intend to make a crime, and punish the mere act of doing business in this State by a foreign insurance company, although a member of a pool or trust, whether in or out of the State; for the very gravamen of the crime is *entering a pool or trust to fix the price or premium* to be paid for insuring property, etc. Now, suppose the member of the pool or trust in the foreign State proposed to do business, and did business in Arkansas on a strictly competitive basis, which tended to cheapen and lower the rates of insurance to the people of this State, could any dispassionate lawyer say that the Legislature intended by this act to punish such a beneficial and commendable deed as that? Certainly not. The Legislature manifestly was intending to correct an evil existing which affects, or might affect, injuriously the people of the State. Now, the prohibiting of foreign corporations from doing business in this State on any terms and conditions that the Legislature may prescribe is one thing, and the punishing of them for any crime they may commit is another and entirely different thing. As to the former—the privilege to do business—the Legislature has the power to say: 'Foreign corporations, you cannot do business in this State, if you are a member of a pool or trust to fix or limit prices anywhere in the wide world.' As to the latter—the entering of a pool or trust, the crime—they could say: 'You will be punished with the severe penalties denounced by this act, if you are a member of a pool or trust to fix the price or premium upon property in Arkansas.'

"As the Legislature had no power to punish foreign corporations for becoming members of a pool or trust outside of the

State, which did not propose to affect prices in the State, and as it did have full power to punish them for entering pools or trusts to affect prices or premiums in Arkansas, and also to forfeit their right to do business in this State, is it not conclusive that they intended by the words 'any pool or trust' to mean any pool or trust to fix the price or premium on property in this State? We must not convict the Legislature of doing or attempting to do a vain and idle thing. Had the Legislature intended to exclude foreign corporations that were members of a pool or trust anywhere in the world to fix prices anywhere outside of this State, how easy it would have been to have made it unlawful for such corporations to do business in this State, and to have provided sufficient penalties for the violation of such law to secure its enforcement. But no such thing as that was provided in the act under consideration. The purpose of the Legislature is doubtless correctly reflected in the title: 'An act providing for the punishment of pools, trusts and conspiracies to control prices, etc.' The fact that the Legislature embraced the other persons named in the act along with foreign corporations shows that it intended that these corporations might be considered as violating the law in the same way as any 'partnership or individual or any other association or persons whatsoever' might do. It is an egregious mistake to suppose that a foreign corporation is guilty of an offense for merely doing business in this State, or to consider the act of doing business as an element of the offense under this law. It would be no more an offense for them to do business than for domestic corporations or individuals to do business. Foreign corporations are expressly authorized to do business. The doing of business by them is not an ingredient of the offense at all. The words, 'and transacting or conducting any kind of business in this State,' applied to them, are used in the sense merely of *descriptio personarum*. They merely indicate that these corporations are within the legislative jurisdiction because of the fact of their doing business in this State. There are no separate acts conjoined, as the Attorney-General supposes and argues, but the one act. The proof which would establish the crime would also establish the forfeiture of the right to do business in the State. The Legislature could both forfeit the right of the insurance company to do business and punish for the crime

of entering a pool or trust to fix the price or premium, if the act was done, or became complete or effectual, in Arkansas, but it could not punish for the crime unless it did. Therefore the fact that the Legislature has included individuals and domestic corporations, and has prescribed, as a result of the violation of this act, both a penalty for the crime committed and a forfeiture of the right to do business, shows conclusively that, as to foreign corporations, it could only have intended to reach such of these corporatins as were in a pool or trust in this State, or in a foreign State, to regulate prices in this State."

The Legislature, having adopted these words, must be held to have adopted them with the construction that was placed upon them by the judges of this court, and as to the proper construction to be given these words there was no difference of opinion among the judges of the court as then constituted. It will not do now to say this question was then not presented, and that what I then said was *obiter dicta.* For that is not true, as shown by the pleadings and the contention of respective counsel in the case. As the Legislature has not indicated by anything they have said in the present act that they intended that the meaning of these words should be different from what we held them to mean in the Rector law, I do not feel called upon to change my views. I concur fully with Judge BATTLE as to the meaning of these words. Suppose we had a law saying: "Any Attorney-General, Governor or Secretary of State, living in Little Rock, and transacting and conducting any kind of business in the west wing of the Capitol, who shall enter or become a member of any trust in this State or elsewhere to fix prices, etc., in this State or elsewhere, etc., shall be deemed and adjudged guilty of a conspiracy to defraud." Could any one say that the words "living in Little Rock, and transacting or conducting any kind of business in the west wing of the Capitol" were elements of the offense? Certainly not. Yet there would be just as much reason and sense in saying that these words were elements of the offense in the case supposed, as to say that the words "and transacting or conducting any kind of business in this State" are elements of the offense in the present law.

Second. As to the proper meaning of the first section, it will be observed that the words "in this State or elsewhere," are

added after the word "made," referring to the trust agreement, and that the words "either in this State or elsewhere" are also added after the words "to regulate or fix," etc., and the words "to fix or limit," etc. Taking the words in the connection used, and giving to each word its grammatical construction and natural meaning, the construction would be that the words "in this State or elsewhere," where they first occur, after the verb *made,* constitute an adverbial phrase, and modify that verb; making the language refer to a "pool, trust," etc., *made anywhere,* and that the words, "in this State or elsewhere," after the verbs to "regulate or fix" and "to fix and limit," likewise constitute an adverbial phrase qualifying these verbs. So that the meaning of this section is, that if any domestic corporation which is a going concern in this State, or any foreign corporation that is transacting or conducting any kind of business here, or any of the other classes of persons named in the act, shall *enter into* any trust *anywhere in the world to fix prices,* and shall proceed to fix the prices or premiums anywhere in the world, or to limit or regulate anywhere in the world the quantity or amount of any article of property in this State, or to be used and which is used in this State, all such classes named in the act are then guilty of a *conspiracy to defraud,* as declared therein, and thereby subject to the penalties denounced against such in the second and third sections for a violation of the provisions of the act.

It will be noticed that the qualifying phrase, "in this State or elsewhere," is not used after the words "property" or "article or things." If this phrase had been used after these words, then it would have been an adjective phrase, qualifying the nouns "property" or "article" or "thing" anywhere in the world. But, as the Legislature has not said that the "property" or "article" or "thing" upon which the premium is paid or of which the quantity is limited or fixed may be elsewhere, we must presume that this was for the reason that they did not intend for the act to have an extra-territorial effect, which would have been beyond their jurisdiction. In *State* v. *Lancashire Ins. Co., supra,* Judge RIDDICK said: "Our conclusion is that this statute does not apply to pools or combinations formed outside of this State, and not intended to affect prices in this State. In other words, we are of the opinion, that the Legislature by this act did not intend to

prohibit or punish acts done or agreements made in foreign countries by corporations doing business here when such acts or agreements have reference only to persons or property or prices in such foreign countries." So it cannot be said that the court expressly decided that the Rector law was applicable to trusts formed outside of the State which were intended to affect persons, property or prices of insurance in this State.

Judge Martin, the learned circuit judge who decided the Lancashire case, and many eminent counsel held to the view, under the Rector law, that, according to the strict construction to be given criminal statutes, the trust agreement itself would have to be made in this State before the law was violated. Now, the Legislature, having taken up the whole subject of anti-trust legislation anew in the act of 1905, determined to make it plain that no matter where the trust was formed or the prices fixed, if such trust affected in any manner persons or property in this State, the crime was complete. Hence they added the words "in this State or elsewhere." The Rector law is expressly repealed. The first section of that law was substantially re-enacted with the slight additions to make clear the purpose which I have here indicated. The second, third, fourth, fifth and sixth sections of that law were re-enacted exactly as in the Rector law, but the fourth, fifth, sixth, eighth and ninth sections of the present law are not embraced in the Rector law at all, showing that the Legislature was intending to make an entirely new law upon the subject.

Third. The court treats the act as a criminal statute, and not as an act simply prescribing conditions upon which foreign corporations may do business in this State. When so treated, the construction given by the court, in my opinion, would render the whole of the first section unconstitutional. For a foreign corporation, having complied with our laws, and already doing business in this State, must be treated, under our Constitution and statutes, so far as the punishment for criminal offenses is concerned, exactly as domestic corporations or other persons are treated. Constitution. art. 12, § 11; Kirby's Digest, §§ 824, 828. And who would be so bold as to declare that it is within the power of the Legislature to punish individuals, or any member of any partnership, association or company, or even domestic corporations for the mere innocent act of doing business in this State,

because such persons might be interested in trusts elsewhere, to affect prices elsewhere, but which acts were perfectly lawful in the States where they were done? Could one of our domestic corporations, or one of our own citizens, or a citizen of another State who owned stock in a corporation or company in another State, which was in the insurance business, for instance, which corporation or company in another State was in a trust not forbidden by the law of the State—could such individual or domestic corporation be punished in this State under this law for selling shoes, groceries or dry goods, when such sales were without any reference whatever to the trust of which he was a member in other States? Clearly not, for such a monstrous doctrine would be contrary to art. 2, § 2, of the declaration of rights in our Constitution, securing to "all men" the "inalienable right" of "defending liberty" and "of acquiring, possessing and protecting property;" also section 17 of the same article, forbidding the passing of any law impairing the obligation of contracts. Upon this question Judge RIDDICK has well said; "Now, while the Legislature can dictate the terms under which corporations of other States may do business here, it does not have control of the citizen. If a merchant of Missouri, doing business also in this State, should enter into a pool or combination in Missouri to regulate prices there, but not intended to have effect in this State, our Legislature could not on that account prevent him from doing business here, or subject him to a penalty. So, if we adopt the construction contended for by the Attorney-General, we must assume, as to a portion of the statute, that the Legislature was attempting to do something it plainly had no right to do, and such portion must be treated as unconstitutional and void."

The Legislature certainly did not intend for the act to have the effect that it must have on other classes named in the statute, if the construction of the majority is correct as to foreign corporations. The Supreme Court of the United States says: "Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution. * * * Such construction shall be given to it as will render it free from constitutional objection. It ought never to be assumed that the law-making power of the government intended to usurp or as-

sume power prohibited to it." *Grenada County* v. *Bragden,* 112 U. S. 269.

This act does not seem to be framed as an exclusion statute, or as prescribing the conditions upon which foreign corporations might be permitted to do business in this State. If the first section had been presented in that light, without any reference to penalties for some crime committed, then, taken in connection with the third section forfeiting the right to do business, I would have had more doubt as to its invalidity. Presented as a criminal statute to punish a foreign corporation for some act done beyond the borders of the State, and which in no manner affects persons or property in the State, I have no doubt whatever of its unconstitutionality. No statute should be given an extra-territorial effect if it can be avoided. Black, Int. Laws, pp. 91 *et seq.*; Endlich, Con. and Int. Stat. §§ 169, 170, 335; Bishop, Stat. Crimes, §141, and many authorities cited.

Treated as a criminal statute, the Supreme Courts of Texas and Missouri have already declared § 7 unconstitutional.

But I have already extended this opinion farther than I intended. As I construe the law, it might have subserved a useful purpose in giving the people some relief from those unlawful combinations in restraint of trade called trusts, which, when intended to suppress competition in prices and thus oppress the people, are wicked and harmful in the extreme. The law should severely denounce and punish these to the extent of driving them from our State, if possible.

But the law, as construed by the majority, will not have that effect. On the contrary, it will rather tend to build up and foster the most gigantic and oppressive of the trusts, by preventing free competition, the very thing which wise anti-trust laws are enacted to encourage. As construed by the court, it will undoubtedly drive nearly all the old line insurance companies from the State, but that will have the effect of raising, instead of lowering, the price of insurance; and, if enforced in other respects, will open up a veritable Pandora's box of ills to the commercial and business interests of the State, which will hurt thousands and help none.

For these reasons, I do not believe the Legislature intended the act to have the effect which the majority of the court con-

strue it to have; and if they did so intend, they have wholly failed to express such intent in the language of the act. That the Legislature knew how to make an act unlawful when they intended it to be so is shown in sections four, five and six, where they expressly make the *doing of certain things named therein unlawful.* But they use no such language with reference to the *"transacting or conducting of business"* in the first section, or anywhere else, which this court now supplies to make a crime out of what has always been considered not only as innocent but helpful to all, to-wit, the doing of business, not under a trust, but in free competition with all. I submit, with due respect to my associates, that they are wrong, and this wrong, having received the final sanction of this tribunal, the last refuge of the litigant for right and justice, can never be corrected.

THOMPSON v. BAXTER.

76 326
f 84 596

Opinion delivered July 22, 1905.

1. APPEAL—ERROR NOT AFFECTING APPELLANT.—Appellant cannot complain of an error which affects alone another party who has not appealed. (Page 327.)
2. SAME—REVIEW OF CONFLICTING EVIDENCE.—A finding of the jury upon conflicting evidence will not be disturbed on appeal. (Page 327.)
3. TENDER—SUFFICIENCY.—Objection to a tender, made after suit brought, that it failed to include a trivial amount of costs already incurred will not be considered on appeal where the tender was refused because the plaintiff claimed a much larger sum. (Page 327.)

Appeal from Craighead Circuit Court, Jonesboro District.

HANCE N. HUTTON, Judge, on exchange of circuits.

Affirmed.

N. J. Thompson, pro se.

A tender after commencement of suit must also include all costs of suit. 1 Ark. 11; 2 Cyc. 77; 13 Am. Dig. § 142; 54 Ark. 215; 64 Vt. 566; 58 Mo. App. 647.

Lamb & Gautney, for appellees.

There was no error in judging costs against appellant. 45 Ark. 37; 13 Ark. 436; Kirby's Dig. § § 972, 6283; 17 Ark. 361; 65 Ark. 219; 30 Ark. 505.

HILL, C. J. Thompson sued Ed and Vernon Baxter in the court of a justice of the peace for the sum of $94, and caused an attachment to issue. Baxter, on the day after suit was filed, made a tender of $5, and, upon it being refused, delivered the money to the constable to keep the tender good as a deposit in court. On the trial Thompson recovered $5, and appealed, and recovered judgment in circuit court for the same amount. In both courts there was a finding that the tender was made and kept good, and that Thompson recover costs prior to the tender, and the costs subsequent thereto were adjudged against him. Three questions are raised on appeal.

1. That the court erred in rendering judgment for costs against the surety on the attachment bond, the contention being that it was not conditioned to cover costs. Thompson alone appealed. The surety has not appealed, and Thompson cannot raise this question for him.

2. The next question presented is that the finding of the jury was not supported by the evidence as to the compromise of the debt sued for at $5 having been reached. Baxter's testimony does sustain it, and that is sufficient, as this court cannot settle conflicting evidence which has gone before a jury.

3. The only other question presented is one of costs. The appellant contends that tender after suit without tender of accrued costs will not prevent recovery of costs subsequent thereto. This is true, but appellant is not in an attitude to complain of it. He refused the tender because he claimed a larger sum, and made no objection to it at the time on account of the costs not being tendered, which were then a trivial sum. The justice gave judgment for the amount tendered and costs prior to the tender. This is exactly what he was entitled to if his present contention is correct. From this he appealed, and the circuit court gave the same judgment, and, after judgment on motion to retax costs, the insufficiency of the tender was for the first time raised. The money had been paid into court immediately on appellant's refusal to accept it, and the litigation had progressed thereafter as to

whether appellees owed a large sum to appellant for which he was suing or only the $5 which were tendered. Appellant cannot now obtain advantage of a failure to tender the trivial sum due for costs when it was refused because a much larger sum than the tendered amount was claimed, and for which he prefered and elected to litigate.

The judgment is affirmed.

---

76 328
181 204
76 328
85 345

MUTUAL LIFE INSURANCE COMPANY v. ABBEY.

Opinion delivered July 22, 1905.

1. LIFE INSURANCE—AUTHORITY OF SOLICITING AGENT.—A mere soliciting agent for a life insurance company, employed under a general agent, could not bind the company by accepting notes in lieu of cash for premiums due, nor by agreement that default in payment of premiums would not forfeit the policy. (Page 331.)
2. SAME—AUTHORITY OF GENERAL AGENT TO ACCEPT NOTES.—Where a general agent of a life insurance company is clothed with authority generally to transact the company's business in the State, and to collect premiums, and to accept notes to himself in lieu of cash, the company looking to him instead of the policy holder for the cash, he is authorized to bind the company by accepting notes in lieu of cash; and when he accepts a note and waives cash payments, the company is bound by his act, whether he pays the company or not. (Page 331.)

Appeal from Pulaski Circuit Court.

EDWARD W. WINFIELD, Judge.

Affirmed.

Edward L. Short and *Rose, Hemingway & Rose,* for appellant.

The continuance of the policy was conditioned upon the payment of premiums. The third was not paid, and the policy lapsed, and the agent of appellant had no authority to waive the forfeiture. 60 Ark. 532; 62 Ark. 348; 86 S. W. 815; 187 U. S. 336; 93 U. S. 30; 54 Ark. 75; 104 U. S. 91. Presumptively, a promissory note

is only conditional payment. 48 Ark. 267; 68 Ark. 233; May, Ins. § 345. The third note was not accepted as payment, and Mrs. George had no authority to do so. 187 U. S. 336; 112 U. S. 707; 28 S. W. 411; 100 Mass. 500; 123 Mass. 115; 42 N. W. 934; 49 Ark. 320. Failure to return the last two notes, which were not accepted, did not prevent a lapse. 35 S. W. 869; 77 N. W. 295; 187 U. S. 336; 42 N. W. 179.

Murphy & Mehaffy and *James P. Clarke,* for appellee.

Mr. Remmel had authority to waive cash payment of premiums and accept a note in lieu thereof. 62 Ark. 70; 155 N. Y. 257; 87 Fed. 646; 48 Ark. 195; 96 U. S. 84; Story, Ag. § § 126, 127. The act of Mrs. George must have been ratified or repudiated *in toto.* 54 Ark. 216; 49 Ark. 324; 111 U. S. 395. The notes given were the notes of appellant. 36 Ark. 501; 115 N. C. 287. The taking of the note is *prima facie* payment. 8 Ark. 213, 494; 9 Ark. 339; 7 Ark. 524; 28 Ark. 66; 35 Ark. 75; 14 Ark. 264. And at least extends the time of payment to the maturity of the note. 131 U. S. 287; 187 U. S. 352; 104 U. S. 252. The declarations of Farr are not binding on the beneficiary. 29 S. E. 560; 32 L. R. A. 477; 96 U. S. 544. Unless a forfeiture is specifically provided for in the contract, no forfeiture attaches upon failure to pay the note. 45 N. J. 543; 37 Kan. 674; 31 La. Ann. 235; 101 Mass. 558; 42 Mich. 19; 37 S. C. 417; Joyce, Ins. § 1202; 101 Cal. 637; 19 S. W. 10; 62 Ark. 562; 69 Ark. 145.

Rose, Hemingway & Rose, for appellant in reply.

The acceptance of one note did not bind appellant as to all. 11 Ark. 189; 58 Ark. 21; 64 Ark. 217.

HILL, C. J. Mr. H. L. Remmel was a general agent of the appellant life insurance company, being district manager for the State of Arkansas. Mrs. George was a soliciting agent of Mr. Remmel's. The company accepted no notes for premiums, but Mr. Remmel authorized his solicitors to take notes for premiums, and directed them, when the party was not strong financially, to divide the annual premium into quarterly payments. When Mr. Remmel approved the notes taken by the solicitors, and the application was accepted by the company, and the policy written, he would pay the first note and deliver the policy. The company required all premiums to be paid in cash; and if Mr. Remmel took

a note he paid the company, and the note was his individual property. He transacted ninety per cent. of his business in notes and the company was aware of his method of business.

George M. Farr was a letter carrier in the city of Little Rock, and Mrs. George solicited him to take life insurance with the company she was working for. She succeeded in getting him to apply for a $2,000 policy, and his application was accepted, the policy written and delivered. He paid no cash, but he and his wife executed four promissory notes, in usual form of negotiable notes, to the order of Mrs. George, due three, six, nine and twelve months from date, respectively. The quarterly premiums were due in advance, and the effect of these notes was to carry the payments over a period of one year, instead of nine months. The agreement when the notes were executed and the subsequent conduct of Farr are subjects of sharp conflict in the evidence. Farr paid none of the notes, and died before the fourth note became due, and his widow, who has remarried, brought suit on the policy, and recovered in the circuit court, and the company has appealed.

The evidence adduced on the part of Mrs. Farr (now Mrs. Abbey) was in substance:

That there was an understanding with Mrs. George that there was to be no forfeiture of the policy till the fourth note fell due, and she was preparing to pay the notes at the end of the year. That when the first one came due they were to pay it, and if not that Mrs. George would stand good for it, and that if a stipulation had been put in the notes that the policy would forfeit when any note was not paid, she would not have signed them. That after Farr's death Mrs. George told her to pay Mr. Remmel the money, that the policy was as good as ever, and that she (Mrs. George) had an interest of $40 in the premium. The notes were never returned to her or to Farr.

The testimony on behalf of the company was in substance:

That Farr was told that the policy would forfeit on non-payment of any one of the notes; that at his request, and on his promises to repay the amounts, Mrs. George got Mr. Remmel to pay each of the two first notes, and that Farr afterwards declined to pay or continue the policy, and said he would take cheaper insurance. That Mrs. George indorsed the first and second

notes to Mr. Remmel, but did not indorse the last two. That the last notes were never accepted by Remmel, but merely retained by him with the understanding that as each note was paid he would accept the next one. After Farr's death Mr. Remmel gave the last two notes to a clerk to return to Mrs. Farr, and the clerk lost them. The evidence is undisputed that Mrs. George was the agent of Mr. Remmel, and had no express authority to accept notes finally; only to take them subject to his approval and acceptance. Mr. Remmel wrote Farr several letters demanding payment of each of the first notes, explaining that he had paid them to the company, thereby giving and continuing life to the policy; and he threatened suit upon them, and finally offered to grant further indulgence if he would get a surety.

Mrs. George had no right to waive cash payment and accept notes therefor. She was a mere soliciting agent under the general agent, and she could not bind the company by accepting notes in lieu of cash for the first or any subsequent premium. Nor could she bind the company by any agreement that default in payment of premiums would not forfeit the policy. *American Ins. Co.* v. *Hampton,* 54 Ark. 78; *Burlington Ins. Co.* v. *Kennerly,* 60 Ark. 532; *German-American Ins. Co.* v. *Humphrey,* 62 Ark. 348; *Fidelity Mutual Ins. Co.* v. *Bussell,* 75 Ark. 25, 86 S. W. 815; *Iowa Life Ins. Co.* v. *Lewis,* 187 U. S. 336.

Mr. Remmel, the general agent, was clothed with authority to transact generally the company's business in this State, and to collect the premiums, and was permitted by the company to accept notes to himself in lieu of cash to the company, the company looking to him instead of the policy holder for the cash in such cases. This general power gave him authority to bind the company by accepting notes in lieu of cash; and, whether he paid the company or not, when he accepted a note and waived cash payments, the company was bound by his act, for it was within the apparent scope of his agency. See *Miller* v. *Life Ins. Co.* 12 Wall. (U. S.) 285, and long line of decisions following and approving it collected in 7 Rose's Notes on U. S. Reports, pp. 546-549. In *American Employers' Liability Ins. Co.* v. *Fordyce,* 62 Ark. 562, this court approved the doctrine above stated, and said it was in accordance with "the consensus of modern authority."

In *Insurance Company* v. *McCain,* 96 U. S. 84, the Supreme Court of the U. S. said:

"The law is equally plain that special instructions limiting the authority of a general agent, whose power would otherwise be co-extensive with the business entrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. Were the law otherwise, the door would be open to the commission of gross frauds. Good faith requires that the principal shall be held by the acts of one whom he has publicly clothed with apparent authority to bind him. Story on Agency, § § 126, 127, and cases there cited."

The court sent the case to the jury under instructions correctly embodying the principles above stated. The right to a recovery was limited to finding from the evidence that Mr. Remmel accepted the notes and instructing that there could be no recovery on any agreement or understanding with Mrs. George to this effect; that the jury must find that Mr. Remmel accepted the notes in lieu of cash payment, including the third note, before the beneficiary could recover. The jury was correctly instructed, and has found that Remmel accepted all of the notes. The question of difficulty before the court is whether there is legally sufficient evidence to sustain this finding. There is positive testimony from Mr. Remmel and Mrs. George that only the first two were accepted, but Mrs. George's testimony is contradicted, either directly or by necessary implication, on all material matters by Mrs. Abbey.

Against this positive testimony of Mr. Remmel and Mrs. George are these facts: Mr. Remmel took and retained all four notes, and promptly paid the company for the first two as they fell due. They were negotiable and not due, and did not belong to him unless he had accepted them; and yet he retained all of them long after Farr had defaulted on the first two, and after he had repeatedly threatened suit on them. The taking of four notes, instead of one, indicates that credit was to be extended for the first year, and not merely the first quarter, and the absence of a clause in the notes forfeiting the policy in case of default gives color to this theory. If Farr gave the notes with that understanding with Mrs. George, their retention by Remmel would indicate

an approval of that agreement of his agent. Farr put out these four absolute obligations, good in the hands of an innocent purchaser, and there was no consideration for any of them except the first when they were taken, under Mr. Remmel's theory, and yet after three defaults they are still retained, and the fourth, not yet due, also retained. These and other facts in evidence are sufficient to support the finding that the notes were accepted by Mr. Remmel when the policy was delivered.

The judgment is affirmed.

WHITE RIVER RAILWAY COMPANY v. HAMILTON.

76 333
77 555

76 333
81 367

Opinion delivered July 22, 1905.

1. ACTION ON CONTRACT—RECOVERY IN TORT.—Where a complaint sounded on a contract, it was error to instruct that the plaintiffs might recover in tort. (Page 335.)
2. RAILROAD—CONTRACT TO REBUILD FENCE.—It was error to assume in the instructions that it was the duty of the railroad company, under the written contract, to fence its right of way, when the deed which evidenced the contract provided only that it should reconstruct the fences when the same are on its right of way. (Page 335.)

Appeal from Baxter Circuit Court.

JOHN W. MEEKS, Judge.

Reversed.

Thomas Hamilton and G. E. Cunningham jointly sued the White River Railway Company and George C. Smith, a contractor in the employ of such company, alleging that Cunningham owned 120 acres, and sold defendant company a right of way 100 feet wide over and across same; that defendant company contracted to rebuild, replace and keep up all fences in and over said right of way, so as to protect the crops; that, in violation of said contract, defendants failed to replace said fences and

permitted stock to enter the fields and destroy the crops, to the value of $300.

The answer denied every allegation in the complaint.

At plaintiffs' request, the court charged the jury as follows:

"1. This is an action by the plaintiffs for damages alleged to have been caused by the destruction of the crop raised by the plaintiff Thos. Hamilton on the lands of the plaintiff G. E. Cunningham. If you find from the evidence that the plaintiff Thos. Hamilton planted and cultivated a crop on the lands of the plaintiff G. E. Cunningham, described in plaintiffs' complaint, during the farming season of the year 1902, and that the defendants, or either of them, caused the destruction of said crop or any part thereof by breaking or throwing down the plaintiffs' fences, whereby the stock broke in and destroyed the same, you will find for the plaintiffs, and assess their damages at the value of the crop so destroyed, or such part thereof as was destroyed.

"2. If you find from the evidence that the defendant White River Railway Company, in accepting a deed to its right of way through the lands of the plaintiff G. E. Cunningham, agreed to fence its said right of way, and that in consequence of its failure to fence its said right of way the crop of the plaintiff was left exposed to the inroads of stock, and thereby damaged or destroyed, you will find for the plaintiffs against both of the defendants, and assess the damages of the plaintiffs at the value of that part of said crop so destroyed."

The court also, of its own motion, charged the jury:

"If you find from the evidence that the plaintiffs erected a fence around the crop mentioned in plaintiffs' complaint sufficient to protect the same, and that the defendants, or either of them, or their employees, broke or threw down said fence, whereby the plaintiffs' crop was destroyed by stock, then you will find for the plaintiffs the value of the crop so destroyed, or so much thereof as you find was destroyed in consequence of such throwing down or breaking of said fence."

A verdict was returned for plaintiffs, from which the defendant railway company appealed.

B. S. Johnson, for appellant.

There is no evidence to sustain an action growing out of a breach of contract. 54 Ark. 426; 53 Ark. 131; 47 Ark. 334; 58 Ark. 503; 54 Ark. 424.

Thomas Hamilton, for appellees.

If there was a misjoinder of causes of actions and parties, the same was barred by not filing a motion to compel an election. 48 Ark. 424. It could not be raised by demurrer. 43 Ark. 230; 44 Ark. 202. To reconstruct means to construct again. 17 Am. & Eng. Enc. Law, 24. The railway company was liable under an express contract. 55 S. W. 940. 8 Am. & Eng. Enc. Law, 431; 54 Mich. 13; 55 S. W. 540.

HILL, C. J. This was an action by a landowner and his tenant for the destruction of the tenant's crop by cattle destroying it, owing to the railroad company failing to rebuild, replace and maintain fences pursuant to a contract between the railroad and the landowner. The contract sued upon was in a deed to a right of way over the land in which this is part: "Said railway company to reconstruct fences when same are on right of way, and to provide necessary road crossings and stock guards." There is no allegation and no evidence to impeach the above-quoted clause as being the correct written evidence of the contract.

The court gave three instructions, which will be set out by the Reporter, together with the substance of the pleadings. The first instruction is erroneous in that it authorizes a recovery for a tort when the complaint counted alone upon a contract. The second instruction is erroneous in that it states that if the jury find from the evidence that in accepting the deed the railroad company agreed to fence its right of way, and in consequence of its failure the crop was left exposed to the inroads of stock, etc., the company was liable; whereas the deed alone evidenced the contract, and it was to construct fences when the same are on the right of way, which may be a very different matter from fencing the right-of-way.

The third instruction, is, like the first, based on the theory that the action is one of tort for breaking or throwing down the fences. The railroad company had a right, in the construction of the road, to break and throw down the fences, and agreed to reconstruct them when they were on the right of way. The plaintiff's

action must be, under the complaint and evidence, confined to a breach of the stipulation in the deed, and it cannot be made broader than the parties made it; nor can a tort arise from the railroad breaking the fences, for this contract clearly contemplates such to be done, and required their reconstruction. For a failure to comply with its terms the company is liable, and to its terms the action must be limited.

Reversed and remanded for new trial.

In re SARLO.

Opinion delivered July 22, 1905.

76 336
77 214
77 215
77 216

1. LIQUOR LICENSE—REVOCATION.—A liquor license is a mere privilege, revocable at the will of the State, or the State's delegated agencies. (Page 337.)
2. SAME—DISCRETION OF COUNTY COURT.—Where the popular vote at the last biennal election in the county, township and ward favored licensing the sale of liquors, the county court may license all applicants possessing the legal qualifications or not, but it must treat all alike who possess the required qualifications. (Page 338.)
3. SAME—POWER OF COUNTY COURT TO REVOKE.—In the exercise of its discretion to refuse liquor license, and to determine the character of the applicant therefor, the county court may grant a license to sell liquors upon condition that if the licensee shall permit gambling upon the premises, or if he shall be guilty of a breach of the Sunday law, or of the law against keeping disorderly houses, his license may be revoked. (Page 338.)

Appeal from Pulaski Circuit Court.

EDWARD W. WINFIELD, Judge.

Affirmed.

Fulk, Fulk & Fulk, for appellant.

The condition contained in the grant of license was not authorized by law. 43 Ark. 42; Kirby's Dig. § § 5119, 5120. The right to regulate the liquor traffic is vested in the Legislature. 43 Ark. 364; 45 Ark. 356; 34 Ark. 397. The county court merely

has the power to license. 41 Ark. 485; 31 Ark. 462; 46 Ark. 358. And does not include the power to revoke the license granted. 17 Col. 302; 6 Rich. 404; 43 Ia. 514; 52 Ia. 515; 150 Mass. 325; 163 Mass. 470; 21 Minn. 512; 46 N. J. L. 108; 5 Hun, 25; 95 N. Y. 223; 21 Or. 83; 29 Grat. 705; 78 Va. 375; 75 Va. 947; 65 Ia. 556; 158 Mass. 200; 23 Neb. 371; 27 Nev. 71; 46 N. J. L. 108; Black, Intox. Liq. 127.

J. C. Marshall, for appellee.

A liquor license is always subject to revocation. 53 Ark. 353; 71 Ark. 419. The county court had such authority. 34 Ark. 394; 70 Ark. 395. And could enforce the condition imposed at the time the license was granted. 41 Ark. 456; 6 Mackey, 409; 69 Ark. 435; 69 Pac. 407; 63 L. R. A. 337; 87 Ga. 120; 68 Ill. 372; 95 N. Y. 223; 12 N. Y. 25; 68 Ill. 444; 141 Mass. 321; 32 L. R. A. 706, 116; 61 Ark. 321; 95 N. Y. 223; 84 S. W. 500.

HILL, C. J. When the matter of granting liquor license in Pulaski County for the year 1905 came before the county court, the court decided to grant license in the county upon this condition or reservation, which was incorporated in the license issued to all applicants who were found qualified, towit: "Conditioned that this license is issued, by the consent and agreement of the licensee, upon the condition that if the licensee shall permit gambling upon the premises, or if gambling occurs upon the same through his connivance or agency, or if he is guilty of a breach of the Sunday law, or the law against keeping disorderly houses, the county court may at any time revoke this license, this license being issued upon the express condition, and with that reservation."

Sarlo agreed to the terms, accepted the license, and conducted a saloon thereunder. He violated the Sunday law against keeping open saloon, and was fined therefor. The prosecuting attorney filed information before the county court, reciting these facts and praying revocation of his license. He was cited to answer, and on a hearing the license was revoked, and he appealed to the circuit court, where the case was tried on an agreed statement of facts developing the facts as set forth herein. The circuit court revoked the license, and Sarlo brings the case here.

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. *Metropolitan Board* v. *Barrie,* 34 N. Y. 667; *Sprayberry* v. *Atlanta,* 87 Ga. 120; *Schwuchow* v. *Chicago,* 68 Ill. 444; *Moore* v. *Indianapolis,* 120 Ind. 483; *Columbus* v. *Cutcomp,* 17 N. W. Rep. 47; *Martin* v. *State,* 23 Neb. 371; Black on Intoxicating Liquors, § § 127, 129.

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. 17 Am. & Eng. Enc. (2d Ed.), pp. 262, 263; *Metropolitan Board* v. *Barrie,* 34 N. Y. 667; *Schwuchow* v. *Chicago,* 68 Ill. 444; *Sprayberry* v. *Atlanta,* 87 Ga. 120; *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25; Black on Intox. Liq. § 127.

In this State the issuance of liquor licenses is committed to the county court, subject to a veto upon such issuance when the vote at the last biennial election in the county, township or ward is against it. Kirby's Dig. § 5120. The grant or refusal of license, where it is voted to be lawful to issue it, is exclusively and finally determined by the county court. The county court may license all qualified persons applying therefor, or may license none. It cannot be controlled in determining a policy of license or no license. When a policy of license is adopted, then the court must treat all alike who possess the legal qualifications. It cannot license favored classes or persons, and refuse others possessing similar qualifications. Ex parte *Whittington,* 34 Ark. 394; Ex parte *Levy,* 43 Ark. 42; Ex parte *Clark,* 69 Ark. 435.

Possessing this power derived from the State, which clearly has the power to insert conditions in the license like the one under consideration, or authorize one of its agencies to do so, the

question remains, does the power above outlined in the county court include the power to grant licenses subject to a condition that the laws regulating the liquor traffic shall be obeyed by the licensees under penalty of revocation?

The Supreme Court of Louisiana recently said:

"We do not criticise the proposition pressed upon our attention that, where the power is delegated to a municipal corporation to forbid the sale of intoxicating liquors, it may grant the privilege of selling on terms and conditions it chooses to impose, and that then it has the power claimed for it to impose the additional condition that a license shall be subject to recall on violation of any statute or ordinance relating to the liquor traffic; that the municipality could then, as it were, exercise a sort of resolutory condition." *Shreveport* v. *Draiss,* 111 La. Rep. 511.

The State of Illinois conferred on municipalities the power to license, regulate, restrain and suppress the liquor traffic. The Supreme Court of that State said: "The Legislature, then, having conferred such power, it was for the common council to determine whether they would wholly suppress the sale of intoxicating liquors, or grant the privilege on such terms and conditions as they might choose. And the power was ample, under this grant, to impose as a condition that when a license is granted it should be liable to revocation on the violation of the ordinances regulating the traffic, or, having absolute control over the whole subject of granting licenses, they may impose any other condition calculated to protect the community, preserve order, and to suppress vice." *Schwuchow* v. *Chicago,* 68 Ill. 444.

In Georgia a similar case arose, and the court said:

"Under the charter the mayor and general council have power to grant licenses for the sale of liquors, or to prohibit the sale altogether by refusal to issue licenses. If they have power to prohibit the sale altogether by refusal to issue license therefor, they certainly have the right to issue license under such restrictions, conditions and limitations as may seem proper to them." *Sprayberry* v. *Atlanta,* 87 Ga. 120.

The power of issuing liquor licenses was vested in the commissioners of the District of Columbia, and they made a rule denying license to keepers of provision stores. One of the applicants contested, and claimed that this was legislative power,

with which the commissioners were not vested; that the commissioners must pass on the applications individually, and not exclude a class who otherwise possessed the legal qualifications to obtain license. The court said: "If they are invested with such discretion, may they not, by rule made *in advance,* say that in a given instance they will not issue a license if it is apparent that there is some good reason for making such rule? If it is an arbitrary rule made without cause or reason for it, and is simply oppressive, it would be beyond the power of the commissioners, and this court might so declare." *U. S.* v. *Com.,* 6 Mackey, (17 D. C.), 409.

Another phase of the case is presented in the consent of Sarlo to the condition. A case, similar in many respects, arose in Iowa, and the court said:

"In this case the plaintiff took his license from the city with the distinct provision written upon it that a violation of any of the ordinances of the city by the party holding this license shall work a forfeiture of the same. It was somewhat in the nature of a reservation, evidently intended as a safeguard against allowing improper persons to hold license, and the plaintiff took it with a full understanding of the consequences attendant upon a violation of the ordinances of the city. Having entered into the stipulation, so to speak, with the city, he cannot be heard to complain that, while engaged in prosecuting the very business permitted by the license, he violated an ordinance of the city, and the very terms of the license itself, and that therefore his license was revoked." *Hurbur* v. *Baugh,* 43 Ia. 514.

In Pennsylvania the court authorized to issue licenses imposed a condition upon a saloonkeeper that he was not to sell beer in kettles, on acount of the too great demand in the neighborhood for that form of drinking. He agreed to the condition, which was entirely beyond any statutory requirements. He violated the terms of his agreement. The court held that it was within the discretion of the licensing power to impose this condition, which was manifestly promotive of the peace and sobriety of that particular locality, and the failure to observe it worked a revocation of the license. *Gerstlauer's License,* 5 Penn. Dist. Rep. 97.

In *Schwuchow* v. *Chicago,* 68 Ill. 444, and *Sprayberry* v. *Atlanta,* 87 Ga. 120, importance was attached to the fact that the licensees had accepted the terms imposed by the municipalities, and took their licenses, as did Sarlo, with them written in the face thereof.

The power of the county courts is not so broad and extensive as the power conferred on municipalities and excise boards in the cases reviewed, and it is not clothed with superintending power over the liquor traffic. Its power over it is derived solely from the power to refuse license at all and to determine the character of the applicants applying therefor. In the cases reviewed the power to impose conditions requiring obedience to the laws and other conditions promotive of the public good is derived from the power to refuse license, in that way prohibiting the business. The county court does possess this power of refusing license, and should, in determining the question of whether license should be granted, take into consideration the character of the applicants, particularly their character as to observance of the laws regulating their business. In the exercise of these duties the county court of Pulaski County adopted a policy of no license to any one except on condition of an obedience to the laws regulating saloons, and a forfeiture of the license on a failure to obey these laws. The court is of opinion that it was within the power of the county court to adopt a requirement of obedience to the laws as a condition of granting any license; and when the licensees voluntarily assumed these conditions, instead of refusing the license or availing themselves of their legal remedies to contest this power and the manner of its exercise, they cannot complain of a revocation of the license produced by their violation of the law contrary to their agreement and the terms of the license.

The judgment is affirmed.

BATTLE, J., concurs in the judgment; not the opinion.

McCULLOCH, J., (dissenting.) I do not agree with the majority of the court that the county court had either the power to insert the condition in the license or to revoke the license after breach of the condition. However wholesome the exercise of such power may seem to be, it is sufficient to say that the Legislature has not seen fit to confer that authority, and it is

not within the province of the courts to read it into the statute. The power to regulate and control the liquor traffic is vested exclusively in the General Assembly, which may delegate it to any other body or tribunal. It has not yet done so. The county court has no legislative power, and is not invested with power to regulate the sale of liquor. Its powers are limited solely to that of determining, after the people have voted affirmatively on the license question, whether or not license shall be granted, and of issuing the same to such persons of good moral character as apply therefor. To that extent it may exercise the veto power to prohibit the liquor traffic altogether; but when it has determined upon a policy, and found the applicant to be a person of good moral character, and issued to him a license to sell whisky for the year, its powers are completely exhausted, so far as that applicant is concerned. In passing upon the question of license to a given applicant, the court must first determine whether or not he is a person of good moral character. The court cannot pretermit a determination of that question, and take the applicant upon probation, so to speak, by granting a license upon condition that he shall thereafter continue to be of good moral character, or that he shall not thereafter violate the law, under penalty of having his license revoked.

None of the cases cited in the opinion of the majority, with a single exception, sustain the view that the county court has power either to insert the condition or to revoke the license. All of them are cases where the power of revocation is sought to be exercised by municipal boards having legislative functions and empowered to regulate the liquor traffic. It is conceded, as before stated, that the Legislature has power either to impose conditions upon liquor licenses, or to revoke them, or to authorize some other body to regulate the traffic by the imposition of conditions and to exercise the power of revocation.

The Legislature of this State has done neither. I am not aware of the decision of any court holding that a court or other body not exercising legislative functions can revoke a license once issued, with the single exception of a decision of a district court of Pennsylvania cited in the majority opinion.

In the case of *Lantz* v. *Hightstown,* 46 N. J. L. 102, the learned judge, delivering the opinion of the court, said: "In

regard to the exercise of the power over the subject of licensing inns, the statute contains express mention of the grounds upon which the court of common pleas shall proceed to revoke the license before the expiration of the time for which it is granted. Rev. p. 489, § 24. This section contains a wide scope for judicial action, and the prescription of the causes which shall be the ground for revocation is an implied admission of the absence of the power to revoke without legislative sanction. I know of no case where this power has been asserted in a case not coming within those mentioned in the act. I can find no instance in the practice of boards of excise or other licensing bodies in which the power of revocation has been exerted except under the provisions of a statute."

Our statute (Kirby's Digest, § § 2052-2057) prescribes the offenses for which the license of a saloonkeper may be canceled, and it may be said that this excludes the power to revoke for any other cause. It is not contended that the county court has, under this statute, the power to adjudicate the guilt of the licensee of the offenses named and to revoke his license on that ground. That power is lodged in the courts exercising criminal jurisdiction, and the cancellation of the license follows as a part of the penalty for the violation of the law.

The right of the county court to revoke the license is based, in the majority opinion, upon the ground that the appellant accepted the license and voluntarily assumed the performance of the conditions imposed, and cannot, therefore, now be heard to dispute the power of the court to impose the conditions to revoke the license for his failure to perform them—an application, as I understand it, of the doctrine of estoppel. I think it is a misapplication of that doctrine, as the license is in no sense a contract, and appellant was not, by acceptance of the license, barred from disputing the power of the court to insert conditions not authorized by law.

In the case of *Drew County* v. *Burnett,* 43 Ark. 364, the county court had exacted of an applicant for liquor license a tax of $50 in excess of the amount fixed by the statute. He paid it under protest, and sued the county to recover the excess, and this court held that the requirement of payment of the excess was an illegal exaction, and that the applicant could recover it

from the county. Now, if the majority of the court are correct in their view that the power of the county court to prohibit the liquor traffic altogether involves the power to permit it upon conditions, then it could be said with equal force that the court has the power to issue license only on condition that the applicant pay an assessment in excess of the tax fixed by statute. This court has held (properly, I think), in the case cited above, that the county court cannot exact an excessive amount for the license, and I think it reasonably follows from this that the county court has no power to impose any conditions at all, and that, if such are imposed, the court lacks power to enforce them.

LIDDELL v. JONES.

Opinion delivered July 22, 1905.

1. GARNISHMENT—TRANSFER OF LIEN.—When a garnishment is carried into judgment, it operates to transfer to the garnisher all the rights and remedies of the judgment defendant, including any mortgage or other lien to secure the indebtedness. (Page 345.)
2. CHATTEL MORTGAGE—WAIVER.—The holder of a chattel mortgage, by levying an execution upon the mortgaged property, waives his mortgage lien thereon. (Page 345.)
3. EXEMPTIONS—EFFECT OF GARNISHING PURCHASE MONEY.—As a garnisher succeeds to all the rights and remedies of the principal debtor, a vendee who is garnished to recover the purchase price of chattels cannot claim exemptions therein. (Page 346.)

Appeal from Clay Circuit Court, Eastern District.

ALLEN HUGHES, Judge.

Reversed.

Hawthorne & Hawthorne, for appellant.

Mortgaged property is not subject to sale under execution. 42 Ark. 239. If the assignee of a mortgage attaches the property, such action is a waiver of the mortgage lien. 64 Ark. 213. The

appellee could not claim the property as exempt. 42 Mass. 476; 17 N. E. 73; 21 Oh. St. 402; Kirby's Dig. § 4966. A vendor's lien is assignable. 47 Ark. 293; 36 Ark. 91; 62 Ark. 397; Jones, Mortg. § 565; 122 Mass. 303.

J. H. Hill and *F. G. Taylor,* for appellee.

Appellant could not claim the rights of a vendor and a mortgagee both. 64 Ark. 213; 51 Ark. 285; 55 Ark. 542; Wade, Attach. § 521.

HILL, C. J. The appellee, Jones, purchased two horses and harness of one Strong for $180, and, to secure payment of the purchase money, executed a mortgage to Strong on the horses and harness and also one log wagon. Strong was indebted to Hancock, who sued him, and caused attachment to issue, and ran a garnishment on Jones. The result of this proceeding was the sustaining of the attachment, and a judgment against Jones in favor of Hancock for the debt of $180, which he owed Strong for the horses. Hancock caused execution to issue, and the horses, harness and wagon were levied on. Jones filed a schedule of his personal property, and claimed this property as exempt. The circuit court held it exempt, and the sheriff, representing the rights of Hancock, the judgment plaintiff, prosecuted this appeal.

There are two lines of decisions on the effect of a garnishment: one holding that it amounts to a compulsory assignment of the debt, and carries with it the liens securing the debt; the other holding that it does not operate as an assignment, but as an impounding of the debt for the garnisher's benefit. The cases on this subject are collected in a note under section 192, Rood on Garnishment. This court, in *Smith* v. *Butler,* 72 Ark. 350, held that the garnishment, when carried into judgment, operated to transfer to the garnisher all the rights of the judgment defendant, and give him the rights and remedies possessed by him, including a lien to secure the indebtedness. Therefore it follows that Hancock became the owner of the debt of Jones and the mortgage securing it, and became possessed of the same rights which Strong, the mortgagee, possessed.

When Hancock levied on the property in question, he waived the mortgage which he then owned by operation of law. No one else could levy on the property, because mortgaged chattels

are not subject to execution. *Jennings* v. *McIlroy,* 42 Ark. 239. The mortgagee, however, can waive his mortgage rights, and levying an execution upon the property is inconsistent with the mortgage, and a waiver of it. *Cox* v. *Harris,* 64 Ark. 213. It follows that the levy was proper, and the property subject to the execution.

The next question is whether Jones could claim the property as exempt. It is provided by article IX, section 1, Constitution 1874, and section 4966, Kirby's Digest, that exemptions cannot be claimed in property in the hands of the vendee against the debt for its purchase. It is contended that Hancock, as an involuntary assignee of Strong, is not clothed with Strong's rights in this regard, but these cases settle that question against the appellant: *Creanor* v. *Creanor,* 36 Ark. 91; *Morris* v. *Ham,* 47 Ark. 293; *Smith* v. *Butler,* 72 Ark. 350. The log wagon was properly held to be exempt, as there was no debt for the purchase money due against it, and no mortgage was sought to be enforced against it in this action; in fact, a position inconsistent with the mortgage, so far as Hancock's rights were concerned, was taken. The court erred in holding the horses and harness exempt from seizure under the execution, as it was levied to enforce a debt for purchase money while the property was in the hands of the purchaser.

Reversed and remanded, with directions to enter judgment in conformity herewith.

CRAWFORD *v.* STAINBACK.

Opinion delivered July 22, 1905.

RECEIVER'S SALE—PROPERTY NOT LISTED.—Where a receiver was directed to sell to the highest bidder the personal property of a partnership described in an inventory of the assets which had been filed, and sold the assets to one of the partners, certain assets not included in the inventory, and of which neither the receiver nor the other partner had any knowledge, were not included in the sale.

Appeal from Pulaski Chancery Court.

JESSE C. HART, Chancellor.

Reversed.

Dan W. Jones, for appellant.

In their dealings with each other partners occupy a position of trust, and are required to exercise scrupulous good faith. 17 Am. & Eng. Enc. Law, 1054, 1056.

HILL, C. J. L. A. Stainback and P. W. Crawford, Jr., were partners, doing a wholesale and retail business in builders' material and like lines of wares, in the city of Little Rock, under the firm name of Stainback, Crawford & Company. They agreed to dissolve, and, being unable to agree on a disposition and settlement of the business, united in a suit to have a receiver appointed and the partnership wound up in the chancery court. The receiver was duly appointed, and was directed to sell the personal property described in the inventory of assets in bulk at public auction for cash to the highest bidder. The receiver made the inventory, assisted by the partners, who examined it after it was completed. The inventory did not contain five notes which had been given to the firm, and which had been negotiated to the firm's bank upon the firm's indorsement; and did not contain certain material bought of Sickels & Company to complete a contract of the firm for the inside furnishing of the Majestic Hotel at Hot Springs. The receiver had no knowledge or information in regard to these matters.

Stainback's brother was the bookkeeper of the firm, and he (Stainback, the partner) was thoroughly familiar with all the details of the business. Just how familiar Crawford was with the details is not clear, but it is clear that he did not possess the intimate familiarity of Stainback, and that these matters were wholly in Stainback's charge. Crawford's father bid upon the assets of the firm at the sale $35,900, and he relied entirely upon the inventory as furnishing a complete list of the assets. Other bidders did the same, and the court's order called for the sale to be according to this inventory, which had been filed in court. J. P. Stainback, the bookkeeper, bought the assets at the sale for $36,000. He bought for a corporation then formed in which his brother, L. A. Stainback, owned a majority of the

stock. Crawford filed a petition, praying that the notes and said material (and other matters not presented on this appeal) be charged as assets of the firm. The chancery court held that the notes passed to the purchaser subject to the lien of the bank, and that their payment should be out of the firm assets, and that the material bought of Sickels & Company passed to the purchaser, and its cost was a firm debt. Crawford appeals from this finding.

Whether Stainback performed his full duty to his partner in disclosing the existence of these notes and material and not listing them in the inventory is a matter upon which the evidence conflicts; and the court is of opinion that he did not do so; and furthermore is of the opinion that the assets passing to the purchaser were only those listed. Stainback is in no position to claim that the notes passed when he was in charge of that department of the business, and did not list them, and he wrote to Sickels & Company to have the shipping of the material antedated so as to apparently precede the sale, when in fact it was shipped subsequently. The evidence shows that the purchaser at the sale was to take the contracts as they were, and to furnish the material to finish them.

The decree is reversed, and the cause remanded with directions to enter a decree in conformity herewith.

RIDDICK and MCCULLOCH, JJ., non-participating.

---

76 348
f80 227

76 348
f 84 46
84 50

76 348
88 26

DAVIS v. RICHARDSON.

Opinion delivered July 22, 1905.

1. INDECENT ASSAULT—MISLEADING INSTRUCTION.—Where there was evidence, in a civil action for indecent assault, that defendant made an indecent and insulting proposal to plaintiff, and subsequently assaulted her, an instruction that "if a man takes improper liberties with a female, * * * he is guilty of indecent assault," is misleading, since it might be taken to refer to the proposal, which was not an assault. (Page 351.)

2. SAME—An instruction to the jury in a civil action for indecent assault, directing a recovery for plaintiff if defendant made use of any "indecent familiarity toward her," was erroneous and prejudicial if the language quoted might be understood to refer to an indecent proposal which defendant is said to have made to plaintiff. (Page 352.)
3. SAME—ABSTRACT INSTRUCTION.—It was error in a civil action for assault to instruct the jury to allow the defendant for the "effects upon her future condition in life," if there was no evidence of such damage. (Page 352.)
4. SAME—INSTRUCTION CONSTRUED.—Where, in a civil action for indecent assault, the jury were told what elements would be considered in awarding actual damages, and then were told that they might, under certain circumstances, allow punitive damages also, after which the instruction added, "In estimating such damage you may consider the financial condition of the defendant," the instruction, while defective in form, was not erroneous as permitting the jury to consider defendant's wealth in ascertaining plaintiff's actual damages. (Page 352.
5. INSTRUCTION—FORMAL DEFECT.—A formal defect in an instruction should be pointed out by a specific objection. (Page 352.)

Appeal from Stone Circuit Court; FREDERICK D. FULKERSON, Judge; reversed.

Stuckey & Stuckey, Morris M. Cohn, and *Rose, Hemingway & Rose,* for appellant.

Yancey & Casey and *Wright & Reeder,* for appellee.

This court will not reverse a cause where there is evidence to support the verdict. 13 Ark. 317; 51 Ark. 115, 324; 57 Ark. 577; 23 Ark. 208; 13 Ark. 385; 25 Ark. 89, 482; 27 Ark. 517; 46 Ark. 524; 4 7 Ark. 196; 50 Ark. 511. Testimony introduced without objection cannot be complained of. 1 Ark. 224; 6 Ark. 456; 7 Ark. 488; 9 Ark. 389; 10 Ark. 184; 13 Ark. 437; 15 Ark. 128; 17 Ark. 188; 18 Ark. 34; 36 Ark. 653, 221, 304; 39 Ark. 221; 52 Ark. 180. The instruction upon the question of an assault was proper. Kirby's Dig. § 1583; 43 Ind. 146; 3 Cyc. 1020. Instructions Nos. 1 and 4 correctly stated the law. 2 Am. & Eng. Enc. Law. 975; 38 Am. Rep. 703; 66 Id. 805; 8 Ark. 183; 15 Ark. 491; 36 Ark. 242; 42 Ark. 57; 71 Ark. 351; 23 Ark. 215; 71 Ark. 574; 69 Ark. 448. Appellant should have asked to have the instructions amended. 56 Ark. 602; 60 Ark. 613; 47 Ark. 196; 45 Ark. 539. The instructions as to the measure of damages were correct. 19 Am. Rep. 319; 50 *Id.* 143;

67 Am. Dec. 560; 82 *Id.* 670; 17 Fed. 913; 6 Dana, 477; 80 Me. 177; 61 Md. 89; 16 S. C. 575; 4 Wis. 85; 24 Wis. 452; 50 Mo. 361.

BATTLE, J. Eliza Richardson, by her next friend, filed a complaint in the Stone Circuit Court, alleging that the defendant W. E. Davis, on the 27th day of April, 1902, assaulted her in his storehouse near St. James, in Stone County, in this State, by seizing and embracing her in a rude and indecent manner, in consequence of which she, being in feeble health, suffered a severe shock to her nervous system and much humiliation; and that before that, on the same day, he made indecent proposals to her at the house of Ed. Grigsby; and she claimed $8,000 damages.

The defendant denied all these allegations.

In the trial of the issue in the case the plaintiff, in part, testified that on the 17th day of April, 1902, she went to the defendant's store, and no one was there. She then went to Mrs. Grigsby's, and found her there and the defendant. After a short conversation Mrs. Grigsby left the room, and Davis then told her, the plaintiff, to go home through a certain hollow, and he would meet her there; that he had something to tell her. In a short time Mrs. Grigsby returned, and Davis left. In a short time after this, on the same day, she went to Davis's store to buy some goods, and he again said to her that he had something to tell her, and "Don't you tell a thing about it; I will make it all right." He pulled, hugged and kissed her, "and acted like he was going to do something else." She escaped, and, as she did so, he said, "Don't you tell anything about it." At this time the plaintiff was fifteen years old.

The defendant, testifying, denied the conversation at Mrs. Grigsby's and the assault and conversation at the store.

Other evidence was adduced.

The court, over the objections of the defendant, instructed the jury as follows:

"1 You are instructed that every person is the sole custodian of his person, and no one has a right to touch it unlicensed, and that any unlawful touching of the person of another constitutes an assault; and if you believe from the evidence in this case that the defendant, W. E. Davis, did make an assault upon the person of Eliza Richardson by making use of any violent or

indecent familiarity toward her, or embracing, touching or handling her person in an indecent manner, then your verdict should be for the plaintiff for such an amount as you believe she is entitled.

"2 That for every unlawful assault the law conclusively presumes some damage.

"3 That the law presumes every female to be chaste and virtuous.

"4 If a man takes improper liberties with a female, or fondles her against her will and consent, he is guilty of indecent assault.

"5. If you find for plaintiff, in arriving at the amount of damage to which you think the plaintiff is entitled, if you find that the assault was committed, you should take into consideration the actual damage sustained by reason of the assault, in which is included not merely the physical injury suffered, but you may also consider the mental suffering, humiliation, mortification, and injury to her feelings and sensibilities, if such you find to be the consequence of the assault, together with the disgrace, insult, and indignity to which the plaintiff is subjected by reason of said assault, as well as its effects upon her future condition in life, all of which are proper elements of damage to be considered by you in making up your verdict. And if the jury further believe that said assault was unprovoked and willfully, wantonly or maliciously done, you may assess an additional sum as damages as a punishment to the defendant, and to deter others from the commission of a like offense; and in estimating such damage you may consider the financial condition of the defendant."

The plaintiff recovered judgment for $4,000, and the defendant appealed.

The trial court erred in giving to the jury instruction numbered 4. Under it they might have found that appellant committed an assault upon appellee by making the indecent and insulting proposal to her at Mrs. Grigsby's, and under instruction numbered 5 returned a verdict against him for damages. The proposal was not an assault, and, being unaccompanied by a physical injury, did not give the appellee the right to recover

damages on account thereof. It was not an element of damage. *Peay* v. *Western Union Telegraph Company*, 64 Ark. 538.

What we have said as to the fourth instruction applies to the words "or indecent familiarity towards her" in the first instruction.

Appellant objects to the fifth instruction because it directs the jury to allow the appellee for the "effects upon her future condition in life." There was no evidence of such damage, and the direction should not have been given.

Appellant objects to the same instruction, the fifth, because it told the jury that it might consider the appellant's wealth in computing damages, both actual and punitive. We do not think that this is a correct interpretation of the instruction. The court told the jury in this instruction what is included in actual damages, and then told them that they might allow punitive damages, and in this connection said: "In estimating such damage you may consider the financial condition of the defendant," having reference to punitive damages. Surely, the court did not mean that the wealth of the appellant could assist in measuring actual damages. Construed in the way suggested, the instruction in that respect is correct. 2 Sutherland on Damages (3d Ed.) § 404, and case cited. But it is defective in form, and should not have be given as it is. The defect, however, should have been pointed out by a specific objection.

Reverse and remand for a new trial.

NELSON *v.* ARMOUR PACKING COMPANY.

Opinion delivered July 22, 1905.

1. SALE OF PROVISIONS—WARRANTY.—In the sale of provisions by one dealer to another, in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness; but when articles of human food are sold to the consumer for immediate use, there is an implied warranty or representation that they are sound and fit for food. (Page 355.)

2. SAME—PRIVITY OF CONTRACT.—As a warranty in a sale of personal property does not run with the property, and as there is no privity of contract between a vendor in one sale and the vendees of the same property in subsequent sales, each vendee, as a general rule, can resort only to his immediate vendor. (Page 355.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

Affirmed.

Lucien M. and E. B. Nelson filed separate suits against the Armour Packing Company. The facts appear in the opinion.

L. A. Byrne and *B. A. Lewis*, for appellants.

Manufacturers of food stuffs are held to great caution to see that the articles of food contain nothing deleterious to life or health. 74 Ark. 144; 139 Mass. 411; 12 Johns. 468; 18 Mich. 50; 6 N. Y. 396; 41 S. E. 190; 47 Atl. 965; 48 S. W. 971.

Scott & Head, for appellee.

In the sale of drugs, medicines and chemicals, the rule *caveat emptor* does not apply if the purchaser is not an expert, and buys in reliance upon the knowledge and skill of the druggist. 15 Am. & Eng. Enc. Law, 1239; 15 L. R. A. 818; 23 R. I. 381; Benj. Sales, § 431, 668; 106 Mass. 143. There is no general or public duty, but only a duty which arises from the contract, out of which no duty arises to strangers to the contract. 96 Mich. 245; 110 Mo. 605; 119 Fed. 572; 73 N. W. 163; 142 Pa. St. 221; 163 Ill. 518; 145 Mass. 439.

BATTLE, J. In these two cases complaints were filed, containing the same allegations. The allegations in the first are as follows:

"Comes the plaintiff, L. M. Nelson, and complains of the defendant, Armour Packing Company, and for his cause of action says:

"That the defendant, Armour Packing Company, is a corporation organized and existing under the laws of the State of New Jersey; that said defendant, Armour Packing Company, maintains a branch of its business in Kansas City, Kansas, and the plaintiff's cause of action occurred in Miller County, Arkansas.

"That said branch house or business of the Armour Packing Company in Kansas City is engaged in the preparation and pack-

ing of the various articles of food which it places on the market for sale to whomsoever may wish to purchase; that, among said various articles of food, the defendant, Armour Packing Company, prepares, packs in sealed tin cans, and places on the market for sale to the wholesale and retail trade an article of food commonly known, and so labeled and branded, as 'Lunch Tongue.' That when said lunch tongue is so prepared and placed in sealed tin cans, it is intended and fixed for immediate use as food on the family tables without further preparation, and the public is invited to purchase same as such in this condition; and the label aforesaid was printed and pasted on the can from which plaintiff was poisoned, as hereinafter alleged, in plain letters the following: 'Select cooked tongue. This can is soldered on the outside and without the use of acids, therefore allowing no criticism as to the formation of the cans. These tongues are selected, preserved and packed with due reference to their keeping in all climates; guaranteed.' Whereby said defendant is held in law and fact to warrant and guaranty same to be wholesome food and free from impurities to all consumers.

"That on or about the 21st day of December, 1901, the defendant, through its Kansas City packery, sold to A. J. Offenhauser, of Texarkana, Arkansas, a dealer in family groceries, a case of lunch tongue, and immediately thereafter a can of said lunch tongue was bought of said A. J. Offenhauser by the plaintiff's family, and was on the same day opened and served for supper on the family table at the home of this plaintiff.

"That the plaintiff ate of this food so prepared by the defendant, and the same was partaken of by him, trusting and believing that the same was wholesome and good, and safe to be eaten, and had been properly prepared by the defendant; but the plaintiff says said food was not good and wholesome and properly prepared, but improperly and negligently prepared in a way not known to the plaintiff, but the same was infected with ptomaine and other poison, and was thereby rendered unwholesome, poisonous, dangerous and unfit to be eaten, and by reason thereof plaintiff was poisoned and greatly injured, and made very sick, and endured thereby great pain and suffering, and was obliged to have, and did have, a physician to attend him during his sickness, and was subjected by reason thereof to great expense for medical

attendance and medicine. Plaintiff was very sick, nigh unto death, during the entire night, and continued to be sick for many days, which said sickness and disability were caused by the eating of said poisonous and dangerous food, negligently prepared and put on the market for sale by the defendant, Armour Packing Company.

"That injuries complained of were caused by the negligence of the defendant, its agent or servants, and this plaintiff in no manner whatever contributed to the acts resulting in said injury.

"That for bodily injury and pain and suffering incident thereto, the plaintiff has suffered damages in the sum of one thousand eight hundred dollars.

"Wherefore, premises considered, plaintiff prays judgment for his damages, for cost and general relief."

The defendant filed a demurrer to the complaint, which the court sustained. The plaintiff rested upon his complaint, and the court rendered judgment in favor of the defendant, and plaintiff appealed.

The demurrer was properly sustained.

In the sale of provisions by one dealer to another in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness; but when articles of human food are sold to the consumer for immediate use, there is an implied warranty or representation that they are sound and fit for food. *Howard* v. *Emmerson,* 110 Mass. 320; *Giron* v. *Stedman,* 145 Mass. 439; Benjamin, Sales (7th Ed., Bennett's), pp. 661, 691; 2 Mechem, Sales, § § 1356, 1357; Tiedeman, Sales, § 191.

Unlike covenants as to the title to land, a warranty upon the sale of personal property does not run with the property. There is no privity of contract between the vendor in one sale and the vendees of the same property in subsequent sales. Each vendee can resort, as a general rule, only to his immediate vendor. *Boyd* v. *Whitfield,* 19 Ark. 447; *Bordwell* v. *Collie,* 45 N. Y. 494.

In this case there was no privity of contract between appellant and appellee, and no warranty passed with the property from appellee to appellant through his vendor.

Judgment affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. MCGINTY.

Opinion delivered July 22, 1905.

76 356
76 524

76 356
80 272
181 5

1. REMOVAL—LOCAL ACTION.—A suit against a railroad company to recover damages for personal injuries is not a suit to enforce a lien on real estate, within the rule in *Dick* v. *Foraker*, 155 U. S. 404, holding that a citizen of one State may in such case sue a citizen of another State in the Federal Circuit Court of a third State where the land is situated; nor is such suit, instituted in the State court, subject to removal to the Federal court. (Page 362)

2. SAME—DIVERSITY OF CITIZENSHIP.—In a suit by a citizen of Indian Territory against a citizen of a State there is not such diversity of citizenship as is necessary to give the United States Circuit Court jurisdiction in local actions, a citizen of one of the territories of the United States not being a citizen of a State, within the meaning of the Constitution and the judiciary acts. (Page 362.)

3. SAME—WHEN PETITION FILED TOO LATE.—A petition for removal of a cause to a Federal court which is filed after the time allowed by the statutes of this State for the filing of answers to complaints is too late. (Page 362.)

4. CARRIER—CONTRIBUTORY NEGLIGENCE OF PASSENGER.—A passenger who is injured by the negligence of a carrier cannot recover if his own negligence contributed to produce the injury, unless the carrier, after becoming aware of his negligence, omitted to use a proper degree of care to avoid the consequences thereof. (Page 362.)

5. SAME—WHEN DUTY TO PROTECT PASSENGER.—Notwithstanding the employees of a railroad company are required to keep a lookout, they are not bound to interfere with the acts of a passenger in order to protect him unless there was reason to anticipate that he would be injured without such interference. (Page 363.)

Appeal from Sebastian Circuit Court, Fort Smith District.

STYLES T. ROWE, Judge.

Reversed.

STATEMENT BY THE COURT.

This action was brought by Ida L. McGinty in her own right and as next friend of Lucretia A. McGinty, Bernice W. McGinty and Lois L. McGinty, against the Kansas City Southern Railway Company to recover judgment for the damages to them caused by the killing of Joseph W. McGinty by the negligent operation of defendant's railway. Ida L. is the widow of the deceased, and Lucretia A., Bernice W. and Lois L. McGinty are minors, and the children of Joseph W. and Ida L. McGinty. The

widow and children are residents and citizens of the Indian Territory, and the defendant is a corporation created and existing by virtue of the laws of the State of Missouri, and operates a railway from the city of Fort Smith, Arkansas, to the town of Spiro, in the Indian Territory, and from thence to the town of Panama, in the same territory, and elsewhere. The action was brought in the Sebastian Circuit Court for the Fort Smith District. Plaintiff alleged in their complaint the foregoing facts and as follows:

"That upon the 9th day of October, 1900, the said Joseph W. McGinty was at the station of Spiro, Indian Territory, and desired to take passage upon the train of the defendant railway company from said station of Spiro to the station of Panama, Indian Territory.

"That the defendant railway company was operating a passenger train from said station of Spiro to the station of Panama, and inviting the public to take passage upon said train, which was what is commonly designated a local freight, and which said local freight carried passengers for hire.

"That the said Joseph W. McGinty went to the station of the defendant railway company at Spiro, Indian Territory, to take passage upon said train to the station of Panama, Indian Territory, at the time when the said train was about to leave said station at Spiro for said station of Panama, and at the usual place of taking passage upon said train, and that he was in the act of embarking thereon as a passenger when the defendant carelessly, negligently and without due regard for the safety of said passenger, caused said train to be suddenly and violently jerked backwards, thereby causing the said Joseph W. McGinty to be thrown under the wheels of said train, whereby he was instantly killed; that the employees of the defendant railway company did see, or by the exercise of ordinary care and caution could have seen, the said Joseph W. McGinty was in the act of taking passage upon said train when said employees caused the same to be violently and suddenly jerked backward.

"That the plaintiff as widow, and the said minor children, have been damaged by the loss of the life of the said husband and father in the sum of $25,000."

The defendant, on September 9, 1901, it being the first day of the Sebastian Circuit Court for the Fort Smith District held

after the commencement of the action, filed a petition and bond, asking for the removal of the action to the United States Circuit Court for the Western District of Arkansas.

The first ground of removal is that the parties are citizens of different States, the plaintiffs being citizens and residents of the Indian Territory, and the defendant a citizen and resident of the State of Missouri, it being organized under the laws of that State; and the second ground is stated as follows in petition: "The property of the defendant against which this action is leveled is located in the county of Sebastian, Fort Smith District, and State of Arkansas, in which county this suit is brought and is now pending. Under the laws of the State of Arkansas, * * * judgment, if obtained, will be a lien on property of the defendant located in the Fort Smith District of Sebastian County. The plaintiffs in their complaint ask for judgment against your petitioner for the sum of $25,000, and also pray other and general relief; and part of the relief to which the plaintiffs are entitled under that prayer is that said judgment, if obtained, can be declared a lien on all the property of your petitioner located in the Fort Smith District of Sebastian County and State of Arkansas. And, therefore, the plaintiffs seek to have judgment declared a lien against defendant's property located in said county and district."

This petition was denied. Thereafter an amended petition was filed, and it, being filed out of time, was also denied; the time to plead or answer plaintiff's complaint allowed by the statutes having expired. The defendant then answered, denying the allegations of the complaint and alleging contributory negligence. Evidence was adduced in the trial of the case which tended to prove the following facts:

On the 9th day of October, 1900, a freight train of the defendant, with caboose attached, in which passengers for hire were carried, stood upon the track at the station of Spiro, in the Indian Territory. The caboose was a little north of the door of the station. The defendant's employees rearranged the train, taking out and putting in cars. When this work was about completed, Joseph W. McGinty approached the caboose, put one foot on its step as if in the act of entering it, and stood with his foot in that position, with the other on the platform, and one hand on

the shoulder of a friend, and so stood for a few minutes talking to the friend; and while he was standing in this position the train was moved back suddenly for the purpose of coupling cars, he was knocked down by the movement, jerked under the train, and killed.

Mrs. Ida L. McGinty was his wife, and the other plaintiffs were his children.

The court gave the following among other instructions, over the objections of the defendant, to the jury:

"12. If the position in which deceased was standing, with one foot on the platform of the station and one foot on the step of the caboose, in any manner contributed to his death, then he was guilty of contributory negligence; and the plaintiffs in that event are not entitled to recover in this action, unless the defendant discovered, or in the exercise of ordinary care and caution ought to have discovered, the dangerous position of deceased, if he was in a dangerous position."

And the defendant asked the following instruction:

"12. If the position in which deceased was standing, with one foot on the platform of the station and one foot on the steps of the caboose, in any manner contributed to his death, then he was guilty of contributory negligence, and the plaintiffs in that event are not entitled to recover in this action." And the court modified it by adding the following words, "unless the defendant discovered, or in the exercise of ordinary care and caution ought to have discovered the dangerous position of deceased, if he was in a dangerous position," and, over the objection of the defendant, gave it as modified.

The attorney for the plaintiffs, in his opening argument before the jury, said:

"And I say to you, gentlemen of the jury, that, even if you should find that Mr. McGinty's position, as described to you by the witness in this case, was the most negligent position on earth, still you should not find for the defendant."

The defendant objected, and plaintiffs' attorney further said: "You did not wait until I had finished. I was going to say further that it was the duty of the employees of the railroad company to warn him. My argument is this. * * * I want the court to hear it. My argument is this: I do not care, for the purposes of

this suit, whether McGinty was guilty of the most negligent act possible in having his hand upon the railing and his foot upon the step; for, under the evidence in this case, and under the instructions of the court, if the employees of the railway company saw him in that position, *or by the exercise of ordinary care could have seen him in that position, then the railroad company should have warned him, and they were guilty of negligence.* I ask the court if there is anything wrong in that argument."

The defendant objected, and the court said: "I think he can argue that." And the defendant excepted.

The plaintiffs recovered judgment, and the defendant appealed.

S. W. Moore and *Read & McDonough,* for appellant.

The court erred in overruling the petition as amended for removal to the Federal court. 155 U. S. 404; 67 Ark. 295; 61 Fed. 757; 122 Fed. 588; 123 Fed. 827; 158 U. S. 41; 160 U. S. 77; 119 U. S. 473; 140 U. S. 406; 151 U. S. 685; 121 U. S. 421; 169 U. S. 101; 113 U. S. 595; 68 Fed. 176; 117 Fed. 593; 105 Fed. 530; 92 Fed. 209; 84 Fed. 413; 104 Fed. 929; 69 Fed. 68. The court erred in overruling the motion to quash the service. 11 N. Y. 524; 99 Tex. 107; 78 Tex. 17; 40 Ga. 206; 14 Johns. 134; 17 Ark. 43; 67 Ark. 295; 7 Tenn. 151; 30 U. S. Stat. 497; 148 U. S. 691; 135 U. S. 641; 118 U. S. 375; 4 How. 567; 187 U. S. 294, 553; 138 U. S. 157; 64 Ark. 72; 6 Blackf. 125; 33 Cal. 212; 7 Ind. 519; 34 N. W. 85; 28 Fed. Cas. 397; 5 Wall. 737; 4 Dill. 387, 397; 71 Fed. 576. It was error to permit the plaintiff to testify as to the amount of property deceased had at his death. 57 Ark. 306; 60 Ark. 550. Also to admit the conversation between the deceased and bystanders at the station before the accident. 55 Ark. 248; 47 Ill. App. 484. The court's instruction upon the definition of a passenger was error. Hutch. Car. § 562; 63 Ark. 491; 67 Ark. 53; 51 Conn. 143; Hutch. Car. § 562; 139 Mass. 238; 68 Miss. 643; 52 Am. Rep. 705; 58 Am. & Eng. R. Cas. 4. The court erred in telling the jury that deceased's intoxication must have been the proximate cause of the injury before they could find that he was guilty of contributory negligence. 36 Ark. 371. It was error to instruct the jury that, notwithstanding deceased's negligence, if the defendants failed to exercise ordinary care in avoiding the injury, the plaintiff could recover. 62 Ark.

235; 58 Ark. 397; 60 Ark. 106, 164, 245; 47 Ill. 484; 90 Ill. 586; 46 Ark. 528; 48 Ark. 106; 49 Ark. 277. The instruction governing the measure of damages was error. 60 Ark. 550. The plaintiff was guilty of contributory negligence. 46 Ark. 528; 47 Am. Rep. 266; 36 Ill. App. 327; 40 Ill. App. 461; 84 Me. 203; 96 Mass. 429; 18 Mo. 219; 29 Mo. App. 265; 90 Hun, 419; 64 Vt. 107; 26 Pac. 331; 51 Ill. 495; 175 Pa. St. 122; 42 Pac. 1075; 50 Am. & Eng. R. Cas. 32; Hutch. Car. § 660; 15 So. 876; 33 Md. 542; 63 Miss. 291; 18 Atl. 884; 53 Ark. 117. The question of intoxication should have been submitted to the jury. 31 Am. & Eng. R. Cas. 54. Negligence must be proved. Hutch. Car. § 497.

James Brizzolara, for appellant.

There was no ground for removal to the federal court. 166 U. S. 395; 111 U. S. 379; 1 Wheat. 91; 182 U. S. 244; 66 Fed. 372; 1 Foster, Fed. Pr. 38; Dill. Rem. Caus. § 82; Carter, Jur. Fed. Ct. 16; 155 U. S. 404; 148 U. S. 603; 72 Fed. 561; 183 U. S. 185; 167 U. S. 57; 170 U. S. 226; 160 U. S. 430; 176 U. S. 321; 174 U. S. 168; 117 U. S. 505; 175 U. S. 639; Black, Dill. Hem. Caus. § 109; 175 U. S. 581. The amended petition was filed too late. Moore, Rem. Caus. § § 154, 155, 177; Black, Dill. Rem. Caus. § 183; 32 Atl. 398; 117 U. S. 430; 122 U. S. 513; 149 U. S. 617; 71 Ark. 451; 62 Ark. 261; 67 Ark. 299; 62 Ark. 254; 83 Ky. 170; 63 Ia. 70; 65 Ia. 721; 103 U. S. 11; 145 U. S. 59; 168 U. S. 445; 93 Fed. 260; 52 Ark. 385; 64 Ark. 72; 71 Ark. 258. The purchase of a ticket is not necessary to establish the relation of carrier and passenger. 63 Ark. 491; 67 Ark. 47; Sand. & H. Dig. § 6213; 3 Thomp. Neg. § 2638. Freight trains which carry passengers are bound to protect them. 3 Thomp. Neg. § § 2714, 2901; 57 Ark. 287; 1 Fetter, Car, Pas. § 68; 27 Wis. 158; 47 Ill. App. 307; 80 Hun, 174; 70 Ark. 264. There was no error in the third instruction. 47 Atl. 497; 3 Thomp. Neg. § 2873; 2 Rap. & Mack, Dig. Ry. Law, 391, 392; 58 Ga. 461. A passenger is not bound to sit in an immovable position. 3 Thomp. Neg. § 2945; 1 *Id.* 190; 3 *Id.* § § 2930, 2987; 59 N. E. 491. It was the duty of the conductor to use ordinary care in looking after the safety of the passengers. 67 Ark. 531, 47; 65 Ark. 255; 27 Minn. 178; 13 S. E. 454; 147 U. S. 571; 60 Fed. 698; 75 Mo. 185; 86 Mo. 421; 75 Mo. 475; 72 Conn. 362; 75 Fed. 28. The instruction as to the measure of

damages was correct. 60 Ark. 550; Kirby's Dig. § 6217. The instructions upon the questions of contributory negligence were correct. 117 Fed. 127; 147 U. S. 571; 149 U. S. 43; 2 Rap. & M. Ry. Law, 382, 406, 426; 9 Cent. Dig. 1136; 3 Thomp. Neg. § 2830; 49 N. Y. 990; 80 Hun, 491; 20 S W. 990; 41 Fed. 181.

S. W. Moore and *Read & McDonough,* for appellant in reply.

Where there is a conflict between the bill of exceptions and the record, the latter controls. 23 Ark. 131; 22 Ark. 365; 17 Ark. 332; 10 Ark. 449; 9 Ark. 133; 24 Ark. 499.

BATTLE, J., (after stating the facts.) The appellant has abandoned the first ground for removal set out in its petition. He has no right to removal on the second ground. *Dick* v. *Foraker,* 155 U. S. 404, cited by him to sustain his petition as to the second ground, does not apply. That was a suit in equity brought by a citizen of Ohio against a citizen of Illinois in the circuit court of the United States for the Eastern District of Arkansas, to remove the cloud from a title of real estate situated in that district. The jurisdiction was sustained upon the ground that the suit was local, and had to be brought in the district where the real estate is situated. That is not the case in the action before us. It is transitory. And there is not that diversity of the citizenship of the parties that is necessary to give the United States Circuit Court jurisdiction in such actions; "a citizen of one of the territories of the United States" not being "a citizen of a State, within the meaning of the Constitution and judiciary acts." *Hooe* v. *Jamison,* 166 U. S. 395; *Mansfield, Coldwater & L. M. Ry. Co.* v. *Swann,* 111 U. S. 379; *Snead* v. *Sellers,* 66 Fed. 37.

The amended petition for removal was filed too late, it being filed after the time allowed by the statutes of this State for the filing of answers to complaints. *Kansas City, Fort Scott & Memphis Railroad Co.* v. *Daughtry,* 138 U. S. 298.

The instructions of the court, and the remarks of counsel, which we have copied herein, are erroneous and prejudicial. "It is well settled that one who is injured by the mere negligence of another cannot recover at law or in equity any compensation for the injury if he, by his own * * * negligence or willful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury

would not have happened to him; except where the direct cause of his injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." This rule applies to passengers as well as to other persons. *Little Rock & Fort Smith Railway Company* v. *Miles,* 40 Ark. 298; *Fordyce* v. *Merrill,* 49 Ark. 277; *Little Rock & Fort Smith Railway Co.* v. *Cavenesse,* 48 Ark. 106; *Little Rock & Fort Smith Railway Co.* v. *Pankhurst,* 36 Ark. 371; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Martin,* 61 Ark. 549.

This court has held that it applies and is in force in cases where the employees of a railroad are required by statute to keep a lookout, and when obedience to the statute would have avoided the result of the contributory negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Leathers,* 62 Ark. 235; *St. Louis Southwestern Ry. Co.* v. *Dingman,* 62 Ark. 245; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 64 Ark. 364.

In *Little Rock Traction & Electric Company* v. *Kimbro,* 75 Ark. 211, this court held that conductor on a street railway, seeing the acts of a passenger on the street car, would not be in duty bound to interfere to protect him, unless he could have reasonably anticipated that he would be injured without such interference. He was not bound to do a useless act, or to interfere unnecessarily with the freedom of the passenger. No such rule was embodied in the instructions of the court, and the remarks of counsel. The facts and principles involved in the two cases are different.

Reversed and remanded for new trial.

HILL, C. J., being disqualified, did not participate.

CROSS v. JOHNSTON.

Opinion delivered July 22, 1905.

STATUTE OF FRAUD—ORAL SALE OF LAND—PART PERFORMANCE.—Where a tenant in possession of three acres of land contracted to purchase one hundred and twenty acres of which the former constitute a part, paid

part of the purchase money, and proceeded to clear and improve the residue of the land, his acts constituted a sufficient part performance of the contract to take the case out of the statute of frauds.

Appeal from Calhoun Circuit Court in Chancery.

CHARLES W. SMITH, Judge.

Affirmed with modification.

STATEMENT BY THE COURT.

Elizabeth Cross was the owner of 120 acres of land in Calhoun County, which she contracted to sell to B. B. Johnston on the 1st day of March, 1899. He agreed to pay Mrs. Cross $285 for the land. He paid $50 of this at the time of the contract, and was to pay the remainder when the deed was executed. There was an acre or two of this land cleared, and Johnston had rented this cleared land from Mrs. Cross for that year, and had possession of it at the time he purchased. The next day after making the purchase Johnston took possession of and commenced to clear up and improve additional portions of the land he had bought. A few days afterwards he had a deed prepared, and sent it by one of his sons to Mrs. Cross with the balance of the purchase money to complete the purchase, but Mrs. Cross had changed her mind, and refused to execute the deed. Soon afterwards she sold the land to the Pearson Lumber Company for $275, ten dollars less than Johnston agreed to pay for it. Johnston brought this action in equity against Mrs. Cross and the lumber company, in which he alleged that he had paid part of the purchase money, had taken possession under his contract, and made improvements, etc., and that the lumber company had notice of his purchase from Mrs. Cross at the time it purchased from her, and he asked that her deed to the lumber company be canceled, and that she be required to execute a deed to him. The court found the facts in favor of the plaintiff, and ordered Mrs. Cross to execute a deed to him, but made no order in reference to the deed she had executed to the lumber company. The defendants appealed.

Thornton & Thornton, for appellants.

Parol contracts for the sale of lands, partially performed, must be strictly proved. 39 Ark. 429; 44 Ark. 340; 63 Ark. 105; 34 Ark. 363; 15 Ark. 322; Fry, Spec. Perf. § 203, 229, 380;

Bispham, Pr. Eq. § 337. Part performance is not sufficient. 70 Ark. 350. Possession also must be exclusive, 44 Ark. 79; 21 Ark. 277; 33 N. W. 365; 29 S. W. 409; Fry. Spec. Perf. § 253; Eaton, Eq. 555; Bispham's Eq. § 385. There was an adequate remedy at law. Fry, Spec. Perf. 46. Specific performance will not be decreed where the vendor has parted with title. 19 Ark. 51. The statute of frauds need not be pleaded when contract is denied. 19 Ark. 34, 39. The decree of the chancellor is not supported by the evidence. 55 Ark. 116; 41 Ark. 292; 42 Ark. 522.

Smead & Powell, for appellee.

The statute of frauds must be pleaded. 15 Ark. 322; 19 Ark. 34, 39; 32 Ark. 97; 71 Ark. 302. Appellant had notice of the contract between Cross and the plaintiff before it purchased the land. 23 Ark. 744; 32 Ark. 251; 58 Ark. 84, 446; 69 Ark. 448; 63 Ark. 149; 49 Ark. 336; 52 Ark. 11. Possession of another at the time of the purchase was sufficient to put it upon inquiry. Kirby's Dig. § 763; 33 Ark. 465; 34 Ark. 391; 37 Ark. 195; 47 Ark. 533; 41 Ark. 169; 54 Ark. 424; 66 Ark. 167; 48 Ark. 409.

RIDDICK, J., (after stating the facts.) This is an appeal from a decree ordering the specific performance of a contract to sell and convey land. The evidence is amply sufficient to support the finding of the chancellor that the plaintiff did contract to sell this land to the plaintiff, and that the lumber company, which afterwards bought the land from her, had notice of his purchase at the time it purchased. But the contract of the plaintiff with Mrs. Cross was not in writing, and the main question in the case is whether the facts in proof are such as to take the contract out of the statute of frauds. The plaintiff paid fifty dollars on the purchase when the contract was made, and he took immediate possession of the land, and commenced to clear and improve the land. Plaintiff, it is true, was already in possession of the cleared land, as a tenant, but there was only an acre or two of this cleared land, and the plaintiff had no control of the uncleared land until his purchase. If the only possession shown had been that he continued to remain in possession of the land that he already held as tenant, that would not have been sufficient; but the evidence shows that he not only held the cleared

land, but, after the purchase and in pursuance of his contract, plaintiff took possession of the uncleared land, and commenced to make improvements upon the same by clearing the same and getting it ready for cultivation. He had no authority as tenant to cut timber and clear the land, and these acts of plaintiff show that he had taken possession of the land as owner thereof. As the evidence shows that this was done under the contract of purchase, we think that this, in connection with the part payment of the price, was sufficient to take the case out of the statute, and to authorize the decree rendered by the court. *Morrison* v. *Peay*, 21 Ark. 110; Pomeroy, Contracts, § 115.

By some oversight the decree of the court made no reference to the deed of Mrs. Cross to the Pearson Lumber Company, but, unless this deed is canceled, it is evident that a deed from Mrs. Cross to the plaintiff will be of no avail. As this was probably a mere oversight, the case, if plaintiff desires, may be remanded so that the decree can be corrected in that respect; but if that is done, the additional cost must be paid by the plaintiff. In other respects the decree is affirmed.

HINSON v. STATE.

76 366
90 209

Opinion delivered July 22, 1905.

1. WITNESS—IMPEACHMENT AS TO IMMATERIAL MATTER.—Where a witness in a trial for assault with intent to kill was asked if he did not state to a certain person a day or two after the difficulty that he knew there was going to be a difficulty between one of the defendants and the party assaulted, and that witness went down there to see it well done, it was error to admit evidence to contradict the witness by proving that he had made such a statement. (Page 369.)
2. TRIAL—IMPROPER ARGUMENT.—Where a witness was improperly impeached by contradicting him as to an immaterial point, it was error to permit the prosecuting attorney to argue that the witness had been contradicted on a material point, and was therefore unworthy of belief. (Page 370.)

3. ASSAULT TO KILL—REDUCTION OF DEGREE.—A conviction of assault with intent to kill, with the consent of the Attorney General, will be reduced to a lower degree of the offense if such reduction will cure the only errors of which complaint is made. (Page 370.)

Appeal from St. Francis Circuit Court.

HANCE N. HUTTON, Judge.

Hinson and Scott were convicted of an assault with intent to kill, and have appealed.

Judgment modified.

STATEMENT BY THE COURT.

R. H. Hinson and E. S. Scott were in March of this year engaged in logging, and lived with their wives in tents on the bank of the St. Francis river northeast of Forrest City. Not far away lived one Al. Smith, upon whom, on the 14th day of March, they committed an assault. Smith was struck on the head with a stick, and severely hurt, and the grand jury of St. Francis County indicted the defendant for an assault with intent to kill. On the trial the evidence showed the following facts: On the night of the 13th of March Smith indulged to some extent in intoxicating liquors, and while under the influence thereof he went to the tent where Hinson lived, and inquired if he was there. On being told that he was not at home, he made use of insulting language about him in the presence of Hinson's wife and child. Scott and his wife came from their tent to Hinson's tent, and after some persuasion induced Smith to return to his home. The witnesses say that after Smith returned home he came out of his house with a shotgun and pistol, and fired into the tent. One of the bullets of the pistol, so the witness testified, passed through the tent not far from where Mrs. Hinson was seated in the tent with her child. Witnesses also testified that Smith while at the tent made threats against Hinson. The next day, while Smith was near the place where logs were being placed in the river, Scott accosted him, and requested him to pay the money that Smith owed him. Smith told him that he would do so, but said that he might have to go to his house to get the money. Scott then said that when they arranged their business matters he wanted Smith to settle for his conduct of the previous night. To quote the language of one

of the witnesses for the State, "Smith then asked, 'What have I done?' Mr. Scott said, 'You cursed me, and abused me; you called me a son-of-bitch, and threatened to kill me.' Mr. Smith said, 'I did not do it; if I did, I apologize to you for it.' And about that time Mr. Scott struck him on the side of the head with a stick, staggering him, and knocked him partially down, and I think he struck him again. About the same time the defendant Hinson, who was standing near, ran up and struck Mr. Smith with a stick, and knocked him down. I think he struck him two or three times; once on the back, and once or twice on the head. When Mr. Hinson took part in the fight, Mr. Scott quit, and Scott and I caught hold of Hinson, and tried to pull him off of Mr. Smith. Hinson had dropped his stick, and had Smith by the throat with one hand, and was hitting him with the other. While Scott and I were trying to separate Hinson and Smith, they became engaged in a scuffle for a pistol in Smith's right hip pocket, and one Mr. J. S. Turner ran up and took the pistol from both of them, and carried it, and gave it to Mr. Bailey, who was sitting near in a wagon. When we succeeded in separating Hinson and Smith, Smith started off towards his house. When he had gone but a short distance, Hinson broke loose from us, and followed Smith, overtook him, and I think he struck him two or three times. Mr. Garrett went up, and caught hold of Hinson, and Smith got up, and started towards his home, and Hinson threw his stick after him." The sticks with which the assault was made were introduced in evidence, and a witness testified that a man could be killed with them. Other witnesses testified that, after Hinson commenced his assault upon Smith, Scott made no further effort to injure Smith, but on the contrary endeavored to prevent Hinson from striking him.

There was some testimony on the part of the defendant that Smith attempted to draw a pistol during the assault, and Hinson testified that he struck Smith because he thought he was about to draw his pistol in the effort to carry out the previous threats against himself and Scott. The jury returned a verdict of guilty against both defendants for the crime of assault with the intent to kill, and assessed the punishment of each of them at one year in the penitentiary, and judgment was rendered against them accordingly, and they appealed.

R. J. Williams, for appellants.

Robert L. Rogers, Attorney General, for appellant.

There was no incompetent evidence admitted. 1 Greenl. Ev. 542, 546.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment convicting the defendant of an assault with intent to kill one Al. Smith. While the evidence does not fully satisfy us that either of the defendants intended to kill Smith, the assault made by Hinson was very persistent, and, had no one interfered, might have resulted in the death of Smith. As to Hinson, therefore, we think the evidence is sufficient to sustain the judgment. The evidence against Scott, while it shows an assault, does not to our minds show an intent to kill. Before noticing that point further, we call attention to the argument of the appellants that improper evidence was admitted against them. One Garrett, who testified for the defendants, and whose daughter was the wife of Scott, was asked on his cross-examination by the attorney for the State "if he did not state to one Duke a day or two after the difficulty, while he (Garrett) was on his way to Round Pond, that he (Garrett) knew that there was going to be a difficulty between Scott and Smith when they met, and that he went down there where they were to see it well done." The defendants objected to the asking of this question, but the court overruled the objection, and the witness responded that he had made no such statement to Duke or to any one else. Afterwards the attorney for the State was, over the objections of the defendants, permitted to ask Duke whether Garrett had made such statement to him. The answer of the witness was, "Yes, sir; he told me that he knew there was going to be a row next morning, and that he went down there to see it out." Now, the witness Garrett was not asked whether or not the defendants, or either of them, had told him that they intended to have a difficulty with Smith or make him settle for his conduct of the previous night. He was not asked to state whether he knew there was going to be a difficulty between the defendants and Smith before it happened, or if he had any reason to believe that there would be trouble between them previous to the difficulty. If these questions had been asked, and had been answered in the negative, then, to refresh his memory, or to impeach him,

the witness might have been asked if he had not made contrary statements to Duke. But, without having asked the witness anything of his own previous knowledge of the difficulty, the attorney for the State propounded to the witness the question as to whether he had not previously stated to Duke after the fight that "he knew there was going to be a row next morning, and went down there to see it out." As the witness answered this question in the negative, no prejudice would have resulted, had not the court permitted the State by its attorney to prove by Duke that the witness had stated to him after the difficulty that he knew it was going to take place, and went down to see it out. Now, as Garrett was not asked, and did not testify, whether he knew, previous to the difficulty, that the assault was going to be made, it was entirely immaterial what he said to Duke on the subject, for the answer did not tend either to corroborate or contradict his previous testimony, for the reason that he had not testified on that point. This testimony of the witness Duke contradicted Garrett about an immaterial matter, and should not have been permitted.

That the admission of this improper testimony was probably prejudicial is shown by the argument of the prosecuting attorney, for he contended in his argument before the jury that this testimony of Duke contradicted Garrett on a material point, and showed that he was unworthy of belief. It may have also aroused in the minds of the jury a suspicion that the assault upon Smith was premeditated, and caused them to find the defendants guilty of a higher grade of crime than they would otherwise have done. Proper exceptions were saved both to the admission of this evidence and to the argument of prosecuting attorney based upon it. We are of the opinion that the evidence was incompetent, and that for that reason the argument also was improper and prejudicial.

In conclusion, we will say that, though there may be evidence sufficient to support the judgment of an assault with intent to kill against the defendants, we feel very doubtful on that point, especially as to the defendant Scott. But, while we have doubt as to whether the defendants intended to kill Smith or not, we think it is clear that they were not justified in making the assault upon him. The evidence makes it very clear that

both of these defendants were guilty of an aggravated assault, and one of them may have been guilty of a higher crime. On the whole case, we are of the opinion that the judgment must be reversed and a new trial ordered unless the Attorney General should prefer to have the judgment sustained against them for one of the lower grades of crime included in the indictment. Unless he files a motion to that effect within one week, the judgment will be reversed, and a new trial ordered.

MAIN v. TRACEY.

76 371
s86 28

Opinion delivered July 22, 1905.

SALE—SHIPMENT BEFORE ORDER WAS COUNTERMANDED.—Where a bill of goods was ordered, and the same were shipped in accordance with the terms of the order, it is no defense, in an action for the purchase money, that a letter countermanding the order was received after the goods had been shipped.

Appeal from Calhoun Circuit Court.

CHARLES W. SMITH, Judge.

Reversed.

STATEMENT BY THE COURT.

Action by W. F. Main & Company, wholesale jewelry merchants of Iowa City, Iowa, against Tracey & Witherington, retail merchants of Woodbury, Calhoun County, Arkansas, to recover the price of a bill of jewelry sold by the former to the latter. A verdict was rendered in favor of the defendants, and plaintiffs appealed.

Thornton & Thornton, for appellants.

Appellee could not rescind the contract of purchase. Tied. Sales § 40; Benj. Sales § 64; 47 Ark. 519. Appellee did not plead premature suit below and cannot here. 54 Ark. 442. It is error to give an instruction not supported by the evidence. 42 Ark. 61; 46 Ark. 96; 54 Ark. 339.

C. L. Poole, for appellees.

The order for the goods was countermanded in due time. 1 Mech. Sales, § 252; 74 Ark. 16; 60 Ark. 539. The finding of the jury was warranted by the evidence. 57 Ark. 93; 55 Ark. 229; 53 Ark. 537; 46 Ark. 141; 51 Ark. 467; 84 S. W. 786; 57 Ark. 192. There was a rescission of the contract. 23 Am. & Eng. Enc. Law, 918; 52 Ark. 453; 21 Am. & Eng. Enc. Law 58; 28 Ind. 365; 4 Wend. 285; Beach, Mod. Law Contr. § 230.

McCULLOCH, J., (after stating the facts.) Appellees gave a written order for the bill of jewelry to the traveling salesman of appellants, and same was forwarded to appellants for acceptance and shipment of the goods. Appellees thereafter wrote and mailed a letter to appellants countermanding the order. This case is similar upon the facts to the recent case of *Merchants' Exchange Company* v. *Sanders,* 74 Ark. 16, except that in the Sanders case the proof failed to show satisfactorily that the letter countermanding the order was received before the acceptance of the order and shipment of the goods, while in this case the manager of appellants' business testifies positively that the countermand was not received until after the shipment of the goods. His testimony is uncontradicted on this point. There was no other testimony tending to show when the letter was or could have been received. Neither the precise date when the letter was mailed, nor the length of time which would, in the ordinary course of mail, have been required to carry the letter to appellants' place of business, was proved, nor any other circumstance from which the jury could have found that the letter was received by appellant before shipment of the goods. This being true, the verdict finds no support from the evidence, as it is shown beyond dispute that appellees gave the order for the goods, and the same were shipped to them in accordance with the terms of the order.

The court erroneously gave an instruction at appellees' request submitting the case to the jury upon a theory not warranted by the pleadings or proof, but the bill of exceptions does not disclose any objection thereto by appellants, and we cannot consider the assignment of error as to that in the motion for new trial.

On account of the insufficiency of the evidence to sustain the verdict, the judgment is reversed, and the cause remanded for a new trial.

REMMEL v. WITHERINGTON.

Opinion delivered July 22, 1905.

AGENCY—RESPONDEAT SUPERIOR.—Where a special insurance agent represents and acts for his superior, the general agent, in taking notes for premiums, the general agent is bound by and responsible for the fraudulent acts of the special agent in taking such notes.

Appeal from Calhoun Circuit Court.

CHARLES W. SMITH, Judge.

Affirmed.

STATEMENT OF FACTS BY THE COURT.

This is an action brought by appellant, Remmel, against appellee, Witherington, to recover the amount of a negotiable promissory note for the sum of $414.60, executed by appellee to one Ward, and by the latter assigned before maturity to appellant. Appellant was the general agent for a life insurance company, and Ward was a sub-agent, or, as he is designated in the proof, a special agent working under appellant. The note in question was executed to cover the first annual premium for a policy of $10,000 in said insurance company. Appellee, Witherington, was illiterate, and unable to write his name, but signed the note by mark, and the note and signature were written and witnessed by Ward. Ward also wrote the signature of appellee to the application for insurance.

The policy for $10,000 was issued by the company, and mailed to appellee, who declined to accept it, and refused to pay the note, for the alleged reason that he intended only to apply for insurance in the sum of $2,000 and to execute a note for premium on a policy for that amount, and that Ward had taken

advantage of his illiteracy, and fraudulently imposed upon him by writing his signature to an application for a $10,000 policy and a note for premium thereon, instead of for $2,000, as agreed upon. He pleaded this as a defense to the action, and the jury returned a verdict in his favor.

Thornton & Thornton, for appellant.

A principal may intrust his interest to an agent, who has an interest that may be adverse to the principal's. Mech. Ag. § 713. Every person is presumed to know the contents of a writing signed by himself or by another at his request. Brad. Ev. 601; 141 N. Y. 559; 142 U. S. 56.

Smead & Powell, for appellee.

McCULLOCH, J. The testimony was conflicting on the issue as to the alleged fraud on the part of Ward in writing the application for a policy of $10,000 and the note for the premium on that amount, instead of $2,000; but the jury found, upon instructions to which there was no objection, in favor of appellee, and we must treat that issue as settled. The testimony is sufficient to have sustained a verdict either way on that issue.

Appellant asked an instruction, which the court refused, telling the jury that "if the defendant requested the witness Ward to sign his name to note sued on, he became the agent of defendant in signing the note; and if he did not follow defendant's instructions, then the plaintiff, if he took the note before maturity and for a valuable consideration, is not responsible for the act of the agent." The refusal of the court to give the instruction is now urged as grounds for reversal. The proof did not warrant the giving of this instruction. Ward was acting under authority from and control of appellant. It is shown that the company does not accept notes for premiums, but that the taking of notes by a special agent is done for the general agent, and that in so doing he acts for his superior, the general agent.

Ward testified on that point as follows:

"Q. Does Mr. Remmel take up all those notes taken by special agents?

"A. Yes, sir; we are not allowed to handle any paper whatever.

"Q. Then, while this note is taken in your name, it is really for Mr. Remmel?

"A. Yes, sir, and indorsed right over to him.

"Q. You did that because you were authorized by him to do so and turn it in to the general agent?

"A. Yes, sir."

This shows that Ward in taking the note was the agent of appellant, who is responsible for his acts in regard thereto. *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295; *Insurance Company* v. *Brodie,* 52 Ark. 11.

We do not mean to say that a person may not act as the agent of both parties to a transaction for some purposes, where there is no conflict of interest; but that rule cannot be applied to the facts here, where Ward was the agent of appellant in taking the note.

We find no error, and the judgment is affirmed.

---

76 375
84 468

HUNTON v. MARSHALL.

76 375
88 380

Opinion delivered July 22, 1905.

76 375
89 203

REAL ESTATE BROKER—WHEN ENTITLED TO COMMISSIONS.—A broker who has been employed to sell real estate is entitled to his commissions where he has brought about between his principal and another negotiations which resulted in a sale, which was consummated by the principal.

Appeal from Sebastian Circuit Court, Fort Smith District.

STYLES T. ROWE, Judge.

Affirmed.

STATEMENT BY THE COURT.

Action by J. E. Marshall against Mrs. E. H. M. Hunton to recover the amount of commission alleged to have been earned by the plaintiff as a real estate agent under employment by the defendant for the sale of certain real estate, in the city of Fort

Smith, owned by her. The plaintiff recovered judgment for the amount sued for, and defendant appeals.

Mechem & Mechem, for appellant.

A broker is not entitled to commissions for unsuccessful efforts. 83 N. Y. 383; 61 N. Y. 416; 73 Ga. 301.

Winchester & Martin, for appellee.

In a suit by a real estate agent for the amount of his commission, it is immaterial that the owner sold the property and concluded the bargain. 53 Ark. 49; 52 Mo. 249.

McCULLOCH, J. No exceptions were saved below on the introduction of testimony, and none to the rulings of the court in giving or refusing instructions. The only question presented by counsel here is whether or not the plaintiff was the procuring cause of the sale, so as to entitle him to commission.

It is not disputed that plaintiff was a real estate agent, that defendant listed her property with him for sale at the stipulated price of $2,250, and that he at once opened up the first negotiations with one Crawford, who finally became the purchaser.

Appellee testified that, as soon as appellant placed the property in his hand, he offered it to Crawford, and showed it to him, and that Crawford was pleased with it, but said he would not buy for a short while. That the next day he informed appellant of these facts, and she then told him that she had decided to put the price up to $2,400, but finally agreed that he might sell to Crawford for $2,250, net to her, Crawford to pay the commission; that he communicated this price to Crawford, with a statement that his commission would be $115, and Crawford replied that he was still not quite ready to purchase a house, but would decide about it in a few days. Some days later, while the negotiations were still pending between appellee and Crawford, appellant sold the property to Crawford for $2,400, less the commission, and refused to pay appellee a commission.

We think it is quite clear that appellee was the procuring cause of the sale under his employment for that purpose, and is entitled to the commission, though the sale was made and consummated by the owner. *Scott* v. *Patterson,* 53 Ark. 49.

Affirmed.

SAINT LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. CLEERE.

Opinion delivered July 22, 1905.

76 377
77 12
76 377
e 83 67

1. MARRIED WOMAN—AUTHORITY TO ACT AS ADMINISTRATRIX.—Under the laws of New York a married woman is capable of acting as administratrix, and under Kirby's Digest, § 6003, a foreign administratrix may sue in this State (Page 380.)

2. RAILROAD—NEGLIGENCE—INSTRUCTION.—The court instructed the jury, in a suit against a railroad company for negligent killing of a person on its track, that if the defendant backed one of its engines over the track between its coaches and the platform without guard or lookout, and without such signal or warning as would reasonably attract the attention of a man of ordinary care and prudence who was rightfully engaged in passing between the coaches and platform, the railroad company was guilty of negligence. *Held,* that the instruction, taken with other instructions given, did not exact too great a degree of care. *Held,* also, that, construing all the instructions together, this instruction did not assume that deceased was rightfully upon the track. (Page 381.)

3. SAME—NEGLIGENCE—PARTIAL OBSTRUCTION OF VISION AND HEARING.—The court properly charged that the fact alone, if proved, that deceased pulled his cape over his head in such manner as only partially to obstruct his ability to see or hear an approaching train, and in that condition stepped in front of an approaching engine, did not necessarily render him guilty of contributory negligence, the question being whether he exercised ordinary care under the circumstances. (Page 383.)

4. SAME—REMARRIAGE OF WIDOW IN REDUCTION OF DAMAGES.—In an action by an administratrix on behalf of the widow and next of kin of one alleged to have been killed by defendant's negligence it was not admissible for defendant to show, in reduction of the widow's damages, that she had remarried since the killing. (Page 386.)

5. APPEAL—EFFECT OF FINDING AS TO SUFFICIENCY OF EVIDENCE.—Where on former appeal the evidence was found sufficient to support the verdict, but the cause was reversed because of erroneous instructions, the finding as to the sufficiency of the evidence is not conclusive on a new trial. (Page 387.)

6. CARRIERS—PERSON ASSISTING PASSENGER.—One who passes over railway tracks betwen the platform of the station and a coach which is open to receive passengers, being engaged in looking after an embarking passenger, has a right to rely upon an implied assurance that the way is clear. (Page 387.)

7. SAME—INSTRUCTION AS TO NECESSITY OF LIGHTS.—An instruction which withdrew from the jury's consideration the question whether there

should have been lights upon the moving engine and tender was properly refused if there was evidence tending to show that it was dark enough to require lights. (Page 387.)

8. DEATH—EXCESSIVE DAMAGES.—Where the evidence tended to establish that deceased had an expectancy of life of 35 years, and was contributing to his family more than $1,250 per annum, and that his infant child suffered the loss of the parent's physical and moral training, a verdict of $20,000 in favor of the widow and next of kin was not excessive. (Page 388.)

9. SAME—INTEREST.—In action for a negligent killing, plaintiff is entitled to interest at the rate of 6 per cent. per annum on the amount of damages from the date of deceased's death to the date of recovery. (Page 388.)

Appeal from Hot Springs Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Affirmed.

STATEMENT BY THE COURT.

This action was brought by the widow and administratrix of the estate of Arthur Tomlinson, deceased, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for his death. The case has been here on a former appeal, and the facts are fully stated in the former opinion. *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson,* 69 Ark. 489.

After the case was remanded, a change of venue was taken to Hot Springs County, where a trial was had which resulted in a verdict and judgment in favor of the plaintiff for $20,000 damages.

Before the trial the defendant filed a plea in abatement, as an amendment to its answer, setting forth the intermarriage of the plaintiff with one Martin J. Cleere since the commencement of the action. The plaintiff responded, admitting such intermarriage, and asked that the cause proceed in her name, Regina Tomlinson Cleere as administratrix, and that her husband be joined with her in the suit. She asked that she, in her own interest as widow, and Arthur T. Tomlinson, the infant son and only heir at law of said decedent as the next of kin, be also made parties plaintiff. These requests of the plaintiff were granted by the court, and the cause proceeded accordingly. The final judgment of the court awarding damages was rendered only in favor of the administratrix.

B. S. Johnson, for appellant.

The plea in abatement should have been sustained. 69 Ark. 489; Sand. & H. Dig. § 5912; 32 Ark. 91; 35 Ark. 511. The verdict should have been for appellant. 69 Ark. 498; 62 Ark. 245; 95 U. S. 697; 49 Ark. 134; 61 Ark. 549; 130 Fed. 72; 16 S. W. 909; 55 Ark. 459; Patt. Ry. Law, § 177; 54 Ark. 431; 73 Ind. 163; 62 N. E. 455; 23 Oh. Cir. Ct. 130; 201 Pa. 124; 96 Me. 207; 64 N. E. 130; 121 Fed. 678. Under the facts in the case, appellant was not liable. 154 Mass. 403; 155 Mass. 44; 165 Mass. 264; 156 Mass. 180; 158 Mass. 10; 4 L. R. A. 632; 74 Fed. 299; 44 S. W. 703; 57 Fed. 926; 73 Fed. 627; 61 Ark. 555; 150 U. S. 248; 12 Am. & Eng. R. Cas. 460. The first instruction given was abstract and misleading. 16 Ala. 53; 5 Ark. 651; 18 Ark. 527; 15 Ark. 492; 37 Ark. 593; 51 Ark. 88; 55 Ark. 259; 68 Ark. 106; 65 Ark. 98; 37 Ark. 333; 30 Ark. 383. The third instruction was error. 14 Ark. 295, 537, 543; 34 Ark. 702; 45 Ark. 263; 37 Ark. 333; 30 Ark. 383; 57 Ark. 512; 62 Ark. 286. The sixth instruction undertakes to pass upon a question of fact. 37 Ark. 581; 37 Ark. 239; 49 Ark. 439; Const. Ark., art 7, § 23; 49 Ark. 148; 34 Ark. 696; 45 Ark. 166, 492; 123 Fed. 52. The instruction upon the re-marriage of plaintiff was error. 13 App. Cas. 800; 4 Best & S. 403; 44 L. J. Exch. 39; 15 Ont. App. 477. Where a disputed fact is shown not to exist by undisputed evidence, that fact should be taken from the jury. 51 Ark. 140; 57 Ark. 461; 52 Ark. 406. The tenth instruction requested by appellant should have been given. 54 Ark. 431; 64 Ark. 365; 62 Ark. 156, 263; 61 Ark. 549; 95 U. S. 161; 114 U. S. 615. Instructions Nos. 11, 12 and 14, requested by defendant, should have been given. 56 Ark. 460; 143 Ind. 405; 3 Elliott, Railroads, 1771, 1167; 41 N. Y. 296; 128 Ind. 143; 25 Mich. 274; 105 Mass. 77, 203; 39 N. Y. 358; 160 Pa. St. 117; 56 Minn. 274; 26 Ark. 17; 5 Ark. 558; 7 Ark. 542; 10 Ark. 186. The verdict is excessive. 57 Ark. 384; 12 S. E. 512; 18 W. Va. 1; 11 Wis. 415; 43 Kas. 309; 37 Kas. 567; 38 N. Y. 178; 68 Tex. 617; 7 S. W. 492; 5 Minn. 376; 17 Grant. 366; 12 Pick. 191; 40 Cal. 73; 13 Texas, 594; 66 Ill. 71; 49 S. W. 868; 38 Ib. 401; 46 Mo. App. 638; 70 Ga. 120; 91 Ga. 820; 49 Kas. 78; 37 Kas. 578; 44 Kan. 410; 49 Pac. 436; 46 Mo. 310; 75 N. W. 272; 39 Ark. 511.

Ashley Cockrill and *Murphy & Mehaffy,* for appellee.

The questions settled by the former appeal cannot be considered in this one. 55 Ark. 614; 56 Ark. 170; 3 Cyc. 396; 36 N. Y. 339. The motion to abate the suit was properly overruled, 7 La. 595; 59 Ind. 344; 43 Mass. 31; 44 Ark. 202; 49 Ark. 277; 63 Ark. 510; 70 Ark. 74; 11 Am. & Eng. Enc. Law, 681, 814; 1 Wm. Exrs. 233; 41 S. C. 374; 3 Bush, 505; 16 Kas. 568; 1 Disn. 592; Cros. Ex. & Admr. 102; Sand. & H. Dig. § 37; 32 Ark. 332; 1 Redf. 217; 89 N. Y. 401; 2 N. Y. S. 634; 84 N. Y. 48. The husband, widow and son were properly joined as parties. 54 Ark. 528; 30 Ark. 401; 35 Ark. 303; 10 Enc. Pl. & Pr. 222; 70 Tex. 582; Kirby's Dig. § 5999; 68 Ark. 555; 43 Ark. 41; 44 Pa. St. 179; 112 Pa. St. 511; 71 Ark. 258; 77 S. W. 890; Kirby's Dig. § 6002; 93 Fed. 260; 52 Fed. 371; 68 Tex. 664; 76 S. W. 589; 28 Ohio St. 191; 36 L. R. A. 812. The court's instruction upon the remarriage of the widow was proper. 45 Oh. St. 470; Suth. Dam. § 158; 70 Tex. 582; 57 Ga. 277; 34 Atl. 856; 27 W. Va. 32; 91 N. W. 358; 66 N. E. 696; 69 N. E. 620. The instructions as to the hood worn by deceased were correct. 74 Ill. App. 387; 36 S. W. 319; 79 Wis. 404; 115 Mass. 190. Instructions Nos. 11 and 12 requested by defendant were properly refused. 56 Ark. 457; 64 Ark. 332; 54 Ark. 159; 48 Ark. 366; 12 Am. & Eng. R. Cas. 418. The verdict was not excessive. 15 Ark. 345; 21 So. 507; Sand. & H. Dig. § 912; Suth. Dam. § 455; 52 Fed. 371, 724, 87; 64 Tex. 485; 75 Tex. 157; 60 Ark. 550; 34 S. W. 229; 27 W. Va. 32; 42 Pac. 822; 66 Me. 572; 29 N. Y. 286; 2 Biss. 282; 58 Ark. 454; 60 Ark. 560; 50 Pac. 508; 44 N. Y. Sup. 820; 52 Fed. 714, 87; 34 S. W. 133; 75 Tex. 61; 178 N. Y. 623; 87 N. Y. S. 617; 80 S. W. 852; 176 N. Y. 607; 174 N. Y. 512; 176 N. Y. 607; 65 S. W. 217.

MCCULLOCH, J., (after stating the facts.) 1. The initial question presented for our consideration is, should the action have been abated on account of the remarriage of the administratrix? In passing upon that point we waive the question whether, conceding that the remarriage of the administratrix *ipso facto* revoked her letters and left no administration pending, the widow and heir at law could properly be made parties plaintiff, and the cause be allowed to proceed in their names. This was done, and the cause proceeded in their names as well as in the

name of the administratrix, though the final judgment was rendered in favor of the administratrix.

The statute provides that "every such action shall be brought by and in the name of the personal representative of such deceased person; and if there be no personal representative, then the same may be brought by the heirs at law of such deceased person." Kirby's Digest, § 6290.

But we uphold the ruling of the court upon a different ground from that of the right of the widow and heir to be substituted as parties plaintiff. The plaintiff derived her powers from letters of administration issued to her from the proper court exercising probate jurisdiction in the State of New York, where the decedent lived and claimed his citizenship at the time of his death, and where the plaintiff also resided. A foreign executor or administrator is permitted by the statutes of this State to sue here. Kirby's Dig. § 6003. Under the laws of that State, which must control us in determining the question, and of which we take judicial knowledge (Act April 11, 1901, Kirby's Digest, § 7823), married women are legally capable of acting as administratrices, and, that being true, it necessarily follows that the marriage of an administratrix did not revoke her letters. The course of legislation in that State on the subject is reviewed in the case of Re *Benj. Curser Estate,* 89 N. Y. 401. See also *Hamilton* v. *Levy,* 41 S. C. 374; *Moss* v. *Rowland,* 3 Bush, 505; *Kansas Pacific Railway Co.* v. *Cutter,* 16 Kan. 568.

No error was committed in refusing to sustain the plea in abatement.

2. Numerous errors are assigned in the giving of instructions asked by plaintiff, and in refusing to give certain instructions, and modifying others asked by the defendant.

Nine separate instructions were given at the request of the plaintiff, and fifteen at the request of the defendant, some of which were modified. All of them need not be copied here, but only such as we deem it important to discuss.

Instruction number three given at plaintiff's request is as follows:

"3. If you find from a preponderance of the evidence that the defendant railway backed one of its engines over a track between the coaches and the platform, without a guard or look-

out, or, not having such a guard or lookout, without signal or warning which, under the circumstances, would reasonably attract the attention of a man of ordinary care and prudence who was rightfully engaged in passing between the coaches and the station platform, the railway was guilty of negligence, and you should so find."

Error is alleged in that the word "guard" is used in the instruction, though the statute only requires a lookout to be kept; and that the instruction assumes the existence of the fact that plaintiff's intestate was rightfully upon the track.

We do not think that the instruction is open to either of the objections named. The court was there telling the jury what would constitute negligence on the part of the railway company. It is true that the statute only requires that a lookout be kept, but the court in effect said that if *either* a guard or lookout was kept, or if, in the absence of such guard or lookout, such signals or warnings were given as would, under the circumstances, reasonably attract the attention of a man of ordinary care and prudence rightfully engaged in passing between the coaches and station, then the company was guilty of no negligence. An instruction on that subject which omitted the word "guard" would have been erroneous and prejudicial to appellant's interest, as there was some testimony tending to show that a guard was maintained near by who warned persons about the tracks, and, in the face of that testimony, it would have been improper to instruct the jury that the failure to keep a lookout was negligence. On the other hand, if the servants of the company kept neither a guard nor lookout, nor gave signals or warnings such as would reasonably attract the attention of a man of ordinary care and prudence rightfully engaged in passing between the station and the coaches then open for the reception of passengers, then they were guilty of negligence, and the jury were properly so instructed.

This instruction must, of course, be considered in connection with the others, and particularly the following, given at the instance of the defendant:

"17. The court instructs the jury that defendant's only duty in running said engine was to use ordinary care, with reference to speed of same, to keep a lookout while passing through the station,

and to give signals by ringing the bell; and if the proof shows that these things were done, then there was no negligence, and your verdict should be for defendant."

The two, when read together, constitute a correct and complete exposition of the law on the question of negligence, as applicable to the facts of this case, and were quite as favorable to appellant as the facts warranted.

No higher degree of care was exacted of appellant's servants by the instruction complained of than is done by the following language contained in the fourteenth instruction asked by appellant's counsel, viz: "Although it is the duty of the railway company, by lookout, by bell signals, and by such other means as ordinary prudence may dictate, to endeavor to protect him, it has the right to assume that he has knowledge of his surroundings, and knows that the engines and trains may pass, and that he will use ordinary care to protect himself," etc.

Nor does the instruction involve an assumption by the court of the fact that Tomlinson was rightfully upon the track. The question whether he was, at the time he was killed, crossing the tracks upon the invitation of the railway company was the chief point at issue in the case, and the proof and instructions were directed specifically to it. All the instructions must be considered together, and the question was plainly submitted to the jury for determination upon instructions given at the instance of each party, and the jury could not possibly have understood that the existence of that fact was assumed by the court. *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 75 Ark. 325; *Fort* v. *State,* 52 Ark. 180.

The eighth instruction, given at the request of the defendant, is an example of the manner in which the question was submitted:

"One who, after having escorted a passenger to his coach, leaves the coach, and then returns without any necessity therefor, and for his own pleasure merely, is a licensee, and cannot be said to have returned upon an implied invitation of the carrier, and the carrier owes him no duty save to keep a lookout, and not to wantonly injure him."

The next assignment of error is in the giving of instruction number seven, asked by the plaintiff, which is as follows:

"7. You are instructed that the fact alone, if proved, that Tomlinson pulled his cape over his head in such manner as only partially to obstruct his ability to see or hear an approaching train, or both, and in that condition stepped or walked in front of an approaching engine, does not necessarily render him guilty of contributory negligence; the question for you to determine being, then, whether Tomlinson exercised ordinary care and prudence under the circumstances."

The court also gave, in the following modified form, instructions on the subject of contributory negligence, asked by appellant, viz.:

"7. The court charges the jury that if they find from the evidence that Tomlinson, in order to keep the rain off, enveloped his head in the cape or hood of his coat just before he passed upon the track, *so as to obstruct his vision or hearing,* and in this condition stepped, ran or walked upon defendant's track immediately in front of a backing engine, and was immediately struck and killed by it, when he would have seen or heard the engine approaching had his vision or hearing not been obstructed, then he was guilty of contributory negligence, and your verdict should be for the defendant.

"9. If the jury find from the evidence that the deceased attempted to cross over one of defendant's tracks during a heavy rain, with his head and ears so muffled up as to obstruct his hearing or seeing an approaching engine, and, in making such an attempt stepped in front of a moving engine, was struck, and killed, then the court tells you that he was guilty of contributory negligence, and there can be no recovery against the defendant."

And the following in the form asked by appellant, viz.:

"15. If the jury find from the evidence that Tomlinson pulled his cape or hood over his head, covering his eyes and ears so that he could only see directly in front, and in this condition plunged on the track just before the tender of the backing engine, then he was guilty of contributory negligence, and your verdict should be for the defendant."

This court on the former appeal of this case said:

"While it cannot be said as a matter of law that a person crossing a track of a railroad by invitation of the company should under all circumstances look and listen for approaching trains,

neither, on the other hand, can it be said that they should not do so; the question, as before stated, being usually one for the jury to determine. Yet certainly a person in such situation should not lose sight of the fact that he is in a place of danger to a careless person. He should not close his eyes or stop his ears, so that warning of danger would not reach him."

It will be observed that the court did not hold that a partial obstruction to the sight or hearing would necessarily be contributory negligence, but said that, if Tomlinson "pulled his cape over his head, covering his eyes and ears, so that he could see directly in front only, and plunged, in this condition, on the track just before the tender of a backing engine," he was guilty of such negligence as would bar a recovery. In other words, it was held that Tomlinson's failure to look and listen was not necessarily negligence, but that if he obstructed his vision and hearing so as to put it beyond his power to see or hear, he was, as a matter of law, guilty of contributory negligence. It follows from this that if, in crossing the track, he pulled his cape over his head in such manner as only partially to obstruct his vision or hearing, and not to put it beyond his power reasonably to hear the approaching engine, then it cannot be said, as a matter of law, that he was guilty of negligence, but it was a question for the jury to determine whether or not he exercised ordinary care and prudence under the circumstances. To hold that, as a matter of law, he could not with prudence even slightly or partially obstruct his vision or hearing would be to declare that he must have looked or listened—the very thing which the court in the former opinion in this case would not declare, but said that it should be submitted to the jury as a question of fact. The court said:

"If, then, a passenger or his escort is injured while attempting to pass an intervening track to reach a depot or train, when the circumstances justify him in believing that he is invited by the company to pass over the track, it becomes a question for the jury, after considering all the circumstances, to say whether or not he is guilty of ordinary care. In determining that question the jury should no doubt consider whether he did or did not look and listen, along with the other circumstances in proof; but the mere fact, if proved, that he did not look or listen does not,

under such circumstances, conclusively establish negligence, it being for the jury to say whether he should have looked or listened, and whether, under all the circumstances, he was guilty of negligence or not."

We do not think there was any error in giving the instruction complained of, especially in connection with those herein quoted on the same subject. They were entirely harmonious, and in no wise inconsistent with each other, or with the former opinion of the court, which is established as the law of this case.

Appellant also complained on account of the giving of an instruction asked by the plaintiff to the effect that the jury should not consider the remarriage of the widow as affecting the assessment of damages. This was a correct instruction, as it was not proper for the jury to consider the remarriage of the widow to reduce the amount of the damage. The defendant alleged the remarriage in its amended answer, and the fact was brought out in the proof; hence it was not improper for the court to tell the jury that they could not consider it in assessing the damages. In *Railway Co.* v. *Maddry,* 57 Ark. 306, this court said: "The reason is that a right of action arises at the time of the death to recover just what was lost by it; and that the loss thus occasioned is none the less, even though the injured party thereafter acquire, through his own skill or industry, or the charity or affection of another, more than he lost." The precise question was passed upon in *Davis* v. *Guarnieri,* 45 Ohio St. 470, and it was held that damages to the husband for the loss of his wife could not be reduced by proof that he has married a second wife, who performed the services for him formerly performed by his first wife. We cannot agree with learned counsel that "the pecuniary loss of the wife by the death of her husband was, in a manner, recouped by her second marriage, and her loss could and should extend only up to such time as she married the second time, and not up to the probable life of her deceased husband." To so hold could but lead to an inquiry as to the comparative capacity of the two husbands and the amount of their respective contributions to the support of the wife. We find no error in the refusal and modification of certain other instructions asked by the defendant.

The fifth instruction withdrew from the consideration of the jury the question whether there should have been lights upon the moving engine and tender, and was properly refused, as there was some testimony tending to show that it was dark enough to require lights, so as to enable those passing over the tracks to observe the approach of the engine.

The other refused instructions involved a declaration that the failure to "look and listen" on the part of Tomlinson was negligence when the court in the former opinion in this case held that such failure was a question of care and prudence to be submitted to the jury. The instructions were contrary to the law of the case announced in the former opinion, and were properly refused.

3. Counsel for appellant strenuously urge that the testimony was insufficient to support the verdict. We do not agree with the contention of counsel for appellee that the decision of this court on the former appeal, reversing the case for a new trial, is conclusive of the question of the sufficiency of the evidence in support of the verdict of the jury on the retrial. We have recently held to the contrary. *Heard* v. *Ewan,* 73 Ark. 513, 85 S. W. 240. But we think the testimony on the trial anew, as upon the former trial, was sufficient to sustain the verdict. The jury were warranted in finding, and, before returning the verdict under the instructions they received from the court, must have found, that the servants of the railway company backed the engine and tender at a rapid speed between the coaches and depot without keeping an efficient lookout and without giving warning of its approach by bell or whistle. This, the court has said, was negligence under the circumstances, the coaches being then open for the reception of passengers, and passengers and their friends, passing to and fro, as the evidence tended to show. They were warranted in finding that Tomlinson was killed either on his return from a trip to the coach made by him to assist an embarking passenger, or on his return from a second trip, made to look after the comfort and welfare of the passenger; and this court has said that, if that be true, his entry upon the premises of the railway company was upon its implied invitation, and that he had the right to rely upon an implied assurance that the way was clear. They were warranted in finding, and must have found, in order to reach a verdict under the instructions given them, that

he did not, when he went upon the track, have his head so enveloped in the cape or hood of his coat as to prevent his seeing or hearing the signals from an approaching engine. This court said that under those circumstances it could not be said as a matter of law that he was guilty of contributory negligence, but it became a question for the jury, after considering all the circumstances, to say whether or not he failed to exercise ordinary care.

It is claimed that the verdict is excessive. Tomlinson was, at the time of his death, 29 years old, a vigorous, healthy man, and, according to the mortality table introduced in evidence, had an expectancy of 35 years. He was possessed of a good education, had at the age of 18 become a practical printer, and advanced rapidly in his trade. At the time of his death he was chief of the stationery division in the Department of the Interior at Washington, receiving a salary of $2,900 per annum, and in addition to this he was earning a salary of $180 per annum as professor of military tactics in a college in the City of Washington. It is also shown that he sometimes did night work in the Government department, for which he received extra pay. There was sufficient evidence to base a finding of his gross earning capacity at the time of his death, to say nothing of the probability that a man of his character and ability, as shown by the evidence, would increase his earning capacity in the sum of $2,500 per annum, and the plaintiff testified that he spent a small portion of it on himself, the remainder being contributed to the support of his wife and child. Putting the net earning contributed to plaintiff and the child at one-half of the gross earnings, $1,250, it would require the sum of $18,125 to purchase an annuity, calculating at 6 per cent. interest, for that sum. This leaves out of account the other element of damages, viz., the loss of the physical and moral training by the father to the child. It is shown that he was an affectionate father, and was qualified to bestow, and would probably have bestowed, great care and attention upon the training of his child, who was two years old at the time of his death.

The plaintiff was entitled to interest at the rate of 6 per cent. per annum on the amount of the damages from the date of Tomlinson's death, when the cause of action arose, to date of recovery. Computing interest at that rate on an estimate of damages at

$13,190 from July 8, 1894, the date of Tomlinson's death, up to February 14, 1903, the date of the judgment, would make a total of $20,000 principal and interest.

The evidence warranted the amount assessed by the jury. The judgment is affirmed.

HILL, C. J., not participating.

---

76 389
f 84 323

76 389
f86 451

76 389
89 580

O'HAIR v. O'HAIR.

Opinion delivered July 29, 1905.

HUSBAND AND WIFE—ADVANCEMENT.—Where a husband advances money to buy a piece of land, and takes deed in his wife's name, the law will presume it to be a gift.

Appeal from Pulaski Chancery Court.

JESSE C. HART, Judge.

Affirmed.

J. A. Comer, for appellant.

In order to create a resulting trust in favor of one who pays the purchase money for property bought in the name of another, the payment must be contemporaneous with the purchase. 30 Ark. 230; 29 Ark. 612; 26 Ark. 445. As to lot 6 appellant was entitled to the declaration of a resulting trust. 134 Ind. 529; 116 Ind. 175; 134 Ind. 115; 92 Ia. 610; 40 Ia. 152; 69 Ky. 339; 77 Me. 465; Am. Dig. 1904 A, 1451; Am. Dig. 1904, B, 4422.

Blackwood & Williams, for appellee.

There are no such circumstances in this case as to take it out of the general rule as to resulting trusts, laid down in 40 Ark. 67 and 45 Ark. 481. The presumption is that the purchases were made by way of gift or advancement. 70 Ark. 149; 68 Ark. 408; 57 Ark. 634; 51 Ark. 530; 47 Ark. 62; 52 Ark. 188; 36 Ark. 588. There was no error in the modification of the decree after the cause was appealed. *Cf.* 42 Ark. 495; 12 Ark. 369; 13 Ark. 54.

HILL, C. J. The parties to this suit are husband and wife; they have been married thirty-two years, and are the parents of nine children, and in their old age have fallen into litigation with each other over lots 4, 5 and 6 in block 142, in the city of Little Rock. Lot 4 was purchased in 1887 by Mrs. O'Hair from her mother, contrary to the wishes of Mr. O'Hair. It was heavily incumbered, and the equity not of great value. Part of lot 5 was purchased by Mrs. O'Hair, or rather she made a small payment on the purchase price, while Mr. O'Hair was in Colorado for his health, and without his knowledge. The other parts of the lot were purchased subsequently. The titles were taken in Mrs. O'Hair's name, and the evidence shows that the mortgages were reduced, and the purchase price paid, by moneys derived from Mr. O'Hair, Mrs. O'Hair, their children, and the rents from the property. Lot 6 was purchased by Mr. O'Hair, paid for by him, and the title taken in his wife's name. He was then in embarrassed circumstances, and testifies that the title was put in her name to protect her and the family from anything which might happen to him, and to secure a home for themselves and their children.

Mr. O'Hair is seeking to impress a trust upon lots 4 and 5 in his favor for the payments made for their purchase, which he claims were practically all made by him, and upon lot 6 on account of an understanding with his wife that it was to be held for their mutual benefit.

Passing the question of the sufficiency of the evidence to establish a trust, even if the transaction was between strangers (see *Tillar* v. *Henry,* 75 Ark. 446), there is no trust in this case. Judge EAKIN thus expressed the whole situation as presented by this record:

"This is only a claim for money advanced to buy a piece of land for the wife and improve it. It was a good thing for the husband to do, and may be supposed to have been done from a desire to protect her against want. The law will not raise any implied promise on her part to repay it. It will be presumed to be a gift." *Ward* v. *Estate of Ward,* 36 Ark. 586.

The principles controlling this case may be found in *Miller* v. *Freeman,* 40 Ark. 67; *Robinson* v. *Robinson,* 45 Ark. 481; *Bogy* v.

Roberts, 48 Ark. 17; *White* v. *White,* 52 Ark. 188; *Rhea* v. *Bagley,* 63 Ark. 374; *Culberhouse* v. *Culberhouse,* 68 Ark. 405; *Grayson* v. *Bowlin,* 70 Ark. 145; and many more on the same line.

The decree is affirmed.

BATTLE, J., absent.

KRAFT v. MOORE.

Opinion delivered July 29, 1905.

1. RES JUDICATA—WHEN PLEA UNAVAILING.—Where the issues in a former and a pending suit were not the same, and different relief was sought in the two suits, a plea of *res judicata* is unavailing. (Page 393.)
2. APPEAL—QUESTION NOT RAISED BELOW.—Objections that a cross complaint was filed by one of defendants *as administrator* when he was sued individually, and that it is not responsive to the complaint, cannot be raised on appeal for the first time. (Page 394.)
3. SAME.—Objection to the right of an ancillary administrator to sue a resident of the State of the domiciliary administration who happens to be within the State of the ancillary administration cannot be raised on appeal for the first time. (Page 394.)

Appeal from Phillips Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

Affirmed.

N. W. Norton, for appellants.

An administrator is liable personally for transactions subsequent to the death of his intestate, and a suit against him personally is proper. 19 Ark. 671. The suit having been brought against John P. Moore as an individual, he had no right, in his fiduciary capacity, to file a cross-bill. The cross-complaint was not proper because not responsive to the case made in the complaint. 30 Ark. 249; 31 Ark. 345. The administration of John P. Moore is ancillary, and his powers are limited to assets in this State, for the protection of domestic creditors. 46 Ark. 453; 31 Ark. 539; 34 Ark. 177; 42 Ark. 164; 16 Ark. 257; 30 Ark. 231.

M. L. Stephenson, for appellees.

This court will not disturb the findings of a chancellor unless there is a clear preponderance of evidence against them. 44 Ark. 216. A court of equity will not interfere with proceedings in the probate court for the settlement of estates to correct errors or irregularities, unless they are sufficiently gross to raise the presumption of fraud. 50 Ark. 217; 33 Ark. 575; 36 Ark. 383; 39 Ark. 256; 40 Ark. 393. Costs in equity are subject to the discretion of the court. 36 Ark. 383. Where a husband receives the capital fund of his wife's property, there is no presumption that she intended to give it to him. 98 Ill. 178; 135 Ind. 482.

HILL, C. J. Joseph H. Jackson died, leaving a widow, Sallie B. Jackson, *nee* Moore, and three minor children, Jamison A. Jackson, Martha Jackson and Lida Jackson. He left $8,000 in insurance to his wife. Mrs. Jackson was possessed of real estate, consisting of farm and other property in Phillips County. Mrs. Jackson, some years after her first husband's death, married Fred W. Kraft, and, after living some time in Helena, they moved to East St. Louis, Illinois, and there made their home until the death of Mrs. Kraft. Mrs. Kraft left one child, Overton A. Kraft, as the issue of her second marriage. Her husband, F. W. Kraft, took out letters of administration on her estate at the place of her domicil, East St. Louis, Ill., and John P. Moore, her father, took out letters on her estate in Phillips County, Arkansas, about one year prior to the letters of Kraft in Illinois. Several claims were probated in Phillips County, among others one of John P. Moore and another of Frierson Moore, Mrs. Kraft's brother.

On the petition of the administrator, the Phillips Probate Court ordered some real estate sold to pay debts; it was bought by Frierson Moore, and his purchase of it confirmed. Thereafter Kraft in his own right and as next friend to his child, Overton A. Kraft, brought suit in Phillips Chancery Court to assign him his estate of curtesy in the lands sold, to set aside the sales, and attacking the debts of Moore and son. Since this appeal was taken, Overton A. Kraft has died, and his estate has passed to his half brother and half sisters, who are not parties here. Counsel agree that the issues in the original suit, as to

these sales and debts, died with Overton A. Kraft, and left only a question of costs for determination. There are decisions to the effect that an appellate court will not proceed to determine a question formerly in the case in order to determine the present question of costs. In this case the costs are all in one suit, and the determination of the issues of the cross complaint will settle all the costs, as the costs in the suit and cross suit are inseparable, except possibly trivial amounts.

After meeting the issues in the original suit, John P. Moore, in his capacity as administrator, sued Kraft in a cross-complaint, alleging that he had obtained $6,000 of his wife's money under promise of investment in her name, and converted it to his own use, and bought property with it, taking title to himself. He prayed judgment for this as such administrator, or in the alternative that Mrs. Kraft's children by her first marriage be made parties, and judgment rendered in their favor for three-fourths of it. Kraft denied the allegations, and pleaded *res judicata.* The chancellor found in favor of Moore on both the suit and cross suit, except as to Kraft's curtesy interest which was decreed to him, and there was no cross appeal on that issue, and gave judgment against Kraft for $4,800 with interest. The latter is the only matter before the court.

1. Moore, as next friend of the Jackson children, had sued Kraft in Illinois, making substantially the same allegations as herein made in regard to money obtained by Kraft from his wife under promise of re-investment for her, and sought to impress a trust on certain real estate in Illinois alleged to have been purchased with this money thus obtained, title to which was taken in himself. The Supreme Court of Illinois decided the case against the Jackson children, on the ground that they failed to trace the money received from Mrs. Kraft as the whole or a definite part of the consideration of the properties sought to be impressed with the trust. In that case the court found Kraft received large sums from his wife, and that undoubtedly he was to use it or invest it for the benefit of his wife, and to account for it to her in some manner; and that it was not a gift from her to him, as he contended. For lack of tracing it into the property the Jacksons failed, and no relief was sought in that action other than the subjection of certain

real estate to a trust in their favor. There was not an identity of issues in that suit and this suit which will render the defense of *res judicata* availing here. 2 Black, Judgments, § 160.

2. Objection is here made to the cross-complaint being filed by Moore as administrator when he and his son were sued individually, and further that it is not responsive to the complaint. These questions were not raised below. The cross complaint charged Kraft with appropriating money belonging to Mrs. Kraft to his own use, and sought its recovery. Kraft denied the allegation as a first defense, and as a second defense pleaded that the matters alleged had been adjudicated in the Illinois suit heretofore referred to. He cannot raise such issues now after having accepted the issues tendered and unsuccessfully defended against such cross suit, the only issues then interposed.

3. The next question, and it is one not free of difficulty, is the right of the ancillary administrator to sue a resident of the State of the domiciliary administration who happens to be in the jurisdiction of the ancillary administrator. On this point the following authorities may be consulted with profit. *Greene* v. *Byrne,* 46 Ark. 453; *Shegogg* v. *Perkins,* 34 Ark. 117; *Turner* v. *Risor,* 54 Ark. 33; *Lewis* v. *Rutherford,* 71 Ark. 218; Minor's Conflict of Laws, § 113; 1 Woerner on Administration, § 158; *Equitable Life Assurance Society* v. *Vogel,* 76 Ala. 441, s. c. 52 Am. Rep. 344; *Merrill* v. *Ins. Co.* 103 Mass. 245, s. c. 4 Am. Rep. 548.

This question, however, like the preceding one, was not raised by the pleadings. It seems, from the chancellor's opinion in the record, that it was raised in argument, but the record shows the cross complaint and the answer thereto on the merits. This is a matter to be raised *in limine.* The chancery court is one of general jurisdiction in equitable causes of action, where it has jurisdiction of the persons. The objection now raised, if tenable, went to the jurisdiction over the *situs* of the debt represented by the debtor before the court, and could be waived by him like any other personal right to the proper place to be sued. Where not waived, and an appearance to the merits is entered, there was nothing for the court to do but proceed to adjudicate the issues thus presented.

4. The evidence sustains the chancellor's finding that Kraft had taken money of Mrs. Kraft intrusted to him as trustee for herself and her children by her former marriage for investment for them, and appropriated it to his own use. Finding no error, the decree is affirmed.

BATTLE, J., absent.

---

76 395
82 385
82 386
82 387

TAYLOR v. GODBOLD.

Opinion delivered July 29, 1905.

1. BROKER—GOOD FAITH.—A broker owes to his principal the utmost good faith and loyalty, and will not be permitted to make gain for himself by selling for a sum in advance of his commissions; and if he undertakes to do so, he will not be entitled to recover his commissions of his principal. (Page 399.)

2. SAME—CASE STATED.—Where the evidence tended to prove either that plaintiff verbally purchased goods from defendant, or was employed as a broker to sell them, plaintiff cannot recover on either theory if on the theory of a sale the transaction would have been within the statute of frauds, and if on the theory of a brokerage transaction the evidence showed that plaintiff failed to disclose to the principal that, in addition to his commissions, he had resold the goods at a profit above his commission. (Page 399.)

Appeal from Pulaski Circuit Court.

EDWARD W. WINFIELD, Judge.

Reversed.

STATEMENT BY THE COURT.

Godbold was a cotton seed broker; Taylor, a planter, owning a plantation at South Bend on the Arkansas River. They had a transaction over the purchase of Taylor's cotton seed, and Godbold's version of it was given in this letter:

"Little Rock, Ark., Feb. 4, 1903.

"DR. C. M. TAYLOR,

"City.

"DEAR SIR:—

"I was very much surprised when I received your letter of the 31st ult., saying that you had sold your cotton seed. On or about January 10 I met you at the Capital Hotel, and asked you when you got ready to sell your cotton seed to let me know; and you replied you were ready then, provided you got your price. I asked you what you would take for them, and you said you would take $14 f. o. b. bank of river. Just at that time Mr. M. D. L. Cook came into the hotel, and you asked me to excuse you, that you wanted to speak to Mr. Cook. In the meantime I telephoned to Mr. C. C. Johnson, manager of the Southern Cotton Oil Mill Company, and asked him what he would give me for 250 tons of cotton seed, more or less, on the river below Pine Bluff. He replied that he would give me $15 and my commission, which is 50 cents per ton. I waited at the hotel until you and Mr. Cook got through with your conversation, and I then told you that I would take your seed, and you said that you would have the seed out of about 500 bales when you got through ginning; that is why I said you would have about 250 tons, less planting seed; that is the remark you made at the time, and, thinking you intended to sell me the seed, I went so far as to see Captain Brashear of the Dardanelle, and told him you wanted him to send a boat down to South Bend to get your household furniture, etc. You made the remark that you would just as soon the seed would come to Little Rock as not, as you wanted the boat to go down the river. Now, Doctor, I will certainly expect my commission out of the sale of these seed, $1.50 per ton on 500 bales, less planting seed for the place. Am sorry we had this misunderstanding. I have even borrowed $50 from Mr. C. C. Johnson, thinking it a *bona fide* sale, and had already sold the seed to this mill.

"Please let me hear from you in the matter, and oblige,

"Yours truly,

"A. GODBOLD."

Taylor refused to consummate the alleged sale, and Godbold sued him for commissions, and testified to the transaction,

in substance, as stated in the foregoing letter, and on cross-examination the following testimony was given by him:

"I did not tell Dr. Taylor that I had sold the seed to the Southern Cotton Oil Company for $15 per ton. I expected to get the seed from Dr. Taylor at $14 per ton and to make the profit at $15 per ton.

"Q. If you were selling the seed for Dr. Taylor as a broker, do you not think you should have told him that you were selling them at a dollar more?

"A. If Dr. Taylor had put the seed in my hands. I simply asked him what he would take.

"Q. Then you did not understand that the seed was in your hands as a broker?

"A. No, sir.

"Q. Then you understood that Dr. Taylor was selling the seed to you?

"A. For the mill, yes. I claim that fifty cents per ton is my commission; but if a man says he will take $14, and a man offers me $15, I take it.

"Q. If you were the broker, was it not your duty to sell the seed for the highest price?

"A. Yes, sir.

"Q. Then if you were acting as his broker and agent, would you not expect him to have the profit?

"A. Yes, sir.

"Q. Then you were not acting as Dr. Taylor's agent in this matter?

"A. No, sir.

"Q. And you did not claim to be his agent in the matter?

"A. No, sir.

RE-DIRECT EXAMINATION.

"Q. You were simply acting as a go-between.

"A. Yes, sir.

"Q. You were not employed by Dr. Taylor exclusively, were you ?

"A. No, sir.

"Q. Now, how did you hold yourself out to the world, as the agent of one party, or how was it?

"A. I suppose I am the agent of both parties in a way; I locate the seed, and sell it to the mills. I should think Dr. Taylor knew me well enough to know that I was not the consumer of 250 tons of cotton seed."

The court sent the case to the jury under instructions which would have been proper if Godbold was a broker in good faith to his principal. Godbold recovered commissions at the rate of 50 cents per ton, and Taylor appealed. Both parties have died, and the cause is revived in the name of their respective administrators.

Ratcliffe & Fletcher, for appellant.

There was no contract between Taylor and Godbold. Bish. Cont. § 30. Even if there had been, it would be void under the statute of frauds. Kirby's Dig. § 3656. If Godbold was acting as Taylor's agent, and failed to disclose the fact that he was getting a profit of $1.50 per ton, he can not recover. 138 U. S. 380. Godbold did not make any binding contract with Johnson on behalf of Taylor. Mechem, Ag. § 966; Wood, St. Fr. § 16. If there was an employment to sell, and not merely to find a purchaser, the employment must have been in writing. Mech. Ag. § 89. Godbold could not contract in his own name, and claim to be agent. 149 U. S. 248; Mech. Ag. § § 455, 592, 972; 138 U. S. 380. The jury found that Godbold was a broker, and was employed by Taylor to find a purchaser; and this finding, being supported by the evidence, should not be disturbed. As to what constitutes a broker, see: 33 Ark. 440; Webst. Dict. *verbo,* "broker."

Blackwood & Williams and *J. G. Dunaway,* for appellee.

A broker is entitled to his commission when he shows that he has procured a purchaser, ready and willing to purchase upon the terms proposed. 64 N. E. 643; 33 How. Pr. 440; 56 N. Y. 238; 125 Ind. 588; 2 Ind. App. 160; 41 Cal. 202; 40 Cal. 240; 31 Minn. 484. The presumption is that the purchaser is able to carry out the contract, and the burden is on the principal to disprove this. 64 N. E. 643. A broker may act for both parties and claim compensation. 127 Ind. 325; 70 Ky. 253; 82 Mass. 398; 3 Col. App. 236; 7 Pac. 89. When the broker finds a purchaser according to instructions, he is entitled to his commission, regardless of whether sale is made to that purchaser or not. 43 Cal.

306; 18 Cal. 86; 61 Ill, 295; 62 Ill. App. 100; 34 N. E. 1069. And this is true although the broker has not formed a binding contract. 33 How. Pr. 440; 12 Daly, 6; 13 Daly, 516; 163 Pa. St. 112; 63 N. E. 580; 58 N. E. 152. The statute of frauds must be pleaded. 32 Ark. 97; 56 Ark. 263. Even if the transactions were not sufficient under the statute of frauds, this would not affect the plaintiff's right to recover commissions. 149 U. S. 481; 91 Ind. 243; 59 Mich. 253; 33 How. Pr. 440; 56 N. Y. 238; 57 Wis. 243.

HILL, C. J. Godbold under his own testimony cannot recover as a broker. Mr. Mechem thus states the reason: "Like other agents in whom trust and confidence are reposed, the broker owes to his principal the utmost good faith and loyalty to his interests. * * * It is his duty, therefore, to fully and freely disclose to his principal at all times the fact of any interest of his own or of another client which may be antagonistic to the interests of his principal, and he will not be permitted to take advantage of the situation to make gain for himself by forestalling or undermining his principal." Mechem on Agency, § 952. It is unquestionably good law, as well as good morals, that the unfaithful broker who seeks a profit from the transaction other than the commission for his brokerage cannot recover of his principal for any commissions. *Wordsworth* v. *Adams,* 138 U. S. 380; *Shaeffer* v. *Blair,* 149 U. S. 248; Mechem, Agency, § § 952, 972, and numerous authorities cited. This necessarily reverses the case, and there is another matter which calls for its dismissal. Either the sale as claimed by Godbold was through him as broker or to him individually. If the former, he cannot recover on account of his failure to disclose to his principal that he had sold to his, the principal's, advantage at $1.00 per ton and commissions above what the principal asked; and if the latter, he cannot recover because he is precluded by the statute of frauds. Kirby's Digest, § 3656.

It is true that the statute of frauds is not pleaded in this action; there is no room for it, as the action is for broker's commissions; but if the action is sought to be maintained on the other theory, the facts as stated by Godbold show the contract to be void. The judgment is reversed, and cause dismissed.

BATTLE, J., absent.

CARPENTER v. DRESSLER.

(Two cases.)

Opinion delivered July 29, 1905.

76 400
f75 423,
f76 448
76 464

76 400
78 13
79 289
f80 444

1. EVIDENCE—TRANSCRIPT FROM LAND OFFICE.—Under Kirby's Digest, § 3064, providing that "all certified transcripts from the office of the Commissioner of State Lands shall be received in evidence of the existence of the records of which the transcript is a copy," a certified transcript showing the execution of a deed by the Commissioner is not admissible until the party offering it accounts for the loss or destruction of the deed, or shows it to be inaccessible or otherwise not subject to production, as a foundation to admit the transcript as secondary evidence. (Page 401.)
2. SECONDARY EVIDENCE—FOUNDATION.—It was error to refuse to permit a party to lay the necessary foundation for the introduction of secondary evidence. (Page 403.)
3. NONSUIT—RIGHT TO TAKE BEFORE SUBMISSION.—A case is not finally submitted until the argument is closed, until which time the plaintiff has a right, under Kirby's Digest, § 6167, to take a nonsuit. (Page 403.)
4. SAME—WHEN ALLOWED AFTER SUBMISSION.—Even after final submission it is within the sound discretion of the court to permit a nonsuit, and the court ought to do so when it is in the interest of justice, and necessary to enable parties to obtain a fair trial, which cannot be had on the record as it stands. (Page 403.)
5. EXCEPTION TO EVIDENCE—SUFFICIENCY.—A general exception to competent secondary evidence was insufficient to raise the objection that proper foundation had not been laid for its introduction. (Page 404.)
6. EXCEPTION TO OVERRULING OF MOTION FOR NEW TRIAL—HOW PRESERVED.—An exception to the overruling of a motion for new trial may properly be made in the record entry of its overruling, and when that is done it is unnecessary to repeat the same formality in the bill of exceptions. (Page 404.)

Appeal from Arkansas Circuit Court.

GEO. M. CHAPLINE, Judge.

Reversed.

H. A. & J. R. Parker and *John F. Park*, for appellant.

By the statute (Kirby's Dig. § § 3057, 3064) copies of entries made in the books of the land office, certified by the proper officer, are made evidence to the same extent as the original books and papers would be, if produced. The transcript of the record entries of the land office was sufficient as a link in the chain of title in ejectment. Kirby's Dig. § §

2738, 2741; 41 Ark. 97; 9 Ark. 559; 43 Ark. 296; 52 Ark. 290; 57 Ark. 153; 73 Ark. 221; 74 Miss. 13. As to use of certified copies in general see Kirby's Dig. § 757. Neither the answer nor the exceptions contained therein are sufficient. Kirby's Dig. § § 2742-4. Exceptions must specifically point out all objections to the adversary title. 47 Ark. 197; *Ib.* 413; 55 Ark. 286; 73 Ark. 221. The court erred in refusing to allow appellant to prove the loss of the patent and in refusing to allow a nonsuit.

Lewis & Ingram and *H. Coleman,* for appellee.

The certified transcript from the land office is not of equal evidentiary value to the patent itself, but is only secondary evidence of the existence thereof. *Cf.* Kirby's Dig. § § 3057, 3064, 4746 *et seq.* The loss of the patent must be first shown as a foundation for the admission of such secondary evidence. 57 Ark. 158. Appellee's exceptions to the muniments of title filed by appellant were sufficient. Kirby's Dig. § 2742 *et seq.*

H. A. & J. R. Parker and *John F. Park,* for appellant, in reply:

The certified copy of the record of the land office was equal in evidentiary value to the patent certificate itself. 55 Ark. 286. Further upon the insufficiency of the answer and exceptions, see: 52 Ark. 290; 73 Ark. 221.

HILL, C. J. The issues in these cases are identical, and they will be treated for the purposes of the opinion as one case.

1. The first question for consideration is the effect to be given to a certified transcript from the office of the Land Commissioner, when offered in evidence to prove a transfer therein shown. The statute, section 3064, Kirby's Digest, only provides that, when properly certified, it shall be received in evidence of the existence of the records of which the transcript is a copy. It does not provide whether it shall be primary or secondary evidence, and the question here is whether such transcript can be received as original evidence to prove the issuance of a certificate or deed, without first accounting for the deed or certificate. In other words, does this statute make the record of the transaction required by law to be kept in the land office the same grade of evidence as the certificate or deed issuing from the land office as a

result of the transaction there recorded? One view to take of it is that the law requires a record to be had of the transaction, say a land sale, and as evidence of the consummation of that sale the deed is issued, and it is evidence, but not the only evidence, of the sale, for this record must precede the issuance of the deed, and the deed is based upon the transaction therein recorded. In this view, the record and deed would be original evidence of equal grade, and this statute makes the certified transcript of the record equal to the record itself. This is the view taken, under closely analogous statutes, in Mississippi and Alabama. *Boddie* v. *Pardee,* 74 Miss. 13; *Wood-Stock Iron Company,* v. *Roberts,* 87 Ala. 436.

In *Boynton* v. *Ashabranner,* decided at this term, 75 Ark. 415, this view prevailed. However, the question was not fully considered, as the court was then of opinion, as therein indicated, that *Dawson* v. *Parham,* 55 Ark. 286, had settled this question in this way. In the argument of this case, counsel pointed out the error of the court in misconceiving the scope of *Dawson* v. *Parham.* That case did not reach to this point, but to the effect of the certified transcript being of equal dignity to the record in the land office, and did not decide the effect of the record itself (or its copy made pursuant to the statute) as original evidence to prove the transfer, without accounting for the deed or certificate itself. The question arising again in this case and in *Covington* v. *Berry,* this day decided, has caused the court to re-examine the ruling in *Boynton* v. *Ashabranner,* as well as in the cases now at bar. The other view of the question is that the record in the land office is a public memorandum of the transaction, and that the primary evidence of the transaction is the deed or certificate issued by the Land Commissioner, and this public memorandum is only admissible evidence after the loss or destruction or inability of the party to produce the original is shown, and then this public record (and by statute certified transcripts thereof) becomes the highest grade of secondary evidence to prove the transaction therein recorded. This subject is fully and exhaustively treated by Wigmore in his recent treatise on the Law of Evidence, and statutes and decisions from almost every State in the Union are collected in a note following the discussion on the subject. 2 Wigmore on Evidence, 1239, and note pages 1484-1488.

tion of ejectment for the recovery of six and one-half acres of land. There had been prior a action for the same land, which was commenced on the 22nd of August, 1898, and in which a nonsuit was taken in March, 1900. Afterwards the present action was begun on the 25th of August, 1900. In the first action plaintiff relied on a conveyance from Brinkley to McMurray, and one from the heir of McMurray to plaintiff. After the commencement of the first action plaintiff procured deeds from the heirs of Brinkley to himself. In the second action he does not refer to the conveyance from Brinkley to McMurray, but relies on the conveyance from the heirs of Brinkley to himself. Defendant pleaded the statute of limitations, and her counsel contend that the two suits above referred to were based on different causes of action, and that the statute of limitations did not stop running until the commencement of the last action. The mere fact that plaintiff did not properly set out his chain of title in one or the other of these suits would, we think, on this point be immaterial if he was in fact the owner of, and seeking to sustain, the same title in each action. But the contention of defendant is sound if plaintiff in the second action is seeking to maintain a title acquired subsequent to the commencement of the first action, for such title gave plaintiff a new cause of action, and the fact that plaintiff brought a former action against defendant did not stop the statute from running against plaintiff on a cause of action acquired after the commencement of such suit. That is to say, if plaintiff held the title to this land, or any part of it, at the time of the commencement of the first action to recover the land, the statute of limitations stopped, as to the land he then owned, on the bringing of such action; but if he acquired title to it, or to part of it, subsequent to that time, then as to that part he had no right of action at the time the first suit was brought, and the statute did not stop running against his right to recover until he acquired title and began the new action. It takes a right on the part of plaintiff and a violation of that right on the part of defendant to make a cause of action; and, until plaintiff acquired title to the land, the possession of the defendant did him no injury, and gave him no right of action against her. Plaintiff did not set out or read in evidence the deed from Brinkley to McMurray or from McMurray to him, and we are not able to pass on

those deeds. But, as the chain of title set out by plaintiff and the evidence tend to show that the title to at least a portion of the land was acquired by plaintiff subsequent to the commencement of the first action, we are of the opinion that the court erred in holding generally that the statute of limitations stopped running on the commencement of the first action. *Union Pacific Ry.* v. *Wyler,* 158 U. S. 285; *Sicard* v. *Davis,* 6 Peters, 124; *Whalen* v. *Gordon,* 95 Fed. Rep. 305.

The objection to the introduction of the transcript of the record of the State Land Office should have been sustained, in the absence of a showing that the original patent was lost or could not be produced. *Carpenter* v. *Dressler, ante,* p. 400.

As to the question whether the land was sufficiently described in the various deeds submitted by plaintiff, it is not material to notice the description of the land contained in the deed from the United States to the State, for the reason that the title to the swamp land of the State does not depend alone upon that deed, but upon the grant contained in the statute of 1850. The fact that the State afterwards conveyed this land to Brinkley as swamp land makes out, we think, at least a *prima facie* showing of title in him. The deed of the State describes the land as the east half of the southeast quarter, giving section, range and township, which is sufficiently certain.

The deed from Folbre, by which Folbre, as commissioner to enforce a decree for the payment of levee taxes, sold and conveyed the land to plaintiff, described the land as "E. pt. S. E. ¾ Sec. 30, 5 N., 4 E., containing 63 acres," and the tax deed from the clerk of St. Francis County, conveying land to Reeves, under which deed plaintiff also claimed, described it as the east part of southeast quarter of section 30, 5 N., 4 E., containing 60 30-100. These descriptions might possibly be construed to describe a tract in the shape of a parallelogram taken from the east side of the quarter section described, but the evidence shows that it was not the intention to sell a tract in that shape. Under former decisions of this court these descriptions are not sufficiently certain to pass title in a proceeding to collect taxes, and these deeds are void, and the exceptions to them should have been sustained. *Rhodes* v. *Covington,* 69 Ark. 357; *Texarkana Water Co.* v. *State,* 62 Ark. 188; *Schattler* v. *Cassinelli,* 56 Ark. 172.

ruling of a motion for a new trial can properly be made in the record entry of its overruling, and that it is not necessary, when that is done, to repeat the same formality in the bill of exceptions. The court is aware that this question has been ruled differently in *Johnson* v. *State,* 43 Ark. 391, which was followed in *Beidler* v. *Freidell,* 44 Ark. 411. Both of these decisions overlooked this statute, or else they could hardly have failed to apply it. The court considers these cases in conflict with the statute, and they should not be followed, but overruled.

Other questions are presented and discussed, but, as the evidence and records may be different on another trial, the court does not consider it proper to decide more than necessary to determine the appeal.

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

BATTLE, J., absent.

ON REHEARING.

Opinion delivered September 30, 1905.

HILL, C. J. The appellee complains of the statement of facts made by the court. The court has carefully gone through the record; and while it is not as clear it should be, yet it is reasonably clear and certain that the matters occurred as heretofore stated.

Attention is called to the fact that there was no ruling on the cross appeal, and appellee might be concluded by matters therein set up. The court intended the reversal to be complete, and the order will now be made to that effect, so as to remove any doubt that the entire proceeding is reversed.

TILLAR v. CLAYTON.

[76 405 / 83 376]

Opinion delivered July 29, 1905.

1. ESTOPPEL—VENDEE IN POSSESSION.—A vendee in possession under verbal purchase, and his heirs, cannot dispute the vendor's title while the purchase money remains unpaid. (Page 408.)

2. FORECLOSURE OF VENDOR'S LIEN—BURDEN OF PROOF.—In a suit to foreclose a vendor's lien on land the burden of establishing payment is on the vendee and his heirs. (Page 408.)

3. ADVERSE POSSESSION—VENDOR AND VENDEE.—The statute of limitations does not run against a vendor in favor of a vendee holding under a contract of purchase; nor does it run where the original possession of the holder was in privity with the rightful owner until there be an open and explicit disavowal and disclaimer of holding under that title brought home to the other party. (Page 408.)

4. APPEAL—QUESTION NOT RAISED BELOW.—Where, in a suit to foreclose a vendor's lien, defendants failed to plead the omission of the vendor to tender a deed with his complaint, and based their defense on other grounds inconsistent with that plea, the objection that no deed was tendered cannot be raised on appeal for the first time; but relief in such case will be granted to the vendor only on condition that he execute and tender in court a deed in proper form. (Page 409.)

5. FORECLOSURE OF VENDOR'S LIEN—TENDER OF DEED.—A vendor suing to foreclose his lien for purchase money must tender to the widow and heirs of his deceased vendor a deed conveying to them the land according to their respective interests. (Page 409.)

6. VENDOR AND VENDEE—REDUCTION OF PRICE.—Land was sold verbally, and after the vendee's death, the purchase money being unpaid, it was resold at a reduced price to one of the vendee's heirs, who falsely claimed to have acquired the interests of the widow and the other heirs of the vendee. *Held,* that the reduction inured to the benefit of the widow and the other heirs of the original vendee. (Page 409.)

Appeal from Desha Chancery Court.

MARCUS L. HAWKINS, Chancellor.

Reversed.

STATEMENT BY THE COURT.

Appellant, J. T. W. Tillar, brought this suit, claiming a lien, as vendor, on eighty acres of land in Desha County, and praying for foreclosure of the same. He alleged that he first sold the land by verbal contract to one C. C. Clayton, who died intestate before paying any part of the purchase price; leaving appellees, his widow and heirs, who were all defendants to the suit. That thereafter, on July 8, 1898, appelleee L. A. Clayton, one of the children of C. C. Clayton, purchased the land from appellant on credit, giving five notes aggregating the sum of $945.60, which includes interest to maturity, due and payable on the first days of July, 1899, 1900, 1901, 1902 and 1903, respectively, and appel-

lant executed to him a title bond or covenant to convey said land on payment of said notes. That at the time of said purchase said L. A. Clayton represented to appellant that he had obtained all the interest of said widow and heirs in and to said land. He also alleged that nothing had been paid on said notes.

L. A. Clayton answered, denying that Tillar was ever the owner or in possession of the land, and averring that Tillar had been unable to make title or to put him in possession of the land, and hence that Tillar had failed to perform the conditions of the title bond.

The widow and other heirs answered, denying that plaintiff ever owned the land, and denying that C. C. Clayton had ever made any agreement with plaintiff about the land, or that C. C. Clayton had ever gone into possession under any agreement with him, or that either of them had sold their interest to L. A. Clayton, and they averred that as widow and heirs of C. C. Clayton they claimed the land by seven years' adverse possession.

A. C. Stanley testified that he and appellant were formerly in the mercantile business as partners under the firm name of Tillar & Stanley, and that about the year 1881 Tillar bought the land in question from one Pitser Miller; that the land was considered assets of the partnership, and that he (witness) verbally sold the same to C. C. Clayton at the price of $10 per acre, with the understanding that he (Clayton) should go ahead and clear the land, and that a deed should be made to him when he paid the purchase price; that no deed or other papers were ever executed, no payment made, and that the land remained on the tax books in the name of Tillar & Stanley, and the taxes were paid by them, and that Clayton never claimed title to the property, though, pursuant to his purchase, he had taken possession of the land and cleared a portion of it. He further testified that, upon the dissolution of the partnership, he quitclaimed his interest in the land to Tillar. Appellant testified to the same facts, substantially, and that Clayton never paid anything on the price, but made promises up to the time of his death to pay same. He also testified that he never heard of C. C. Clayton nor of appellees claiming the land prior to the commencement of this suit. That the friendly relations between himself and C. C. Clayton were very intimate,

and that no written contract was executed covering the sale and purchase of the land.

All the testimony introduced by appellees was that of appellee J. R. Clayton, a son of C. C. Clayton, who said that his father died in possession of the land, claiming to be the owner thereof by purchase from A. C. Stanley. He said he did not know whether or not his father ever paid for the land.

The chancellor found in favor of the defendants, and dismissed the complaint for want of equity.

W. S. McCain, for appellant.

The law presumes that the mere occupant of the land holds in subordination to the legal title; and the burden of showing that possession was in reality adverse is always on him who alleges such. 43 Ark. 504; 4 How. 289; 2 Wall. 328; 50 Ark. 141; 65 Ark. 422; 43 Ark. 495. A vendee in possession can not, without first surrendering possession, dispute his vendor's title, while the purchase money is unpaid. 27 Ark. 61; 60 Ark. 39. The possession of Clayton was that of appellant. Freeman, Cot. § § 156-166; 20 Ark. 381; 49 Ark. 242.

X. O. Pindall, for appellees.

The evidence does not establish a cause of action under the L. A. Clayton contract set up. Kirby's Dig. § § 5399, 5400. It was the duty of appellant to tender a deed to appellees. 44 Ark. 192; 28 Ark. 27; 27 Ark. 176, 662; Dart, Vend. 519, 520; Sug. Vend. 416.

McCULLOCH, J. The conclusion of the chancellor was erroneous, and finds no support in the record. The evidence is undisputed that C. C. Clayton took possession of the land under his verbal purchase from Tillar & Stanley, and neither he nor his heirs can dispute the title, while the purchase money remains unpaid. *Johnson* v. *Douglass,* 60 Ark. 39.

The burden is upon the appellees to prove payment of the purchase price, and they introduced no proof at all tending to establish payment. On the contrary, the undisputed testimony of both Stanley and Tillar shows that nothing was ever paid on the purchase price.

The statute of limitations does not run against a vendor in favor of a vendee holding under a contract for sale and purchase;

nor does it run where the original possession of the holder seeking to plead the statute was in privity with the rightful owner, until there be "an open and explicit disavowal and disclaimer of holding under that title and assertion of title brought home to the other party." *Williams* v. *Young,* 71 Ark. 164; *Whittington* v. *Flint,* 43 Ark. 504; *Ringo* v. *Woodruff,* 43 Ark. 495; *Coleman* v. *Hill,* 44 Ark. 452; *Duke* v. *State,* 56 Ark. 485.

It being shown that the original possession of Clayton was subordinate to the rights of his vendor, the law presumes that it continued in subordination thereto untill some hostile act is shown, and that notice thereof was brought home to the vendor. No act of hostility is shown in this case either by C. C. Clayton or his heirs after his death, and the plea of adverse possession is not sustained by the proof.

Counsel for appellees contend that appellant is not entitled to the relief sought for the additional reason that he failed to tender a deed with his complaint. This would have been a good defense if it had been pleaded; but appellees failed to plead the omission, and based their defense on other grounds inconsistent with that plea. It is too late now for them to object here for the first time that no deed was tendered.

Computing interest upon the purchase price agreed upon in the original sale to C. C. Clayton from the date of that sale would make that amount to more than the notes executed by L. A. Clayton; but appellant elected to sell to L. A. Clayton for the reduced amount, and that reduction inures to the benefit of the other heirs of C. C. Clayton. Appellant asks for a foreclosure for the amount of the L. A. Clayton notes and interest, and he is entitled to decree therefor, but must execute and tender in court a deed in proper form conveying the land to appellees as widow and heirs of C. C. Clayton according to their respective rights as such.

The decree is therefor reversed, and the cause remanded, with directions to enter a decree of foreclosure in favor of appellant in accordance with this opinion.

BATTLE, J., absent.

UNITED STATES FIDELITY & GUARANTY COMPANY v. FULTZ.

Opinion delivered July 29, 1905.

1. INSURANCE—WHEN LIABILITY ON BOND ACCRUES.—In an action on a bond executed to the State, under section 4124 of Sandels & Hill's Digest, by a fire insurance company, "conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond by virtue of any policy issued" by the company, the liability of the sureties is fixed when the loss by fire occurs, and not from the date when the amount becomes payable. (Page 413.)
2. SAME—WHEN BOND RETROACTIVE.—In view of the statutory requirement that insurance companies execute annually a bond to secure the payment of all claims against them (Sandels & Hill's Digest, § 4124), a bond for the payment of all claims arising and accruing for a period of one year, beginning March 1, 1900, and ending March 1, 1901, although it was not approved by the Auditor, and did not become effective, until March 16, 1900, will cover a claim arising and accruing between March 1 and March 16, 1900. (Page 415.)

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

Affirmed.

STATEMENT BY THE COURT.

Appellee, D. W. Fultz, recovered a judgment for $2,500 in the Circuit Court of Ouachita County against the Minneapolis Fire & Marine Insurance Company on a policy of insurance to him upon his property which was destroyed by fire, and on appeal to this court the judgment was affirmed. 72 Ark. 365. Pending the appeal to this court, appellee brought this suit against said insurance company and the appellants herein as sureties on a bond executed to the State of Arkansas, as required by statute, conditioned for the payment of all claims arising and accruing to persons by virtue of policies of insurance issued by said insurance company.

The bond sued on is in the following form, towit:

"Know all men by these presents: That we, the Minneapolic Fire & Marine Mutual Insurance Company of Minneapolis, Minn., as principal, and the United States Fidelity & Guaranty Company, a corporation created and existing under

the laws of Maryland, and Sam W. Reyburn and W. B. Scull, of Little Rock, as sureties, are held and firmly bound unto the State of Arkansas in the sum of twenty thousand dollars, lawful money of the United States; for the payment of which well and truly to be made we hereby bind ourselves, our executors, administrators and assigns, jointly, severally and firmly by these presents.

"Witness our hands and seal this 1st day of March, 1900.

"The conditions of the above obligation are such that:

"Whereas, The said Minneapolis Fire & Marine Mutual Insurance Company has filed its charter and statement, and in other respects conformed to the statutes in such cases made and provided, and

"Whereas, the said company proposes to enter this State (or continue in this State) for the purpose of transacting the business of fire insurance for the period of one year ending March 1, 1901.

"Now, therefore, if the said Minneapolis Fire & Marine Mutual Insurance Company shall promptly pay all claims arising and accruing to any person or persons during said term of one year by virtue of any policy issued by the said company upon the life or person of any citizen of the State of Arkansas, or upon any property situated in the State of Arkansas, when the same shall become due, and shall faithfully comply with and perform all and singular the duties and obligations imposed upon them by reason of an act of the General Assembly of the State of Arkansas, approved March 6, 1899, entitled, 'An Act for the punishment of pools, trusts, and conspiracies to control prices,' and shall pay to the State of Arkansas all such sums of money as shall be adjudged against them for the violation of any of the provisions of said act,' then this obligation shall be void; otherwise to remain in full force and effect."

The bond is shown to have been delivered to the Auditor of State on March 16, 1900, and on that day approved by him and filed in his office.

This insurance company had been doing business in the State during the year previous, and had filed with the Auditor a bond in similar form, with other parties as sureties, dated

May 16, 1899, conditioned for the payment of all claims arising and accruing during one year ending May 16, 1900.

The plaintiff's property insured under the policy was destroyed by fire on March 2, 1900; and the policy contained a clause providing that the amount of loss proved thereunder should be payable 60 days after receipt of proof of loss.

Cantrell & Loughborough, for appellants.

Appellee has sued upon the wrong bond, because:

(1) The bond sued upon was not in force at the date when the plaintiffs' claim arose. The date in the bond does not necessarily control in such a case. Devlin, Deeds, § 182; Brandt, Sur. & Guar. § § 25, 27; Throop, Public Officers, § 183. The date of delivery and acceptance controls, and the bond takes effect only from that date. Brandt, Sur. & Guar., § § 93, 526; Throop on Public Officers, § 204; 19 How. 73; 79 Cal. 84; 9 Daly (N. Y.), 398; 114 N. Y. 197; 42 Hun, 646; 19 Md. 309; Gilp. (U. S.) 106; 42 Ark. 392; 22 Iowa, 360; 53 Me. 252; 25 Mich. 36; 14 Lea (Tenn.), 1; 81 N. Y. 592; 65 N. C. 409; 11 Gill & Johns. (Md.). 309; 24 Ark. 244.

(2) The bond is not retrospective. Throop, Public Officers, § 204; Brandt, Sur. & Guar. § § 93, 526; 195 Ill. 445; 41 Mich. 225; 5 Pet. 373; 15 Pet. 187; 126 Mass. 320; 89 Mo. 470; 19 How. 73; 166 U. S. 572; 27 Am. & Eng. Enc. Law, 442; 56 Miss. 648: 79 Cal. 84. This is shown by the language of the bond, which plainly relates to the future. 3 Cranch, 399; 15 Pet. 187, 206; 5 Rose's Notes, 106; 91 Tex. 113, 121; 42 Hun, 646; 2 McLean, 405; 9 Daly, 398; 114 N. Y. 119. As to when plaintiffs' cause of action accrued, see: Century Dict. *verbo* "accrue"; 10 Wis. 433-5; Bouvier, L. Dict. *verbo* "accrue"; Anderson's L. Dict. *Id;* 59 Hun, 145; 52 C. C. A. 663. The liability of a surety will not be extended by implication. Brandt, Sur. & Guar. § 106; 7 Wheat. 680; 163 Ill. 467; Mech. Pub. Off. § 282. The new bond did not take effect until May 16, 1900. Brandt, Sur. & Guar. § 617; 107 Mich. 151; 24 Fed. Cas. 1250; 80 Me. 362; 4 Hen. & M. (Va.) 208; Mechem, Public Officers, § 268; Throop, Public Officers, § 207; 62 Ark. 135.

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

The bond plainly makes appellant liable as surety during the year ending March 1, 1901. A bond is construed like any other

written contract, and appellant must be held to the plain meaning of its undertaking. 51 Ark. 205; 71 Ark. 185; 91 U. S. 50; 56 L. R. A. 926. An instrument is presumed to have been signed on the day when it bears date. Reynolds, Stephens, Ev. c. 2, art. 85; 10 Gray, 66, 68; 5 Denio, 290, 293; 2 Whart. Ev. § § 977, 988, 1312. The bond was retrospective. 11 S. W. 995; 23 Mo. App. 293; 34 Fed. 202, 19 How. 73; 13 Mass. 177; 97 Mass. 533.

McCULLOCH, J., (after stating the facts.) It is contended by appellants that they are not liable, for the reason that the bond was not in force when the fire occurred. This is the sole question presented by the appeal.

The statute on the subject which was in force when the bond was executed is found in Sandels & Hill's Digest (having since been amended), and is as follows:

"Section 4124. All fire, life and accident insurance companies now or hereafter doing business in this State shall, in addition to the duties and requirements now prescribed by law, annually give a bond to the State of Arkansas, with not less than three good and sufficient sureties, to be approved by the Auditor of the State, in the sum of twenty thousand dollars, conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond by virtue of any policy issued by any such company, individual or corporation upon the life or person of any citizen of the State or upon any property situated in this State, and such bond shall be annually renewed."

"Section 4127. Any insurance company failing to comply with the provisions of this act shall not be entitled to transact any business in this State; and any such company or any person acting for such company who shall attempt to transact any business in this State until the provisions of this act shall be complied with shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than twenty nor more than one hundred dollars."

"Section 4130. When any insurance company shall have complied with all the provisions of this chapter, it shall be the duty of the Auditor of State to issue to said company a certificate to that effect, which shall entitle it to do business in this State," etc.

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

A consideration of the language of the statute leads to the conclusion that the liability of the sureties is fixed when the loss by fire occurs, and not from the date when the amount becomes payable. The happening of that contingency fixes the liability of the principal in the bond upon its policy, and nothing remains to be done but to ascertain and adjust the amount of the loss. The liability is fixed when the loss occurs, though payment does not become due until sixty days later. It follows that the liability of the sureties becomes fixed with that of the principal, and ripens into a mature cause of action when default is made by the principal in the payment according to the terms of the policy. This is the conclusion reached by the United States Circuit of Appeals for the Eighth Circuit, in the case of *Union Cent. Life Ins. Co.* v. *Skipper,* 115 Fed. 69, in construing this statute and a bond executed in compliance therewith. Judge THAYER, speaking for the court, said: "We may either assume that the word 'and' is used in the statute as it frequently is, in a disjunctive sense, and that the Legislature intended to make the obligors in such bonds as the one sued upon liable for any loss where either the death occurs, or the loss becomes payable by the terms of the policy, during the lifetime of the bond. Or we may assume that the words 'arising and accruing' mean the same thing; one word being used as explanatory of the other; the intent being to say that the obligors in such bonds shall be liable to pay all losses that 'arise or accrue' by reason of deaths which occur during the period covered by the bond. We incline to the opinion that the latter is the correct interpretation of the statute, *and that the time when the death occurs fixes the liability on this class of bonds.*"

Was the bond in force on March 2, 1900, the date of the fire? We hold that it was in force on that day.

The bond did not become effective until presented to and approved by the Auditor, and it is undoubtedly the law, as con-

tended by learned counsel for appellants, that the contract of a surety is to be given no retroactive effect, so as to cover past delinquencies, unless it in express terms provides that it shall have that effect. Throop on Public Officers, § 204; 2 Brandt on Sur. & Guar. § 525; *Bartlett* v. *Wheeler,* 195 Ill. 445; *Hyatt* v. *Sewing Mach. Co.,* 41 Mich. 225; *Farrar* v. *U. S.,* 5 Peters, 373; *Thomas* v. *Blake,* 126 Mass. 320.

But this bond by its express terms provides for the liability of the contracting sureties for all claims arising for a period of one year beginning on the date of the bond, March 1, 1900, and ending on March 1, 1901.

The bond was executed pursuant to the requirement of the statute, and the obligors are presumed to have known the terms of the statute, and to have bound themselves with reference thereto. The statute provides that insurance companies doing busines in the State shall annually give such bond, and that the same shall be annually renewed. The statute contains no provision for a bond for a shorter period than one year, and in conformity with this provision the bond in question, by its express terms, was to run for one year from March 1, 1900, the date of its execution.

Then, if this bond is to be given full effect according to its express terms and the provisions of the statute, when did the year of its life begin to run? Obviously, not from March 16, 1900, for that would carry it beyond the date of expiration expressly named in the face of the bond. Suppose the loss under the policy had occurred on March 2, 1901, could it be seriously contended that the sureties on the bond would be liable?

The liability of these sureties is not affected by the fact that the company had previously given a bond dated May 16, 1899, which ran for one year from that date. Under the statute the Auditor may require a new bond, and there is no reason why the company may not substitute a new bond or supplement the old by an additional bond. It may be that in this case both bonds were liable for the loss. We do not decide that question, but we do hold that these sureties are liable on their bond.

In determining whether contracts of this kind are to be given a retroactive effect, the peculiar language of each instrument is controlling, but authorities are not lacking to sustain the con-

clusion we have reached that the language of this bond is sufficient to warrant that interpretation.

In *McMullen* v. *Winfield B. & L. Association,* 64 Kan. 298, McMullen was secretary of a building and loan association for eleven years, being elected annually for a term running from the first day of January. On January 13, 1885, he was re-elected for the year 1885, and on February 2, 1885, gave bond for his faithful performance of the duties of his office "for the year beginning January 1, 1885, and ending December 31, 1885." The court held that the language gave the bond a retroactive effect, and that the sureties were liable for default occurring in 1885, prior to the date of the bond. The court said:

"It may be assumed that, in the absence of a provision to the contrary, a bond can only be regarded as prospective and to cover only future transactions; but if the language used is retrospective, and clearly shows an intent to include defaults occurring before the execution of the instrument, the sureties will be held liable. * * * The fact that the election occurred after the first of the year and term is not controlling, but the real question is, what time was intended to be covered by the bond? And that must be determined from its terms. The language is plain, and manifestly the parties contemplated that the bond should be retrospective in its operation, and should indemnify against defaults occurring from the first to the last of the year. When it appears that a bond is intended to be retrospective as well as prospective, such effect must be given to it." See also *State* v. *Finn,* 98 Mo. 532; *Hatch* v. *Attleborough,* 97 Mass. 533; *Commonwealth* v. *Adams,* 3 Bush (Ky.), 41; *United States* v. *Ellis,* 4 Sawyer (U. S.), 591.

In *Hatch* v. *Attleborough, supra,* the Supreme Court of Massachusetts held (quoting the syllabus of that case) that "the obligors upon the bond of a town treasurer executed after the beginning of his official term, which, after reciting the period of such term, is on condition that he shall faithfully account for and pay over all moneys by him received, are liable thereon for moneys received by him during such term prior to as well as after the execution and acceptance of the bond."

Counsel for appellant have cited some authorities tending to sustain the contrary view, that language similar in some re-

spects to that employed in this bond is not sufficient to justify a retroactive effect to the obligation, but we entertain no doubt that the conclusion we have reached, and the cases herein cited, are supported by sound reason, and are right.

This conclusion does not conflict with the decision of this court in *Haley* v. *Petty,* 42 Ark. 392. In that case Petty was sheriff and *ex officio* collector of the county, but forfeited the office of collector by failure to give bond within the time prescribed by law. He was appointed collector by the Governor on January 31, 1878, and gave bond as such to faithfully perform his duties for the year 1878. The court held that the sureties on his bond were not liable for delinquencies occurring before his appointment and the execution of the bond, for the reason that such delinquencies occurred while the principal was holding a separate and distinct office, that of sheriff and *ex-officio* collector. There is no analogy between the two cases. There the sureties on the bond as collector could not be held liable for defaults of the principal done prior to the execution of the bond while he was holding another office, any more than if the defaults had been previously committed by another individual holding the same office. Here the insurance company was already doing business in the State, and the sureties signed a bond dated March 1, 1900, expressly obligating themselves to stand surety for all claims arising for a period of one year from that date. They are liable under the policy and bond for the loss of appellee's property, and the circuit court was correct in so holding. Affirmed.

BATTLE, J., absent.

WELLS v. CHASE.

76 417
85 498

Opinion delivered July 29, 1905.

1. DEED—AFTER-ACQUIRED TITLE—QUITCLAIM.—As a quitclaim deed does not purport to convey any title except what the grantor has at the time of its execution, such a deed is not within the statute which provides that "if any person shall convey any real estate by deed purport-

ing 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 afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee." (Kirby's Digest, § 734.) (Page 419.)

2. SAME.—A quitclaim deed conveying an interest in a lode mining location will not be held to convey a placer mining claim subsequently acquired by the grantors. (Page 420.)

Appeal from Marion Circuit Court in Chancery.

ELBRIDGE G. MITCHELL, Judge.

Affirmed.

J. C. Floyd, for appellant.

The deed carried the after acquired title to the appellants. Kirby's Dig. § 734. The deed is, in effect, not a quitclaim deed, but a special waranty deed, and is sufficient to pass title. 53 Ark. 153; 5 Ark. 693; 33 Ark. 251; 15 Ark. 73; Bisph. Eq. 218. The record of the deed was constructive notice to the world, and there could be no innocent purchasers. Kirby's Dig. § 762; 69 Ark. 442.

G. J. Crump, for appellee.

Kirby's Dig. § 734, has reference to the conveyance of real estate by deed, and does not apply to a mining claim, which is only a right of possession. 163 U. S. 445.

MCCULLOCH, J. This suit was brought in equity by appellants, H. Wells and Fannie A. Gray, as executrix of the last will of Chas. S. Gray, deceased, against appellees, Geo. W. Chase and Estella E. Chase, alleging that appellees had, on December 4, 1889, sold and conveyed to said H. Wells and C. S. Gray an undivided one-tenth interest in the Red Cloud Mining Claim and the Mt. Ida Mining Claim, and had thereafter acquired title to said claims from the United States, which said subsequent acquisitions, appellants say, inured to the benefit of Wells and Gray under said deed executed to them by appellees. The prayer of the complaint is that the title to one-tenth interest in said claims be decreed to appellants.

The Red Cloud Mining Company, a corporation, which had acquired title to said claims under conveyance from appellees, was made a party defendant, and filed its answer, claiming

to be an innocent purchaser without notice of appellant's rights. Appellees answered, admitting the execution of their said deed, but alleging that said Wells and Gray had failed to pay their proportionate part of the cost of the annual assessment work on said mining claims, and had thereby forfeited their rights therein, and that appellees and their co-owners had subsesequently abandoned said mining claims as lode claims, and relocated the same as placer claims, and obtained patents therefor.

It is shown that the mining claims in controversy had been located as lode claims, and were held by appellees and others at the time of the conveyance of the one-tenth interest therein to Wells and Gray. Subsequently the claims were found not to be in fact lode claims, and were abandoned and forfeited as such, and appellees and other parties located the same as placer mining claims.

It is urged in behalf of appellants that the title subsequently acquired by appellees in the placer mining claims inured to their benefit by operation of Kirby's Digest, § 734, which is 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."

The deed in question is somewhat peculiar in its terms. It recites that the grantors "have sold and released and quitclaimed" to the grantees, Wells and Gray, an undivided one-tenth interest in "the following mining and mineral lands and claims," describing the claims in controversy, and others. The habendum clause contains a stipulation that the grantors will "forever defend the title aforesaid against all parties who hold under or through" the said grantors. The effect of the deed was to convey to the grantees whatever title the grantors then had to the undivided one-tenth interest, and to warrant against any prior conveyances or incumbrances made or suffered by the grantors; but it did not purport to convey any title except what the grantors

then had. They then had title to a lode claim, which was subsequently abandoned and forfeited. This is all that passed by the deed, and another title subsequently acquired did not pass. As said by this court in *Blanks* v. *Craig,* 72 Ark. 80: "The statute only affects interests in land which the grantor has conveyed or which his deed purports to convey. It does not affect interests afterwards acquired by the grantor which he has not previously conveyed or attempted to convey." Where one has title or interest in land which he conveys by deed, and the deed purports to convey no more, another title or interest subsequently acquired by him does not pass to his grantee under the deed.

Appellant Wells testified that he paid G. W. Chase part of the expense of assessment work, and that Chase was indebted to him, and promised to pay the remainder of the expense. It is urged by counsel for appellants that Chase wrongfully allowed the forfeiture of the interest of Wells and Gray, and cannot take advantage of it to acquire another title to the claim. No such issue is raised by the pleadings; but if we treat the issue as properly raised, the burden is upon appellants to prove, at least by a preponderance of the testimony, the bad faith and misconduct of Chase; and as the latter denies that he was indebted to Wells or ever promised to pay for the assessment work, or that Wells ever sent him any money for that purpose, we cannot say that there was a preponderance in appellants' favor. There was no testimony except that of Wells and Chase, and they positively contradict each other on every material matter. We are not justified by the record in overturning the finding of the chancellor, and his decree must be affirmed. It is so ordered.

BATTLE, J., absent.

WHITE RIVER MINING & NAVIGATION COMPANY *v.* LANGSTON.

Opinion delivered July 29, 1905.

1. WITNESS — IMPEACHMENT — CONTRADICTORY STATEMENT.—Where, in ejectment to recover a mining claim the issue was whether plaintiffs had done the $100 worth of assessment work required by the mining

laws during a certain year, and plaintiffs' agent testified that he had done the required amount of development work on the claim, and that only a small part of the work in question had been done on another claim, certified copies of affidavits of others procured and filed by the witness in the United States land office, showing that the work in question had been done entirely on the other claim, were admissible to contradict the witness. (Page 422.)

2. EJECTMENT—PLEADING—CHANGING ISSUE.—Where plaintiffs sued in ejectment, alleging title based on a mining claim, a different cause of action and source of title, based on adverse possession, could not be introduced by them after the issue was joined and the cause was before the jury. (Page 423.)

Appeal from Marion Circuit Court.

ELBRIDGE G. MITCHELL, Judge.

Affirmed.

Woods Bros., for appellants.

The court erred in permitting the introduction of the affidavit of Honeycutt and Gardner and the evidence of Cook in reference to the same matters. Gr. Ev. § 94; 1 Enc. Ev. 722-3; 8 Ark. 363; 1 Snyder, Mines, § § 485, 486; Barr. & Ad. Mines, 275, 301. The evidence does not sustain the finding that appellant suffered a forfeiture of the land in controversy. Appellants had title by adverse possession. 1 Snyder, Mines, § § 357, 672; Barr. & Ad. Mines, 45, 318, 321, 323, 568, 569, 575; 70 Ark. 525.

Horton & South, for appellee.

There was no error in the admission of the affidavit and testimony complained of. Kirby's Dig. § § 3057, 5360-4-5; 68 Ark. 587; 29 Ark. 99; 52 Ark. 11; Mech. Ag. 718-720. No exception being saved to instructions, they are presumed to have been correct. No issue of adverse possession having been made below, it can not now be raised. 54 Ark. 186; 56 Ark. 249; 49 Ark. 253; 60 Ark. 613; 51 Ark. 357; 46 Ark. 103; 62 Ark. 78.

MCCULLOCH, J. This is an ejectment suit brought by the White River Mining & Navigation Company and H. D. Armstrong against A. L. Langston, to recover possession of the land embraced within the boundaries of a mining claim, and involves a contest between appellants and appellee as rival claimants under mining claims held by them, respectively. The claim of appellants was located on January 1, 1899, and that under

which appellee holds on January 1, 1901. Appellee alleged in his answer that appellants failed to do as much as $100 worth of assessment work during the year 1900, as required by mining laws, thereby forfeiting the claim. A trial was had before a jury upon this issue, and the same resulted in a verdict and judgment for the defendant.

The mining claim under which appellants assert title was located by E. C. Cook and others, who subsequently conveyed to appellants, and the assessment work on the claim is alleged to have been done for them by Cook as their agent. On the trial they introduced Cook as a witness to prove the amount of assessment work done, and he testified that during the year 1900 he caused to be done for appellants "actual development work on said lands to the amount of $60, and over $200 in making a road from said land to Buffalo City on White River." The witness was asked by counsel for appellee, on cross-examination, if he had not, as agent for the owner of another mining claim, known as the "Small Hope Placer," caused the roadwork in question to be done as assessment work on that claim, and if he had not procured and filed in the United States general land office as final proof to obtain a patent of the Small Hope placer claim the affidavits of two persons, Honeycutt and Gardner, showing that said road work had been done as work on that claim. He answered that only a small part of this work had been applied on the Small Hope placer claim, and thereupon appellee was permitted to read in evidence certified copies of said affidavits of Honeycutt and Gardner, filed by the witness in the United States land office, showing the cost of the road work during the year 1900, and that it had been done on the Small Hope placer claim. This ruling of the court is assigned as error. The evidence was competent for the purpose of contradicting the witness. He testified that only a small part of the road work was applied on the Hope placer claim, and it was competent to contradict him by showing that he had procured and filed the affidavits as proof that this work was done entirely on the other claim. His act in procuring and presenting the affidavits was in direct contradiction of his testimony in this case to the effect that only a part of it was applied on the Small Hope placer

claim, and the remainder upon the claim in controversy. The testimony of the other witnesses was conflicting as to which claim should have received credit for the road work. Omitting this credit from the claim in controversy, the amount of assessment work done during the year 1900 fell short of the amount essential to prevent a forfeiture. There was sufficient testimony to warrant the jury in finding that the whole of the road work was done upon the Small Hope placer claim, and none upon the claim in controversy. No complaint is made, and no error is assigned, as to instructions of the court, and, the jury having settled the issue of fact against appellants upon legally sufficient evidence, there is no reason for disturbing the verdict.

Counsel for appellants urge further that the testimony shows that appellants have held adverse posession of the land for more than the statutory period of limitation, and were thereby fully invested with title. No issue of that kind was tendered by the pleading. The complaint filed by appellants set forth their claim of title under a location of the mining claim on January 1, 1899, and by the answer of the defendant the sole issue joined was to a forfeiture for failure to perform the requisite amount of assessment work during the year 1900. A different cause of action and source of title could not be introduced into the case after the issue was joined and the case was before the jury. Judgment affirmed.

BATTLE, J., absent.

---

76 423
f79 194

76 423
88 162

CHURCH v. GALLIC.

Opinion delivered July 29, 1905.

1. APPEAL—RIGHT TO PROSECUTE—RES JUDICATA.—Under Kirby's Digest, § § 1227, 1228, providing that an appellee may, by motion or answer, raise the question of the appellant's right to prosecute an appeal further, an appellee may plead that since the appeal was taken a court of competent jurisdiction has settled against appellant the rights asserted on the appeal. (Page 425.)

2. JUDGMENT—CONCLUSIVENESS.—A judgment of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or could have been interposed in the suit. (Page 426.)

3. SAME—FORMER RECOVERY.—A judgment in ejectment upholding a certain deed may be pleaded in bar of the further prosecution of a suit in equity between the same parties to cancel the same deed, though the equity suit was first begun. (Page 426.)

4. FORMER SUIT PENDING—WAIVER.—The defense of a former suit pending is waived by failure to plead it. (Page 426.)

Appeal from Garland Chancery Court.

LELAND LEATHERMAN, Judge.

Appeal dismissed.

STATEMENT BY THE COURT.

Appellant, Mahala Church, was the owner of the property in controversy, certain real estate in the City of Hot Springs, and on December 22, 1890, by warranty deed duly executed, acknowledged and recorded, reciting a cash consideration of $500, she conveyed this property to Lula Oborg. Appellee, Gallic, claims the property under the last will of Lula Oborg. Mrs. Church remained in possession of the property, and commenced this suit in equity against Gallic in 1901 to cancel said deed, alleging that she intended to execute only a testamentary paper, and, being illiterate, did not know that she executed a deed, and that she had continuously remained in actual, open and exclusive adverse possession of the property, claiming it as the owner, since the execution of the deed, a period of more than seven years. Gallic appeared by his solicitor, and answered the complaint, asserting title in himself under said deed and the last will of Lula Oborg, and denying all the allegations of the complaint concerning fraud or mistake in the execution of said deed. He also denied that the plaintiff had held adverse possession of the property, but alleged that she occupied the premises as tenant at will of Lula Oborg.

The cause was heard upon the pleadings and depositions, and a final decree rendered dismissing this complaint for want of equity, and the plaintiff appealed to this court.

After the appeal was taken in this case, appellee Gallic brought an ejectment suit against Mrs. Church in the circuit

court of Garland County for recovery of possession of said premises. A trial of that cause was had, which resulted in a judgment in favor of the plaintiff therein, Gallic, for the possession of the property. An ineffectual effort was made by Mrs. Church to take an appeal to this court from that judgment, which failed by reason of the bill of exceptions not being signed by the presiding judge and filed in due time. She then filed her suit in chancery for relief against this judgment, and on final hearing that complaint was dismissed for want of equity, and on appeal the decree was affirmed. *Church* v. *Gallic,* 75 Ark. 507.

The judgment in the ejectment suit, having become final, is now pleaded by appellee in bar of appellant's right to prosecute this appeal.

James E. Hogue, for appellant.

R. G. Davies, for appellee.

The issues in this case have become *res judicata* by virtue of the decision in the ejectment suit.

McCULLOCH, J., (after stating the facts.) The statute regulating appeals to this court and the practice in disposing of same provides that an appellee may, by motion to dismiss or answer, raise the question of the appellant's right to further prosecute an appeal. Kirby's Digest, § § 1227, 1228.

An appellee may plead in this court that since the appeal was taken a court of competent jurisdiction has, by judgment duly rendered, settled against the appellant the rights asserted in the case on appeal. *Pillow* v. *King,* 55 Ark. 633. The fact that the suit on appeal was commenced first in point of time and in a different court from that in which the subsequent judgment was rendered does not obviate the bar in such adjudication. The pendency of the first action might have been pleaded in the second suit in bar of the right to maintain the same, but, if not pleaded, or if, after the plea is amended, judgment upon the merits of the controversy in the second suit is allowed to become final, it is a bar to further prosecution of the first suit.

"The fact that a judgment was obtained after the commencement of the suit in which it is pleaded does not prevent its being a bar. It is the first judgment for the same cause of action that constitutes an effective defense, without regard to the order of

time in which the suits were commenced. Hence it follows that a prior judgment upon the same cause of action sustains the plea of a former recovery, although the judgment is in an action commenced subsequent to the one in which it is pleaded." 2 Black on Judgments, § 791; *Finley* v. *Hanbest,* 30 Pa. St. 190; *David Bradley Mfg. Co.* v. *Eagle Mfg. Co.,* 57 Fed. 980.

In *Daniel* v. *Garner,* 71 Ark. 484, this court said: "Under the statutes of this State a defendant, when sued at law, must make all the defenses he has, both legal and equitable. If any of his defenses are exclusively cognizable in equity, he is entitled to have them tried as in equitable proceedings, and for this purpose to a transfer of the cause to the equity docket or chancery court, as the case may be." *Horsley* v. *Hilburn,* 44 Ark. 458; *Reeves* v. *Jackson,* 46 Ark. 272.

A judgment 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 suit. *Ward* v. *Derrick,* 57 Ark. 500.

All of the rights and matters asserted in this suit by appellant could have been adjudicated in the ejectment suit, or she could have pleaded the pendency of this suit in bar of appellee's right to maintain that suit. Having failed to do either, she is barred by the final judgment in that case from seeking further to adjudicate the question in this case. Her right to prosecute this appeal has, on that account, ceased, and the same must be dismissed. It is so ordered.

BATTLE, J., absent.

PRICE v. GREER.

Opinion delivered July 29, 1905.

76 426
82 55

76 426
85 211

76 426
89 303

1. TRESPASS—WHEN MAINTAINABLE.—In actions for trespass it devolves upon the plaintiff, before he can maintain the action, to show either possession or title, mere color of title being insufficient. (Page 429.)

2. SAME—SUFFICIENCY OF EVIDENCE.—A verdict will not be sustained in an action of trespass on several tracts of land if it fixed the gross value of the timber cut from all the land, and the proof failed to

show plaintiff's title or possession as to part of the land, or to show the amount of timber cut from each tract. (Page 429.)

3. LIMITATION—PAYMENT OF TAXES FOR SEVEN YEARS.—Evidence that plaintiff paid the taxes on wild and unimproved land for more than seven years, without proving that at least three of such payments were made after the passage of the act of March 18, 1899, was insufficient to show title under that act. (Page 429.)

4. TRESPASS—SUFFICIENCY OF ANSWER.—As in actions of trespass upon real estate it is not necessary for plaintiff in his complaint to deraign title, but only to allege that he is the owner or in possession, all other allegations of ownership of a more specific character may be disregarded, and need not be denied in the answer. (Page 430.)

5. SAME—SUFFICIENCY OF PLAINTIFF'S TITLE.—In actions for trespass on land it is not necessary for the plaintiff to deraign title, but only to allege ownership or possession. (Page 430.)

Appeal from White Circuit Court.

HANCE N. HUTTON, Judge.

Reversed.

STATEMENT BY THE COURT.

This is an action brought by appellee, B. W. Greer, against appellant, C. A. Price, for trespass upon several tracts of lands claimed by appellee, aggregating 495.97 acres, by cutting timber therefrom. The complaint alleges that the plaintiff is the owner of the lands in question, and that he "has been in the possession of the same and paying the taxes assessed against said lands continuously for the past twelve years." Damages are laid in the sum of $3,000.

The defendant answered, admitting that he cut the timber on the land, and that plaintiff was the owner of the land at the time of the suit, but denying that plaintiff was the owner of the land at the time the timber was cut, and denying "that the plaintiff is in possession of said land, and has been in such possession for the past twelve years."

The jury returned a verdict in favor of the plaintiff, and assessed the damages at $1,250, and the defendant appealed.

J. G. Holland and *J. W. & M. House,* for appellant.

A quitclaim raises no color of title, unless it appears that the grantor has some title to or the possession of the land. 3 Washb. R. Prop. 155; 14 N. H. 111; 50 Ark. 322. In this case

appellee's chain of title begins with a tax deed void on its face, because:

(1) A county clerk is not allowed to purchase lands at a delinquent tax sale. 34 Ark. 582.

(2) A tax sale showing sale of more than one tract is void. 29 Ark. 476; 30 Ark. 579; 31 Ark. 491.

(3.) A sale on August 2, 1869, was on a day later than the law authorized, and was therefore void.

A tax deed void on its face is no cloud on a title. 27 Ark. 675; 55 Ark. 549; 30 Ark. 579. To maintain trespass, the plaintiff would have to show actual possession or such a state of facts as would imply possession. 44 Ark. 74. There is no constructive or implied possession under a tax deed void on its face. 57 Ark. 523; 60 Ark. 163. As both parties to this action really claim under a common source of title, G. W. Andrews, the appellee can not dispute the right of appellant in the timber, the deed of the latter being prior in time to the former. 38 Ark. 181; 41 Ark. 17.

When both parties claim title to land under the same grantor, both are estopped to deny his seisin. 44 Ark. 516.

When a tax deed is executed without power, no benefit can be derived under it. The deed from John A. Cole, clerk, to John A. Cole was a fraud upon its face, and put everybody upon notice. 32 Ark. 131; 35 Ark. 505; 13 Mich. 329; 16 Mich. 12; 23 Ind. 46; 21 Iowa, 70; 42 Mo. 162; 29 Iowa. 356.

S. Brundidge, Jr., for appellee.

Appellee has color of title. 102 U. S. 540; 40 Ark. 237; 47 Ark. 531; 70 Ark. 487; 71 Ark. 390; 71 Ark. 386; 96 Ga. 860; 7 Wash. 617; 32 N. E. Rep. 309; 2 Blackw. Tax Titles (5th Ed.) sec. 861; 13 How. 477.

McCULLOCH, J., (after stating the facts.) In actions for trespass upon land it devolves upon the plaintiff, before he can maintain the action, to show either title or possession. Mere color of title is not sufficient. The plaintiff in the trial below introduced a chain of title deeds conveying the lands in question, running back to a deed from one John A. Cole in 1881. These deeds constituted color of title, but do not show a perfect chain of title. He also introduced a deed, dated February 7, 1872, from John A. Cole, as clerk of White County, to John A. Cole

(whether the grantor and grantee are the same individual does not appear), conveying part of the lands (295.97 acres) pursuant to sale for taxes. The validity of the tax sale and appellee's title thereunder is attacked by appellant, but we need not determine the question of its validity, inasmuch as the proof does not show the amount of timber cut from each tract; and as the verdict of the jury fixes the gross value of the timber cut from all the land, the case must be reversed unless the plaintiff has shown his right to recover for the timber cut from the other tracts. The burden was upon appellee to prove his title or possession.

It is not claimed that he had actual possession, the lands being wild and unoccupied, but he sought to establish title to and possession of all the lands by showing compliance with the act of March 18, 1899, in paying taxes.

This court, construing that statute in the case of *Towson* v. *Denson,* 74 Ark. 302,, held that the payment of taxes on wild and unimproved land under color of title constitutes possession for each successive year in which payment is made, provided, however, that such payments be continued for at least seven years in succession, and not less than three after the passage of the statute.

The only testimony on the point was that of J. H. Greer, a brother and agent of the plaintiff, who said that he had "paid taxes on all these lands since 1891." He did not say what years he paid, nor give the dates of payments. This was sufficient to warrant the jury in finding that he paid the taxes continuously since 1891, and made the payments within the times required by law for paying taxes; but it does not authorize a finding that three payments were made before the date of the trespass and after March 18, 1899, so as to bring the case within the terms of the statute. The trespass commenced in June, 1901, and, in order to have made three tax payments before that time, he must have paid for the years 1898, 1899 and 1900. Now, the jury could have found from this testimony that the plaintiff paid the taxes for the year 1900 on or before April 10, 1901, and for the year 1899 on or before April 10, 1900, but there was nothing on which to base a finding that he paid for the year 1898 after March 18, 1899. The taxes of that year were payable at any time from the first Monday in January to April 10, 1899, and, for aught that appears in proof, the same may have been paid before

March 18, 1899. The burden was upon plaintiff to show, if such was a fact, that he made this payment after March 18, 1899, for that was essential in order to show compliance with the terms of the statute. This being true, the evidence is insufficient to sustain the verdict as to title or possession of the plaintiff, and the same must be set aside, and a new trial granted.

It is urged by counsel for appellee that the allegation of tax payments by the plaintiff is not denied in the answer, and was not an issue in the trial below; but we think he is mistaken. It is true that the defendant's answer does not specifically deny the payment of taxes by the plaintiff, but it does deny that the plaintiff was the owner or has had possession of the land. If a more specific denial was to be required, it should have been pointed out by motion at the proper time. In actions for trespass upon real estate, it is not necessary for the plaintiff in his complaint to deraign title. It is only necessary for him to allege that he is the owner or in possession. All other allegations of ownership of a more specific character may be treated as a surplusage, and the defendant need not deny them. The title and possession of defendant was, we think, denied with sufficient certainty to put the same in issue; and as the testimony failed to establish either, the judgment must be reversed, and the cause remanded for a new trial.

BATTLE, J., absent.

---

76 430
82 440

SAINT LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY

v. HARRISON.

Opinion delivered July 29, 1905.

RAILROAD—ASSAULT ON PASSENGER BY CONDUCTOR—PROXIMATE CAUSE.—In an action by a passenger against a railway company to recover damages for an assault committed by defendant's conductor which grew out of a dispute between plaintiff and the conductor as to whether a pass which plaintiff presented had expired or not, it was error to permit plaintiff's counsel to argue that, if the pass was negligently written, this should be considered, with the other facts, in

determining defendant's liability, as the negligence in writing the pass was not the proximate cause of the assault.

Appeal from Jackson Circuit Court.

FREDERICK D. FULKERSON, Judge.

Reversed.

STATEMENT BY THE COURT.

The complaint alleged that, while plaintiff was a passenger on defendant's train, he was wantonly and maliciously assaulted, beaten, cursed and abused by the conductor and brakemen in charge of said train and by certain other employees of defendant, whereby he suffered greatly in mind and body, to his damage in the sum of $15,000, for which sum he prayed judgment.

In the first count of its answer the defendant specifically denied all the material allegations of the complaint. In the second count of its answer the defendant alleged that, if it be true that plaintiff was assaulted and struck by defendant's conductor, the same was done by said conductor in the necessary and proper exercise of his right of self-defense against a violent and vicious assault upon him by the plaintiff.

It appears that the appellee was a foreman in the building of railroad bridges. He boarded appellant's train at Batesville for Little Rock. Appellant's conductor asked appellee for his ticket, and appellee handed him the following pass:

"St. Louis, Iron Mountain & Southern Railway Co.

"Leased, Operated and Independent Lines.

"Employees' Trip Pass.

"No. K. 12448. Little Rock, 5-4, 1905.

"Pass I. Smith and three men from Batesville to Little Rock, account contract. Good for one trip only until May 10th, 1903. Countersigned by G. W. Hershman.

"W. T. TYLER,
"General Superintendent."

Appellee describes what took place thereafter substantially as follows:

"The conductor looked at the pass, and said it had expired. Konig's labor agent was sitting facing plaintiff, and he, upon inspecting the pass, said, 'That pass is all right; it was written

on May 1st, and expires on May 10th.' The conductor then jerked the pass out of said agent's hand, and put it into his own pocket, saying, 'That pass is no good.' Plaintiff then said, 'That kind of thing makes a man feel sore, to get bowled out in a crowd.' The conductor then said, 'You son-of-a-bitch, come into the baggage car, and I'll make you sorer.' Plaintiff then put his hand on the seat, and the conductor struck him with his ticket punch. Plaintiff finally got up on his feet, and struck at the conductor, but does not remember striking him. Plaintiff received several licks in the side, and the first thing he knew somebody cut his head open. After that he saw two negroes behind him, a short brakeman in front, and the conductor in between the seats. Plaintiff said, 'I can't whale all of you people,' and sat down and tried to stop the blood. Conductor Hunter took the pass away from him, and went into the baggage car, and then returned and said, 'What are you going to do, pay or get off?' Plaintiff answered, 'I guess I'll get off at Moorefield.' "

The plaintiff then describes his injuries, and details other matters not necessary to set out. His testimony was corroborated in essential particulars by witness Lee as to the origin and nature of the trouble between him and the conductor. The physician who dressed his wound testified concerning the injuries. The appellant's evidence tended to prove the allegations in its answer. The conductor testified that the "naught and the one on the pass were connected in such a manner that it looked to him to be intended for the 1st instead of the 10th. He did not examine it carefully when it was handed to him the first time. He looked at it in a hurry, and said: 'This has expired on the first of May.' He took the 'st' to stand for the 1st. It is 10th."

Counsel for the plaintiff, in his argument to the jury, used the following language, towit.

"It is claimed that the pass on which plaintiff was riding was not carefully made out; that the date on which it expired is negligently written. Well, gentlemen, if the pass was negligently written, it was the negligence of the defendant. The defendant wrote out this pass; and if it was negligently written, you will consider that fact, in connection with all other facts in this case, in determining the liability of this defendant."

The defendant objected to this argument by counsel, as being an incorrect statement of the law. The court overruled said objection, and the defendant duly saved its exceptions. The defendant, after the above language was used by the counsel for plaintiff, again asked the court to give instruction No. 7, but the court refused to give said instruction, to which action of the court defendant saved its exception.

Instruction No. 7 had been asked before by appellant and refused by the court, and exceptions properly saved. It was as follows:

"Even though the jury may find from the evidence that the defendant negligently wrote the date on the pass, so that it appeared to expire May 1st, instead of May 10th, they are instructed that negligence in writing the date on said pass is not to be considered by the jury in determining the liability of the railway company in this action."

There was a verdict for $1,000, and judgment accordingly, to reverse which this appeal is taken.

B. S. Johnson for appellant.

It was error to refuse the seventh instruction asked by appellant. Suth. Dam. 57; 96 Mass. 295; 94 U. S. 475; 105 U. S. 252; 69 Ark. 402. The court erred in permitting counsel for appellee to state the law incorrectly in his closing argument to the jury.

Jos. W. Phillips and *S. D. Campbell*, for appellee.

Upon the whole case the court's charge was correct, and favorable enough to the defendant. 64 Ark. 613; 125 Fed. 187. There was no error in the refusal of the seventh instruction prayed by appellant, or in the remarks of counsel complained of. If the jury had believed that the assault upon the plaintiff was wanton and malicious, they would have been authorized to award punitive damages. 122 U. S. 597 (L. Ed. 30, page 1146); 22 Am. St. 499. Even if there was technical error in the refusal of instruction No. 7 and in remarks of plaintiff's attorney, the same was harmless, as is conclusively shown by the fact that the jury returned a verdict only for actual damages upon the uncontradicted testimony and the whole record. 64 Ark. 613; 48 Am. R., 538; 71 Ark. 437; 74 Ark. 489.

WOOD, J., (after stating the facts.) The only reversible error we find in this record is the failure of the court to give instruction number seven. It was a close question on the evidence as to whether or not the assault made by the conductor was in self-defense, and in the discharge of his duty as conductor. These matters were fully and properly submitted to the jury, and we would not disturb their finding, because there is ample evidence to sustain it. But it is by no means true that the verdict was justified by the "uncontradicted testimony in the case." On the contrary, the verdict might very well have been for appellant on the evidence, and it is impossible to tell what influence the improper argument of counsel, set out in the statement, might have exerted in producing the verdict. After appellant objected to it, and the court permitted the counsel to proceed, the argument was thus approved by the court, and went to the jury with the same force as an instruction from the court, to the effect that they might consider the negligence of the defendant, in writing the pass, if it was negligently written, in determining the liability of the defendant. The argument was exceedingly improper and prejudicial, and the court should not have permitted it, and especially after it had been permitted the court should have granted appellant's seventh request, in order to counteract all possible damaging effect of such argument. This instruction, asked at that time, was an effort on the part of the appellant to have the court correct the improper argument of counsel, and nullify whatever prejudicial influence it might have had upon the jury. The appellant was clearly entitled to it, for the assault of the conductor on the passenger bearing the pass could never have been contemplated even as a remote consequence of any negligence in writing the pass. Such assault certainly could not be considered anywhere within the range of the natural, ordinary and reasonable, or even remotely probable, effect of negligence in making out the pass. *St. Louis, I. M. & S. R. Co.* v. *Bragg,* 69 Ark. 402; 1 Suth. on Dam. 57; *McDaniel* v. *Snelling,* 96 Mass. 295; *Scheffer* v. *Ry. Co.,* 105 U. S. 252; *Milwaukee & S. P. Ry. Co.* v. *Kellogg,* 94 U. S. 475.

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

TERRY v. CLARK.

Opinion delivered July 29, 1905.

EVIDENCE—HEARSAY.—When the issue in an attachment suit was whether certain household furniture attached belonged to the attachment debtor or to his wife, testimony of the officer who took the debtor's assessment that he admitted, for the purpose of assessment of taxes, that the furniture belonged to him was hearsay, so far as the wife is concerned, and inadmissible against her.

Appeal from Hempstead Circuit Court.

JOEL D. CONWAY, Judge.

Reversed.

Feazel & Bishop, for appellant.

The court erred in admitting certain evidence of witness Forgy. Kirby's Dig. § 3090; 31 Ark. 684; 34 Ark. 663; 13 Ark. 295; 21 Ark. 77; 58 Ark. 441.

Jas. H. McCollum, for appellees.

WOOD, J. This suit is over certain household furniture claimed by appellant, and which had been attached by appellee, Clark; and was held by the officers for him as the property of one D. P. Terry, the attachment debtor. The appellant was the wife of D. P. Terry.

The question of fact as to whether Mrs. Terry or her husband owned the property attached was properly submitted to the jury, and we would not disturb the verdict upon the evidence in the record. The court erred, however, in permitting one A. J. Forgy to testify to a conversation he had with D. P. Terry at the time Terry assessed his property in 1901. Forgy was the clerk of the county, and had custody of the assessment rolls, and testified that D. P. Terry made the assessment of household goods before him in 1901. He was asked to "state to the jury in that conversation had with Mr. Terry if he claimed the household goods in his residence." The witness answered: "He stated this to me; he advised with me; he asked me before he made his assessment as to whether he had to assess it both years. He stated he had been to a considerable expense remodeling his house and refurnishing his house, and he wanted to know if his

house improvements would be subject to taxation. I told him they would. He made an assessment at an increase of $500 on that item." This testimony was objected to by the appellant, and her objection was overruled. This testimony was clearly hearsay and incompetent. Sec. 3095, Kirby's Digest, subdiv. 4; *Collins* v. *Mack,* 31 Ark. 684; *Watkins* v. *Turner,* 34 Ark. 663.

This testimony was highly prejudicial, for it tended to prove that Terry was the owner of the property in controversy, and was probably considered by the jury as the strongest testimony on that point. We cannot tell. It was very damaging testimony on the very question at issue between appellant and appellees.

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

WALKER v. LOUIS WERNER SAWMILL COMPAN.

Opinion delivered July 29, 1905.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—An employee who was injured in his master's employment cannot recover if the evidence fails to show any negligence of the master that proximately caused the injury, or if his own negligence directly contributed to his injury.

Appeal from Nevada Circuit Court.

JOEL D. CONWAY, Judge.

Affirmed.

STATEMENT BY THE COURT.

On July 29th, 1902, plaintiff, Lee Walker, filed his amended and substituted complaint, in which he alleged that he was a minor, and sued by D. C. Walker, his next friend, and that, on the 22d day of November, 1901, he was in the employ of the defendant as a common workman, assisting in running one of its trains, which train was engaged principally in hauling logs to

the mill owned by the defendant at Sayre, Arkansas; that he had no experience in running trains or engines, which was well known to the defendant; that the engine upon and about which he was placed to work was not provided with an apparatus with which to sand the track, had no headlight, and was not provided with lanterns; that plaintiff was set to work, while said train was running, to sand the track, it being his duty to pour sand on the track with a can from a place upon the pilot of the engine; that the defendant failed to provide a safe place for him to sit, and that on the night the injury occurred, after dark, the train stopped, and plaintiff left his position on the pilot to assist in making a coupling and to procure sand; that the engine had no headlight, and plaintiff was not provided with a lantern; that there was no light about the engine except one lantern in the cab, and defendant kept no lookout, and could not have seen plaintiff if he had kept a lookout, on account of the failure of the defendant to provide lights; that, while plaintiff was in the discharge of his duty, the engineer, who was also a conductor and in charge of the train, negligently and without warning started the train; that the defendant had failed to provide a safe and sound roadbed, in that the ties were of uneven lengths, some six and some eight feet long, and that, in attempting to regain his position on account of having no light and the insecure place he was required to work and of the uneven ties, he stumbled over said uneven ties, and fell with his hand upon the track, and was so badly injured that amputation of his hand became necessary to save his life; that the defendant gave him no warning of the unsound and unsafe condition of the engine and track, and that by reason of youth and inexperience he was not aware of the danger to which he was exposed; that by reason of his injury his ability to earn a living had been greatly and permanently decreased; that he suffered great pain, to his damage in the sum of $5,000.

The answer denied the material allegations of the complaint, and pleaded contributory negligence.

Plaintiff testified as follows:

"I am twenty years old. The injury occurred November 22, 1901, between 8 and 9 o'clock at night, after dark. The train stopped to make a coupling over a hill and to get sand.

There was some trouble in making the coupling, and I went back to help. When I got to the back end of the engine Mr. Norwood, the brakeman, told me not to come in, as I had no lantern, and it was dangerous, and I was likely to get hurt. I started round to the front end, and before I got there, and when I was in about four feet of my place, the engine started.

"I had worked some time the first of the year on the railroad, and had worked on the train about a month when they laid me off for about a week; I had a lantern when I worked on the train the first time. They kept all lanterns at the commissary, and each man stood good for his own lantern. When I quit, I took my lantern back. The second time when I went to work, I applied to the bookkeeper for a lantern. He had charge of the affairs of the company at that point. I also spoke to Mr. Sparkman about it the morning I got hurt. I met him, and asked him if I could get a lantern, and he told me he did not know. I had been out a few trips without a lantern. Mr. Painter told me that he would have some in a few weeks, but that he had none at that time. We usually made two trips over the road each day. We seldom made three trips. The day I got hurt we were coming in on our second trip. We usually got in in the daytime, but sometimes would be after dark. They had a sand box on the engine, but did not use it. The sand was kept in a bucket sitting on the pilot between myself and the other brakeman. When the train stopped this night, I got off to get sand. Mr. Norwood went back to make the coupling. When he told me not to come in, I went to get on the front end of the engine, not expecting them to start before they gave the signal. The engineer was between Norwood and myself on the opposite side. They had three lanterns on the train, two of which were in the cab, to see about the steam and water. There were four men on the train. The engineer, fireman and Mr. Norwood each had a lantern. Each man when he got his lantern was charged with it, and if he returned it he was given credit for it. Tulley Norwood got the lantern which I turned in when I was laid off the first time. The headlight was not lighted the night I was injured, because there was no oil, and had not been lighted for four or five days, and during this time there was no oil in the headlight. Garland Nichols had charge of the train, and gave orders for running it. The train was loaded with logs. They were flat

cars, called skeleton cars, with no steps on them. The brakeman generally rode on the front end, coming in. The front end of the engine had an 8x10 piece to sit on and the board for our feet. Norwood sat on one end, and I on the other, and sat close to the rail with the bucket between us, and sanded the track with our hands. We got the sand off the side of the road. I got no sand that night, as there was plenty in the bucket. They gave no signal, but just opened the throttle and started, and when I was within four feet of my place, walking by the side of the engine, I fell down, and my left hand fell across the rail. It had rained that morning, and it was a dark night.

"My hand was so badly mashed that it was amputated, and I was laid up about a month. Before I got hurt I received $1.50 a day. Since that time night watching is about the only thing that I can do. I paid no doctor's bill, except that I contributed fifty cents a month out of my wages for a doctor. I suffer some yet, as I imagine that the fingers to my hand which has been cut off hurt me.

"When I was notified not to attempt to make the coupling, I started back to my place, and had gone about twenty feet, I reckon, when the engine started. I had not stopped, and was just going a common gait. Nichols, I think, made the coupling. I was walking towards the front of the engine, and expected the signal before the train started, but I did not stop. Mr. Norwood had his lantern in his hand. I did not see him when I got hurt. I think he had got on the engine, but whether in front or not I do not know. His lantern had been sitting there on this piece of timber. Something was said about lighting the headlight. I remember hearing the engineer say that night that he had no oil. He said this when we started over the hill the first time, and at the time we lighted the lantern. I had worked on this train the first time about three weeks, but I worked on the railroad with Mr. Owens the first of the year."

The circuit court directed a verdict for appellee.

Geo. R. Haynie and *McRae & Tompkins,* for appellant.

The court erred in giving a peremptory instruction for the defendant, because:

(1) There was evidence, tending to show negligence of the defendant, sufficient to go to the jury. 71 Ark. 447; 48 Ark.

333; 44 Ark. 530; 39 Ark. 17; 54 Ark. 289; 54 Ark. 303; 40 L. R. A. 781.

(2) The case is not one where the undisputed facts show that the plaintiff was guilty of contributory negligence, or that the proximate cause of the injury was a risk he had assumed. 31 Minn. 248; 82 N. Y. 370; 107 Ill. 44; 71 Ark. 445; 17 Mich. 99.

Gaughan & Sifford, for appellee.

There is no such negligence of appellee disclosed by the evidence as made a case proper to go to the jury. 54 L. R. A. 402; 95 Pa. St. 287, s. c. 40 Am. Rep. 649; 58 L. R. A. 404; 36 Ark. 371; 71 Ark. 447.

The negligence of defendant complained of was known to plaintiff; he therefore assumed the risk. 35 Ark. 602; 41 Ark. 382; 41 Ark. 542; 54 Ark. 389; 58 Ark. 125; 55 L. R. A. 910.

WOOD, J., (after stating the facts.) Conceding that the appellee was guilty of negligence, which we think the proof tends to show, still there is nothing to show that such negligence was the proximate cause of the injury, or concurred in producing it, and, if it did, then it is clear from appellant's testimony that his own negligence also contributed. While appellant testifies that the night was dark, and that the headlight was not burning, and that he had no lantern, and that no signal was given before starting, still it does not appear that, if the headlight had been burning, it would have lighted the place where appellant was walking when he was injured. Nor does appellant say that the failure to give the signal, or to furnish him a lantern, caused him to stumble and fall. He says, "When I was within four feet of my place, walking by the side of the engine, I fell down, and my left hand fell across the rail." He does not say that it was caused by the darkness or the starting of the engine without signal. We know that his injury was caused by his falling, but no one can say from the evidence what was the cause of his falling. The jury were not at liberty to find as a fact that the appellant fell because he could not see, or because the engine started without a signal If such had been the fact, appellant might have stated it as a fact. If such was the fact, appellant knew it, better than any one else.

It was not shown that the place where appellant was walking was rough. For aught that the proof shows to the contrary, appellant's fall may have been the result of accidental misstep, not caused by any of the things charged as negligence in the company. It might just as well have been attributed to some inherent clumsiness or physical defect in appellant as to any other cause. The whole matter was left to conjecture, and in such case the inference from the undisputed evidence most favorable to appellee must be taken, for appellant has the burden.

Again, it appears that appellant did not get off to help make the coupling, but to get sand. He says: "When the train stopped this night, I got off to get sand." True, after he had got off "to get sand," finding that no sand was needed, he started to assist in making the coupling, but was told that he was not needed for that, and was warned to "keep out," as the place was dangerous. It appears that he did not discover that the bucket contained "plenty of sand" until he was off the engine. "I didn't get any sand; they had plenty to go over the hill," he says. Again, he says, "I got off, and saw there was enough sand in the bucket;" then he went around to see about the trouble in coupling. Now, it was shown that he sat on one end of a plank on the front of the engine, and another brakeman sat on the other, and there was a sand bucket between them from which they each sanded the track. The bucket was about "two or three feet" from appellant, and he could just as easily have discovered that it had "plenty of sand" before he got off as afterwards, yet he says he "got off to get sand," and "as quick as he got off he saw he had plenty of sand." "If he had noticed, he would have known" that there was "plenty of sand in the bucket." It conclusively appears that the carelessness of appellant himself in not discovering that there was plenty of sand in the bucket was the cause of his getting off; and if he had not left the engine to get sand, he would not have been injured, of course. He was guilty, by his own undisputed evidence, of contributory negligence.

The court did not err. Let the judgment be affirmed.

SIBLY v. GOMILLION.

76 442
83 539

Opinion delivered July 29, 1905.

ADVERSE POSSESSION—TITLE.—Two years open, continuous, exclusive and adverse possession under a donation deed gives title upon which to base a suit to quiet title.

Appeal from Lonoke Chancery Court.

THOMAS B. MARTIN, Chancellor.

Affirmed.

M. Gomillion filed his bill January 24, 1902, against Sarah S. and George Sibly to quiet his title to the east half of west half of section 19, township 1 south, range 7 west, alleging that he donated same in 1886, and on April 17, 1888, procured deed from the State, and that he had been in adverse possession of it ever since.

Defendants denied the plaintiff's title, and claimed under the purchase in June, 1888, by George Sibly, who conveyed to Sarah S. Sibly, his wife, on October 3, 1891, and she procured a decree of confirmation of her tax title on November 25, 1892.

The testimony tended to prove the facts alleged by plaintiff. There was a decree for plaintiff, from which defendants have appealed.

Geo. Sibly, for appellants.

This case is ruled by the decision in 70 Ark. 371.

Elias Gates and *Lehman, Gates & Lehman*, for appellee.

Appellee had title by adverse possession under a donation deed.

WOOD, J. The only question is, did appellee at the time of bringing his suit have title by limitation? The decree of the lower court recites: "The court, after due consideration, is of the opinion that, by reason and by virtue of the open, notorious, continuous, exclusive and adverse possession thereof by complainant for more than seven years under his donation deed, the aforesaid possession having begun prior to the conveyance to Mrs. Sarah S. Sibly by Geo. Sibly, the complainant has a good and valid title to the land described in the original bill of complaint as follows: 'east half of west half, section 19, township 1

south, range 7 west.' The decree of confirmation of the tax sale in Sarah S. Sibly is and constitutes a cloud upon complainant's title acquired by reason of said limitation, and should be removed."

To set out and discuss the evidence upon which we base our conclusion could serve no useful purpose. The question is purely one of fact. The chancellor's finding went further than was necessary to give title to the appellee. Two years open, continuous, exclusive and adverse possession under a donation deed gives title. *Helena* v. *Hornor*, 58 Ark. 151; *Finley* v. *Hogan*, 60 Ark. 499; *Woolfork* v. *Buckner*, 60 Ark. 163; *Crill* v. *Hudson*, 71 Ark. 390; *Boynton* v. *Ashabranner*, 75 Ark. 514.

We have carefully examined the record, and find that the appellee had title to the land in controversy by adverse possession under his donation deed, when he brought his suit. The decree is affirmed.

BENTON v. WILLIS.

76 443
89 567

Opinion delivered July 29, 1905.

1. STATUTES—REPEALS BY IMPLICATION.—Repeals of statutes by implication are not favored; there must be repugnance between the two statutes, or it must be clear that the whole subject-matter of the prior law is covered by the last enactment. (Page 446.)
2. MUNICIPAL CORPORATIONS—IMPOUNDING OF STOCK.—The act of May 23, 1901, relating to the impounding of stock in cities and towns, does not cover the entire subject-matter of the act of April 20, 1895, nor impliedly repeal it. (Page 447.)

Appeal from Saline Circuit Court.

ALEXANDER M. DUFFIE, Judge.

Affirmed.

E. S. Willis brought replevin against the incorporated town of Benton, alleging that he was the owner of eleven hogs which had been impounded by defendant.

The case was submitted on the following agreed statement of facts, towit: That plaintiff is the owner of the eleven hogs sued for; that plaintiff resides outside the incorporated town of Benton; that the hogs were taken up by the poundmaster while running at large within the incorporated town of Benton, and by him put in the town pound; that plaintiff within twenty-four hours after they were impounded made demand for said hogs, but did not pay the impounding charges nor offer to pay them; that defendant refused to deliver up said hogs, and that this occurred on the 28th day of March, 1903.

The defendant introduced the following ordinance in evidence as constituting the law of the incorporated town of Benton, towit:

"RESTRAINING STOCK FROM RUNNING AT LARGE.

"Sec. 140. The running at large anywhere within the limits of this town after October 1, 1902, of any horse, ass, jennet, mule, colt, sheep, goat or hog is expressly prohibited, and the owner or the possessor of any such animal permitted to violate this section shall pay all costs incurred by reason of every such violation. Ordinance Sept. 8, 1902.

"Sec. 141. The town marshal or any town stock impounders having authority so to do shall promptly and strictly enforce the provisions of all the sections under this heading by immediately taking up and impounding in the town pound, by feeding and watering from day to day, and if unclaimed by finally advertising and selling at public auction within the hour for judicial sales at the front gate of town pound, for cash in hand to the highest bidder, all animals so impounded and unclaimed. *Ib.*

"Sec. 142. On the same day wherein any animal may be impounded, the taker up of every such animal shall post up written or printed advertisements at the following places in this town: One at the south side of the court square and one at mayor's office and one near the front gate of the town pound where the impounded animals are to be kept, which posted notices shall each describe the ear and flesh marks of each animal advertised with such clearness as to inform the public of its identity, shall state kind of animal, the day, manner and terms of sale, and shall each be so posted for a period of not less than ten days before the day fixed for its sale. A copy of every such

notice shall be filed with the recorder to be kept for the inspection of the public. *Ib.*

"Sec. 143. The charges for enforcing this ordinance, which shall be paid into the town treasury in all cases, are hereby fixed as follows: For every animal other than hogs, sheep and goats impounded, fifty cents for the taking up and fifty cents per day for the feeding and watering of each, and for each and every other animal contemplated in this ordinance the charges shall be twenty-five cents for the taking up and fifteen cents per day for the feeding and watering each animal, except sucklings, for each of which the charges shall be ten cents for each taking up and five cents each for keeping per day. The marshal or impounder, for his services in enforcing the provisions herein relating to the impounding, keeping and selling of stock, shall receive only such compensation as the town council may from time to time allow. *Ib.*

"Sec. 144. The owner or possessor may at any time before the day of sale reclaim any and all stock by presenting to the marshal or impounder the receipt of the town treasurer showing that the provisions of the foregoing sections under this heading have been complied with." *Ib.*

The following was given as the law of the case at the instance of the plaintiff, towit: That a person living outside of the town limits having stock taken up under the ordinance has the right to the possession of same upon demand made within twenty-four hours, without paying any fee for impounding same, and that the act approved May 23, 1901, does not repeal section 1 of the act approved April 20, 1895.

The defendant asked the court to declare the law to be that, by virtue of the ordinance of the town of Benton introduced in evidence, the town had the right to take up the hogs sued for if the said hogs were found running at large within the town limits of said town, and impound them, and charge a fee for impounding them, and that before the owner could take said hogs out of pound he must pay the cost incurred by reason of said impounding, and that, unless the evidence shows that plaintiff paid said cost before the commencement of this action, then he can not recover. The court refused to declare the law as asked by

defendant. Judgment was for plaintiff, from which defendant has appealed.

W. R. Donham and *D. M. Cloud,* for appellant.

The act of May 23, 1901 (Kirby's Digest, § 5450), repeals the act of April 20, 1895 (Kirby's Dig. § 5451).

J. W. Westbrook, for appellee.

That Kirby's Digest, § 5451, is not repealed, see 80 S. W. 883. Repeals by implication are not favored. 26 Am. & Eng. Enc. Law (2 Ed.), 721; 23 Ark. 317, 325; 29 Ark. 225, 227; 34 Ark. 499.

WOOD, J. The only question presented by this record is, does the act of May 23, 1901 (Kirby's Digest, § 5450), repeal the act of April 20, 1895 (Kirby's Digest, § 5451), with reference to the impounding of stock in cities and towns?

The act of 1901 does not expressly repeal the act of 1895, and there is no repeal by necessary implication; for the two acts may stand together. There is no irreconcilable conflict between them. Th act of 1901 expressly confers upon cities and towns power to prevent the running at large of the animals designated within their corporate limits, and prescribed impounding, in general, as a method which they are authorized to adopt in order to carry out the purpose of preventing such animals from running at large. But in this act the Legislature does not undertake to prescribe the manner of such impounding. That had already been done by the act of 1895.

The Legislature of 1901 did not take up the whole subject-matter; for, if so, it is hardly probable that they would, in such general terms, have repealed the former law. The Legislature must be presumed to have known the prior statute, and to have enacted with reference thereto. This being true, it is hardly probable, since they did not expressly repeal the prior law, that they intended to do so, and the language used does not have that effect. Repeals by implication are not favored. There must be repugnance, or it must be clear that the whole subject-matter of the prior law is covered by the last enactment. *Pratt* v. *Dudley,* 73 Ark. 536; 26 Am. & Eng. Enc. Law, p. 721; *English* v. *Oliver,* 28 Ark. 317; *McPherson* v. *State,* 29 Ark. 225.

The statutes, construed together, present the complete system for impounding the animals named. The last statute in express terms confers the power of impounding, and the prior limits and prescribes the exact manner of its exercise. It follows that the court did not err, under the facts of this case, in giving the instruction asked for by the plaintiff and in refusing the prayer of appellant. There was no question raised in the case as to the right of the town to collect the expense in the taking care of the animals. The town was proceeding under an ordinance in conflict with sec. 5451, and it must fail.

Affirmed.

76	447
f79	199
82	265
76	447
84	144

CARPENTER v. SMITH.

Opinion delivered July 29, 1905.

1. EVIDENCE—EXEMPLIFICATION OF RECORDS.—An exemplification of the records of the State land office is inadmissible to prove the existence of a patent, in the absence of a showing as to the loss or absence of the patent itself. (Page 448.)
2. QUIETING TITLE—TITLE OF PLAINTIFF.—A plaintiff in a suit to quiet title must show title in himself. (Page 449.)
3. ADVERSE POSSESSION—TAX TITLE.—Possession under a tax title, maintained by defendant openly, continuously and adversely for two years prior to the bringing of the suit, is sufficient to convey title, though the tax title was void in the beginning. (Page 449.)

Appeal from Arkansas Chancery Court.

JOHN M. ELLIOTT, Chancellor.

Affirmed.

H. A. & J. R. Parker, for appellant.

Appellant is not bound by laches. 70 Ark. 256; 100 Fed. 520; 66 F. 834; 71 Ark. 310. The seven-year statute of limitation does not apply; nor does the five-year statute, there being no judicial sale. 52 Ark. 290; 63 Ark. 1; 71 Ark. 310. The facts do not warrant the claim of adverse possession. 2 Wall. 328;

65 Ark. 422; 57 Ark. 589. The tax title can not aid appellees. 31 Ark. 334; 59 Ark. 364; 49 Ark. 397; 58 Ark. 181; 69 Ark. 587; 71 Ark. 318; 71 Ark. 565. The law authorizing procedure against non-residents must be strictly construed. 40 Ark. 124; 18 Wall. 350; 10 Fed. 891.

John L. Ingram, John F. Park and *Geo. C. Lewis,* for appellee.

The exemplification of the records of the State land office was competent only as secondary evidence, and a foundation therefor should have been first laid by showing the loss of the patent. 57 Ark. 158; 42 Ark. 300. Appellant was barred by the two-year statute applicable to tax sales. Kirby's Dig. § 5061; 57 Ark. 523; 58 Ark. 151. Appellee was entitled by adverse possession. 1 Am. & Eng. Law (2 Ed.), 823, 830; 20 S. W. 112; 2 Demb. Land Tit. 1392; 34 Ark. 598; 38 Ark. 181; 48 Ark. 312. The judgment and the sheriff's deed were valid. 49 Ark. 412; 50 Ark. 338; 58 Ark. 187; 61 Ark. 464; 117 U. S. 269; 87 Ala. 533; 60 Miss. 870; 2 How. 319; 24 Ga. 245.

WOOD, J. Appellant filed suit against appellee to quiet his title to the land in controversy and cancel certain deeds alleged to be clouds thereon. The answer denies appellant's title, and sets up title in appellee from two separate and distinct sources; pleads the two years statute of limitations, and laches and stale claim.

Appellant alleged title from the State of Arkansas by swamp land patent to Robert B. Southard, one of his alleged grantors. To prove the patent, he offered in evidence an exemplification from the records of the State Land Commissioner. No showing was made as to loss of the original patent, and exception was taken to the introduction of this testimony.

From what we have said to-day in the companion case of *Carpenter* v. *Dressler, ante,* p. 400, submitted with this, following the decision of this court in *Steward* v. *Scott,* 57 Ark. 158; and *Driver* v. *Evans,* 47 Ark. 300, the appellant did not show title in himself through mesne conveyances from the Government. After exceptions were filed to the exemplification of the records of the State Land Commissioner to prove patent in Southard, the first grantor, appellant made no offer to produce the patent or show its loss, and did not ask for a postponement to be allowed to

do so, evidently relying upon such exemplification as competent and proper evidence. This was not the primary, and therefore best, evidence, and could not, according to the rule announced, be substituted for it without first showing the loss, or accounting for the absence of the best evidence. Appellant therefore fails to prove title in himself. This was necessary before he could remove cloud. He must first show that he has title to quiet. *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton,* 74 Ark. 383. This alone is sufficient to affirm the decree of the lower court. But we are also of the opinion that the plea of the two years statute under tax deed is sustained by the proof. It appears that on the 13th day of June, 1892, the land in controversy was sold at tax sale for the nonpayment of the taxes of 1891, and the clerk of the county court of Arkansas County issued on this sale (the land not having been redeemed) to appellee's grantor, William Chesshire, a clerk's tax deed therefor, dated July 11, 1894. On the 25th day of March, 1895, Chesshire conveyed the land in question to appellee, John Y. Smith. In March, 1897, appellee inclosed the entire tract of land with a substantial fence, and has held open and adverse possession thereof ever since. This suit was filed in the clerk's office of Arkansas County June 7, 1900, and therefore appellee had held open, continuous, adverse possession of said land for more than three years prior thereto.

It is unnecessary to set out in detail the testimony upon which our conclusion is reached. The testimony shows that as early as February, 1897, appellee's grantor, Chesshire, fenced from three to six acres for the purpose of penning cattle. and that late in the spring of that year the entire tract was fenced with a three-wire fence. The wire was galvanized, and the posts set 16 feet apart. The fence was shown to be the best in that neighborhood. The land was fenced for the purpose of preserving it for hay cutting, and it was used for that purpose some in 1898 and 1899, and in 1900 was leased. It was shown that the fence was broken down in places, but this was repaired, and there is no evidence to warrant the conclusion that possession of the land was ever abandoned after it was taken in the manner indicated. On the contrary, the preponderance of the evidence clearly shows that the land was looked after, and the possession

maintained, open, continuous and adverse till the bringing of this suit. Two years of such possession under his tax deed was sufficient to give appellee title. Section 5061, Kirby's Digest; *Helena* v. *Hornor,* 58 Ark. 151; *Cooper* v. *Lee,* 59 Ark. 460; *Woolfork* v. *Buckner,* 67 Ark. 411; *Crill* v. *Hudson,* 71 Ark. 390; *Boynton* v. *Ashabranner,* 75 Ark. 514.

But it is contended that an agreement between appellant and appellee at the trial that the taxes had been paid since 1875 by Hopkins, the original grantor, and his grantees, precludes the appellee from setting up the two years statute. The agreement was tantamount to saying that the taxes had been paid by appellee or his grantors, and hence there should have been no forfeiture and sale of the land for taxes, and that the tax title was therefore void. But we fail to see how this could have prevented appellee or his grantors from acquiring such title for the purpose of quieting and strengthening such title as they had or claimed. Nor do we understand how appellee could be estopped from setting up adverse possession, if he chose, under this void tax title. If he or his grantors paid the taxes, then surely it was no fault of his that the lands were improperly forfeited and sold for taxes, and he had the perfect right to acquire such outstanding void title, and to claim all the benefits that could be obtained under it. The agreement negatives the idea that appellee's grantors permitted the land to forfeit in order to acquire title thereby. That the tax title was void makes no difference. See *Gates* v. *Kelsey,* 57 Ark. 523, and *Finley* v. *Hogan, supra.*

It is unnecessary to consider the question of laches.

The decree is affirmed.

---

76 f82 450 33

76 87 450 190

76 89 450 297

CRACRAFT v. MEYER.

Opinion delivered July 29, 1905.

1. AUDITOR'S DEED OF FORFEITED LAND—PRESUMPTION.—The effect of the act of March 5, 1838, providing that a deed of forfeited lands executed by the Auditor "shall be evidence that all things required by law to be done to make a good and valid sale were done both by the collector

and Auditor," was to cast the burden of proof upon the assailant of a tax title acquired from the Auditor by making the deed *prima facie* evidence of title in the purchaser. (Page 453.)

2. LAND COMMISSIONER'S DEED—EFFECT.—When the office of State Land Commissioner was created in 1868, and the control and disposition of forfeited lands were conferred upon him, instead of upon the Auditor, the laws previously applicable to the Auditor's deeds, including the statutory presumption in favor of their regularity, became applicable to the deeds of the Land Commissioner. (Page 455.)

3. SAME—REQUISITES.—A tax deed executed by the State Land Commissioner, which names the purchaser, describes the property sold, states a consideration, and contains apt words conveying all the right, title and interest of the State, is *prima facie* evidence of title in the purchaser, although it does not contain recitals showing that the requisite steps have been taken to give the State title. (Page 455.)

4. SAME—WHEN PRESUMPTION NOT OVERCOME.—The statutory presumption in favor of a tax deed executed by the State Land Commissioner is not overcome by proof that the land was once held by the State as Real Estate Bank land, being exempt from taxation while so held, and that the record of deeds does not show any conveyance from the receiver of the Real Estate Bank or from its successors. (Page 456.)

5. REAL ESTATE BANK LAND—EVIDENCE OF SALE.—Under the act of February 6, 1867, exempting the lands of the Real Estate Bank from taxation while in the hands of the receiver, and requiring the receiver, upon their sale, to furnish the assessor "with the correct list thereof for assessment in the name of the purchaser," it will be presumed, where lands of the bank were listed for taxation, that they had been sold. (Page 457.)

6. SAME—Where the receiver of the Real Estate Bank reported that he was convinced that his predecessor had sold certain lands, the original deeds having beeen exhibited to him, and such report was confirmed by the court, such report and confirmation are evidence that the land was sold. (Page 457.)

Appeal from Chicot Circuit Court.

ZACHARIAH T. WOOD, Judge.

Affirmed.

B. F. Merritt, J. F. Robinson and *Rose, Hemingway & Rose,* for appellant.

1. No interlocutory proceeding constitutes *res judicata.* 1 Freeman, Judg. 325. The difference between orders which work no estoppel and judgments is explained in 11 Enc. Pl. & Pr. 828; 56 S. W. Rep. 971; 11 S. W. Rep. 950. Mere orders create no estoppel. 75 N. Y. 599; 1 Cow.

482; 35 Pac. 796; 45 Pac. 724; 76 Fed. 761; 108 *Id.* 564; 34 Ala. 135; 14 Gratt. 48; 86 Va. 625; 6 How. Pr. 321; 24 Kans. 442; 104 Ind. 373; 33 Minn. 419.

2. The admissions of appellee as to appellant's title make a *prima facie* case, and cast the *onus* on him to show a better title in himself or a stranger. There is no showing that the State abandoned or parted with her title. The deed of the Commissioner did not pass the State's title, and she is not estopped by her tax deed. Kirby's Dig. § 4914. The State's rights have always been protected against the erroneous and unauthorized acts of her officers. 75 Ark. 146; 39 Ark. 315; 56 *Id.* 276; 64 *Id.* 576; 33 *Id.* 17; 39 *Id.* 580; 40 *Id.* 251; 42 *Id.* 118; 54 *Id.* 251; 62 *Id.* 188.

N. B. Scott, E. A. Bolton, Garland Streett and *Jas. P. Clarke,* for appellees.

Any rights of appellant were derived from act May 23, 1901, p. 360, § 1. This act does not include the lands claimed by appellant. *Scott* v. *Mills,* 49 Ark. 226; 19 Ark. 262; 4 Ark. 592; 38 Ark. 574; 45 Ark. 81. Being a proceeding analogous to the action of a probate court in authorizing a sale of lands of an intestate, it is essentially *in rem,* and can be invalidated only by some direct proceeding in time by some one who has a right to question same. 19 Ark. 499; 44 Ark. 267. Worthen was acting as an officer of court, and when his action was confirmed it became the act of the court. 57 L. R. A. 910. Title will be presumed after long lapse of time. 1 Gr. Ev. § 45; 120 U. S. 534; 56 Ark. 84.

P. C. Dooley, also for appellees.

The authority of the commissioner to sell does not rest alone on the act of 1901, *supra,* which is an amendment to section 4678 Sand. & Hill's Dig. See § § 4622-3-7, Sand. & Hill's Dig. The sole issue is, were the lands the property of the State when the alleged forfeiture occurred under which Mrs. Myers claimed? If so, the forfeiture was a nullity. Sand. & Hill's Dig. § 4675. The action was final unless set aside by a judgment of a court having jurisdiction. Sand. & Hill's Dig. § 4670. The conduct of the land office shows no intention to abandon. State officers are the agents of the State whose

power of authority is the statutes of the State, beyond which they are powerless to bind the State. 23 Ark. 642; 23 Ark. 610; 54 Ark. 269; 98 U. S. 433. Nor will the State be bound by the mistake or unlawful acts of its officers. 40 Ark. 526; 95 U. S. 316. See also 49 Ark. 266; 75 Ark. 146; 40 Ark. 256; 93 U. S. 689. The State is not estopped to deny the acts of its officers beyond their authority. 54 Ark. 269, 270, 271. The burden was on Mrs. Meyers to show a conveyance by some one authorized by law to make it before 1874. 41 Ark. 97.

B. F. Merritt, J. F. Robinson and *Rose, Hemingway & Rose,* for appellant in reply.

The act of 1901 authorized the sale of the land. Sec. 4914, Kirby's Dig. The only presumption in case of a tax deed is that the forfeiture was legal. 42 Ark. 118. It will not be presumed that the State made a grant. 92 U. S. 343. Appellant was not barred. 45 Ark. 81. When a party takes expressly subject to another claim, his possession will continue in subordination till he disclaims and asserts hostile possession. 56 Ark. 492.

WOOD, J. Appellee is in possession of certain tracts of land in Chicot County, Arkansas, under deeds from the State Land Commissioner based upon a forfeiture of the land for the non-payment of taxes. Her deeds are dated December 24, 1891, and July 23, 1897, respectively. She has made valuable improvements, and has been in the adverse possession of the lands since the deeds were executed.

Appellant brought ejectment against appellee for the lands in controversy, claiming title by deed of the State Land Commissioner dated July 14, 1902, based upon an alleged Real Estate Bank foreclosure.

First. As early as March 5, 1838, our Legislature passed an act requiring the Auditor to execute deeds to purchasers of lands forfeited to the State for the non-payment of taxes, and prescribing that such deeds "shall convey to the purchaser all the right, title, interest and claim of the State thereto"; also that the deeds "shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in all courts of this State as evidence of good and valid title in such grantee, his heirs or assigns, and shall be evidence that all things required by law to be done to make good and

valid sale were done both by the collector and the Auditor." Rev. Statutes, c. 128, § § 133, 134.

In *Steadman* v. *Planters' Bank,* 7 Ark. 427, this court, passing upon this statute, said: "Our statutes have changed the rule of law that it is incumbent upon the purchaser of lands sold for taxes to show that the sale was regular, and that the prerequisites to the sale existed and were strictly complied with. The Auditor's deed, executed in accordance with the provisions of the statute, vests in the purchaser all the right, title, interest and estate of the former owner in and to such lands and also all right, title, interest and claim of the State thereto, and is declared to be evidence in all courts of this State of a good and valid title in such grantee, his heirs, and assigns, and that all things required by law to make a good and valid sale were done both by the collector and Auditor." In *Merrick* v. *Hutt,* 15 Ark. 331, this court, speaking of this statute, said: "A more comprehensive provision could hardly be found, and it might seem, at first view, to make the tax title derived from the Auditor valid against all objection. But that was not the design. The evil to be remedied was that the entire burden of proof was cast on the purchaser to show that every requisite of the law had been complied with, and the deed of the officer was not even *prima facie* evidence of the facts therein stated. * * * The intention and scope of the statute was to change this rule, so far as to cast the *onus probandi* upon the assailant of the tax title by making the deed *prima facie* evidence of title in the purchaser, subject to be overthrown by proof of non-compliance with the substantial requisites of the law." In *Patrick* v. *Davis,* 15 Ark. 363-6, it is said: "In the same category may be included that capital provision of the statute, according to the legislation of several of the States, which, when the deed is regular upon its face, reverses the *onus probandi,* and subjects the tax title, when thus sustained, to be overthrown only by proof of a nonconformity in the proceedings to some one of the substantial prerequisites to the sale." In *Biscoe* v. *Coulter,* 18 Ark. 423, it is held "that the Auditor's deed for land forfeited for the non-payment of taxes and sold under the statute is to be treated in the courts as *prima facie* evidence that all things required by law to be

done to make a good and valid sale were done by the collector and Auditor; and it is incumbent upon the party assailing the title of the purchaser to *show affirmatively* a non-compliance with some substantial requisite of the law;" citing cases just quoted in 15 Ark.

When the office of Commissioner of Immigration and State Lands was created (Acts 1868, p. 62; Sched. Const. 1868, § 3), and the control and disposition of forfeited lands was was given to the Land Commissioner (sec. 9, act 1868), *ipso facto* the laws applicable to the deed of the Auditor for these lands became applicable to the deed of the Land Commissioner. *Helena* v. *Hornor,* 58 Ark. 151. And section 4 of the act of December 13, 1875 (erroneously digested as section 4 of the act of March 10, 1879, in Kirby's Digest, § 4807), continues in substance and legal effect the act of March 5, 1838, with reference to deeds to forfeited lands. That section provides that all deeds issued by the State Land Commissioner to forfeited land "shall convey to the purchaser, his heirs and assigns, all the right, title and interest of the State to said land, and that such deed shall be received as evidence in any court in the State." It will be observed that, under the statutes, deeds to forfeited lands are not required to contain recitals showing that the requisite steps have been taken to give the State title. "It is sufficient to give *prima facie* evidence of title in the purchaser if the deed names the purchaser, describes the property sold, states a consideration, and contains apt words conveying all the right, title and interest of the State." *Merrick* v. *Hutt,* 15 Ark. 331; *Walker* v. *Taylor,* 43 Ark. 543; *Thornton* v. *Smith,* 36 Ark. 508. In *Scott* v. *Mills,* 49 Ark. 266, Judge BATTLE speaking for the court, said: "The statute having provided that the title to the land forfeited shall vest in the State upon the performance of certain acts by the clerk, it is clear that the object of the Commissioner's deed is to convey that title to the purchaser from the State, and that the deed was intended to be *prima facie* evidence of that title. Such has been the policy of the State, as a general rule, in respect to tax deeds long prior to and at all times since the enactment of the statutes under which appellant's deed was executed. It was in pursuance of this favorite policy that the

deed of the Commissioner of State Lands to lands forfeited for taxes was made *prima facie* evidence of title in the purchaser to the lands conveyed. As of all such legislation, the object is to relieve the grantee and those holding under him from making proof until evidence is introduced showing or tending to show that the deed conveyed no title. It was not, therefore, necessary for appellants to have proved that all things necessary to vest title in the State were done. Their deed was *prima facie* evidence of that fact."

"Generally, when an official act has been done which can only be lawful and valid by the doing of certain preliminary acts, it will be presumed that these preliminary acts have also been done." 1 Greenleaf, Ev. pp. 38, 135. But the almost universal rule, in the absence of an express statute to the contrary, was to treat the acts of officers in connection with tax deeds as an exception to the general rule. Thus, one claiming under such a deed was required to show *affirmatively* that every step necessary to establish the regularity of the proceedings had been taken. Tax deeds, in the absence of a statute, did not furnish *prima facie* proof that all the requirements of the law had been complied with. 3 Elliott on Ev. § 2053, and many authorities cited in notes; *Hogins* v. *Brashears,* 13 Ark. 242. Now, as I have shown, our lawmakers, almost from the beginning of our history as a State, changed this prevailing doctrine with reference to tax deeds, and, in concrete form, applied to the deeds of the Auditor, and, later, of the State Land Commissioner, the rule applicable to official acts in general, making the deeds of these officers to forfeited lands *prima facie* evidence that all preliminary steps, necessary to title, had been taken. I have quoted liberally from our decisions, showing the significance of the rule, that it has been consistently followed, and that the policy, whether wise, or otherwise, has become firmly imbedded in our real estate law, and is a settled rule of property, upon which many titles are based. Appellee invokes the rule to protect her possession and all other rights under her deed. In this defense alone she is secure, unless appellant, having the burden of proof, has shown that some one of the prerequisites to title in appellee was omitted.

Second. Appellant, having a land commissioner's deed to

the lands as Real Estate Bank lands, assails appellee's title, contending that at the time of the alleged forfeiture to the State the lands belonged to the State as Real Estate Bank lands, and were not subject to forfeiture and sale for taxes. To support his contention, he shows that the lands passed into the hands of the receiver of the Real Estate Bank by foreclosure proceedings, and from that time, to-wit, October 23, 1867, to the date of appellant's deed, June 14, 1902, the record of deeds of Chicot County do not show that there had been recorded in the recorder's office of such county any deed of conveyance to any person for the land in suit from the receiver of the Real Estate Bank or any of his successors. But this evidence falls far short of showing that the lands were not sold. Purchasers of land often fail to place their deeds of record. If any presumption of non-sale follows such a failure to find a deed on record showing a sale, then such a presumption, at most, is but a weak and disputable one of fact. The finding such a deed of record was not an essential in the proceedings by which the lands were forfeited, and title was vested in the State. Appellee might rest here, and upon conflicting presumptions alone she would prevail, because her deeds are prior in time, and the presumptions attending them are of equal dignity and cogency with those of appellant's deed, and it is incumbent upon appellant to overcome her title.

But if evidence of an affirmative character were required of appellee, "to make assurance doubly sure," certain facts in the record would fully warrant the finding of the lower court in her favor.

(1.) The act of 1867, exempting lands of the Real Estate Bank from taxation while in the hands of the receiver, required such receiver "upon sale by him of any of such lands, to furnish the assessor of the county in which the same are situated with the correct list thereof for assessment in the name of the purchaser.' Section 3, act of February 6, 1867. The lands in suit were listed for taxation as early at 1873. This tends strongly to show that the lands were sold by the receiver after he acquired them by foreclosure of the vendor's lien in 1867.

(2.) In a proceeding by the State in the chancery court of Pulaski County to wind up the affairs of the Real Estate Bank, the receiver was directed to make a list of all the lands

in his hands or subject to his control as receiver, to the end that the same might be offered for sale preliminary to closing the trusts. He accordingly made such list, and on the 26th day of October, 1880, he, as receiver of the court, was directed to offer the same at public sale on the 8th day of January, 1881. In making his report of the sale conducted by him as receiver, Worthen included therein this statement: "Your receiver found before the sale that the following land had been disposed of by his predecessor, but no mention of the fact has been made in or upon the records, *and he, being fully convinced that the bank had disposed of its interest, by exhibition to him of the original deeds from the receiver in some instances, and conclusive evidence in all cases,* did. under instructions from your Honorable Court, omit the same from sale." Then follows a list of thirteen tracts, in which is included the land in controversy here. On the 17th of January, 1881, the sale and the report thereof were in all things confirmed by the Pulaski Chancery Court. After that, the estate of the Real Estate Bank having been fully administered, the receiver was directed to "turn over to the Commissioner of State Lands all the accounts, books of said Real Estate Bank now in his possession, and the mortgages given to the said bank now in his possession, and all papers and assets in his possession, pertaining to his receivership, and take a receipt for same." While this finding by the receiver and confirmation by the court may not be conclusive of the facts found, and binding upon the State or her grantees as an adjudication, yet it is evidence of a high probative character, it was received and acted upon by the lower court without objection, and tends *to strengthen the presumption that the land was sold.*

Third. Thus far we all agree, and I have voiced the opinion of the court. I shall now express my own views of another phase of the case, in which Judge RIDDICK concurs.

The deed of the State Land Commissioner, under the express terms of the statute, and in express words, conveyed "all the *right, title, and interest of the State to said lands.*" In my opinion, after the execution of the deed to the appellee by the duly authorized and only agent of the State for conveying title to her lands, this same agent could not convey to another pur-

chaser the same lands without first canceling the first purchaser's deed, which could only be done upon proper grounds laid in a proper proceeding therefor, in a court of chancery. It is the duty of the Land Commissioner, before executing deeds to the State's lands, to investigate the sources of her title. He is presumed to do so, and when he executes his deed he conveys "all the right, title and interest" that the State has, provided he has made no mistake, and no fraud has been perpetrated by the purchaser. And if a mistake has been made, as the State is not bound by the mistake of her agents, she may take advantage of it, and cancel and set aside the deed made by her agent. But there is no authority for her to sell this right, or transfer, by her deed to another, the right to cancel the oustanding deed of another purchaser. The State can do no wrong, and her agents have no power, for her, and in her name, to speculate in lawsuits to the injury of her citizens. If she has sold her lands for too much or too little, or her agents have made a mistake as to the lands sold, or as to her title, she may correct the mistake of her officers. But she has no power, with or without consideration, to transfer this right to another. Section 759 of Kirby's Digest provides: "Where by law the Commissioner of State Lands is required to execute any deed of conveyance or patent for any lands sold, or granted by the State, such deed of conveyance or patent, when executed by such Commissioner under his official seal, shall convey *all the right and title of the State in and to said lands to the purchaser,* and may be recorded in the office of the recorder of the proper county, and the original, or a duly certified copy of the same taken from the record thereof, shall have the same effect as evidence as if such deed or patent had been acknowledged and recorded under the existing laws of this State." Act of December 31, 1850. This statute settles this controversy in favor of appellee. It is in harmony with section 4807, *supra,* under which appellant claims the deed was executed. Neither of these statutes makes any exceptions or places any limitations upon the interest conveyed. And the Land Commissioner and the courts can make none. The words *"all the right, title and interest of the State"* say what they mean, and mean what they say. *They are plain words.*

Appellant invokes the following statute: "No tax title shall be valid or binding against the equitable or legal interest of this State in or to any real estate whatever; but such tax titles are and shall be void, so far as the same shall conflict with the interest of the State, and shall be treated and considered as null and void in all courts." Kirby's Digest, § 4914. It is obvious, from what I have said, that such statute has no application here. It had no reference whatever to titles conveyed by the State Land Commissioner, or, if so, it is only the *interest of the State* in the land that can be affected by it. The State has parted with all her interest in this land. At least, she is not here attempting to assert any interest.

The judgment is affirmed.

BATTLE, J., not participating.

---

76 460
83 201

COVINGTON v. BERRY.

Opinion delivered July 29, 1905.

1. STATUTE OF LIMITATION—BRINGING SECOND ACTION WITHIN YEAR.—Where plaintiff brought an action in ejectment to recover land, relying upon a deed from B. to M. and from the heir of M. to plaintiff, and dismissed the suit, and within a year thereafter brought a second action in ejectment, relying upon deeds from the heirs of B., without relying upon or setting out the deeds relied upon in the former action, the running of the statute of limitation in the second action was not stopped by the commencement of the former action. (Page 463.)
2. EVIDENCE—BEST AND SECONDARY.—In the absence of a showing that the original patent has been lost or can not be produced, it is not admissible to prove its existence by a transcript of the record of the State Land Office. (Page 464.)
3. SWAMP LAND—EFFECT OF CONVEYANCE FROM STATE.—A deed from the State, which, by a correct description, purported to convey a tract of land as swamp land, conveys a *prima facie* title, though the deed from the United States to the State purporting to convey the same land contained an insufficient description, since the title of the State to swamp land does not depend alone upon the deed from the United States, but upon the Swamp Land Grant of 1850. (Page 464.)
4. LEVEE TAX DEED—SUFFICIENCY OF DESCRIPTION.—A deed executed by a commissioner appointed to enforce a decree for the payment of levee

taxes which describes the land as the east part of a certain quarter section, containing 63 acres, without any more specific description, is void, where the proceeding was based on constructive service, and the name of the owner of the land was incorrectly stated. (Page 464.)

Appeal from Lee Circuit Court; HANCE N. HUTTON, Judge; reversed.

STATEMENT BY THE COURT.

Ed Berry brought an action of ejectment against Lucy Covington to recover six and one-half acres of land in St. Francis County. This land was a part of the east half of the southeast quarter of section 30, township 5 north, range 4 east, that was east of the St. Francis River. The Choctaw Railroad crosses this tract, and the six and one-half acres in controversy lay north of the railroad. The plaintiff claimed to be the owner of that part of the east one-half of the southeast quarter of section 30 that lay east of the river, containing 60.30 acres, which included the six and one-half acres in controversy. The defendant pleaded the statute of limitations of seven years, and also denied that plaintiff was the owner of the 60.30 acres east of the river. The first action brought by the plaintiff against defendant to recover the land was begun in August, 1898. The chain of title set up in this action was as follows:

Conveyance from the United States to the State of Arkansas by the swamp land act of 1850; from the State to R. C. Brinkley in 1853; from R. C. Brinkley to Hugh McMurray in 1872; that subsequently in 1898 the heirs of Brinkley executed a deed to McMurray, correcting a mistake made in a former deed of R. C. Brinkley, and that A. E. Ketchum, the only heir of McMurray, afterwards conveyed the land to plaintiff Berry. A nonsuit was taken in the action in March, 1900, and a new action commenced in August, 1900. The chain of title in this new action is a grant from the United States to the State, from the State to R. C. Brinkley, and conveyances from the heirs of R. C. Brinkley to plaintiff Berry, dated January 13, 1898, and June 29, 1899.

The complaint also set out that he was the owner of the land by virtue of a sale under a decree of court for nonpayment of levee taxes, and also by purchase at a sale for nonpayment of State and county taxes.

On the trial objection was made to the introduction of these tax deeds on the ground that they were void on account of an insufficient description of the land, but the objection was overruled.

The court permitted the plaintiff to prove the conveyance from the State to R. C. Brinkley by a transcript of the record of the State Land Office, without any showing that the patent from the State could not be produced. The court, among other instructions given at request of plaintiff, told the jury, in substance, that they should find for the plaintiff unless there was seven years continuous adverse possession by the defendant before August 22, 1898, the time of the bringing of the first suit, and refused the request of the defendant that the statute of limitations did not stop until the 25th of August, 1900, the date of the bringing of the last action.

There was a verdict and judgment in favor of the plaintiff, and defendant appealed.

W. Gorman and *N. W. Norton,* for appellee.

It was error to permit the introduction of the certificate of the Commissioner of State Lands to show a transfer from the State to R. C. Brinkley, without laying a proper foundation therefor by showing the loss of the deed, 47 Ark. 297; 57 Ark. 153; s. c. 50 S. W. 1088, 1089. The description of the 60.30 acres was too vague, and the deed conveyed nothing thereby. 34 Ark. 534; 30 Ark. 640; 41 Ark. 495; 48 Ark. 419; 60 Ark. 487; 69 Ark. 357; 56 Ark. 178. It was error to rule that the statute ceased to run in favor of the defendant in August, 1898. 7 Pet. 202; 6 Pet. 130; 95 Fed. 305; 59 Ark. 441.

John Gatling, for appellee.

There was no error in the admission in evidence of the certificate of the Commissioner of State Lands. 57 Ark. 153. The admissibility of the document offered here should not be questioned by the appellant, occupying as she does the position of one holding no paper title, and in possession without right. 41 Ark. 465; 36 Ark. 471. The description in the deed is sufficiently certain. Appellee had a right to offer the deeds in evidence, and to amend his pleading acordingly. 9 So. 74; 17 So. 41; 101 Fed. 91.

RIDDICK, J., (after stating the facts.) This is an appeal by the defendant from a judgment rendered against her in an ac-

tion of ejectment for the recovery of six and one-half acres of land. There had been prior a action for the same land, which was commenced on the 22nd of August, 1898, and in which a nonsuit was taken in March, 1900. Afterwards the present action was begun on the 25th of August, 1900. In the first action plaintiff relied on a conveyance from Brinkley to McMurray, and one from the heir of McMurray to plaintiff. After the commencement of the first action plaintiff procured deeds from the heirs of Brinkley to himself. In the second action he does not refer to the conveyance from Brinkley to McMurray, but relies on the conveyance from the heirs of Brinkley to himself. Defendant pleaded the statute of limitations, and her counsel contend that the two suits above referred to were based on different causes of action, and that the statute of limitations did not stop running until the commencement of the last action. The mere fact that plaintiff did not properly set out his chain of title in one or the other of these suits would, we think, on this point be immaterial if he was in fact the owner of, and seeking to sustain, the same title in each action. But the contention of defendant is sound if plaintiff in the second action is seeking to maintain a title acquired subsequent to the commencement of the first action, for such title gave plaintiff a new cause of action, and the fact that plaintiff brought a former action against defendant did not stop the statute from running against plaintiff on a cause of action acquired after the commencement of such suit. That is to say, if plaintiff held the title to this land, or any part of it, at the time of the commencement of the first action to recover the land, the statute of limitations stopped, as to the land he then owned, on the bringing of such action; but if he acquired title to it, or to part of it, subsequent to that time, then as to that part he had no right of action at the time the first suit was brought, and the statute did not stop running against his right to recover until he acquired title and began the new action. It takes a right on the part of plaintiff and a violation of that right on the part of defendant to make a cause of action; and, until plaintiff acquired title to the land, the possession of the defendant did him no injury, and gave him no right of action against her. Plaintiff did not set out or read in evidence the deed from Brinkley to McMurray or from McMurray to him, and we are not able to pass on

those deeds. But, as the chain of title set out by plaintiff and the evidence tend to show that the title to at least a portion of the land was acquired by plaintiff subsequent to the commencement of the first action, we are of the opinion that the court erred in holding generally that the statute of limitations stopped running on the commencement of the first action. *Union Pacific Ry.* v. *Wyler,* 158 U. S. 285; *Sicard* v. *Davis,* 6 Peters, 124; *Whalen* v. *Gordon,* 95 Fed. Rep. 305.

The objection to the introduction of the transcript of the record of the State Land Office should have been sustained, in the absence of a showing that the original patent was lost or could not be produced. *Carpenter* v. *Dressler, ante,* p. 400.

As to the question whether the land was sufficiently described in the various deeds submitted by plaintiff, it is not material to notice the description of the land contained in the deed from the United States to the State, for the reason that the title to the swamp land of the State does not depend alone upon that deed, but upon the grant contained in the statute of 1850. The fact that the State afterwards conveyed this land to Brinkley as swamp land makes out, we think, at least a *prima facie* showing of title in him. The deed of the State describes the land as the east half of the southeast quarter, giving section, range and township, which is sufficiently certain.

The deed from Folbre, by which Folbre, as commissioner to enforce a decree for the payment of levee taxes, sold and conveyed the land to plaintiff, described the land as "E. pt. S. E. ¾ Sec. 30, 5 N., 4 E., containing 63 acres," and the tax deed from the clerk of St. Francis County, conveying land to Reeves, under which deed plaintiff also claimed, described it as the east part of southeast quarter of section 30, 5 N., 4 E., containing 60 30-100. These descriptions might possibly be construed to describe a tract in the shape of a parallelogram taken from the east side of the quarter section described, but the evidence shows that it was not the intention to sell a tract in that shape. Under former decisions of this court these descriptions are not sufficiently certain to pass title in a proceeding to collect taxes, and these deeds are void, and the exceptions to them should have been sustained. *Rhodes* v. *Covington,* 69 Ark. 357; *Texarkana Water Co.* v. *State,* 62 Ark. 188; *Schattler* v. *Cassinelli,* 56 Ark. 172.

We have not overlooked the fact that this is not an ordinary tax sale, but a sale under the order of a court. This court has held in a recent case of this kind that a mistake in the name of the owner of the land did not invalidate the proceedings (*Ballard* v. *Hunter*, 74 Ark. 174); because the published description of the land is notice to the owner, even though another person be designated as owner; but if the land is not correctly described, the owner has no notice. The court acquires jurisdiction by the filing of the complaint and publication of the notice describing the land; and if the land is not described so that the owner may know that his land is being proceeded against, the court acquires no jurisdiction to sell it. For this reason we think that when there is no personal service, but notice is given by publication only, as here, and when, as in this case, the name of the owner of the land is not correctly stated, the description of the land must be reasonably sufficient to identify it. The land here is only six and a half acres, in the shape of a triangle, and we are of the opinion that its description as the "east part of S. E. ¼ of Sec. 30, 5 N., 4 E., containing 60 30-100 acres" was well calculated to mislead an owner whose name did not appear in connection with the description.

For the reasons stated the judgment is reversed, and the cause remanded for a new trial, with leave for either party to amend pleadings.

---

76 465
f79 19
81 173

JOHNSON v. LESSER.

Opinion delivered July 29, 1905.

1. DECREE—CONSTRUCTIVE SERVICE—COLLATERAL ATTACK.—Where, in a suit to foreclose a mortgage, a warning order against a non-resident mortgagor was duly published, the failure to make proof of such publication in the manner required by statute is an irregularity that does not affect the jurisdiction, and cannot be considered in a collateral proceeding. (Page 467.)

2. SAME—FAILURE TO INDORSE WARNING ORDER.—Failure of the clerk to indorse the warning order on the complaint in a suit against a non-resident mortgagor to foreclose the mortgage is an irregularity merely which does not affect the jurisdiction of the court. (Page 467.)

Appeal from Lee Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

Affirmed.

STATEMENT BY THE COURT.

Ben Johnson owned 80 acres of land in Lee County. He mortgaged the place to Morris Lesser to secure an account for supplies that he owed Lesser. Afterwards Johnson left the State, and Lesser brought a suit in equity to foreclose his mortgage. Lesser filed an affidavit that Johnson was a non-resident, and the clerk made the following indorsement on the complaint:

"It appearing from the affidavit of the plaintiff that defendants, Ben and Lucy Johnson, are non-residents of the State of Arkansas, it is ordered that a warning order be made and published for the time and in the manner prescribed by law for said non-resident defendants."

[Signed] "D. S. CLARK, *Clerk.*"

A warning order was published, but it was not indorsed on the complaint. The affidavit of the proof of publication was made by the foreman of the paper in which it was published.

A decree was rendered foreclosing the mortgage, and at the foreclosure sale Lesser purchased the land, and the sale was confirmed, and a deed made conveying the same to him.

Afterwards Ben Johnson died, and Tobe Johnson and other heirs brought this action in equity to set aside the decree of foreclosure and the sale to Lesser.

The chancery court dismissed the complaint for want of equity, and plaintiffs appealed.

H. F. Roleson, for appellant.

The court had no jurisdiction to decree the foreclosure at the suit of Lesser *v.* Johnson, for the reason that no warning order was made upon the complaint as required by law. Kirby's Digest, § 6055; 71 Ark. 318; 69 Ark. 591.

P. D. McCulloch, for appellee.

The decree was not void for the failure to indorse the warning order on the complaint. 72 Ark. 101; 85 T. W. 252; 127 Fed. 219; 47 Ark. 131. Appellants are bound by the decree, and are estopped by their own conduct from disputing the title acquired by appellee. 2 Herm. Estop. § § 589, 590; 38 Ark. 571; 63 Miss. 584; 106 Mo. 155; 75 Mo. 503; 66 Mo. App. 402; 57 Ill. 41.

H. F. Roleson, for appellants, in reply.

Appellants were not estopped. 1 Herm. Estop. 216; 49 Ark. 218; Big. Estop. (3 Ed.), 484.

RIDDICK, J., (after stating the facts.) In this case the heirs of Ben Johnson seek to set aside and declare void a foreclosure decree rendered against Ben Johnson and wife while they were non-residents of the State, and to compel the defendant to account for the rents and profits arising from the land purchased under the foreclosure sale. The service upon the defendants in the foreclosure decree was by publication, and the contention of the plaintiffs is that the forclosure decree was void on account of want of jurisdiction over the persons of the defendants. One objection urged on the hearing was that proof of publication was not made in the manner required by the statute, but counsel now concedes that this question has been decided against him by a recent decision of this court, where it was held that when a warning order has been duly published, the failure to make proof of such publication in the manner required by statute is an irregularity that does not affect the jurisdiction of the court, and cannot be considered in a collateral proceeding. *Clay* v. *Bilby,* 72 Ark. 101.

The only remaining contention is that the judgment against the non-residents was void because the clerk did not indorse the warning order upon the complaint as the statute requires. But this also was an irregularity that did not injure the defendants or affect the jurisdiction of the court. *Ballard* v. *Hunter,* 74 Ark. 174, 85 S. W. 252; *Clay* v. *Bilby,* 72 Ark. 101.

On the whole case, we are of the opinion that the judgment should be affirmed, and it is so ordered.

McELVANEY v. SMITH.

76 468
f80 227

76 468
85 325

Opinion delivered July 29, 1905.

1. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Where, without objection, proof was admitted to disprove an allegation in the complaint not put in issue by the answer, a merely general objection to an instruction which assumed that such allegation had been put in issue was insufficient to call the court's attention to the defect in the answer, which will be treated as amended to conform to the proof. (Page 469.)
2. INSTRUCTION—ASSUMPTION OF DISPUTED FACT.—An instruction which assumes a material fact in dispute is misleading and prejudicial. (Page 470.)
3. LANDLORD AND TENANT—UNLAWFUL EVICTION—DAMAGES.—For an unlawful eviction a tenant is entitled to recover as damages whatever loss results to him as a direct and natural consequence of the landlord's wrongful act; thus, if the rental value of the place from which he is evicted is greater than the price he agreed to pay, he may recover this excess, and, in addition thereto, any other loss directly caused by the eviction, such as the expense of removal to another place. (Page 470.)
4. SAME—DAMAGES FOR EVICTION—COST OF TWO REMOVALS.—A tenant wrongfully evicted may, if necessary, seek a temporary shelter until he can secure a suitable home to rent, and recover damages for both moves if they are so closely connected as to be in effect one and directly caused by the eviction. (Page 471.)
5. INSTRUCTION—OBJECTION.—Objection to an instruction on account of a merely formal defect should be saved by a special exception. (Page 471.)

Appeal from Craighead Circuit Court, Jonesboro District.

HANCE N. HUTTON, Judge, on exchange of circuits.

Reversed.

STATEMENT BY THE COURT.

McElvaney was the owner of a farm in Craighead County which he rented to Smith for the year 1899. Smith continued to remain on the land after the expiration of his term, and was put out by an action of unlawful detainer. On the trial testimony for McElvaney tended to show that he only rented the farm to Smith for 1899; that during the latter part of that year he was endeavoring to sell the farm; but, as a sale was uncertain, he told Smith that if he failed to sell the place he would rent the place to him for another year. He further told Smith that he would furnish him wheat to plant part of the farm

in wheat, and that, if the place was sold, he would pay Smith for his interest in the wheat, or make some other satisfactory arrangement about it. Smith planted the wheat, and afterwards McElvaney sold the place, and notified Smith to leave, which he refused to do. He was put out by an officer under writ sued out in this action, but was permitted to retain his interest in the wheat crop, and afterwards sold it.

On his side Smith introduced evidence tending to show that he rented the farm for the year 1900, and then planted his wheat; that when McElvaney sold the place Smith offered to surrender possession, provided McElvaney should pay him $50, and allow him to retain his part of the wheat, which McElvaney refused to do.

The other facts sufficiently appear from the opinion.

There was a verdict in favor of the defendant, and damages assessed at $34, and judgment accordingly. Plaintiff appealed.

Frierson & Frierson, for appellant.

The court erred in giving instructions Nos. 2 and 3, and in refusing that asked by appellant and numbered "A." 1 Suth. Dam. § § 13, 15, 16, 45; 7 Cyc. 25. Also in giving No. 4. 9 Enc. Pl. & Pr. 63; Kirby's Dig. § 6137; 19 Pac. 281; 1 L. R. A. 242; 8 Minn. 536; 43 Atl. 434; 55 N. W. 603; 31 Ark. 357; 41 Ark. 17; 30 Ark. 362. Also in giving instruction No. 5. 193 Pa. St. 541, s. c. 44 Atl. 565. A new trial should have been granted for newly discovered evidence. Kirby's Dig., § 6219; 66 Ark. 612; 16 Ia. 121; 69 N. W. 77.

Eugene Parrish, for appellee.

RIDDICK, J. This is an appeal from judgment against plaintiff in an action of unlawful detainer brought by him against the defendant.

On the trial the presiding judge instructed the jury, in substance, that, unless a written notice to vacate was given to defendant three days before the execution of the writ of possession evicting him from the premises, the eviction was unlawful, and that, unless such notice was proved, the finding must be for the defendant. The counsel for plaintiff duly excepted to this instruction, and now contend that the judge erred in giving it, for the reason

that it was alleged in the complaint that notice was given, and there was no denial in the answer. But it does not appear that the attention of the trial judge was ever called to the fact that the answer did not raise the issue of whether there was notice or not. The testimony for the plaintiff tended to show that written notice to vacate was given, while the defendant testified to the contrary. No objection was made to this testimony, and the trial judge was no doubt led to believe that the parties regarded the question of notice as an issue in the case, and therefore gave an instruction in regard to it. Only a general objection was made to this instruction. It is too late now to put in the special objection that no such issue was raised, and the answer must be treated as amended so as to conform to the proof. *Nicklace* v. *Dickerson*, 65 Ark. 422.

The court also told the jury in his instruction that the plaintiff "claimed that the land was rented to Smith for the year 1900, but that the contract was conditional," and that if that was so he must show a compliance with the conditions. But the record shows that plaintiff did not claim to have rented the land to Smith for the year 1900. He positively denied that he had rented Smith the land for that year. He testified that he only agreed to rent it in the event that he did not sell it, which he was trying to do. As he did sell the land, the contingency on which, according to his testimony, he agreed to rent it, did not happen, and according to plaintiff's statement he did not rent it. This instruction of the court touched the pivotal point in the case; and, as it misrepresented the contention of the plaintiff on that point, and was contrary to his testimony, it was misleading and prejudicial. We think the court erred in giving it over the objection of plaintiff.

The only other point necessary to notice relates to the measure of damages. When a landlord unlawfully evicts a tenant from the premises, the tenant is entitled to recover as damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord. If the rental value of the place from which he is evicted is greater than the price he agreed to pay, he may recover this excess and, in addition thereto, any other loss directly caused by the eviction, such as the expense of removal to another place. *Grosvenor Hotel Co.* v. *Hamilton*,

(1894) 2 Queen's Bench Div. 836; *Snow* v. *Pulitzer,* 142 N. Y. 263; Sutherland on Damages (2 Ed.), § 865.

But counsel contend that this expense is limited to one removal, and that if, after the tenant is settled on another place, he takes a notion to make a second move, he cannot recover for the expense of the second removal. This, in the absence of special circumstances, is no doubt true. But a tenant evicted in January, as this one was, may be compelled to seek a temporary abode for his family to shelter them until he can find a suitable farm to rent. When he is compelled by the eviction to seek first a temporary shelter and then to make another removal, we are not able to say, as a matter of law, that he can not recover the entire cost, for these two moves might be so closely connected as to be in effect one, and directly caused by the eviction.

The evidence does not show how long defendant remained at the Pardew place before the second removal, but it leaves the impression that this was only a temporary stopping place. The language of the instruction of the court on the measure of damages, by which the jury were told that in assessing the damages they might "take into consideration the rental value of the land, the trouble and expense of removing, expense of renting a house rendered necessary by such removal, and all other damages flowing from the dispossession," is to a certain extent objectionable, for it appears to assume that the renting of the Pardew house was made necessary by the eviction. But the court no doubt intended to leave to the jury the question of whether the renting of this house was made necessary by removal, and the defect in the instruction, being one of form only, should have been raised by a special objection.

Another objection to this instruction is that it tells the jury that they may consider the rental value of the land. But, as there is nothing to show that the rental value of the land from which defendant was evicted was greater than the amount he had agreed to pay for it, there was no room for any damages in that respect, and the jury should have been so told.

On the whole case, we are of the opinion that for the reasons stated the judgment should be reversed, and the cause remanded for a new trial. It is so ordered.

BANK OF BATESVILLE v. MAXEY.

Opinion delivered July 29, 1905.

1. PAYMENT—UNAUTHORIZED AGENT.—Payment to an unauthorized agent is not binding on the principal. (Page 476.)
2. UNAUTHORIZED AGENCY—RATIFICATION.—Where a firm of attorneys assumed to act for a creditor without authority by accepting payment and giving a receipt in full, and paid to the creditor the residue of the amount collected after deducting their fee, the creditor will not be held to have ratified the acts of the attorneys by accepting the money, unless the acceptance was with full knowledge of the facts, and was inconsistent with any other reasonable hypothesis than that of approval of the attorneys' acts. (Page 479.)
3. SAME—ESTOPPEL.—Where a bank held the note of the active member of a firm which was signed by several sureties, a payment by the silent member of the firm to a firm of attorneys, who, without authority, assumed to act for the bank and gave a receipt in full therefor did not bind the bank as against the sureties on the note, save to the extent that the bank actually received payment; and it will not be estopped, as to such sureties, to collect the balance due on the note, although it retained the amount so collected from the silent partner. (Page 479.)

Appeal from Independence Circuit Court.

GUSTAVE JONES, Special Judge.

Reversed.

STATEMENT BY THE COURT.

R. L. Maxey, a merchant of Independence County, borrowed two thousand dollars from the Bank of Batesville, and executed therefor the following note:

"$2,000.00. Batesville, Ark., Dec. 23, 1901.

"Four months after date, we, or either of us, promise to pay to the Bank of Batesville, two thousand dollars at ten per cent. interest per annum from date until paid, for value received.

[Signed]

"R. L. Maxey.	David Dearing.
"John H. Maxey.	M. D. Maxey.
"W. A. Greenway.	J. B. Northcut.
"J. F. Morris.	M. G. Farris.
"W. W. Edmonson.	E. T. Fulks."

Maxey afterwards, before the note came due, failed in business, and was forced into bankruptcy, his estate being worth about 17 cents on the dollar. But the other parties to the note, who were in fact only sureties of Maxey, owned enough property to make the note good and the bank entirely safe. During the progress of the bankruptcy proceeding, Maxey, in order to protect his own sureties as far as possible, requested the cashier of the bank to file the note in the bankruptcy court, so that a *pro rata* part of the proceeds of the bankrupt's estate might be paid thereon. In compliance with this request the cashier filed the proceeds of the estate. Thereupon the cashier of the bank requested Mr. Casey, an attorney, of the firm of Yancey, Reeder & Casey, to look after the matter, in order that the note might not be stricken from the file of claims, and might be allowed its *pro rata* share of the proceeds. The attorneys did this, and the note was allowed as a claim against the estate. A dividend of 17 per cent. was afterwards paid on the claims against the bankrupt. which amounted to $348 on this note.

Of this sum 10 per cent. was retained by the attorneys, Yancey, Reeder & Casey, or paid by the bank to them, and the remainder, $313.20, was credited on the note. This dividend apparently exhausted all the assets of the bankrupt's estate, and left the balance of the note unpaid. The firm of Yancey, Reeder & Casey held for collection a number of claims against the bankrupt Maxey. Among these clients who had claims against Maxey was the White River Grocer Company, of which D. D. Adams was manager. After the bankrupt's estate had apparently been exhausted by the payment of the dividend mentioned, Adams received a telephone message from Maxey, asking him to come up to Penter's Bluff, and requesting him to bring Mr. Yancey and also Mr. Wolf, the cashier of the bank, with him. Maxey stated to Adams that if he would come up to the Bluff he would have parties there who could tell him how he could collect his debt. The cashier declined to attend the meeting, but Adams went up with his attorney, Mr. Yancey. They met there Maxey, the bankrupt, and also Fulks and Greenway, two of Maxey's sureties on the note to the bank. These parties gave information that tended to show that one Davis, a man of some financial means,

was interested in the mercantile business that Maxey had carried on to such an extent as to make him responsible for the debts that Maxey had contracted in the line of that business. They also gave information which tended to show that Davis withheld goods of the value of $181 belonging to Maxey's estate, and had failed to turn them over to the trustees of that estate in bankruptcy. These parties, Adams representing his company, Fulks and Greenway two of the sureties on the note of Maxey to the bank, Maxey himself, and Yancey, the attorney, discussed ways and means by which Davis could be made to pay these debts. Yancey advised them that if they could prove the facts stated by them Davis could be made to pay the debts. Yancey and the firm of attorneys of which he was a member proceeded then along the line of the facts divulged at the meeting to obtain evidence to show that Davis was liable for such debts. From time to time they held consultations with Maxey and the other parties who had been present at the first meeting. They obtained the affidavits of Maxey and others, showing that Davis was an owner of an interest in the business that Maxey had carried on, and that he was liable for the debts, and also that he had withheld goods of the bankrupt's estate. They then had Davis summoned before the referee in bankruptcy to answer these charges. When Davis arrived in Batesville on the day set for the hearing of these matters, Yancey took him to his office, and showed him the affidavits of witnesses tending to show that he was liable for the debts, and had withheld assets of the bankrupt. A few hours afterwards, Davis and his attorney met Yancey, and the attorney of Davis told him that, under the facts which could be proved, he was liable, and advised him to settle the debts without further litigation. Davis did so, but, as he had been summoned to answer before the referee for a certain amount of goods of the bankrupt, which he had withheld, it was agreed that he should pay the value of those goods, $181, to the referee, and that it should be distributed through him to the creditors. The balance he paid to Yancey, Reeder & Casey, who executed to him a receipt for the same in the following words:

"$4,740.67. Batesville, Ark., July 11, 1902.

"Received from W. E. Davis the sum of forty-seven hundred and forty dollars and sixty-seven cents in full settlement of

the following accounts, and notes proved in bankruptcy in the estate of R. L. Maxey:

Talley Lumber Company.....	$68.00	$ 64.35
Charles Mosby		37.50
J. B. Younger		541.32
Seaton & Lindsay		32.68
L. R. Simpson		59.15
White River Grocery Company.....		234.31
Bank of Batesville.....		1,758.92"

Then follow the names of other creditors represented by the attorneys and amounts due each; the receipt being signed. "Yancey, Reeder & Casey, attorneys for the above mentioned creditors.".

The attorneys then deducted 25 per cent. of the amount collected for their services in collecting, and paid the balance to the creditors. To the bank they paid $1,309.19, which sum it credited on the note. Afterwards, the bank demanded of the sureties that they pay the balance due on the note, and upon their refusal to do so brought this action at law to recover the same.

The defendants appeared, and for answer admitted the execution of the note. But they alleged that the money was borrowed by Maxey to use in the mercantile business carried on in his name at Penter's Bluff, and was so used, but that the business, though carried on in the name of Maxey, in fact belonged to W. E. Davis, and that Davis was in law liable for the debts of that business, including the debt of the bank for borrowed money. That Davis, after Maxey had become bankrupt, agreed with Yancey, Reeder & Casey that he would pay in full all claims of creditors of R. L. Maxey represented by them. That said attorneys represented the plaintiff, Bank of Batesville, and received from Davis payment of the balance due on said note in full, and that the bank, with full knowledge that such attorneys had acted for them in such settlement, received a part of said money, and thus ratified and confirmed their action. They further set up that, under the circumstances, the bank was estopped to deny that Yancey, Reeder & Casey were its attorneys in that settlement. Wherefore they alleged that

the bank was bound by the settlement, and could not recover in this action.

On the trial the court, at the instance of defendant, gave, among others, the following instruction:

"I. The jury are instructed, as a matter of law, that if a person adopts a transaction done in his behalf by an agent who had no authority to do it, he must adopt it in its entirety; he cannot adopt it in part, and repudiate it in part. And if the jury believes from the evidence that Yancey, Reeder & Casey accepted for the plaintiff the money paid by Davis, and that the plaintiff bank either accepted or retained a part of the money so received by said attorneys for it after it had notice that the said attorneys had acted for them in the premises, then this was a ratification of the acts of Yancey, Reeder & Casey in accepting said money, and plaintiff is bound thereby." The jury returned a verdict in favor of the defendant, and the bank appealed.

S. D. Campbell, J. C. Yancey and *Samuel M. Casey,* for appellant.

The evidence fails to show any agency of Yancey, Reeder & Casey to collect this note for appellant under the evidence. This is not a case of agency by estoppel, and the court erred in so instructing the jury. 75 N. Y. 547; Big. Estop. 434; 35 Ark. 376; *Ib.* 293; 36 Ark. 114; 66 Am. D. 478; 56 Mich. 182; Abb. Civ. Trial Brief, 324; 48 Ark. 445. Agency can not be proved by the declaration of the agent himself. 46 Ark. 228. The court erred in refusing to direct a verdict for appellant. 65 Ark. 329; 55 Ark. 347; 21 Ark. 329; 29 Ark. 497; 67 Ark. 223; 21 Ark. 395; 64 Ark. 119; 57 Ark. 468; 70 Ark. 386.

W. S. Wright, for appellees.

RIDDICK, J., (after stating the facts.) This is an action by a bank against a number of defendants, who were sureties on a promissory note of one Maxey executed by him to the bank for a loan of $2,000. The defendants for answer set up that the note had been paid by one W. E. Davis, who was not a party to the note. It is admitted that Davis did pay to Yancey, Reeder & Casey, a firm of attorneys, an amount equal to the balance due on this note, and that they gave him a receipt for the same in full as attorneys for the bank. It is also

admitted that, after deducting a fee for making the collection, these attorneys paid the balance of the money to the bank, which credited the net amount paid to it on the note. The net amount paid the bank left a balance unpaid on the note equal to the amount retained by the attorneys for a fee, and the decision in this case is narrowed down to the question as to whether the attorneys represented the bank in making the collection from Davis, so that a payment to them was in law a payment to the bank, or whether, if they did not represent the bank, the circumstances are such as to estop the bank from denying that they did represent it, or to show that the bank ratified the act of the attorneys in making the settlement with Davis. The evidence showed that Maxey, the principal in the note, had failed in business, and was a bankrupt at the time the note became due. Though Maxey had failed, the sureties on the note were solvent, and made it perfectly good. But the bank, at the request of Maxey, filed the note with the referee in bankruptcy, in order that it might receive its proportion of the bankrupt's estate, and to protect the sureties to that extent. A small amount was paid on the note from the assets of the estate, but a considerable sum remained due for which the sureties were liable to the bank. While matters stood in this condition, Yancey and one Adams, manager of the White River Grocery Company, a creditor of Maxey, had a meeting at Penter's Bluff with Maxey and two of the sureties on the note of Maxey to the bank. Maxey divulged facts which tended to show that one Davis was a secret partner in the mercantile business carried on by Maxey, and that Davis was liable for debts contracted in the course of that business. Now, the bank was not interested in this matter, for the sureties on its note made it perfectly good. And while the evidence shows that the firm of Yancey, Reeder & Casey, of which Yancey was a member, was retained by the bank generally, they had no authority to undertake collection of claims held by the bank unless they were especially requested to do so. They had never been requested to collect this note, further than to have it allowed by the referee as a claim against the estate of Maxey in bankruptcy. At the time of this meeting at Penter's Bluff, the note was in the possession of the bank, and Yancey had no authority from the bank to collect it or to take steps for

that purpose. He did not go to Penter's Bluff at the instance or request of the bank, or to represent it, but as the attorney for Adams, the manager of the White River Grocery Company, and as the attorney for other creditors of Maxey whose claims he held for collection. These debts were unpaid, and Yancey was interested in getting information that would show that Davis, a man of means, was liable for the payment of them. The two sureties present were interested; for, if the amount due the bank from Maxey could be collected from Davis, they would be relieved from liability to pay it. The outcome of this meeting was an understanding that Yancey should go ahead and get up the evidence against Davis, and, if possible, compel him to pay these debts, including the debt due the bank. It is unnecessary for us to consider whether this understanding, taken in connection with the subsequent action of Yancey in collecting these debts from Davis, and to that extent relieving the sureties of this debt, was sufficient to make them liable for a fee for Yancey's services. We may assume that these two sureties had no thought of such a thing; that, knowing that Yancey represented a number of creditors who had claims against Maxey, and supposing that he also represented the claims of the bank, they expected that he would look to these parties, and not to them, for his fee. Whether this was so or not is immaterial here, for, as before stated, the evidence shows that the bank had not authorized Yancey to collect this debt as their attorney or agent. He did subsequently collect money to the amount of these debts from Davis, and gave him a receipt in full against them, signing thereto the name of his firm as attorneys for all the creditors represented, including the bank. The receipt that these attorneys gave tends to show that they were assuming to act for the bank in making the collection, but they say that the receipt was given in that form to identify the different debts for which the money was paid, and to satisfy Davis. However that may be, the receipt is no evidence against the bank until it is shown that the attorneys were attorneys for the bank, and this, as before stated, is not shown. A payment by Davis to these attorneys was not, under the facts of this case, a payment to the bank, and did not affect the debt due the bank.

It is contended with much force that the bank ratified the act of the attorneys by afterwards receiving the money. We are not able to agree with this contention. No express ratification is claimed, and to amount to an implied ratification the act of the bank must be done with the full knowledge of the facts, and must be inconsistent with any other reasonable hypothesis than that of approval of the acts of the attorneys who assumed to act as its agent. But there is nothing to show that, at the time the bank accepted this payment, it had notice that these attorneys had assumed to act for it, and had given Davis a receipt in full for this debt. The attorneys testified that they did not act for the bank, but for the sureties; and as the bank had not authorized them to collect the note, the mere payment by them to the bank of money collected from Davis did not notify the bank that they had assumed to act as its agents and had made a full settlement of the debt with Davis.

If the bank was seeking to hold Davis liable for the balance due on the note, it is doubtful if it could retain the money secured by the attorneys from him by executing this receipt in full, and at the same time reject the settlement. But Davis was not a party to this note, and the bank has never asserted that he was liable for it. This is not an action against Davis, but against the parties to this note, with whom no settlement was made, and who have paid nothing on the note. If, after discovering that a receipt in full had been executed by these attorneys to Davis for this debt, the bank had refused to retain the money and returned it to him, this might have resulted in injury to the sureties, and in the end the bank might have been compelled to shoulder the loss, if any had resulted from the return of the money. Davis was not asking for a return of the money; and as a return of it to him might result in injury to the sureties or the bank, the only safe course for the bank to pursue was to hold the money. Under these circumstances, the failure of the bank to return the money is not inconsistent with a denial on its part of the right of these attorneys to collect the money for the bank, or their right to give a receipt in full against the note. As the bank could not return the money without risk of injury to itself or the sureties, its retention thereof was not in law a ratification of the act of the attorneys.

Martin v. *Hickman,* 64 Ark. 217; *Brown* v. *Wright,* 58 Ark. 20; *Bryant* v. *Moore,* 26 Me. 84, 45 Am. Dec. 96; *Thatcher* v. *Pray,* 113 Mass. 291; 1 Clark & Skyles, Agency, page 327.

It follows from what we have said that instruction No. 1, and other instructions given at the request of the defendants, in which the court told the jury in substance that if the bank retained the money paid to it by Yancey, Reeder & Casey after notice that these attorneys had assumed to act for the bank in the settlement made with Davis it would be a ratification of the acts of the attorneys in making the settlement, were, in our opinion, erroneous and misleading. For, while this instruction, abstractly considered, may be correct in stating that a principal cannot ratify a part of the transaction and reject another part, yet, under the facts here, it is misleading. As the act of the bank in receiving this money from the attorneys who had collected it from Davis did not mislead or injure the defendants in any way, but, on the contrary, was a direct advantage to them, to the extent of such payment, we see no grounds of estoppel.

On the whole case, we are of the opinion that the facts in evidence made out a clear case in favor of the bank, except as to $34.80, the amount paid by the bank to the attorneys out of the $384 collected through the bankruptcy proceedings. The evidence shows that these attorneys were requested to look after this matter in the bankrupt court by the cashier of the bank. He did it at the suggestion of Maxey to protect the sureties on Maxey's note. The collection of the $384 in this way resulted in a benefit to the sureties, to that extent; but, as they did not authorize this step to be taken for them, they cannot be charged with the expense of the collection. The bank authorized it, and a payment of that amount to the attorneys was a payment to the bank. But, as we have said, the collection from Davis was not authorized by the bank, and it is responsible only for the part of that collection that came to its hands. For the reasons stated, the case is reversed, and the cause remanded for a new trial.

LITTLEJOHN v. STATE.

Opinion delivered September 30, 1905.

1. EVIDENCE—MOTIVE.—Upon a prosecution of a stepfather for assault with intent to kill alleged to have been committed upon a young man who was visiting his stepdaughter, it was admissible to prove that defendant had maintained illicit relations with his stepdaughter, as tending to show a motive for the assault. (Page 481.)
2. SAME—HEARSAY.—Self-serving declarations of the accused cannot be proved in his behalf. (Page 482.)

Appeal from Monroe Circuit Court.

GEORGE M. CHAPLINE, Judge.

Affirmed.

Thomas & Lee, for appellant.

The court erred in permitting the witness Josephine Evans to give the number and names of her children. 58 Ark. 473. Facts which go to prove another offense distinct from the offense charged should not be admitted. 43 Ark. 367; 52 Ark. 303; 54 Ark. 489. The evidence of W. L. Jeffries in regard to the two shells should have been admitted. 14 Cent. Dig. § § 861, 862; 99 N. Y. 140. The argument of counsel for the State was improper. 58 Ark. 473; 6 Ark. 157; 70 Ark. 235; 20 Ark. 305; 71 Ark. 403; 72 Ark. 427.

Robert L. Rogers, Attorney General, for appellee.

WOOD, J. Appellant was convicted of an assault with intent to kill one Eli Evans.

Counsel for appellant urged that the evidence was not sufficient to uphold the conviction. We have examined the record carefully, and in our opinion the evidence is ample to sustain the verdict. It is insisted also that the court erred in permitting witness Josephine Evans to give the number and names of her children, and to tell that appellant was the father of two of them. It appears that Josephine Evans was the stepdaughter of appellant. The prosecuting witness, Eli Evans, was visiting her at appellant's house on the night of the assault. At that time they were not married. Josephine testified that on the night of the assault sometime after Eli left for his home, her stepfather came

in, and she heard him tell her mother that "that fellow Evans would'nt tell no more lies on him." The prosecuting witness, Eli Evans, testified positively that appellant assaulted him. The testimony of Josephine Evans showing the illicit relations between her and appellant was proper as tending to show a motive for the assault.

Counsel contends further that the court erred in not permitting the defendant to ask the witness W. L. Jeffries the following question: "After you heard that the defendant got two shells from his daughter-in-law [stepdaughter], did you not ask the defendant about it?" And that the court erred in not letting the witness W. L. Jeffries answer the following question: "Did not Foster Littlejohn tell you, while under arrest in Clarendon, that he borrowed two shells from his daughter-in-law [stepdaughter], and did he not tell you that he put the shells on the mantel piece, and that they were there now; and did you not go out there and get the shells?" These questions were designed to elicit self-serving declarations, or might have done so, and the court ruled correctly in not permitting the witness to answer them.

The alleged remarks of counsel for the State which are pressed upon us as reversible error are not preserved in the record, and there is nothing before us for decision on that ground.

Finding no error, the judgment is affirmed.

---

76 482
79 341

DOWELL v. SCHISLER.

Opinion delivered July 29, 1905.

APPEAL—OBJECTION TO INSTRUCTIONS—SUFFICIENCY.—Where an objection in gross was made to two instructions, and the objection to one of them was waived by omitting same from the motion for new trial, and no objection to it is urged on appeal, the court will not consider the other.

Appeal from Greene Circuit Court.

ALLEN HUGHES, Judge.

H. L. Ponder and *Johnson & Huddleston,* for appellant.

J. D. Block and *Hawthorne & Hawthorne,* for appellee.

McCULLOCH, J. This is a suit by appellant, Dowell, to recover of appellee, Schisler, commissions on the sale of a sawmill plant and other property. The sale was made direct by Schisler to the Culver Lumber Company, but Dowell asserts that he procured the purchaser, and thereby earned a commission. No objections were made to the giving or refusal of instructions, except to the giving of two upon request of the defendant; but the objection was made in gross to both instructions, and, as the objection to one was waived by omitting the same from the motion for new trial, and no objection to it is urged here, we cannot consider the other. An objection in gross to several instructions cannot be considered unless all the instructions embodied in such objections are bad. *Wells* v. *Parker, ante* p. 41; *Young* v. *Stevenson,* 73 Ark. 480, and cases cited.

Nothing remains for us to consider but the sufficiency of the testimony, giving it the strongest force which the jury were warranted in giving it. No useful purpose is to be served by discussing the testimony in detail here. We think it is sufficient to sustain the verdict, and the judgment must be affirmed.

BATTLE, J., absent.

JUNIOR v. STATE.

Opinion delivered October 7, 1905.

EVIDENCE—IDENTIFICATION OF RECORD—SECONDARY PROOF.—Testimony of a stranger identifying a record of the judgment of a justice of the peace is inadmissible, in the absence of any explanation why neither the justice of the peace who rendered the alleged judgment nor his successor in office was present to identify the record.

Appeal from Calhoun Circuit Court.

CHARLES W. SMITH, Judge.

Junior and Tatum were convicted of an assault with intent to kill, and have appealed.

Affirmed.

STATEMENT BY THE COURT.

Appellants were convicted of an assault with intent to kill one Ed. Ware. Ed. Ware was offered as a witness, and appellants objected to his testifying on the ground that he had been convicted of petit larceny.

Appellants attempted to show such conviction by proving the signature of the magistrate before whom Ware was said to have been convicted to the alleged record kept by the magistrate at the time, but the court refused to allow the record to be identified in that way. Appellants then called as a witness one Martin, who testified as follows:

"Q. Is this the book you got in Fordyce yesterday? A. Yes, sir; I got it from Mr. Owens, the justice of the peace at Fordyce. Q. He delivered you possession of it? A. Yes, sir. Q. State to the court what he said about the parties who had made the record."

The State objects, and the court sustains the objection, and defendants except.

Appellants called J. R. Thornton, who testified as follows:

"Q. State to the court whether Mr. Bunn was acting in the capacity of justice of the peace at Fordyce, in that township, about that time?" (State's objection sustained. Defendants except.)

"Q. That judgment there as it appears on the record, is that in W. J. Bunn's handwriting; do you know his handwriting? A. Yes, sir. Q. Is that his writing? A. Yes, sir; I believe that is his handwriting; he and his son's. Their handwriting resembles a great deal. I give it as my opinion that is Wiley Bunn's handwriting. Q. As well as his signature? A. Yes, sir; I mean the whole thing."

(Court holds this insufficient basis for the introduction of the record. Defendants except.)"

C. L. Poole, for appellant.

Robert L. Rogers, Attorney General, for State.

WOOD, J., (after stating the facts.) The ruling of the court was correct. The conviction of Ware of the crime of petit larceny was not shown by the record itself or a certified copy

thereof. The attempt to identify the record in the manner indicated was insufficient. The successor of the justice of the peace before whom the alleged conviction was had was the custodian of the record (Kirby's Digest, § 4546), and the proper one to indentify same. It could not be done by secondary evidence, without laying the foundation therefor, which was not done in this case. No reason was given why the magistrate who rendered the alleged judgment, or his successor in office, was not present to identify the record. Secondary proof was not proper until this was done.

The proof offered to establish the record in this case was incompetent.

Affirmed.

McCULLOCH, J., (dissenting.) I think that the record of conviction of the witness Ware was properly and sufficiently identified, and that the court erred in refusing to permit its introduction.

---

76 485
f 84 213

76 485
f86 454

76 485
f90 166

MILLER v. NUCKOLLS.

Opinion delivered September 30, 1905.

1. SLANDER—REVIVAL OF JUDGMENT.—While an action of slander abates with the death of either the plaintiff or the defendant, yet, if final judgment has been entered in plaintiff's favor, and defendant appeals, and thereafter dies, the action does not abate, as the action has become merged in the judgment. (Page 486.)

2. APPEAL—EFFECT OF SUPERSEDEAS.—An appeal with supersedeas does not have the effect of vacating a judgment, but only of staying proceedings thereunder. (Page 486.)

Appeal from Independence Circuit Court.

FREDERICK D. FULKERSON, Judge.

Motion to abate cause overruled.

Gustave Jones, for appellant.

W. A. Oldfield and *Wright & Matheny,* for appellee.

McCULLOCH, J. This is an action for slander. The plaintiff (appellee) recovered judgment below, and the defendant (appellant) took an appeal to this court. Since the appeal was perfected, the appellant died, and his attorney, as *amicus curiae,* presents this motion to abate the cause. The appellee responds to the motion, and asks that the cause be revived against the administrator or executor of the deceased.

At common law actions of this kind abated with the death of either party, the wrongdoer or the party injured. *"Actio personalis moritur cum persona"* was a maxim of the common law. The statute of this State providing for revival of causes of action for wrongs done to the person expressly excepts from its operation actions for slander or libel, thus leaving the common-law rule in force as to those actions. Kirby's Digest, § 6286. It does not follow, however, that after a verdict and judgment in favor of the plaintiff an action for slander or libel abates. On the contrary, we hold that the cause of action becomes merged in the judgment, and, unless the same be set aside or reversed, there can be no abatement. This view is sustained by authority. Newell on Slander and Libel, p. 375; 21 Enc. of Pl. & Pr. p. 351; *Dial* v. *Holter,* 6 Ohio St. 228; *Ackers* v. *Ackers,* 16 Lea (Tenn.), 7.

An appeal and supersedeas do not have the effect of vacating a judgment, but only stay proceedings thereunder. *Fowler* v. *Scott,* 11 Ark. 675; 2 Cyc. p. 971; 20 Enc. Pl. & Pr., p. 1240; *Runyon* v. *Bennett,* 4 Dana, 599; *Low* v. *Adams,* 6 Cal. 277; *Martin* v. *South Salem Land Co.,* 94 Va. 28; *Fawcett* v. *Superior Court,* 15 Wash. 345.

The motion to abate is therefore overruled.

SUTHERLAND v. STATE.

Opinion delivered September 30, 1905.

1. CRIMINAL LAW—EXPOSURE OF JURY.—When the court placed the jury in a felony case in charge of a specially sworn officer, as provided by Kirby's Digest, § 2390, and the officer, hearing that a member of his family was sick, left the jury in charge of an officer not specially sworn, the purity of the trial was thereby impeached, and the burden was cast upon the State to show that no prejudice in fact resulted. (Page 487.)
2. WITNESS—IMPEACHMENT.—Where a witness testified that he did not see defendant cut deceased's throat, but that he told two persons that he did, it was not admissible to introduce such persons to prove that the witness told them that he saw defendant cut deceased's throat, as such testimony did not tend to impeach the witness. (Page 488.)

Appeal from Newton Circuit Court.

W. S. MCPHERSON, Special Judge.

Reversed.

W. S. Moore and *J. M. Shinn,* for appellant.

A new trial should have been granted on account of newly discovered evidence. 57 Ark. 1; 66 Ark. 620; 78 Tex. 421; 42 N. W. 112; 29 Tex. App. 328, 169; 26 Ark. 496; 14 L. R. A. 609; 99 N. Y. 125. It was error to admit evidence of conversations had in the absence of appellant. 36 So. 609; 46 S. E. 840; 76 S. W. 563; 46 S. E. 733. The remarks of the court upon the testimony of Ruth Lewis were improper. Const., art. 7 § 23; 49 Ark. 439; 62 Ark. 126. The instructions as to the credibility of witnesses were erroneous. Hughes, Instr. Jur. 215, 217, 220; 88 S. W. 822; 47 S. E. 37. Instruction No. 9 was abstract and misleading. 43 Ark. 289; 45 Ark. 165, 292; 49 Ark. 165; 53 Ark. 381; 55 Ark. 244; 58 Ark. 108; Const., art. 115; 57 Ark. 1; 66 Ark. 16, 545.

Robert L. Rogers, Attorney General, for appellee.

The argument of the prosecuting attorney was not prejudicial. 75 Ark. 67.

WOOD, J. Appellant was convicted of murder in the second degree, and sentenced to nineteen years in the penitentiary.

1. The tenth ground of the motion for new trial alleges that the jury, after being impaneled to try the cause, were ex-

posed to improper influences in this: "that the said jury was not at all times in charge of a specially sworn officer or in the presence of the court." The bill of exceptions shows that, after a part of the evidence for the State had been submitted to the jury, and during the recess of the court, the special bailiff who had charge of the jury received word that a member of his family was sick, and thereupon he left the jury in charge of a regular deputy sheriff, who had not been specially sworn to take charge of the jury and to keep them from improper influences. There were a great many people in the court room where the jury were left. This was all in the absence of the judge and the defendant. Section 2390 of Kirby's Digest is as follows: "The jurors, before the case is submitted to them, may, in the discretion of the court, be permitted to separate, or be kept together in charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and suffer no person to speak to or communicate with them on any subject connected with the trial, nor to do so themselves."

It is within the discretion of the court, under the statute, before the cause is submitted to the jury, to permit them to separate, or to keep them together. When the court decided to keep them together, that showed that such course was deemed necessary to secure the accused a fair trial. Having exercised the discretion to keep the jury together in charge of proper officers, the statutory requirements should have been complied with, in order to preserve the integrity of the trial. These provisions are designed to shield the jury from any extraneous influences that might prevent a fair and impartial trial. The purity of the trial is impeached *prima facie* by showing that the jury was subjected to such influences, and the burden was at least cast upon the State to show that no prejudice in fact resulted. *Maclin* v. *State,* 44 Ark. 115; *Vaughan* v. *State,* 57 Ark. 1.

2. Lee Newman, a witness on behalf of the State, testified that he did not see defendant cut deceased's throat, but that he told George Pruett and George Burns that he did. Over the objection of appellant, witnesses George Pruett and George Burns were permitted to testify in substance that Lee Newman told them that he saw defendant cut deceased's throat. This testimony of Pruett and Burns was hearsay, and therefore incompetent. It was not in contradiction of anything witness Newman had testi-

fied to, and was not therefore admissible to impeach such witness. No proper foundation had been laid for his impeachment. By permitting this testimony the State was allowed to show indirectly what she could not prove directly. The testimony was improper and erroneous. But its prejudicial effect was probably removed by an instruction which was given by the court at the instance of appellant. For this reason we would not reverse for this error alone. The error in this regard will not likely be repeated on another trial. For the error in not granting new trial for the reason set up in the tenth ground of the motion therefor, the judgment is reversed, and the cause is remanded for that purpose.

TIGNOR v. STATE.

Opinion delivered September 30, 1905.

1. HOMICIDE—ACCUSED'S FAILURE TO EXPLAIN CIRCUMSTANCES—INSTRUCTION.—In a murder case in which defendant and his wife and the deceased were the only persons who were present at the time the killing took place, and defendant testified fully in regard to the circumstances that led to the killing, his wife being incompetent to testify, it was error to instruct the jury that defendant's failure to make any effort to rebut or explain certain facts and circumstances connected with the killing, of a grave and suspicious nature, and peculiarly within his knowledge, might be considered in determining his guilt or innocence. (Page 492.)
2. SAME—EVIDENCE OF FORMER ASSAULT.—The facts with reference to an assault alleged to have been committed by deceased upon defendant's wife two weeks before deceased was killed were not provable as tending to show justification for the killing. (Page 492.)
3. SAME—ABSTRACT INSTRUCTION.—It was improper to instruct the jury that defendant's failure to rebut or explain facts and circumstances of a grave and suspicious nature and peculiarly within defendant's knowledge should be considered in determining his guilt or innocence, if there was nothing that justified the court in referring to such facts and circumstances as being of a grave and suspicious nature, or as being peculiarly within defendant's knowledge. (Page 492.)
4. SAME—ERRONEOUS INSTRUCTION—AGGRAVATION BY ARGUMENT.—Error of the court in instructing the jury to consider defendant's failure

to introduce rebutting testimony, which the court had refused to permit him to introduce, was aggravated by the argument of the prosecuting attorney in which he called attention to the failure of defendant to introduce such testimony. (Page 492.)

5. SAME—BURDEN OF PROOF.—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. (Page 493.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

Reversed.

STATEMENT BY THE COURT.

The defendant, Seburn Tignor, was indicted, tried, and convicted of murder in the first degree for killing Andrew Lary in Miller County, on the 22d day of July, 1903, by shooting him with a gun and striking him with an ax. At the trial two witnesses for the State testified that on the day of the killing they were going along the road towards the home of the defendant; that when they were about 200 yards distant from the house in which he lived, they heard two or three gunshots fired, and in a few moments afterwards came in sight of the defendant, who was approaching the body of Andrew Lary, which lay just outside of the yard of the defendant. When defendant saw them, he came towards them, and told them that he had killed Lary. Defendant had a gun and a broad axe in his hands, and seemed to be excited, but the witnesses did not remember that he stated his reasons for killing Lary. The witnesses testified that a single-barrel shotgun lay near the body of Lary, and that the trigger of the gun was cocked, but that it had not been discharged. Lary had been shot in the head, and the skull indicated that he had also been struck on the head with an axe or some blunt instrument. Near him was his dog, which had also been shot.

The defendant testified in his behalf that he had been informed that Lary, some two weeks before the tragedy, had attempted to assault defendant's wife at a church meeting, and that Lary had made threats against her; that his wife was informed

that Lary would pass their house that day, and, being apprehensive that he might carry out his threats, had requested defendant to remain at home and protect her; that defendant went to work as usual that morning, but took his gun with him, and, about 11 o' clock returned home to see how his wife and children were getting along; that when he came in sight of his house, about two hundred yards away, he saw Lary with his gun drawn on his wife; that defendant walked to within thirty yards of Lary, and then called to him to take his gun down; that Lary turned and drew the gun on witness, as if he were about to shoot, and witness fired and killed him. He denied having struck Lary, and stated that Lary fired his gun about the same time that witness fired.

Defendant offered to prove by witnesses who were at the church when defendant claimed that his wife had been assaulted by Lary that it was reported there that Lary had assaulted her, but the court refused to allow the proof of such a report to be made. Defendant offered no further testimony on that point.

After the evidence was in, the court, among other instructions, gave the following instruction, numbered 18, to the jury, over defendant's objection, to-wit:

"You are instructed that where evidence which would rebut or explain certain facts and circumstances of a grave and suspicious nature is peculiarly within the defendant's knowledge and right, and he makes no effort to produce the same, the jury may properly take such fact into consideration in determining defendant's guilt or innocence."

He also gave section 1765 of Kirby's Digest to the effect that, the killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, etc.

The bill of exceptions states that in his closing argument the prosecuting attorney argued to the jury that defendant had failed to prove the report of the attempted assault on his wife at the church, to which argument the defendant excepted.

After judgment against him for murder in the first degree, the defendant filed a motion for new trial, which being overruled, he appealed.

Robert L. Rogers, Attorney General, for appellee.

The indictment having been lost, it was proper to try the defendant upon a copy of the record. Kirby's Dig. § 2250; 40 Ark. 488. The indictment charged but one offense, and no election was necessary. 50 Ark. 313; 1 Bish. Cr. Pro. 268.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment convicting the defendant of murder in the first degree. The defendant is a negro, and the person whom he killed was a negro. The evidence of his guilt is amply sufficient to sustain the judgment, but we are of the opinion that the court erred in giving the 18th instruction set out in the statement of facts. We see nothing in the evidence that justified such an instruction.. It is not shown that any one besides the defendant and his wife and the deceased, Lary, was present at the time the killing took place. His wife was not a competent witness, and he could not put her on the stand. The law did not require that the defendant should testify, though he did take the stand and testified fully in regard to the circumstances that led to the death of Lary. Whether this testimony was true was a matter for the jury, and not the court. If this instruction referred to the failure of defendant to show the facts in reference to the previous assault which defendant testified that he had heard was made by Lary upon defendant's wife, it was improper, for this assault happened two weeks before the killing, and was no justification therefor, and the failure of the defendant to prove the facts in reference thereto was no evidence of his guilt. If it was competent for defendant to prove the circumstances of such assault, it does not appear that the facts and circumstances in reference thereto were so peculiarly within his knowledge, or that they were of such nature, as to justify this instruction to the effect that where evidence which would rebut or explain "facts and circumstances of a grave and suspicious nature and peculiarly within defendant's knowledge and right, and he makes no effort to produce the same, the jury may properly take such fact into consideration in determining defendant's guilt or innocence." There was nothing about this reputed assault that justified the court in referring to it as of a grave and suspicious nature, while, as we have stated, the defendant testified fully in reference to the facts of the homicide. The effect of this instruction was aggravated by

the argument of the prosecuting attorney, in which he called attention to the failure of the defendant to prove the report of the attempted assault of Lary upon his wife, which proof had been excluded by the court.

Again, the court gave section 1765 of Kirby's Digest, to the effect that, the killing being proved, the burden of proving circumstances that justify or excuse the homicide devolves upon the accused, etc. Now, this instruction is taken from the statute, and is the law, but it should have been accompanied with an instruction that on the whole case the guilt of the defendant must be proved beyond a reasonable doubt, so that the jury might understand that, though the burden of proving acts of mitigation may devolve on the accused, it is sufficient for him to show facts which raise in the minds of the jury a reasonable doubt as to his guilt. *Cogburn* v. *State*, *ante* p. 110. But, so far as the record here shows, the court did not refer to the question of reasonable doubt in any portion of his charge. The only reference to that question found in the record is in an instruction asked by defendant which was refused, and properly so, because it did not state the law correctly. While the failure to give an instruction on that point was not of itself a reversible error, for the reason that the defendant did not ask any proper instruction on that point, still the failure to give such an instruction emphasizes the error in giving instruction 18, to which we have referred. On the whole case, for the reasons stated, we are of the opinion that there was error in the charge of the court, and for that reason the judgment must be reversed, and a new trial granted. It is so ordered.

---

76 493
82 597

LONG v. STATE.

Opinion delivered September 30, 1905.

1. EVIDENCE—OPINION OF WITNESS.—While it is admissible for witnesses in a murder case to testify that deceased had the reputation of being a quarrelsome and dangerous man, it was not competent to ask them

whether, from the reputation of the deceased, he was a person who would be likely to carry into execution a threat seriously made. (Page 494.)

2. HOMICIDE—ADMISSIBILITY OF THREATS.—An instruction in a murder case that threats do not constitute provocation for a killing, and that the only purpose for which they are admissible is to throw light on the defendant's acts at the time he fired the shot, was correct. (Page 495.)

3. SAME—REPUTATION OF DECEASED.—It was not error in a murder case to instruct the jury that "it makes no difference what the proof may show as to deceased's reputation as to being a dangerous man, provided you believe from the evidence that he was not making an attack or demonstrating on the defendant, as viewed from his standpoint at the time the shot was fired." (Page 495.)

4. INSTRUCTION—PROVINCE OF JURY.—It was not error to refuse to instruct that "it is more probable that a man of bad character will commit a crime than a man of good character." (Page 496.)

Appeal from Hempstead Circuit Court.

JOEL DYER CONWAY, Judge.

Affirmed.

Robert L. Rogers, Attorney General, for appellee.

Defendant, pleading to the indictment, waived all irregularities. 29 Ark. 165; 42 Ark. 94; 62 Ark. 303. The presumption is that the grand jury was properly impaneled. 60 Ark. 450.

MCCULLOCH, J. This case has been before the court on a former appeal, and is reported in 72 Ark. 427. After it was remanded the defendant was put on trial in the Hempstead Circuit Court and convicted of voluntary manslaughter, his punishment fixed at two years in the penitentiary, and he again appealed to this court.

Numerous exceptions were saved to rulings of the court in the trial below, but we are not favored with an argument on behalf of the defendant pressing them upon our attention. Most of these exceptions relate to rulings of the court in giving certain instructions asked by the State, and in refusing others asked by the defendant. Upon consideration of all the instructions given and refused, we are of the opinion that no error was committed in this respect.

Defendant introduced several witnesses who testified that the deceased had the reputation of being a quarrelsome and dangerous man. His counsel then proposed to ask each of these witnesses whether, from the reputation of the deceased, he was a

person who would likely carry into execution a threat seriously made; but the court refused to permit the question to be asked. The question was not competent, as the statement sought was entirely a matter of opinion of the witnesses. We know of no principle upon which this could be admissible. In homicide cases the character of the deceased is, under some circumstances, admissible, but evidence of his disposition or inclination to do right or wrong is always rejected. Underhill on Crim. Ev. § 325.

The testimony adduced on the trial was sufficient to warrant the verdict.

We find no error, and the judgment is affirmed.

ON REHEARING.

Opinion filed November 11, 1905.

McCULLOCH, J. Since the judgment was affirmed by this court on a former day, the appellant has appeared by counsel, asking for a rehearing, and files a brief in support of same.

He contends that the court erred in giving two instructions as follows:

"14. The only purpose for which proof of threats is permitted is to throw light on the defendant's acts at the time he fired the shot; and if you believe from the evidence as explained in these instructions that deceased was not making an attempt to shoot defendant, as viewed from his standpoint, then and in that event you will not consider threats, if proved, for any purpose; and in this connection the court instructs you that no threats, however violent, however great, are any provocation whatever.

"15. You are instructed that it makes no difference what the proof may show as to deceased's reputation as to being a dangerous man; provided you believe from the evidence that he was not making an attack, or demonstrating on the defendant, as viewed from his standpoint at the time the shot was fired, as explained in these instructions."

The effect of these instructions was to inform the jury that the only purpose for which they could consider proof of threats made by the deceased, and of the character of deceased as a dangerous man, was to determine whether or not deceased was making an attack upon the defendant at the time of the killing, or whether the defendant believed at the time that deceased was

attempting to shoot him. This is a correct statement of the law. The instructions are not aptly worded, but we think sufficiently conveyed that idea, and any defects of form should have been specifically pointed out. The jury could not have misunderstood the meaning of the court, taking into consideration all of the instructions on behalf of the State and of the defendant. The court, on motion of defendant, also instructed the jury that to constitute self defense "it is sufficient if the defendant honestly believed, without fault or carelessness on his part, that the danger was so urgent and pressing that the killing was necessary to save his own life, or prevent great bodily harm," and that it is not essential that the killing should appear to the jury to have been necessary. The court also instructed, on motion of defendant, that, if threats were made by the deceased against defendant, they might be considered by the jury in determining who was the aggressor in the difficulty.

There was no error in refusing to give instruction No. 17 ½ asked by defendant. That instruction incorrectly stated to the jury as a matter of law that "it is more probable that a man of bad character will commit a crime than a man of good character." That was a question of fact for the jury to determine, and not one of law for the court to declare. Proof tending to show the character of the defendant as a dangerous man, and of threats made against the defendant, should have been, and was, submitted to the jury, along with other testimony, to enable them to determine which of the parties to the encounter was the aggressor, and to determine whether or not the defendant acted under an honest belief that he was in danger at the time. This was as much as the defendant was entitled to, and we find no errors in the rulings of the court in either giving or refusing instructions.

Petition for rehearing denied.

BUSH v. PRESCOTT & NORTHWESTERN RAILWAY COMPANY.

76 497
83 212

76 497
f86 199

Opinion delivered September 30, 1905.

1. APPEAL—QUESTIONS REVIEWABLE.—Where exceptions were saved to the ruling of the court in sustaining a demurrer to the original complaint, and an appeal was taken within a year thereafter, the error of the court in sustaining such demurrer is ground for reversal, regardless of the sufficiency of a plea of *res judicata* to an amended complaint subsequently filed. (Page 498.)
2. RESCISSION—FRAUD—SUFFICIENCY OF COMPLAINT.—A complaint which alleges that defendant company and one of plaintiff's attorneys conspired to procure fraudulently from plaintiff, who was an illiterate person, an assignment of plaintiff's cause of action against defendant company, and by deception induced her to execute such assignment, and that plaintiff executed such assignment, believing that she was assigning merely a half interest therein, states a good cause of action, entitling plaintiff to a rescission of the assignment of one-half of the cause of action. (Page 499.)
3. SAME—RESTORATION.—Where an illiterate litigant was fraudulently induced to assign her cause of action to one of her attorneys in consideration of the transfer to her of a small tract of land, upon his representation that the paper she signed was only an assignment of a part of the cause of action which she had agreed to assign to him, she will not be required, as a condition to the setting aside of the assignment, to surrender and restore to such attorney the tract conveyed by him to her. (Page 500.)
4. SAME—FRAUDULENT COMPROMISE—NOTICE.—The rule that, to entitle the attorney of one of the parties to a compromised suit to recover his fee from the opposite party, such attorney must prove that the opposite party had either actual or statutory notice of his interest in the cause of action is inapplicable where a party to a compromise sues to rescind same on the ground that the compromise was obtained in fraud of the rights of her attorney. (Page 501.)
5. EQUITY—REMEDY AT LAW.—The fact that plaintiffs had a remedy at law does not oust the concurrent jurisdiction of courts of equity to grant relief against fraud by cancelling a written release or assignment. (Page 501.)

Appeal from Nevada Chancery Court.

JAMES D. SHAVER, Chancellor.

Reversed.

W. V. Tompkins, for appellant.

C. C. Hamby, for appellee.

Assignment of an interest in a judgment is an assignment of an interest in the cause of action. Freeman, Judg. § 431. Appellant should have first offered a return of the land before bringing suit to annul the contract. 59 Ark. 259; 111 Ind. 544; 117 Mass. 479; 61 Fed. 54. Bush had no interest in the cause of action. Kirby's Digest, § 4457; 71 Ark. 327; 74 Ark. 551. And cannot complain of the settlement made. 66 Ark. 260.

W. V. Tompkins, for appellants in reply.

The transfer obtained by Guy Nelson was obtained by fraud, and the complaint stated a cause of action. Eaton, Equity, 44, 283, 286-289.

McCULLOCH, J. This is a suit in chancery seeking to set aside, on account of alleged fraud in its procurement, an assignment by the plaintiff, Mary A. Smith, to Guy Nelson, one of the defendants, of an alleged cause of action against the defendant railroad company for the negligent killing of her minor son and a compromise with said defendant railroad company of said action.

On January 23, 1903, the court sustained a demurrer to the complaint, and entered a decree dismissing it for want of equity and permitting the plaintiff to amend by setting forth the additional facts stating a cause of action. To this decision the plaintiff excepted. During the April term, 1903, the plaintiff filed an amended complaint, stating substantially the same facts as in the original complaint. The defendants again demurred, and also interposed a plea of *res judicata,* on the ground that the amended complaint states no additional facts, and that the decision of the court sustaining a demurrer to the original complaint was a conclusive adjudication of the sufficiency of the amended complaint. The court sustained this plea, and exceptions were duly saved.

Inasmuch as exceptions were saved to the ruling of the court in sustaining the demurrer to the original complaint, and the appeal was taken within a year from that time, the whole record is before us; and if it should be found that the court erred in sustaining that demurrer, the cause must be reversed, without consideration of the sufficiency of the plea of *res judicata.*

The complaint states, in substance, that the plaintiff, Mary A. Smith, had a good cause of action against defendant railroad company for the negligent killing of her son, and had brought suit thereon for damages in the sum of $12,000 against said company in the circuit court of Nevada County, her co-plaintiff herein, J. O. A. Bush, and defendant Guy Nelson, who were partners in the law practice, being her attorneys in that suit, under contract with her to receive one-half of the amount recovered as their fee; that the suit was tried, and she recovered a judgment for $1200 damages against said company, and the latter took an appeal to this court; that while the cause was pending in this court she assigned her half interest in said judgment to defendant Nelson in consideration of his conveyance to her of a tract of land valued at $400; that said judgment was reversed by this court, and the cause remanded for a new trial, and that thereafter, before a new trial could be had, she and Bush and Nelson entered into a new contract, whereby it was agreed that Bush should receive one-half of any amount recovered in said suit, and Nelson should receive one-half of any sum recovered, not exceeding $1200, and one-fourth of any sum recovered in excess of $1200; that thereafter said Nelson and defendant railway company and its attorney entered into a conspiracy to fraudulently procure from the plaintiff, Mrs. Smith, an assignment of the whole of said cause of action and a compromise of the same, and that Nelson, pursuant to said conspiracy, by deception, falsehood and fraud induced her to execute such assignment, and then filed the same with the papers in said damage suit, and compromised and dismissed said suit in consideration of the sum of $500 paid to him by said railway company.

It is alleged that the plaintiff, Mrs. Smith, is illiterate and ignorant of all forms of law, and that Nelson falsely represented to her that the paper she executed was only an assignment of the part of said cause of action which she had agreed to assign to him, and that her attorney, Bush, knew all about it, and had advised her to sign it; that she was ignorant of the contents of said paper, and signed it under the belief that by it she only assigned the part of said cause of action which she had previously agreed to assign to Nelson, and no more; that at the time of said compromise said railway company well knew that said transfer had been

obtained by said Nelson through falsehood, fraud and deception, and that he had no authority to represent Mrs. Smith in making said compromise.

Accepting the allegations as true, which we must do in testing the sufficiency of the complaint on demurrer, they sufficiently state a cause of action, and the learned chancellor erred in sustaining the demurrer. If, as alleged, Nelson and the railway company conspired together, and by falsehood and fraud procured from Mrs. Smith an assignment of her whole cause of action against the company for damages, when she only intended to assign the part which she had previously agreed upon, and was led to believe by Nelson that she was only signing a transfer of such part, and said company compromised with Nelson, then a court of equity should set aside the assignment and compromise, in so far as the rights of Mrs. Smith, and of Bush, who claims through her an interest in the cause of action, are concerned.

As to the rights of Nelson, who is conceded to be entitled to one-half of the recovery on the cause of action up to $1,200, and one-fourth of any recovery over that sum, the assignment and compromise must stand. Nor should Mrs. Smith, as contended by learned counsel for appellees, be required first to surrender and restore to Nelson the tract of land conveyed by him to her. No such condition can be imposed upon her right to set aside the assignment, for the reason that she is not seeking to set aside the part of her cause of action against the railway company which she assigned to him in consideration of the conveyance of the land. That transaction is, so far as the pleadings show, free from fraud, and must stand.

It is contended that Bush cannot maintain this suit because the assignment to him of an interest in the alleged cause of action against the railway company is not shown to be in writing duly acknowledged and filed and noted on the docket of the court where the action was pending, as provided by section 4457 of Kirby's Digest; and because it is not alleged that the railway company had any actual notice of the assignment to him. This would be true if he were suing upon a statutory assignment, but such is not his attitude in this case. Mrs. Smith sues upon the alleged fraud in the procurement of her assignment to Nelson of the whole cause of action, and Bush is properly joined as

plaintiff because of his interest therein. His rights are worked out through her, entirely independent of the statute in question. If no fraud has been perpetrated upon Mrs. Smith in the procurement of the assignment, then Bush has no standing in the suit, unless he has complied with the statute by filing a written transfer, duly acknowledged, etc., with the papers in the suit, or unless the railway company had actual notice of the same, as held by this court in *Kansas City, F. S. & M. Rd. Co.* v. *Joslin,* 74 Ark. 551.

It may be said that the plaintiffs had a remedy at law, and might, in avoidance of the assignment and compromise, show fraud in the procurement, upon a motion in Nevada Circuit Court to reinstate the cause, or in a new action against the railway company to recover the damages. *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 73 Ark. 42, 83 S. W. 332. But this remedy does not oust the concurrent jurisdiction of courts of equity to grant relief against fraud by cancelling a written release or assignment obtained by such means. 1 Pom. Eq. Jur. (3 Ed.), § 188; *George* v. *Tate,* 102 U. S. 564; *Delaine* v. *James,* 94 U. S. 207.

Our conclusion is that the chancellor erred in sustaining the demurrer, and the cause is reversed with directions to overrule the same, and for further proceedings not inconsistent with this opinion.

BRADSHAW *v.* BANK OF LITTLE ROCK.

Opinion delivered October 7, 1905.

1. CREDITORS' BILL—RECEIVERSHIP OF INSOLVENT CORPORATION.—Under Kirby's Digest, § 950, providing that "any creditor or stockholder of any insolvent corporation may institute proceedings in the chancery court for the winding up of the affairs of such corporation, and upon such application the court shall take charge of all the assets of such corporation and distribute them equally among the creditors, after paying the wages and salaries due laborers and employees," a bill by a creditor against an insolvent corporation, alleging plaintiff's claim and

defendant's insolvency and asking for the appointment of a receiver to take charge of the bank's assets, is a creditors' bill. (Page 504.)

2. SAME—ALLOWANCE OF ATTORNEY'S FEE.—Where a creditors' bill is brought for the purpose of procuring the appointment of a receiver to wind up the affairs of an insolvent corporation, the cost of securing the receiver, including reasonable attorney's fee, must be borne by all the creditors in proportion to the amount realized by them. (Page 504.)

3. SAME—APPLICATION FOR ALLOWANCE OF ATTORNEY'S FEE.—The application in a creditors' suit to the chancery court for the allowance of the fee of plaintiff's counsel may be made either by the creditor who employed the counsel or by counsel who performed services. (Page 504.)

4. SAME—BY WHOM ATTORNEY'S FEE IS PAYABLE.—The fee of the plaintiff's counsel in a creditors' suit is not payable by the debtor as costs of the suit, but is payable out of the funds realized in the suit. (Page 505.)

5. SAME—AMOUNT OF ATTORNEY'S FEE.—Where a suit was brought for the benefit of all the creditors, and the services of plaintiff's counsel resulted in securing or producing no fund for the benefit of creditors, the extent of the assets realized in the suit may be considered in fixing the fee of such counsel, which should be a reasonable charge for the services performed. (Page 505.)

Appeal from Pulaski Chancery Court.

JESSE C. HART, Chancellor.

Reversed.

STATEMENT BY THE COURT.

The Little Rock Vehicle & Implement Company, by their attorneys, Bradshaw & Helm, brought an action in equity against the Bank of Little Rock, alleging that the plaintiff was a creditor of the bank and that the bank was insolvent, and praying that a receiver be appointed to take charge of the assets of the bank and for other relief. A receiver was appointed, who took charge of the assets of the bank. The other creditors of the bank proved their claims before the receiver, and assets of the bank were recovered by him amounting to $185,000, sufficient to pay the claims of all the creditors in full.

Afterwards Bradshaw & Helm, attorneys for the plaintiff, Little Rock Vehicle & Implement Company, filed an intervening petition. They set up the fact that, as attorneys for the Vehicle Company, they had filed a complaint, and secured the appointment of a receiver to take charge of the assets of the Bank of Little

Rock; that the complaint filed by them in that action was in fact a creditors' bill, and that it brought into court assets of the bank sufficient to pay the claims of all the creditors; and they asked that an allowance of $500 be made out of the funds in the hands of the receiver for their services in bringing said action.

The Bank of Little Rock filed an answer, in which it denied that the petitioners filed the complaint in the interest of the creditors of the bank generally, but alleged that they represented the plaintiff in that action, and one or two other creditors only, and it denied that petitioners had rendered any services to the receiver or to the general creditors of the bank.

On the hearing the court held that the allowance should not be made, and dismissed the petition, from which judgment interveners appealed.

W. E. Atkinson, Pugh & Wiley, Blackwood & Williams, and *Ratcliffe & Fletcher,* for appellants.

The suit was for the benefit of the general creditors of the Bank of Little Rock. 5 Thomp. Corp. § 6567; Kirby's Dig. § § 249-942; 2 Beach, Trusts & Trustees, § 614; 97 N. Y. 105. And if so, appellants are entitled to a fee for their services, 105 U. S. 527; 13 Allen, 474; 10 Wall. 483; 8 Ves. 4; 93 U. S. 352; 113 U. S. 116; 53 Ark. 560; 66 How. 130; Gluck & Becker, Recrs. Corp. 354; Beach, Recrs. 813; 9 C. C. R. (Ohio), 132; 35 Ohio St. 581; 70 Fed. 643; 38 Fed. 281; 45 S. C. 319; 113 U. S. 116; 43 Fed. 719; 87 Ga. 134; 29 Ga. 142; 59 S. W. 709; 67 Fed. 85; 12 Cyc. 60.

J. M. Moore and *W. B. Smith,* for appellee.

Appellants are not entitled to a fee for services other than by contract. 1 S. E. 5; 91 N. Y. 57; Beach, Recrs. § 752; 122 Mass. 422; 88 N. Y. 571; 21 S. C. 179; 91 Fed. 19; Fed. Cases, 4552, 6530.

RIDDICK, J., (after stating the facts.) This is an application by attorneys, who brought an action to recover a debt against an insolvent bank and secured the appointment of a receiver, for allowance of a fee for such services. The action was brought in the name of the Little Rock Vehicle & Implement Company, and the attorneys were acting for this company and one or two other creditors of the bank. The receiver collected assets

of the bank amounting to $185,000, sufficient to pay all the creditors of the bank, and the petitioners allege that the petition filed by them was in the interest of all the creditors, and that they are entitled to have compensation for their services allowed out of the funds in the hands of the receiver.

Our statute forbids an insolvent corporation from giving preference to any of its creditors, and provides that, "any creditor or stockholder of any insolvent corporation may institute proceedings in the chancery court for the winding up of the affairs of such corporations, and upon such application the court shall take charge of all the assets of such corporation and distribute them equally among the creditors, after paying the wages and salaries due laborers and employees." Kirby's Digest, § § 949, 950. A consideration of the statute shows that the action brought by the plaintiff to secure the appointment of a of a receiver and wind up the affairs of this insolvent bank was for the benefit of all the creditors of the bank. For that reason it is just and equitable that the cost of securing the receiver, including reasonable attorney's fees, shall be borne by all the creditors, in proportion to the amount realized by them. Otherwise, the creditor who brought the action, having to bear all the cost of the attorney's fees, would, in the end, secure a less proportion of his debt than the other creditors. To avoid this inequality, it is customary and usual for the court in such cases to make him an allowance sufficient to cover reasonable charges for his counsel. This question came before the Supreme Court of Massachusetts in a recent case where the plaintiff had procured the appointment of a receiver, and the court sustained the allowance, and said that "when many persons have a common interest in a fund, and one of them for the benefit of all brings a suit for its preservation, and retains counsel at his own cost, a court of equity will order a reasonable amount to be paid to him out of the funds in the hands of the receiver in reimbursement of his outlay." *Davis* v. *Bay State League,* 158 Mass. 434; *Tompkins Co.* v. *Chester Mills,* 90 Fed. 39; *Burden Central Sugar Refining Co.* v. *Ferris Sugar Mfg. Co.,* 87 Fed. 810; *Trustees* v. *Greenough,* 105 U. S. 527.

The main purpose of such an allowance, however, is not to benefit the attorney, but for the benefit of his client and to secure

equality and justice between the creditors. For that reason, we on first thought were inclined to the opinion that the application for such an allowance should be made by the creditor, and not by the attorney, and that for that reason this petition was properly dismissed. But on examination of the case we find that the petition can be made either by the creditor who employed counsel or by the attorneys who performed the services. *Trustees* v. *Greenough,* 105 U. S. 527.

So, treating the petition as properly brought, we have next to consider the proper basis for determining the amount of such fees.

Before proceeding to that point, it is proper to observe that this allowance does not come out of the bank, but from the creditors in proportion to the sums received by them from the receiver. It is alleged that the funds of the bank in the hands of the receiver are sufficient to pay all the creditors in full; and when the bank has paid its creditors in full, it cannot be taxed any further for attorney's fees. The cost which a successful litigant may recover of his adversary in this State does not include such fees.

The petitioners in the action brought by them represented only their own clients, though the action brought was equally beneficial to all creditors of the bank. If their services had resulted in securing or producing a fund for the benefit of the creditors, then the amount of this fund might well be the main element to be considered in fixing the amount of such fee; but no such fund was produced here. The attorneys, acting for two or three creditors, filed a complaint against an insolvent bank, asking for a receiver. The bank admitted insolvency, a receiver was appointed, and here the services of the attorneys ended. The insolvency of the bank resulted from a large loan made by the bank to a party who never repaid it. A mistake was made, but there is no charge of any dishonesty or fraud on the part of the bank officials, or that the remaining assets were in danger of being squandered; and for this reason we, as before stated, do not think that these assets were produced or secured by the action against the bank. In fixing the amount to be allowed, the extent of the assets that came to the hands of the receiver may, no doubt, be considered; but the object of the allowance, as before stated, is not to give the attorneys a larger fee than they might have re-

covered from their own clients, but to shift the burden of the charge from them and place it upon the creditors of the bank generally. The inquiry then is, what would have been a reasonable charge against their own clients for the services performed? No witness testified on this point, though Mr. Bradshaw said that he did not intend to charge his client a very large fee. For this reason, we are of the opinion that the sum demanded is excessive, but we are of the opinion that it is better to refer the matter to the learned chancellor before whom the proceedings were had, and allow him to make the allowance against the creditors generally in such sum as to him may seem proper.

Judgment of dismissal reversed, and cause remanded with an order that a reasonable allowance be made to counsel sufficient to cover costs of services actually performed.

RUSSELL v. HALTOM.

Opinion delivered October 7, 1905.

1. SALE—SUFFICIENCY OF DELIVERY.—Where a vendor of chattels delivered them to one of his employees to hold as agent for the vendee, the delivery was sufficient to complete the sale. (Page 508.)
2. EVIDENCE—INTENTION.—Where a vendor had been permitted to testify that the vendees in a bill of sale absolute on its face demanded the instrument as security for a pre-existing debt, and that he executed same only as security, it was not error to refuse to permit him to testify what his intention was in executing the bill of sale. (Page 509.)

Appeal from Ouachita Circuit Court.

CHARLES W. SMITH, Judge.

Affirmed.

Action by J. C. Russell as trustee of the estate of L. E. Breathwit, a bankrupt, against Haltom & Lester to recover possession of personal property.

Verdict and judgment below for defendants, and plaintiff appealed.

Thornton & Thornton, for appellants.

Appellant should have been permitted to show that the bill of sale was intended as security for a debt past due. 54 Ark. 32. An unusual degree of secrecy observed between the parties in making the sale is a badge of fraud. Wait, Fr. Conv. § 234. The want of delivery and possession in the sale of chattels is evidence of fraud. Wait, Fr. Conv. § 259; 7 Ark. 197; 23 Ark. 128; 31 Ark. 163; 35 Ark. 306; 54 Ark. 305; 50 Ark. 289; 33 Ark. 328. Inadequacy of price is a strong badge of fraud. 8 Ark. 510; 33 Ark. 338; Wait, Fr. Conv. § 232. Fraud may be presumed not only from the face of the instrument but from concurrent acts and circumstances. 41 Ark. 186.

Smead & Powell, for appellee.

There was sufficient delivery of the property. 54 Ark. 305. Possession of personal property taken by the defendants at the time and retained is equivalent to record notice. 29 Ark. 279; 52 Ark. 385. The plaintiff could not maintain his suit until he had offered to return the lumber or its value, obtained by virtue of the security. 16 Ark. 90; 34 Ark. 103; 45 Ark. 447; 62 Ark. 133. One who seeks to rescind a contract must put, or offer to put, the other party *in statu quo.* 4 Ark. 467; 25 Ark. 196; 35 Ark. 483; 38 Ark. 334.

McCULLOCH, J. Appellant, as trustee of the estate of Mrs. L. E. Breathwit, who had been adjudged a bankrupt, commenced this suit to recover of the defendants, Haltom & Lester, thirty-two mules, two wagons, thirty sets of harness, and two saddles. The defendants answered, claiming to be owners of the property by purchase and delivery from Mrs. Breathwit before the adjudication of bankruptcy, and exhibited a written bill of sale from her, purporting to convey the property to them absolutely in consideration of the sum of $2497,21 paid in cash.

It is undisputed that, at the time of the execution of the bill of sale by Mrs. Breathwit, she was indebted to the defendants in the sum named in the bill of sale for balance due on the price of a lot of lumber bought from them a few months previously. The defendants, as security for the purchase price, retained title to the lumber until the price should be paid. A part of the lumber was on hand when the bill of sale was executed, and defendants had

forbidden the shipment of any more of the lumber until the debt should be paid in full.

Appellant contended that the bill of sale, though on its face purporting to convey unconditionally the title to the property, was intended only as security for the debt, and he introduced testimony tending to establish that fact. J. L. Breathwit, who, as agent for Mrs. L. E. Breathwit, conducted the dealings with appellees, and executed the bill of sale, testified that the instrument was intended as security, and that the property was worth $4250. He also testified that it was agreed between the parties that the transaction should be kept secret, and that the bill of sale should not be placed of record. T. P. Lester, one of appellants, testified that the conveyance was intended to be absolute, and that there was no agreement or understanding that it should operate only as a security for debt. He and other witnesses introduced by appellees testified that the price named in the bill of sale was a fair market value of the property.

The case was tried below by appellant upon the theory that the conveyance was intended only as security, and that the same was a fraud upon the rights of other creditors of Mrs. Breathwit. The court submitted it to the jury upon this theory, and, in returning a verdict for the defendants, the jury necessarily found that the transaction was free from fraud, and that an absolute conveyance of the title was intended. The court by its instructions, in effect, told the jury that they must find these facts to exist before they could return a verdict for the defendants. The instructions of the court were as favorable to appellant as the testimony warranted, and we find no errors in them prejudicial to his rights. The testimony was conflicting, and quite sufficient to warrant the verdict.

Counsel for appellant contends that there was no delivery of the property under the bill of sale, and that the title did not pass against creditors. On this issue, too, the verdict of the jury settled the question against appellant's contention. It was shown that the delivery of the property was made at the time of the execution of the bill of sale, and that the same was left in the possession of one Grayson, an employee of appellant, to hold for appellees. Counsel contends that this was equivalent to retention of possession by appellant, and that no title passed. This conten-

tion is not, however, sound, for the reason that Grayson, though an employee of appellant, could have been constituted the agent of appellee for the purpose of holding the property, and the evidence shows that such was a fact. This constituted not only a constructive delivery, but an actual change of possession. Either is sufficient to complete a sale free from fraud. *Shaul* v. *Harrington,* 54 Ark. 305; *Lynch* v. *Daggett,* 62 Ark. 592; *White* v. *McCracken,* 60 Ark. 613.

It is also contended that the court erred in refusing to permit witness J. L. Breathwit to state what his intention was in executing the bill of sale. Such testimony was inadmissible, and was properly excluded. The court had already permitted the witness to state that appellees demanded the conveyance as security for their debt, and that he executed the same only as security. It was incompetent for him to state what his intentions were in the transaction.

Affirmed.

JAMES v. MALLORY.

Opinion delivered October 7, 1905.

76 509
186 283

1. FRAUD—VOLUNTARY CONVEYANCE.—A voluntary conveyance by a debtor who was in fact insolvent is void as against creditors, even though he had no actual intent to defraud. (Page 513.)
2. MORTGAGE—ABSOLUTE DEED HELD TO BE.—Where a debtor executed an absolute deed of his land to his creditor in payment of his debt, and at once repurchased the land, taking a quitclaim deed and giving his notes for the amount of such debt, for which a lien was reserved in the face of the deed, the effect of the transactions was not to extinguish the debt, but merely to give a mortgage for its payment. (Page 513.)
3. ESTOPPEL—INCONSISTENT POSITIONS.—Where a creditor took an absolute deed from his debtor, and executed to him a quitclaim deed, in the face of which a lien was reserved for the amount of the debt, he is not estopped to assert that the conveyance was only a security by reason

of the fact that he sued to foreclose the lien reserved in the quitclaim deed. (Page 514.)

4. APPEAL—ISSUE NOT RAISED BELOW.—A claim of homestead will not be allowed on appeal where it was not asserted in the pleadings, and no direct proof was introduced tending to establish it. (Page 514.)

5. STATUTE OF LIMITATION— FRAUDULENT CONVEYANCE.—There must be an actual holding of the property for the statutory period before a creditor is barred of his right to set aside a fraudulent conveyance and subject the property to the payment of his debt, as long as the debt itself is not barred by limitation. (Page 514.)

Appeal from Crittenden Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

Affirmed.

STATEMENT BY THE COURT.

Appellees, Mallory, Crawford & Co., commenced this suit in equity on February 4, 1901, against Stephen James, Joseph N. James, and J. L. King, to cancel a conveyance by said Stephen James, alleged to be fraudulent, of certain lands, and to subject the same to the payment of appellees' claim.

Stephen James died while the suit was pending below, and the cause was revived in the name of the administrator.

On January 16, 1893, Stephen James was indebted to appellees in the sum of $18,801.22, and executed to them a deed with covenants of warranty conveying certain lands in Crittenden County. The deed recited a consideration of $18,801.22, the amount of said indebtedness, cash in hand paid. On the same day appellees reconveyed the lands to Stephen James by quitclaim deed, reciting the same consideration to be paid in two installments as evidenced by his two notes to them of that date, one for 10,000, payable December 1, 1893, and the other for $8,801.22, payable January 1, 1894, each bearing interest at 8 per cent. per annum. Subsequently James sold and conveyed some of these lands to W. R. Bateman and same to D. W. Clark on credit, and took notes for the purchase price, which he assigned to appellants.

Appellees brought suit in the Crittenden Chancery Court against James to foreclose the vendor's lien reserved in the said quitclaim deed to him, and made Bateman and Clark parties defendant to the suit. In September, 1899, a decree in that suit

was rendered in favor of appellees against James for the amount of the said notes and interest, which the court found to be the sum of $27,535, and said lands were ordered to be sold by the commissioner of the court. The lands were sold by the commissioner, and the net proceeds paid over to appellees on their debt, leaving a balance of $20,258 unpaid on December 3, 1900, the date of the last payment. On October 20, 1892, Stephen James executed to defendant J. L. King a deed conveying the lands in controversy for an expressed consideration of $2500 cash paid; and on July 31, 1893, King executed a deed to Stephen James as trustee for his two children, Joseph N. James, appellant, and America C. James, who has since died intestate and without issue. This deed recites a cash consideration of $10 and the affection of the grantor for the two beneficiaries, who were his cousins. Both of these deeds were filed for record on September 4, 1893. It is alleged in the complaint that both of these deeds were executed without consideration, and with the fraudulent intent to cheat and hinder the creditors of said Stephen James, and that he was insolvent at the time; and the purpose of this suit is to cancel them.

The answer of Joseph N. James denies that his father, Stephen N. James, was insolvent at the time of the execution of this deed to King, or that the same was executed with any fraudulent intent, and pleads the seven years statute of limitation in bar of appellees' right to sue to set aside the deed.

The chancellor found in favor of the plaintiffs upon the issue of fact, and rendered a decree in their favor for the sum of $16,330.80, cancelled said deed, and ordered said lands to be sold by the commissioner for the payment of said debt.

Defendant Joseph N. James appealed to this court.

Wm. M. Randolph, George Randolph and *Wassell Randolph,* for appellant.

The suit was improperly begun, and cannot be maintained. 23 Ark. 494; 23 Ark. 747; 33 Ark. 338; Wait. Fr. Conv. & Cred. Bills, § § 58-60; 11 Ark. 411; 11 Ark. 716. The deed marked exhibit "E" had for its object the support of the two minor children, America C. and Jos. N. James. 31 Ark. 581; Freeman, Cotenancy & Part. § § 12, 13, 28, 362, 365; 14 Gray, 546; 2 Kent Com. 350; 3 Kerr, Real Prop. § § 1917, 1975; 4 Ark. 602; 19

Ark. 267; 17 Ark. 154. The court had no power to withdraw from the jurisprudence of the probate court the interest in the lands in controversy which came to Jos. N. James at the death of America C. James. 10 Ark. 541; 22 Ark. 572; 27 Ark. 252; 28 Ark. 341; 33 Ark. 727; 36 Ark. 529; 40 Ark. 433; 47 Ark. 222; 48 Ark. 544; 51 Ark. 366; 8 How. 112; 14 How. 374; 17 How. 160; 21 Wall. 276. A valuable consideration may be other than the actual payment of money, and may consist of acts done after the conveyance. 1003 U. S. 22; 111 U. S. 722; 4 Kent, Com. 463; Dart, Vendors, 1018, 1019; 7 Peters, 348; 103 U. S. 22. Stephen James in procuring the conveyance from King to himself as trustee was guilty of no fraud. Kirby's Dig. § § 3659, 3660; 17 Ark. 146; 31 Ark. 554; 41 Ark. 316; 22 Ark. 477; 23 Ark. 258. The value of the lands could be denied by neither party. 1 Greenl. Ev. § § 24-27, 207; 156 U. S. 680. To annul a fraudulent transfer, the evidence must establish the assignor's intent at the time of the execution of the instrument. Wait, Fr. Conv. § 320; 8 Ark. 106, 470; 18 Ark. 124; 172; Kirby's Dig. § 3658; 67 Ark. 325; 34 Ark. 292. The deed was not fraudulent. 11 Wheat. 199; 8 Ark. 83; 1 Conn. 525; 8 Ark. 105, 470; 29 Ark. 407; 54 Ark. 162; 23 Ark. 494. Fraud will not be presumed. 38 Ark. 426; 50 Ark. 46; 56 Ark. 256. The land conveyed was Stephen James's homestead, and not subject to his debts. 44 Ark. 180; 43 Ark. 429; 52 Ark. 101; 57 Ark. 242; 73 Ark. 489. Appellees must show affirmatively a good and complete cause of action. 27 Ark. 343; 43 Ark. 136; 48 Ark. 277; 69 Ark. 311; 23 Ark. 336. Appellee's suit is barred. 10 Ark. 211; 63 Ark. 374; Kirby's Dig. § § 3757, 5056; 38 Ark. 181; 34 Ark. 537, 547; 48 Ark. 312; 50 Ark. 340; 144 U. S. 533; 2 Black, 599; 115 U. S. 623; 191 U. S. 538; Kirby's Dig. § § 6059, 5399; 53 Ark. 359; 43 Ark. 464; 47 Ark. 317; 49 Ark. 468; 67 Ark. 27; 7 Yerger, 222; 46 Ark. 25; 19 Ark. 16; 55 Ark. 572; 16 Ark. 129; 14 Ark. 479; 20 Ark. 293; 47 Ark. 301.

Frank Smith and *Hawthorne & Hawthorne,* for appellee.

It was not necessary to prove that an execution was issued and returned *nulla bona.* Kirby's Dig. § 6297. The conveyance from King to James as trustee is *prima facie* fraudulent, and the burden was upon appellant to show that it was not fraudulent. 22 Ark. 143; 43 Ark. 84; 38 Ark. 59; 55 Ark. 419;

55 Ark. 116; 68 Ark. 162; 70 Ark. 58. The facts upon which the decree is based need not be recited in the record. 25 Ark. 487. There was no allegation or proof tending to show that James held any of the lands as a homestead. 46 Ark. 96; 33 Ark. 454. Upon the death of America C. James her interest in the lands ascended to her father. Kirby's Dig. § 2636; 15 Ark. 555; 19 Ark. 396. The court, having jurisdiction for one purpose, had jurisdiction for all purposes, and it was its duty to direct a sale of the lands. 29 Ark. 407; 14 Ark. 50; 37 Ark. 286; 33 Ark. 454; 46 Ark. 25. Appellant is in no position to invade the doctrine of laches. 61 Ark. 527; 39 Ark. 111; 21 Florida, 203; 24 W. Va. 594; 31 Miss. 434.

McCULLOCH, J., (after stating the facts.) The testimony as to the financial condition of Stephen James at the time he executed the deed in question is conflicting, but we think by a fair preponderance his insolvency is established. It is shown that, in addition to the debt to appellees, he was indebted in a large amount to another firm of merchants in Memphis, Tenn., who were unable to collect anything from him, and whose debt remains unpaid. There is some evidence tending to establish the fact that he caused the conveyance to be executed to his children without any actual fraudulent intent, and under the honest belief that he was solvent and would be able to pay all his debts. He owned a large quantity of land, and perhaps expected to receive at some time sufficient sums from the sale of this land to pay his debts; but this hope was never realized. On the contrary, the lands upon which appellees held a lien as vendors were sold under decree, leaving him hopelessly insolvent. If he was in fact insolvent at the time, and voluntarily conveyed away his property without consideration, the conveyance is void as against creditors, even though he had no actual intent to defraud.

It is contended on behalf of appellants that the conveyance of lands by Stephen James to appellees on January 16, 1893, extinguished his debt to them, and that his notes for the price of the lands reconveyed to him by them was a new debt created subsequent to the conveyance to King. It is proved, however, that the conveyance to appellees was not in extinguishment of the debt, but as security therefor, and appellees must be treated

as creditors whose debts existed at the time of the fraudulent conveyance. In a recent decision on this subject we said: "The conveyance must be judged according to the real intent of the parties. If there is a debt subsisting between the parties, and it is the intention to continue the debt, it is a mortgage; but if the conveyance extinguishes the debt, and the parties intend that result, a contract for a resale at the same price does not destroy the character of the deed as an absolute conveyance." *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027. Applying the rule thus announced to the facts of this case as proved with reference to the conveyance, it must be treated as a mortgage.

But counsel for appellant say that appellees, by suing to foreclose the lien reserved in the quitclaim deed, elected to treat the original debt as having been extinguished, and are now estopped to assert that the conveyance was only a security. Not so. The form of the debt only was changed, and the suit was to foreclose the security on the land, and the position assumed in this suit is not inconsistent with their position in the former suit.

It is urged here that a portion of the land was the homestead of Stephen James, and that a conveyance thereof could not have been fraudulent. The proof is not sufficient to establish the homestead right. No reference is made in the pleadings to the homestead question, and no direct proof introduced to show that the land was the homestead of James. If it was in fact his homestead, it could easily have been proved; but no witness was asked a question calculated to elicit information on the subject. All that was said about it in the testimony came out incidentally. Witness King said that James spoke of redeeming a portion of the land which his home was on, in section twenty-seven. This is too vague to base a finding upon that the land was his homestead at the time he made the conveyance in question. If that fact had been relied upon, direct proof should have been introduced tending to establish it. *Steele* v. *Robertson,* 75 Ark. 228, 87 S. W. 117.

The recent case of *Baldwin* v. *Williams,* 74 Ark. 361, 86 S. W. 423, settles the question of limitations against the contention of appellant. We there held that there must be an actual adverse holding of the property for the statutory period before a creditor is barred of his right to set aside a fraudulent

conveyance and subject the property to the payment of his debt, so long as the debt itself is not barred by limitation.

In this case the debt was not barred, and there is no proof of adverse occupancy. On the contrary, it appears that Stephen James, the debtor, remained in possession of the property until the commencement of this suit. The suit is not barred. We find no error in the decree, and the same is affirmed.

76	515
f78	6
f82	327
76	515
83	274
84	100
84	297
76	515
f85	495

PETTY v. STATE.

Opinion delivered October 7, 1905.

1. MURDER—BURDEN OF PROOF.—An instruction in a murder case in the language of the statute that, "the killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused," is not misleading if the jury are further instructed upon the doctrine of reasonable doubt; as the two instructions mean that when the killing is proved, if the State produce no evidence tending to mitigate or excuse the homicide, it devolves upon the accused to do so, but when any evidence is introduced, either on the part of the State or the accused, which, taken in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt of accused's guilt, they should acquit. (Page 517.)
2. MURDER IN SECOND DEGREE—INTENT.—A specific intent to take life is not a necessary element of murder in the second degree. (Page 518.)
3. FORMER TESTIMONY—ABSENT WITNESS.—Where one who was present at the examining trial in a felony case testifies that he took down the testimony of a witness in writing, and that the writing contains an accurate statement of such testimony, he may be allowed, in the absence of such witness, to read such writing to the jury. (Page 518.)
4. NEW TRIAL—SURPRISE.—A party cannot claim to have been surprised by by the testimony of witnesses of the opposite party, nor by evidence introduced by such party, if the same tends to support the issues joined, and is such as might have been reasonably anticipated. (Page 519.)
5. HOMICIDE—WORDS AS PROVOCATION.—Provocation caused by words only is not sufficient to reduce a homicide from murder to manslaughter. (Page 520.)
6. SAME.—While passion created by abusive words does not reduce a

homicide from murder to manslaughter, still such provocation may well be considered in assessing the amount of punishment. (Page 520.)

7. SAME—REDUCTION OF PUNISHMENT.—Where the evidence in a murder case shows that the killing was the result of a sudden quarrel, and was done under the heat of passion caused by very provoking language on the part of deceased, and under circumstances which indicate that the punishment of fifteen years' imprisonment, assessed by the jury, was excessive, the punishment will be reduced. (Page 520.)

Appeal from Pulaski Circuit Court.

ROBERT J. LEA, Judge.

Affirmed with modification.

STATEMENT BY THE COURT.

Crite Petty was indicted by the grand jury of Pulaski County for murder in the first degree for killing one Arthur Pursur by stabbing him with a knife.

On the trial it was shown that during the afternoon of the 18th day of February, 1905, the defendant, Petty, and Pursur engaged in a friendly game of cards at the Turf Exchange Saloon in Argenta. Petty won the game, and then said to Pursur, "Well, I will take a cigar." Pursur was somewhat under the influence of liquor, and replied to Petty by an insulting remark. Soon afterwards they began to fight, Petty using a pocket knife and Pursur a chair. Petty cut Pursur twice with the knife; one cut was on the shoulder, and the other on the right side of the neck. The coroner, who examined the body, testified that the wound on the neck "was a gash about five inches long, commencing back of the right ear and ranging down, cutting through all the large blood vessels in the side of the neck and cutting the neck nearly half through." Shortly after this wound was given the fight was stopped. Pursur put his hand on his neck, and pulled his collar down. The blood spurted from the wound. When Petty noticed the blood streaming from the wound of Pursur, he picked up his hat, and left the saloon. Pursur was assisted to the floor, and in a moment or two was dead.

The jury returned a verdict of guilty of murder in the second degree, and assessed the punishment at fifteen years in the penitentiary.

The defendant appealed.

W. R. F. Paine and *J. W. & M. House,* for appellant.

The court erred in permitting the introduction of the statement of David Hughes taken in the examining court. Kirby's Dig. § § 2148, 2153, 2157, 800; 66 Ark. 545; Kirby's Dig. § 1997; 40 Ark. 461; 33 Ark. 539; Gantt's Dig. § 1707; 22 Ark. 372; 47 Ark. 185; 68 Ark. 441; 37 Ark. 324; 29 Ark. 23; 60 Ark. 400; 2 Ark. 229; 54 S. W. 948; 30 So. 658; 45 Ia. 14; 78 Ia. 292; 105 Cal. 655. Instruction No. 8 was error, as it eliminated the question of reasonable doubt. Kirby's Dig. § 2387; 88 S. W. 822; 71 Ark. 450; 148 U. S. 665; 110 U. S. 47. Instruction No. 3 requested by appellant should have been given. 59 Ark. 132. A new trial should have been granted on the ground of surprise. 2 Ark. 45; 11 Ark. 16; 18 Ark. 570; 20 Ark. 55; 26 Ark. 496; 34 Ark. 659; 41 Ark. 229.

Robert L. Rogers, Attorney General, for appellee.

The verdict is supported by the evidence. 74 Ark. 491. A proper foundation was laid for the admission of the statement of David Hughes. 58 Ark. 353; 22 Ark. 375; 33 Ark. 540; 40 Ark. 461; 60 Ark. 442; 16 Cyc. 1110.

RIDDICK, J., (after stating the facts.) This is an appeal by a defendant from a judgment convicting him of murder in the second degree, and assessing his punishment at fifteen years' imprisonment. We have read the instructions given by the presiding judge, and find nothing calculated to prejudice the rights of the defendant.

Counsel contends that the court erred in reading to the jury, as part of his charge, a section of the digest which provides that, "the killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide devolves on the accused," etc. Kirby's Digest, § 1765. Counsel say that the giving of this section eliminated the doctrine of reasonable doubt, but we do not think so. When taken in connection with the instruction on the question of reasonable doubt given by the court, it means nothing more than that, when the killing is proved, if the State produces no evidence tending to mitigate or excuse the homicide, it devolves on the accused to do so; but when any evidence is introduced, either on the part of the State or the defendant, which,

taken in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt of the guilt of the defendant, they should acquit. This was a correct statement of the law. and is not in conflict with the decision in *Cogburn* v. *State, ante,* p. 110, but, as we think, is supported by that decision.

Again, it is said that the court told the jury that, in order to make out the crime of murder in the second degree, it was not necessary to show a specific intent to take life. But this was also correct, for the main distinction between murder in the first and second degree is that to make out the crime of the first degree such a specific intent must be shown, while it is not necessary in the second degree. *Brassfield* v. *State,* 55 Ark. 556.

It is contended with much force that the court erred in permitting the prosecuting attorney to prove before the jury the testimony of David Hughes, given on the trial before the examining court. It was shown that Hughes testified before the examining court that the defendant was present, and had opportunity to cross examine, that Hughes did not live in this State, was a resident of Missouri, and that it was not probable that his attendance could be procured. His testimony had been taken down in writing by a witness who was present at the examining court. This witness identified the writing which he had made at the request of the examining magistrate, and testified that it was a correct statement of the testimony of Hughes, and contained the substance of all his testimony given at the trial. The presiding judge thereupon allowed it to be read to the jury. Counsel admit that it was proper to prove the testimony of a witness who is beyond the jurisdiction of the court, when a proper foundation has been laid; but they contend that it was not proper to introduce this statement as evidence. We admit that of itself the writing was of no probative force, and that, even had it been made by the magistrate, it would not of itself have been competent evidence. *Payne* v. *State,* 66 Ark. 545. But the testimony of this absent witness might have been proved by any one who heard him testify and could remember the testimony. And when a person who heard him testify reduced the testimony of the witness to writing at the time of the trial, and knows that it contained the substance of all his testimony, he may be allowed to refresh his memory by looking at the writing. When the

testimony is too long for the witness to repeat accurately, but he is able to testify that the writing is an accurate statement of it, he may read the writing to the jury as his testimony of what the absent witness testified on the former trial. *Wilkins* v. *State,* 68 Ark. 441. There are many cases which hold that this may be done, even though the witness has no present recollection of the former testimony, if he knows that the writing was made by him at the time of the former trial, and that it is a correct statement of the testimony of the absent witness. The weight of authority seems to support that view. 16 Cyc. 1106. The testimony goes to the jury for their consideration, and may be contradicted by the testimony of any other witness who was present at the former trial and heard the testimony. Now, in this case, the witness who attended the former trial and took down the testimony of the absent witness, not only identified the writing, but, after examination of it, testified from the writing and from his present recollection that it was a correct statement of the testimony of the former witness, though, on account of its length, he was doubtless unable to repeat the testimony accurately without the aid of the writing. Under these circumstances we do not think the court erred in allowing this writing to be read as a part of the testimony of the witness. Though the bill of exceptions is not quite clear on this point, after considering it, we think this is what was done in the trial court, for the presiding judge refused to allow the writing to be read to the jury until witness had testified that he made it on the former trial, and that it was a correct statement of the testimony of the absent witness, and contained the substance of all the testimony given by such witness. The contention of appellant on this point must therefore be overruled.

Neither can we sustain the further contention that the defendant was surprised by this and other evidence on the part of the State. The general rule is that the doctrine of surprise does not apply to the testimony of witnesses of the opposite party, nor to evidence introduced by such party, when the same tends to support the issues joined and is such as might reasonably have been anticipated. Hughes testified before the examining magistrate; and as his testimony was material, defendant should have anticipated that, if Hughes was absent from the State, his former testimony would be proved.

Lastly, it is contended with much earnestness that the evidence was not sufficient to justify a verdict of murder in either degree. It seems to us very clear that this was not a premeditated, deliberate killing. It was the result of a sudden quarrel between the defendant and Pursur. But there was evidence that the defendant, angered by some indecent language used towards him by Pursur, commenced the assault upon him with a knife, and that Pursur only used the chair in an endeavor to protect himself. On the other hand, there was evidence tending to show that the affray was commenced by Pursur's striking the defendant with a chair. The jury evidently found that the defendant commenced the assault; and, although this assault was provoked by indecent language of Pursur, still provocation caused by words only is not sufficient to reduce a homicide from murder to manslaughter, *Vance* v. *State,* 70 Ark. 272. There is a conflict of evidence, and the finding of the jury as to the grade of the offense must stand. But, taking the whole evidence together, we are well convinced that this is not a very aggravated case of murder. It was done under heat of passion caused by very provoking language on the part of Pursur, and under circumstances which in our opinion show that the punishment assessed by the jury is excessive. While passion created by words only does not reduce a homicide from murder to manslaughter, still such provocation may well be considered in assessing the amount of punishment, and we believe, in view of all the evidence, that justice will be best subserved by reducing the punishment to five years' imprisonment in the penitentiary.

With that modification the judgment will be affirmed.

---

76 520
87 112
188 518

76 520
89 372
89 589
190 498

RODGERS v. CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY.

Opinion delivered October 7, 1905.

1. TRIAL—DIRECTING VERDICT—REVIEW.—In reviewing the action of the trial court in directing a verdict for defendant, the question before the appellate court is whether the evidence introduced by the plaintiff was legally sufficient to support a verdict in his favor; and in testing

that question the testimony must be given its strongest probative force in favor of plaintiff's cause of action. (Page 522.)

2. CARRIER—FREIGHT TRAIN.—A passenger riding on a freight train assumes the inconveniences and risks usually and reasonably incident to travel on such trains. (Page 523.)

3. SAME—DUTY TOWARD PASSENGER ON FREIGHT TRAIN.—While a passenger on a freight train assumes the increased risk incident to the operation and management of such trains, yet, subject to this qualification, the railway company becomes bound in favor of the passenger by all the obligations of a common carrier in the case of a passenger train. (Page 523.)

4. PERSONAL INJURY—PROXIMATE CAUSE.—The failure of the railroad company to provide closets in a freight caboose was not the proximate cause of an injury to a passenger who was thrown off the train while relieving his bowels from the car steps. (Page 523.)

5. CONTRIBUTORY NEGLIGENCE—DISCOVERED PERIL.—Notwithstanding a passenger was negligent in placing himself in a perilous position on a car step, the railroad company is liable if the conductor saw his danger, and neglected to warn him or to exercise due care to prevent the train from suddenly moving. (Page 524.)

Appeal from Monroe Circuit Court; GEORGE M. CHAPLINE, Judge; reversed.

STATEMENT BY THE COURT.

Appellant, J. D. Rodgers, sued the Choctaw, Oklahoma & Gulf Railroad Company to recover damages for injuries caused by negligent operation of its train while he was a passenger thereon. A trial was had before a jury, appellant testified in his own behalf, and rested his case, whereupon the court instructed the jury to return a verdict in favor of the defendant, which was done.

C. F. Greenlee, for appellant.

Appellee was guilty of negligence, which was clearly proved. 37 Ark. 519; 102 U. S. 451; 38 N. E. 578; 33 N. E. 960; 55 N. W. 270; 85 Fed. 945; 57 Ark. 418; 31 L. R. A. 261; 33 L. R. A. 127. It was error to direct a verdict for defendant. 71 Ark. 445; 63 Ark. 94; 71 Ark. 305; 70 Ark. 230.

E. B. Pierce and *T. S. Buzbee,* for appellee.

No negligence on the part of the appellee is shown. 52 Ark. 517; 69 Ark. 405; 75 Ark. 263; 68 S. W. 88; 11 S. E. 555. The appellant was guilty of contributory negligence. 4 Elliott, Railroads, 2552; 54 Ark. 29; 40 Ark. 298; 46 Ark. 537; 71 Ark. 590; 38 Ga. 409; 50 Ga. 353; 84 Me. 203; 21 Am. & Eng. R. Cas.

405; 18 *Ib.* 179, 194; 22 N. E. 662; 34 Am. & Eng. R. Cas. 553; 67 Ill. 398; 84 S. W. 175; 55 Ark. 252.

McCULLOCH, J., (after stating the facts.) The only question before us for determination is, whether the evidence introduced by the plaintiff was legally sufficient to support a verdict in his favor; and in testing that question we must give the testimony its strongest probative force, and accept that view of the facts which it will warrant most favorable to plaintiff's cause of action. *Catlett* v. *Railway Co.*, 57 Ark. 461; *Ford* v. *St. L., I. M. & S. Ry. Co.*, 66 Ark. 363; *Burns* v. *St. Louis S. W. Ry. Co., ante* p. 10.

Appellant lived at Brinkley, a station on defendant's railroad, but was engaged in business at a switch known as the G. & C. Siding, six and one-half miles west of Brinkley, on defendant's road. Passenger trains did not stop at this switch, and appellant was accustomed to ride out there two or three times a week on freight trains which stopped there. On the occasion in question he boarded a freight train at Brinkley to go the the switch, and also shipped a lot of merchandise to be put off there. *En route* he became sick, and his bowels wanted to move, the call being too urgent to await the arrival at his destination. The caboose was not provided with a closet, and he asked the conductor to slow the train down so that he could get off, attend to the call of nature, and walk the remainder of the distance to the switch. The conductor declined to do that. Shortly afterwards the train reached the switch, and was brought to a stop, but the caboose was stopped over a trestle 85 feet long and 20 feet above the surface of the ground.

Appellant testified that he did not know that the caboose was over the trestle, and walked out on the rear step, expecting to get off; that as he walked out on the step he met the conductor going into the caboose, and the latter said to him, "You are in a hurry?" to which appellant replied, "Yes, I am;" that a brakeman on the front platform of the caboose called to him, saying, "Just squat on the steps." Appellant describes the incident as follows: "This man I was speaking about (the brakeman) said, 'Just squat down there,' and I said, 'I can't get off on the dump, for they have stopped over a trestle,' and he said, 'Squat on the steps' and I loosed my pants, and had the rail by my left hand, and the train

gave a jerk, and I fell to the trestle, and from there to the ground, and that's all there is to it." He testified also to material injury resulting from the fall—his collar bone and one rib were broken, and his arm was severely hurt.

Appellant contends that the railroad company was guilty of negligence in failing to provide a closet for the use of passengers, and that he should recover damages on that account. Freight trains are not equipped for the carriage of passengers, and public carriers are not required to equip them for that purpose. *Arkansas Midland Railway* v. *Cannan,* 52 Ark. 517; *Krumm* v. *St. L. I. M. & So. Ry. Co.,* 71 Ark. 590; *Chicago & A. Ry.* v. *Arnol,* 144 Ill. 261.

"A passenger riding in a freight train or a mixed train must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel on such trains, and is not entitled to insist upon having the same care and attention that he might justly demand upon a regular passenger train." 4 Elliott on Railroads, § 1629; Hutchinson on Carriers, p. 616. 1 Fetter on Carriers of Passengers, pp. 33, 34; *Olds* v. *New York, etc., Ry. Co.,* 172 Mass. 73. But where the railroad company undertakes the carriage of passengers on freight trains, it owes such passengers the same high degree of care to protect them from injury as if they were on a passenger train. Hutchinson on Carriers, p. 614; 1 Fetter on Carriers of Passengers, p. 585; *Erwin* v. *Railway Co.,* 94 Mo. App. 289; *C. & A. Ry. Co.* v. *Arnol, supra.* Judge THOMPSON states the rule thus: "We find the courts are agreed upon the proposition that where a railway carrier carries passengers upon its freight trains, it thereby assumes toward them the relation of a carrier to his passenger. And while in such a case it is a reasonable conclusion that the passenger assumes the increased risk incident to the operation and management of such trains, yet, subject to this qualification, the railway company becomes bound in favor of the passenger by all the obligations of a common carrier upon a regular passenger train." 3 Thompson on Negligence, § 2901. Moreover, if it be held that it was the duty of the company to provide closets, the omission to do so cannot be said to have been the proximate cause of the injury complained of by appellant.

We think, however, that there was evidence from which the jury might have found that the conductor knew of the perilous position of appellant and could have prevented the injury, either by warning him of the danger, or by holding the train at a standstill. If the conductor was aware of his peril, and could, by the exercise of ordinary care, have warned him, and failed to do so, or could, by the exercise of such care, have prevented the sudden movement of the train which threw appellant off, and failed to do so, the company is liable for the injury.

Appellant testified that the conductor saw him go down the steps, and said "You are in a hurry?" Whether the conductor meant that appellant was in a hurry to debark, or to relieve himself from the steps of the caboose, does not appear; but the testimony shows that the conductor went into the caboose, and the jury might have found that he knew appellant was in a position of danger on the steps with the caboose on a trestle 20 feet high. They might also have found that the conductor heard the brakeman direct appellant to "squat down on the steps," and knew that he was about to relieve his bowels in that position. If so, he should have warned appellant of the danger or exercised some care to prevent the train from suddenly moving. At least, the question of his knowledge of appellant's position and care exercised to protect him should have been submitted to the jury under proper instructions.

This court has repeatedly held that, notwithstanding the negligence of the injured person in putting himself in a perilous position, whether a passenger or a trespasser on the track, if the direct cause of the injury is the omission of employees of the railroad company, after becoming aware of his peril, to use a proper degree of care to protect him, the company is liable. *L. R. & Ft. Smith Ry. Co.* v. *Pankhurst,* 36 Ark. 371; *L. R. & Ft. Smith Ry. Co.* v. *Cavenesse,* 48 Ark. 106; *St. Louis & S. F. R. Co.* v. *Townsend,* 69 Ark. 380; *St. L., I. M. & Sou. Ry. Co.* v. *Evans,* 74 Ark. 407; *L. R. Traction & Electric R. Co.* v. *Kimbro,* 75 Ark. 211; *K. C. Sou. Ry. Co.* v. *McGinty, ante* p. 356.

The court erred in directing a verdict, and the judgment is reversed, and the cause remanded for a new trial.

ROZELL v. CHICAGO MILL & LUMBER COMPANY.

76 525
81 301
c81 357
76 525
f85 498
85 587

Opinion delivered October 7, 1905.

1. AFTER-ACQUIRED TITLE—EFFECT.—Where a grantor of land belonging to the State subsequently purchased it from the State, and paid for it, and received certificates of entry which entitled him to a patent when the State's title should be confirmed, he acquired an equitable title which inured to the benefit of his grantee, under Kirby's Digest, § 734. (Page 527.)
2. PATENT—CANCELLATION—FRAUD OR MISTAKE.—Where, through mistake or fraud, the legal title to land was patented by the State to another, the holder of the equitable title had a right to go into equity and have the patent set aside and the title vested in himself, as against any one except a *bona fide* purchaser for value. (Page 527.)
3. COMPLAINT—NEGATION OF MATTER OF DEFENSE.—A complaint seeking to cancel a deed from a fraudulent grantee of real estate need not deny that defendants were *bona fide* purchasers for value, as that is matter of defense. (Page 527.)
4. LACHES—DELAY.—A complant seeking to cancel a deed to wild and unoccupied lands is not open to demurrer merely on account of delay in bringing the action, if it did not appear that the rights of defendants were prejudiced thereby. (Page 528.)
5. RECORD OF DEED—NOTICE.—The record of a deed of which neither the granter nor the grantee appears in the recorded chain of title is not notice to a subsequent purchaser of any right or interest of such grantee in the land which it describes. (Page 528.)
6. PATENT—PRESUMPTION OF REGULARITY.—One who purchases land from a patentee of the State is entitled to rely upon the presumption that the State's officers issued the patent to the person entitled to receive it. (Page 528.)

Appeal from Mississippi Chancery Court.

EDWARD D. ROBERTSON, Chancellor.

Reversed.

STATEMENT BY THE COURT.

This is an action by the children and the grandchildren of Ashley B. Rozell to quiet the title of two sections of wild and unoccupied lands in Mississippi County, Arkansas, which they claim as the heirs of the said Rozell. The complaint alleges that Rozell purchased this land fom Jeptha Fowlkes on the 14th day of February, 1855, and received from him a warranty deed for the same. This deed was recorded in Mississippi County on February 25,

1855, and again recorded on April 4, 1868. Fowlkes purchased the land from the State, and paid for same, and on April 22, 1856, obtained certificates of purchase from the State. Fowlkes died in 1863, and in 1870 Sarah Fowlkes, as executrix of his estate, and the devisees under his will filed an affidavit in the land office of the State, showing the purchase of said land by Fowlkes, and stating that the original certificates of entry had been lost, and that they were entitled to duplicate certificates. Thereupon duplicate certificates were issued to them. Afterwards Sarah Fowlkes and the devisees assigned the certificates to one William H. Chatfield, trustee. On the first of October, 1883, Chatfield delivered the duplicate certificates to the State, and received a patent from the State, conveying the land to him as trustee. Afterwards A. H. Chatfield was appointed trustee in lieu of W. H. Chatfield, and he, as such trustee, conveyed the land to George T. Updegraff, and he conveyed it to the Chicago Mill & Lumber Company.

Afterwards L. D. Rozell and others brought this action in equity against the Chicago Mill & Lumber Company and others to set aside the patent and deeds under which defendants hold, and to have the title vested in them. The complaint set up the facts referred to, and alleged further that the obtaining of the duplicate certificates and the assignment thereof by Chatfield was a fraud upon the rights of the plaintiffs, and that the plaintiffs in equity are the owners of the land, and that the deeds upon which defendant claim should be set aside, and the title vested in the plaintiffs.

The defendant appeared, and filed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against defendant, and that there was no equity in it. The court sustained the demurrer, and dismissed the action for want of equity. Plaintiffs appealed.

S. S. Semmes, for appellants.

Fowlkes's after-acquired title inured to the benefit of Ashley B. Rozell. Kirby's Dig., § 734; 5 Ark. 693; 14 Ark. 465; 15 Ark. 73; 18 Ark. 469; 27 Ark. 163. The allegations are not sufficient to set up the after-acquired title of Fowlkes. 20 Ark. 337; 26 Ark. 54; 44 Ark. 452; 49 Ark. 87; 55 Ark. 286. The doctrine of laches does not apply. 70 Ark. 261; 18 Am. & Eng. Enc. Law, 124.

Lamb & Gautney and *N. W. Norton,* for appellees.

Chatfield is not charged with notice of Mrs. Fowlkes's fraud. 148 U. S. 31; 120 Mo. 498; 69 Ark. 95. The registration of the deed to Rozell in 1855 was not constructive notice to Chatfield. Wade, Notice, § § 205-212; 29 Am. & Eng. Enc. Law, 595; 52 Pa. St. 359; 10 Mo. 34; 20 Wis. 523; 2 Pom. Eq. § 658; 14 Mass. 296; Rawle, Cov. of Tit. 428; 73 Mo. 289; 90 Ill. 302; 16 Mass. 418. Appellants are guilty of laches. 71 Fed. 19; 11 Wall. 107; 101 U. S. 135; 149 U. S. 231; 136 U. S. 286; 27 Mich. 306; 124 U. S. 182.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment sustaining a demurrer to a complaint and dismissing the action for want of equity. The facts stated in the complaint are set out in the statement of facts, and show, among other things, that in the year 1855 one Jeptha Fowlkes sold certain land to the ancestor of plaintiffs. At that time the land belonged to the State, and Fowlkes had no right to it. But in 1856 he purchased it from the State, and paid for it, and received certificates of entry, which entitled him to a patent when the title of the State to the land was confirmed by the United States. By this purchase from the State Fowlkes acquired an equitable estate in the land, which inured to the benefit of his grantee, Rozell, under the statute which provides that when one conveys land by deed purporting to convey a fee simple estate, and does not own the land at the time, but afterwards acquires the title, such after-acquired title, whether legal or equitable, passes at once to his grantee. Kirby's Digest, § 734.

Afterwards when, through mistake or fraud, the legal title was conveyed by the State to Chatfield, Rozell had a right to go into a court of equity and have this patent set aside, and the title vested in him, as against any one except a *bona fide* purchaser for value. *Coleman* v. *Hill,* 44 Ark. 452; *Chowning* v. *Stanfield,* 49 Ark. 87.

The complaint of the heirs of Rozell in our opinion makes out a clear case for relief against all except *bona fide* purchasers and other claimants of the land who have acquired rights through the laches of the plaintiffs. But there is nothing in the complaint to show that these defendants are *bona*

fide purchasers for value. The complaint, it is true, does not allege that they had notice, but this court has held that a party claiming protection as a *bona fide* purchaser or mortgagee from the fraudulent grantee of real estate must deny notice of the fraud, although notice thereof is not charged in the plaintiffs' bill. *Miller* v. *Fraley*, 21 Ark. 22. The failure of the complaint to allege notice in a case of this kind does not make the complaint bad, for the burden is on the defendants to show that they were *bona fide* purchasers for value.

Nor can we say from the complaint alone that the circumstances are such that the court should refuse plaintiff relief on account of their delay in bringing the action. If the land is wild and unoccupied, and the delay has not prejudiced the rights of the defendants, they have no reason to object on that ground.

We agree with the contention of the defendants that the record of the deed from Fowlkes to Rozell was not notice to the defendants who purchased from Chatfield. And probably the same thing may be said of Chatfield's purchase of the certificate of entry. The deed from Fowlkes to Rozell was not in the line of defendants' title, and they were not required to look for it. *Turman* v. *Sanford,* 69 Ark. 95. In the absence of any actual notice, or anything to put them upon inquiry, they could safely rely upon the presumption that the officers of the State did their duty and issued the patent to the person entitled to receive it. *Boynton* v. *Haggart,* 120 Fed. 819; *United States* v. *California & Oregon Land Co.,* 148 U. S. 31.

But, as before stated, we are not able to say from the complaint alone that they did not have notice of this Rozell title. If they had notice, defendants were not *bona fide* purchasers. If they were *bona fide* purchasers, they can set that up as a defense, and also any other facts that would show it to be inequitable to grant the relief prayed for. On the whole case, we are of the opinion that the complaint states a cause of action, and that the demurrer should have been overruled. For this reason the judgment is reversed, and the cause remanded, with an order to overrule the demurrer, with leave for defendants to file an answer.

DOWDLE v. WHEELER.

76 529
f87 170

Opinion delivered October 14, 1905.

1. EJECTMENT—TITLE.—As the burden of proving title in himself is undertaken by one who sues in ejectment, the defendant may rely upon the weakness of plaintiff's title. (Page 531.)
2. ACCRETION—INTERVENING CREEK.—Where the evidence establishes that there was a process of accretion going on against the north shore line of a certain river at a given locality, and that this process continued until the bed of the river rose to the level of the bed of a creek which had previously run into the river above, and that then, as the waters of the river receded, the flow from the creek prevented further deposits in its extended channel, and established a permanent channel along the old bed of the river, the land which formed as accretion between the river and the creek became an addition to the land beyond the creek lying adjacent to the former shore line of the river. (Page 532.)
3. ADVERSE POSSESSION—ENCLOSURE—NATURAL BARRIERS.—For the purpose of establishing adverse possession of land, it is no objection that natural barriers are taken advantage of, if the natural, together with the artificial, barriers used are sufficient to clearly indicate dominion over the premises, and to give notoriety to the claim of possession. (Page 533.)
4. SAME—CHARACTER OF POSSESSION.—The fact that defendants built a fence across the mouth of a peninsula formed by the junction of a river and a creek on land owned by them, and pastured cattle therein, was not sufficient notice to plaintiff, who owned part of the land so inclosed, that her land was being held adversely. (Page 534.)

Appeal from Conway Circuit Court in Chancery.

WILLIAM L. MOOSE, Judge.

Affirmed.

Ratcliffe & Fletcher, for appellants.

The land is an accretion to the land of appellants. 84 Mo. 373; 16 Abb. N. C. 176; 37 Hun, 537; 69 N. W. (Wis.) 992; 55 N. W. (Wis.) 770; Gould on Waters (1883 Ed.), § 148; 146 U. S. 445; 61 Ark. 435; 134 Mo. 633, 36 S. W. 612; 64 S. W. 183, 187; 58 L. R. A. 193; 21 Pac. (Cal.) 536; 63 Tex. 332-3; 73 Ark. 199. The action is barred by the statute of limitation. 75 Cal. 584; 17 Pac. 705; 51 N. Y. Supp. 937; 47 S. W. 821; 5 Cowen (N. Y.), 216; 136 Fed. 159; 74 Cal. 11; 47 S. W. (Tex.) 821; 56 Pac. 513. Appellee is estopped by the

description in her deeds. 18 How. 150; 10 Pick. 249; 15 Johns. 451.

A. F. Vandeventer, C. C. Reid, and *Sellers & Sellers,* for appellee.

Appellee's right to accretion is not cut off by the creek running over it. 25 Ark. 122; 44 La. Ann. 1044; 53 Am. Rep. 212; 55 S. W. 1031. The acts of possession were not such as to create title by limitation. 82 S. W. 834; 1 Cyc. p. 1037; 105 Mo. 255; 3 Humph. 447; 29 Ga. 152; 12 Tex. 219; 74 Ia. 172; 64 S. W. 58; 40 S. W. 928; 45 S. W. 156; 5 Cowen (N. Y.), 216; 27 S. E. 255; 77 Am. Dec. 586; 65 Ark. 422; 26 Am. Dec. 95; 59 Am. Dec. 115; 71 Am. Dec. 198; 94 Am. Dec. 350; 42 Ark. 118; 30 Ark. 640; 33 Ark. 154; 65 Ark. 422; 40 S. W. 893; 35 S. W. 776; 42 S. W. 232; 49 Ark. 266; 68 Ark. 551; 69 Ark. 424.

Ratcliffe & Fletcher, for appellants, in reply.

The same proof of possession is required in claims under or without color of title. 30 Ark. 655; 40 Ark. 237.

McCULLOCH, J. This was an action in ejectment brought by Mrs. G. M. Wheeler against R. A. and M. A. Dowdle to recover part of an accretion, which she claims had been formed to the original land of which she held title.

The Dowdles filed an answer, denying that the land was an accretion to Mrs. Wheeler's land and alleging that it was an accretion to their lands, and also pleaded the seven years statute of limitation. The case was transferred to equity on motion of the defendants. A decree was rendered in Mrs. Wheeler's favor, and the Dowdles appealed.

There is no question that Mrs. Wheeler owns the original land to which she claims the land in controversy is an accretion, and that it was at one time upon the north bank of the Arkansas River. The same is true as to the title of the Dowdles to the original land to which they claim the land is an accretion. The plats of the original United States surveys show that the original land owned by the Dowdles is situated south of the Point Remove Creek, which at that time emptied into the Arkansas River at the terminus of the Old Cherokee line—the land of the Dowdles coming to the creek immediately opposite this point or a little south thereof—and that the original land of Mrs.

Wheeler bordered upon the Arkansas River some distance, perhaps sixty-three rods, below the mouth of the creek, and down the stream of the Arkansas River. Point Remove Creek flows in an easterly direction, and the Arkansas River from the mouth of the creek, at the time of the original survey, flowed in an easterly direction. The old Cherokee line, commencing on the old bank of the river at or near the mouth of Point Remove Creek, runs north, 53 degrees east, thus forming, with the old channel of the river, an acute angle with the apex at the mouth of the creek. It is shown that the accretion began to form up stream, and gradually extended down stream until the land in controversy was formed in front of the original land owned by Mrs. Wheeler. In front of the original land of the Dowdles accretion was formed which is in their possession, and their right thereto is not controverted. As the accretion gradually extended down stream, the mouth of Point Remove Creek extended itself eastward along the old channel of the river until it passed the original land of Mrs. Wheeler, and is now some distance below (east) of her east boundary. Its bed, east of the old mouth, is now along the old channel of the river. It is three chains wide at low water, and four and one-half to five chains wide at high water, and has at all times separated the accretion in controversy from Mrs. Wheeler's original land.

It is the contention of appellants that the land in controversy is not accretion to Mrs. Wheeler's land, and that the formation began as an accretion to the Dowdles' land; and as it gradually continued down stream, the extension of Point Remove Creek kept pace with its progress, thus preventing any contact with or accretion to Mrs. Wheeler's land. They say that the land in controversy belongs to them; that, the formation having commenced as an accretion to their land, their title followed its progress down stream; or that the title to this land is in the State. At any rate, they contend that it is not an accretion to Mrs. Wheeler's land, and does not belong to her.

The burden is upon Mrs. Wheeler to prove that it is an accretion to her land. Appellants may rely upon the weakness of the title of their adversary. *Nix* v. *Pfeifer*, 73 Ark. 201, and cases cited.

A careful consideration of the evidence convinces us that the chancellor was correct in his conclusion that the land in controversy was an accretion to the original tract of Mrs. Wheeler. There is much plausibility in the contention of appellants, but it ignores certain facts clearly established by the evidence. They contend that the channel of Point Remove Creek runs with the old bank of the river, but it is established by the proof that there is a narrow margin of accretion between the old shore line of the river and the bank of the creek. This goes to show that there was a deposit against the shore line before the waters of the river receded, that this process continued until the bed of the river rose to the level of the creek's bed, and that then, as the waters of the river receded, the flow from the creek prevented further deposits in its extended channel, and established a permanent channel along the old bed of the river. This theory is, we think, far more consistent with the physical facts existing now, and within the recollection of witnesses, than the theory advanced by appellants that the flow from the creek followed the recession of the waters of the river before there could be a deposit against the old shore line, and that the deposit began at the extended south bank of the creek. If the deposit formed in the manner which we have stated, it is, in a legal sense, an accretion to the lands of appellee, and became her property, notwithstanding the conceded fact that the flow of water from the creek separated it from the original tract.

We held in *Nix* v. *Pfeifer, supra,* that "when the formation begins with a bar or an island detached and away from the shore, and by gradual filling in by deposit, or by gradual recession of the water, the space between bar or island and mainshore is joined together, it is not an accretion to the mainland in a legal sense, and does not thereby become the property of the owner of the mainland." So, if it were proved that there was no deposit against the old shore line, and no recession of the waters therefrom, the formation out from the mainshore would be a bar or island, and would in no sense constitute an accretion to the mainland. This is what was held in *Crandall* v. *Smith,* 134 Mo. 633, which is relied upon by learned counsel for appellants to sustain their contention. We find, however, the facts to be to the contrary in this case. The fact that a stream or body of water separ-

ates the accretion from the original shore line would, as said by the Missouri Supreme Court (*DeLassus* v. *Faherty,* 164 Mo. 361), at first blush seem to be an insurmountable barrier to a claim of ownership on the part of the shoreowner; yet, where it is shown, as in the case at bar, that the formation began by a deposit against the shore of the mainland, the subsequent existence of an intermediate stream of water between the accretion and mainland does not exclude such claim of ownership.

This brings us to a consideration of appellant's plea of the seven years statute of limitations. They allege and undertake to prove that they have held actual adverse possession of the land in controversy for more than seven years continuously next before the commencement of the suit. The chancellor also found against them on this issue.

The only character of occupancy attempted to be proved by appellants is the following: The extended channel of Point Remove Creek on the north side, and the new channel of the Arkansas River on the south and east, form a headland or neck of land extending eastward from the former mouth of the creek, and appellants erected across this neck or headland a wire fence from the creek near its former mouth to the bank of the river. They claim this to be an inclosure in which they pastured cattle—the river and creek forming natural barriers, which, with the wire fence, completed the inclosure. They also show that along the creek in a few places at intervals they stretched wires to prevent cattle from attempting to cross the creek. This, however, is disputed, and the testimony is conflicting in regard thereto.

It is no objection that natural barriers are taken advantage of in constructing enclosures of land, provided that the same are not out of proportion to the artificial barriers erected. If the natural, together with the artificial, barriers used are sufficient to clearly indicate dominion over the premises, and to give notoriety to the claim of possession, it is sufficient to put the statute of limitation in motion. *Goodwin* v. *McCabe,* 75 Cal. 584; *Sanders* v. *Riedinger,* 51 N. Y. Supp. 937; *Thomas* v. *United States,* 136 Fed. 159. "Natural barriers may or may not be of such a character as to serve as part of an enclosure by which a party subjects land to his dominion and control, and so acquires possession of it." *Goodwin* v. *McCabe, supra.*

The question, after all, in such cases is whether the enclosure, like other acts of possession and claim of ownership, is sufficient to "fly the flag" over the land, and put the true owner upon notice that his land is held under an adverse claim of ownership. We think that in this case these acts were insufficient to sustain a claim of adverse possession. They did not constitute such notoriously hostile acts as necessarily put the owner of the land upon notice. This is especially true because the fence erected by appellants from creek to river bank was not on the land of Mrs. Wheeler, and its presence there was not notice to her that her land was fenced. She was not bound to take notice of the natural objects —the creek and the river—as barriers enclosing her land. We hold that appellants pasturing cattle within such inclosure did not, under the circumstances, constitute adverse possession so as to ripen into title.

Upon the whole case, we find no error in the decree of the chancellor, and the same is affirmed.

LYON v. BASS.

76 534
p77 304
77 305

Opinion delivered October 14, 1905.

1. PAYMENT—APPROPRIATION.—When property is mortgaged to secure a debt, and afterwards this property is sold, and the proceeds turned over to the mortgagee, the natural presumption is that both parties intend that the payment shall be applied on the mortgage debt, and the mortgagee has the right to apply the payment in that way, even though the mortgage debt be not due. (Page 537.)
2. SAME—RIGHT OF CREDITOR TO APPROPRIATE.—Where the same property was included in two mortgages to the same creditor, the proceeds arising from a sale thereof may, in the absence of appropriation by the debtor, be applied by the creditor to the payment of either mortgage debt. (Page 537.)
3. APPEAL—PRESUMPTION IN FAVOR OF RECORD.—Where the certified transcript in a cause shows that a decree was rendered during the term of court, the presumption in favor of the clerk's certificate is not overturned by the fact that a record entry of the same day on which

the decree was rendered, which immediately preceded the entry of the decree, recited that the parties were allowed thirty days in which to take depositions, and that the certificate of one of the depositions shows that it was taken during the following month. (Page 538.)

4. RECORD—AMENDMENT.—Where the record of a decree fails to state the truth, the remedy is by amendment of the record. (Page 538.)

Appeal from Calhoun Chancery Court.

EMON O. MAHONY, Chancellor.

Affirmed.

76 525
84 11
84 12

STATEMENT BY THE COURT.

On the 10th of February, 1898, H. L. Lyon and wife, N. C. Lyon, executed a deed of trust to D. W. Bass, to secure a note for the sum of $270, due and payable on the 1st of October, 1898, and all other indebtedness due by the mortgagors to Bass at that time. Afterwards certain other advances were made by Bass to Lyon and wife, and certain payments were made by Lyon. Bass finally brought an action in equity against Lyon and wife to foreclose the deed of trust executed by them, in which he alleged that they owed him a balance of about four hundred dollars, principal and interest. The defendants appeared, and filed an answer, in which they alleged that they had made payments to plaintiff upon the debt more than sufficient to liquidate the sum secured by the deed. The chancellor found in favor of plaintiff; and gave a judgment in his favor for $411.03, with interest from 1st of January, 1903, and ordered the deed of trust foreclosed, and the land sold to pay the judgment.

Defendants appealed.

Thornton & Thornton, for appellants.

1. In the absence of an appropriation by the debtor, the law applies a general payment to the items of a running account in the order of priority. 57 Ark. 595; 38 Ark. 585. The cattle were in the first mortgage, and the proceed of same should have been credited on that debt. 49 Ark. 508; 47 Ark. 17; 50 Ark. 256. The debt secured by the second mortgage was not due, and payments should have been applied to the debt that was due. Benjamin on Sales, § 1109; Tiedeman on Sales, § 152; 47 Ark. 111.

2. A decree in chancery rendered in vacation, though entered on the record in a blank space left for that purpose, is a nullity. 71 Ark. 226.

C. L. Poole and *Gaughan & Sifford,* for appellee.

The evidence fully sustains the chancellor's finding that there were two debts, and that the proceeds of sale of property were properly credited, according to the terms of the mortgages, and neither party could change the appropriation without the consent of the other. 39 Ark. 248; 50 *Id.* 256; 47 *Id.* 17; 49 *Id.* 508; 1 Beach, Cont. § 397. The general rule is that when neither party makes an appropriation, the law applies it to the oldest items. 47 Ark. 119. If there is a reason for a different appropriation, the rule does not apply; especially where it would work hardship or injustice. 11 Metc. (Mass.) 174; 34 Ark. 285; 57 *Id.* 27; Beach, Modern Law of Contracts, Vol. 1, § § 393, 394, 397. If the debtor fails to direct the appropriation, then the creditor has the right, provided he applies the payment to the debt the property secures. 30 Ark. 750; 5 Gratt, 357; 32 *Id.* 645; 83 S. W. 351.

After controversy has arisen neither party has the right to make an appropriation of payments. 51 Ark. 371.

2. The decree of a court of record cannot be overturned or set aside by the file mark of a clerk. Judgments of courts of general jurisdiction are presumed, in a collateral inquiry, to be within jurisdiction, unless from the record itself, it appears otherwise. 61 Ark. 464. Evidence *dehors* the record not admissible. 49 Ark. 397; 50 *Id.* 338. Every presumption is in favor of the judgment. Black, Judgments, § 270; 24 Neb. 490; 39 N. W. 419. The clerk's certificate shows the judgment was rendered at the July term, 1903, and this is conclusive. If the record was silent, it will be presumed it was rendered at the regular term fixed by law. Black on Judgments, § 271; 68 Tex. 441; 4 S. W. 565.

RIDDICK, J., (after stating the facts.) This is an appeal by H. L. Lyon and N. C. Lyon, his wife, from a judgment against them in favor of D. W. Bass, foreclosing a trust deed. The first contention on the part of defendant is that the debt secured by the deed has been paid. The evidence tends to show that the plaintiff had two separate accounts against Lyon, one against him and his wife jointly, the other against Lyon alone for advances made to him to carry on a timber and stave business. This last account

was secured by a deed of trust executed by H. L. Lyon only. No item charged in either of these accounts is disputed by defendant, and they admit the amount of the debt, but claim that, if the payments had been properly applied, the mortgage debt of Lyon and wife would have been paid. But the payments which defendants claim should have been applied on this mortgage debt of Lyon and wife were made by Lyon with funds which arose out of the sale of land, timber, staves and other property which Lyon had acquired in the stave business, and upon which Bass held a lien to secure advances made by him to Lyon in that business. The evidence, as before stated, shows that this account against Lyon individually was entirely separate from the one held by Bass against Lyon and wife jointly, which is involved in this suit. Plaintiff had advanced to defendant the money required to buy property and carry on this stave business. When, therefore, the staves produced in that business, and the other property which plaintiff had advanced the money for defendant to purchase, had been sold, and the proceeds turned over to plaintiff, it was entirely proper for plaintiff to credit it on the debts of that business which defendant owed him for such advances. Defendant had executed to plaintiff a mortgage on this property to secure such advances. When property is mortgaged to secure a debt, and afterwards this property is sold, and the proceeds turned over to the mortgagee, the natural presumption is that both parties intend that the payment shall be applied on the mortgage debt, and the mortgagee has the right to apply the payment in that way, even though the mortgage debt be not due. *Greer* v. *Turner,* 47 Ark. 17; *Caldwell* v. *Hall,* 49 *Ib.* 508; *Faisst* v. *Waldo,* 57 *Ib.* 275.

But it is said that certain cattle sold were included in both mortgages, and that therefore the proceeds arising from their sale were improperly applied to the second mortgage. The evidence as to whether the cattle described in the second mortgage were the same as those in the first is not at all clear, but, conceding that they were the same, we think that, when the debtor made no appropriation of such proceeds, the creditor had the right to apply them to either debt. *Hamilton* v. *Rhodes,* 72 Ark. 625.

Without going into a further discussion of the evidence bearing on the different payments, we will say that in our opinion it is sufficient to support the finding of the chancellor that Bass had

two separate accounts against Lyon, and that the payments made thereon were properly applied by him.

In conclusion, it is said that the record shows that the decree was rendered in vacation. The decree purports to have been rendered at the July term of the Calhoun Chancery Court, on the 27th day of July, 1903. A record entry of the same day, which immediately precedes the entry of the decree, recites that the parties were allowed thirty days in which to take depositions, and the certificate to one of the depositions shows that it was taken in August, 1903. So far as the record entry showing that parties were allowed time to take depositions, that cannot overturn the decree entered on the same day, for the parties might afterwards have waived the continuance, and the decree might have been rendered at that term. The fact that the certificate to one of the depositions shows that it was taken in August—considered in connection with the order allowing time to take depositions, and the recital in the decree that the deposition of this witness was considered by the court—does tend to show that the decree was made in vacation and entered as if made at the preceding term. But the record which the clerk certifies as correct shows that the decree was rendered at the July term, and we do not think that the other matters referred to are sufficient to overturn this certificate of the officer whose duty it is to send up a perfect transcript of the record below.

If this certificate does not state the facts, if the record is not correct, the appellant should have taken steps to have it corrected. *Arkadelphia Lbr. Co.* v. *Asman,* 72 Ark. 320. In the present state of the record the judgment must be affirmed. It is so ordered.

MALLORY v. BRADEMYER.

76 538
187 335

Opinion delivered October 14, 1905.

1. EJECTMENT—TITLE.—The burden of proving title in himself is assumed by the plaintiff in an ejectment suit. (Page 540.)
2. EXPERT WITNESS—QUALIFICATION.—A witness who testifies to long familiarity with a certain river, and to possessing knowledge from

observation and experience of caving banks and the making of islands and bars, qualifies himself as an expert to testify his opinion as to how the land in question was formed, if such be a matter of expert knowledge. (Page 541.)

3. OPINION EVIDENCE—NON-EXPERT.—There is nothing about the formation of an accretion to land which calls for the exercise of peculiar skill or the possession of professional knowledge, or which requires any peculiar habit of study, in order to understand it or testify about it intelligently. (Page 541.)

4. EVIDENCE—GENERAL OBJECTION.—A general objection to the testimony of a witness, part of which is clearly competent, is insufficient to raise the objection that some of it is incompetent as opinion evidence. (Page 541.)

5. JURY—PROVINCE.—It is the peculiar province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony. (Page 541.)

Appeal from Crittenden Circuit Court.

FELIX G. TAYLOR, Judge.

Affirmed.

STATEMENT BY THE COURT.

This was an action of ejectment, begun by the appellant in the circuit court of Crittenden County, to recover from the appellee seventy-seven acres of land alleged to be accretion to the E. ½ of the S. W. ¼ of section 3, township 8 N., range 9 E. The appellee answered, and denied that the land in controversy was an accretion, and also pleaded the statute of limitation of seven years as a defense. It was admitted that the appellant, the plaintiff below, was the owner of the E. ½ of section 3.

The cause was submitted to the jury, who rendered a general verdict in favor of the defendant below, appellee here. It does not appear that any special findings of fact were asked for.

The evidence, in substance, in favor of the appellee on the question of accretion is as follows:

Witness William Brademyer testified that he was a fisherman, and had been on the Mississippi River for about thirty-eight years; that he was familiar with the caving of banks and the formation of islands and bars, and that in his opinion, from an examination of the bar upon which the land in controversy is situated, it was first formed in the river, and built in towards the main land; that he has known the bar in question since 1885, and that in 1885 the water stood the year round on the west side of

where his brother's house now stands, and between the main shore and his house; that in 1885 there was not a bush on this bar; that the highest land on the bar proper is now on the west side next the river, and that there is a swag between the bar and the old main shore of the river; that farther down the bar there is still a lake between the bar and the main shore. He said the land "was made out in the river." He was not there, but knew from the character of the ground.

The witness Dunnavant, who was a witness for the plaintiff, testified that there is a slough of water or lake at the lower end of the bar and between it and the main shore, and that the land in controversy is about as high as the old main shore, but is lower next to the main shore.

The witness Bateman, who was a witness for the plaintiff, testified that there was a kind of low road between the bar and the main shore that he had made there; that the old bank line is well defined; that you can tell where it is by the size of the timber, and that there is a low place between the bar where Mr. Brademyer lives and the main shore, but that towards the head of the bar it is about as high as anywhere else; that he thought the bar belonged to Brademyer as much as anybody.

Frank Smith and *Hawthorne & Hawthorne,* for appellant.

The land was an accretion, and belonged to appellant, unless he was barred by limitation. 61 Ark. 429. The burden was on appellee to show the extent and period of his possession; this he failed to do. 48 Ark. 277.

L. P. Berry and *A. B. Shafer,* for appellee.

There was evidence to sustain the verdict, and this court will not disturb it. 46 Ark. 141-149; 51 Ark. 467-476; 56 Ark. 314-320. The evidence fails totally to show that the land was an accretion; but, if it was, appellant is barred by the statute of limitation.

WOOD, J., (after stating the facts.) The burden was upon appellant to show that he was the owner of the land in controversy by accretion. *Nix* v. *Pfeifer,* 73 Ark. 201; *Wallace* v. *Driver,* 61 Ark. 429.

The question as to whether or not the land in suit was an accretion to appellant's land was submitted to the jury upon a

correct instruction asked by appellant; and as the verdict was general, and no special findings of fact were made by the jury or asked by appellant, we must take it that the verdict was against him on the question of accretion.

The only question therefore for us is, was the evidence legally sufficient to support the verdict? It was. True, the witness Brademyer was permitted to give his conclusion or opinion as to how the land in question was formed. But this was without objection from appellant, and he cannot complain here of that. The witness testified to his long familiarity with the river, and to his knowledge from observation and experience of caving banks and the making of islands and bars. He thus qualified himself, in a sense, as an expert in such matters, if expert testimony were demanded. But we see nothing about the formation of an accretion calling for the exercise of "peculiar skill, the possession of professional knowledge, or requiring any peculiar habit of study in order to understand it or testify about it intelligently. As was said by us in *Railway Company* v. *Thomason,* 59 Ark. 140: "Such questions are open to all men of ordinary information."

The witness detailed facts which he observed, and upon which he based his conclusion; and if the appellant objected to his stating his conclusions, he should have made known his objection specifically on this point to the trial court, to get the benefit of a ruling on it here. Certainly, much of the testimony of this witness was competent.

Doubtless, the jury concluded that it was possible for even a *fisherman* to tell the truth; and, however much we might differ with the jury in this particular case, yet it was their peculiar province, not ours, to pass upon the credibility of the witnesses and the weight to be given their testimony. *Hot Springs Rd. Co.* v. *McMillan, ante* p. 88; 2 Crawford's Digest, pp. 905-6.

This settles the controversy in favor of appellee, and we need not pass upon the question of limitations.

Affirmed.

76 542
80 238
80 239
82 391

76 542
86 409
87 482

76 542
89 521

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. MORRIS.

Opinion delivered October 14, 1905.

1. LIMITATION—NUISANCE.—Where a thing complained of as a nuisance is not necessarily injurious, but may inflict damage for a while, and then cease, the statute of limitations begins to run from the time the damage is done, and not before; and there may be as many successive recoveries as there are successive injuries. (Page 545.)
2. SAME—DIVERSION OF SURFACE WATER.—As the injury from wrongfully opening up a ditch whereby surface water is diverted on to plaintiff's land is occasional and dependent upon the rainfall, the statute of limitations commences to run against an action for damages caused thereby from the time the injury was done, and not from the time when the ditch was dug. (Page 548.)
3. DIVERSION OF SURFACE WATER—LIABILITY.—Where defendant railway company dug a ditch for the purpose of draining its land, and thereby wrongfully diverted the flow of surface water on to plaintiff's land, and other parties, acting independently and without defendant's knowledge, dug lateral ditches, which contributed to injure plaintiff's land, defendant is liable only for its proportion of the damages caused by the ditches. (Page 548.)
4. SAME—MEASURE OF DAMAGE TO CROP.—An instruction that if the jury find that plaintiff sustained damage to his crop by reason of water wrongfully thrown on his land from a ditch constructed by defendant, "the measure of his damages would be the difference between what the land would have otherwise produced and what it did actually produce" is defective in failing to instruct the jury to deduct the difference between the cost of production of a full crop and of the crop actually produced; and also to deduct on account of the increased damages caused by lateral ditches built without defendant's knowledge. (Page 549.)
5. EVIDENCE—OPINIONS OF NON-EXPERTS.—The opinions of non-expert witnesses as to how plaintiff's land could have been drained, and the overflow of it prevented, were inadmissible where it did not appear that the facts could not have been so detailed to the jury that they could form their own opinions. (Page 549.)

Appeal from Lonoke Circuit Court.

GEO. M. CHAPLINE, Judge.

Reversed.

Sam'l H. West and *Bridges & Wooldridge,* for appellant.

The action is barred by the statute. 62 Ark. 360; 52 Ark. 240; 39 Ark. 463. It was error to instruct that the measure of

damage would be the difference between what the land would have otherwise produced and what it did actually produce. 62 Ark. 364; 56 Ark. 612, and cases there cited. The opinions of non-expert witnesses were inadmissible. 56 Ark. 612.

J. B. Gray, Thos. C. Trimble, Joe T. Robinson and *Thos. C. Trimble, Jr.,* for appellees.

Appellant is liable. 39 Ark. 463; 44 Ark. 360; 59 Tex. 128; 54 Ark. 155; 36 L. R. A. 417; 32 L. R. A. 708. The action was not barred; recovery was sought for successive injuries. 56 Ark. 613; 52 Ark. 240; 36 L. R. A. 422-3; 79 Tex. 427.

BATTLE, J. On the 29th day of January, 1903, Lee Morris commenced an action aginst the St. Louis & Southwestern Railway Company to recover the damages he had suffered by reason of a ditch made by the defendant. He alleged in his complaint that the defendant had made, and was at that time maintaining, and had maintained, a ditch by means of which it collected in one channel a large amount of water, diverted it from its natural drainage, and discharged it in a mass upon certain lands of the plaintiff, which otherwise would have flowed in other directions; that his crops on these lands in the years 1900, 1901 and 1902 were materially injured by the increased flow of water caused by the ditch.

The defendant answered, and denied these allegations, and pleaded the statute of limitations of three years in bar of the action.

The issues in the case were tried by a jury. Evidence was adduced in the trial tending to prove the following facts: Prior to the year 1900, and more than three years before the commencement of this action, the defendant constructed a ditch, about one mile and a quarter or a mile and a half in length, along the east side of its railway, in Lonoke County. The lower end of it was near the land of plaintiff, and was obstructed by a ridge. Lateral ditches leading into and connected with it were dug by other parties without the knowledge or consent of the defendant. These ditches collected a large amount of surface water, diverted it from its natural drainage, and precipitated it upon the land of the plaintiff, and damaged his cotton crops growing thereon. This occurred in the years 1900 and 1901 and 1902. In each of these years thirty five or forty acres of plaintiff's land were over-

flowed. This land was planted in cotton, which was injured by the water thrown on it about one half. Other lands adjoining, and of the same quality, produced in the same years three-fourths of a bale for each acre. In this time the average price of cotton in the seed was two and a half cents a pound, and from 1800 to 2000 pounds of seed cotton made a bale. The cost of the production and gathering is not shown by the evidence.

During the progress of the trial witnesses who were not shown to be experts were allowed to testify, over the objections of the defendant, that plaintiff's land could have been drained and the overflow of it prevented by extending the ditch, made by the defendant, through a certain ridge.

The court instructed the jury, over defendant's objections, as follows: "You are instructed that if you find from the evidence that the plaintiff sustained any damage to his crops by reason of water being thrown on said land from a ditch constructed by the defendant railroad company, not into a channel, or live stream sufficient to carry off same, then the measure of his damages would be the difference between what the land would have otherwise produced and what it did actually produce." And refused to instruct them, at the request of the defendant, as follows:

"If the land of plaintiff has sustained damage by reason of a ditch dug by defendant, his cause of action accrued when the ditch was dug; and if it appears from the evidence that the ditches were dug more than three years before the filing of this suit, the jury will find for the defendant as to any damage to the land of plaintiff.

"The jury are instructed that, although they may find from the evidence that the defendant, in the construction of its road, excavated a ditch on its own right of way along the east side of its track, through which water at certain seasons of the year is discharged and carried upon the lands of the plaintiff, the defendant is not liable for damages on account of any water that may be brought into such ditch and discharged upon the land of plaintiff by artificial ditches extending into said railroad ditch and made without consent of defendant.

"The defendant is only liable to the plaintiff for such damages as may ensue from its own acts or the acts of its agents, and if the jury should further believe that the water from the adjoining

lands have been conducted into such railroad ditch by artificial ditches made without the consent of the defendant, thereby increasing the flow of water through said ditch upon plaintiff's land, the defendant is not liable to the plaintiff for damages caused by water artificially brought into its ditch from adjoining lands without its consent, and the burden of showing that the railroad consented to such ditches being put into its right of way, and ditches hereon, rests upon plaintiff; and without evidence on that issue you will find for defendant."

The plaintiff recovered a verdict and judgment for $430, and the defendant appealed.

It is first insisted by appellant that this action is barred by the statute of limitations, because it was not brought within three years after the ditch was completed. Does it come within the rule which provides that actions for injuries caused by nuisances of permanent character shall be brought within three years after the construction of the nuisance? In *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, the rule is stated as follows: "Whenever the nuisance is of a permanent character, and its construction and continuance are *necessarily* an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. * * * But when such structure is permanent in its character, and its construction and continuance are *not necessarily* injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of."

St. Louis, I. M. & S. Ry. Co. v. *Biggs, supra,* was an action to recover damages sustained in 1885 on account of the destruction of plaintiff's levees, fences, and crops by an overflow alleged to have resulted from the negligent construction and maintenance of a railway embankment through the Red River bottom in 1873, without sufficient openings to permit the passage of water. The defendant pleaded the statute of limitation of three years in bar of the action. The railroad embankment was constructed in 1873. The Red River "bottoms," including the plaintiff's land, which was situated therein, was overflowed in

1876 and 1885. By reason of insufficient openings in the railway embankment, the water in cases of unusual overflow was impeded, and rose higher, and remained longer upon plaintiff's land than it had formerly done. In 1885 plaintiff's crops were destroyed, and her levee broken by water dammed by the embankment upon her land. This court held that that case could be brought within three years after the happening of the injury. That case, to some extent, explained the rule as laid down by the court.

Railway Company v. *Yarborough,* 56 Ark. 612, was an action similar to *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, and was against the same defendant. Floods came, and, because the openings in the railway embankment were not sufficient to permit their passage, overflowed the plaintiff's land, and destroyed his crops. This court said: "The damage which the plaintiff sued to recover was not original in the sense that it necessarily resulted from the erection of the railway embankment. But after that structure was completed the injury complained of was still entirely uncertain and contingent, and such as might never happen. In this respect the case is similar to that of the *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240; and, according to the rule there laid down, the statute of limitation did not begin to run until the crops were destroyed."

Railway Co. v. *Cook,* 57 Ark. 387, was an action for injuries to land "alleged to have resulted from the negligent manner in which the defendant changed the structure of its roadbed. It was alleged that the defendant originally constructed its road with sufficient openings, but that in the fall of 1889 it made a change, substituting a solid embankment for a trestle, and thereby encroached upon the channel of Cache River and adjacent sloughs, so as to obstruct the flow of water through them, and cause it to flow back on plaintiff's land; that during the following winter his land was by this means overflowed, and the planting of a crop that year prevented; and that the market value of the land was destroyed by reason of the liability to overflow." According to the contention of the plaintiff in that case all the damage sustained by the plaintiff was the result of an original wrong, was original, and was recoverable in one action. But this court did not sustain that contention. The court said: "The

aim of the law is to compensate the actual loss caused by the injury, and the damage should be so measured as to accomplish this end. * * * To determine what the loss is, it is necessary to first ascertain the scope of the injury, for nothing can be accounted in the loss that does not arise from the injury. If all damages that may ever result from the nuisance are in law the result of its construction as an original wrong, then everything that is a damage, in legal comtemplation, whether for past or prospective losses, is recoverable in one action; but if the wrong be continuing, and the injuries successive, the damage done by each successive injury may be recovered in successive suits, and the injury to be compensated in the original suit is only the damage that has happened."

After saying that "the rule for determining whether a wrong results from an original or continuing wrong was formulated" in *St. Louis, I. M. & S. Ry. Co.* v. *Biggs, supra,* and stating the rule as there laid down, it further said: "Upon the facts of that case * * * it was held to come within the latter class, and a recovery was allowed for damage caused by overflowing a crop when it would have been barred by limitation if it had been occasioned by the original wrong. Upon the authority of that case, we hold that successive injuries from the wrong complained of in this would not be attributable to the original, but to a continuing, wrong, and that the damage recoverable would be only what had happened when the action was brought." According to the doctrine in the Cook case the statute of limitation commenced running when the damage in that case was done.

In *St. Louis, I. M. & S. Ry. Co.* v. *Stephens,* 72 Ark. 127, the court followed the rule as laid down and construed, in *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, and *Railway Co.* v. *Yarborough,* 56 Ark. 612; the facts in the cases being similar.

Wood on Limitations (3 Ed., § 180), says: "But while this is the rule as to nuisances of a transient rather than of a permanent character, yet, when the original nuisance is of a permanent character, so that the damage inflicted thereby is of a permanent character, *and goes to the destruction of the estate thereby, or will be likely to continue for an indefinite period, and*

during its existence deprive the landowner of any beneficial use of that portion of his estate, a recovery not only may but must be had for the entire damage in one action, as the damage is deemed to be original; and as the entire damage accrues from the time the nuisance is created, and only one recovery can be had, the statute of limitations begins to run from the time of its erection against the owner of the estate or estates affected thereby."

According to the cases and authority cited, in cases where the nuisance is not necessarily injurious, but may or may not be so, and if it proves to be injurious, the injury continues for a while, inflicts damage, and then entirely ceases, the statute of limitations begins to run from the time the damage is done, and not before; and there may be as many successive recoveries as there are successive injuries, and the statute of limitation runs from the time each of such injuries occurs. Under a different rule the injured owner might not be able to obtain adequate compensation.

In the case before us the ditch was of uncertain duration. It was obstructed at the lower end by a ridge, and, unless kept open by human labor, would fill up by the soil, leaves of trees, vegetation growing therein, and other things washed and deposited therein by rains and other causes. Like the embankments of railroads, with insufficient openings, in the valley of a river, the injurious effects it may produce depended upon the seasons, the rains, and the floods, and when they ceased it ceased to inflict injury. So the statute of limitation runs against actions for damages caused thereby from the time the injury was done, and not from the time when the ditch was completed.

It appears that only a part of the surface water which caused the damage complained of came from the land drained by the appellant's ditch, but that other water was conveyed into the ditch by lateral ditches dug by other parties, and that they contributed to appellee's injury. Witnesses testify that the appellant in no way aided in the construction of the lateral ditches, or had anything to do with them. It does not appear that they were connected with the appellant's ditch with its knowledge or consent. Appellant insists that it was done without its knowledge or authority, and that the evidence so shows. If this be

true, the appellant, if liable at all, would be liable for its proportion of the damages caused by the overflow produced by the ditches. *Sloggy* v. *Dilworth,* 38 Minn. 179, s. c. 8 American State Reports, 656; *Sellick* v. *Hall,* 47 Conn. 269, 273.

The court instructed the jury that, if they found from the evidence that plaintiff sustained any damage to his crops by reason of water thrown on his land from a ditch constructed by appellant, "the measure of his damages would be the difference between what the land would have otherwise produced and what it did actually produce." This instruction is defective in failing to instruct the jury to allow or deduct the difference between the cost of production and gathering and baling of a full crop of cotton and the crop actually produced. The cost of gathering and baling was certainly less, and the cost of production might have been less, but that does not appear. It also failed to instruct the jury to make any reduction on account of the increased overflow caused by the lateral ditches, although they found that they were connected with the railroad ditch without the knowledge, consent or sanction of the appellant, and notwithstanding the appellant asked for an instruction upon that point. The court erred in giving the instructions as it did.

The opinion of the witnesses, who were not experts, as to how appellee's land could have been drained and the overflow of it prevented was inadmissible. They should have stated what was necessary to show that fact, if they knew, and left the jury to judge for themselves, unless it could not have been sufficiently shown without the opinion. "For if it was practicable for them to detail to the jury the facts within their knowledge as fully and perfectly as they had observed them, then the jury should have been left free to draw their own conclusions, and their opinions were inadmissible." *Railway Co.* v. *Yarborough,* 56 Ark. 612, 617.

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

CARGILL v. STATE.

Opinion delivered October 14, 1905.

INDICTMENT FOR TWO OFFENSES—GENERAL VERDICT.—Where defendant was convicted under indictment containing two counts, one for grand larceny and the other for unlawfully receiving stolen property, and a general verdict of guilty, without specifying the offense, was received without objection, he cannot subsequently object to the form of the verdict if the evidence was sufficient to sustain a conviction of either offense.

Appeal from Independence Circuit Court.

FREDERICK D. FULKERSON, Judge.

Affirmed.

STATEMENT BY THE COURT.

Appellant was convicted upon an indictment charging him with grand larceny and unlawfully receiving stolen property.

The defendant was placed upon trial for both offenses, and the verdict of the jury was as follows:

"We the jury find the defendant guilty, and assess his penalty at one year in the penitentiary."

No objection was made to the form of the verdict at the time it was rendered, but, after the jury had been discharged, the appellant objected to the verdict, and he made the overruling of his objection one of the grounds of his motion for new trial. He also moved to arrest the judgment on account of the form of the verdict, but the court overruled his motion.

This ruling of the court and the sufficiency of the evidence to support the verdict are the only questions presented on this appeal.

Wright & Reeder, for appellant.

Robert L. Rogers, Attorney General, for appellee.

No prejudice resulted from the jury failing to specify upon which count they found him guilty. The punishment is identical, and a general verdict will be sustained if either count is good. Bishop, New Cr. Law, p. 106; 10 Ark. 618; 31 *Id.* 504; 32 *Id.* 592; 34 *Id.* 436; 37 *Id.* 419. See also 32 Ark. 38; 46 Ark. 592; 18 S. E. Rep. 517; 52 Wisc. 534.

WOOD, J., (after stating the facts.) The punishment for larceny and for receiving stolen goods is the same. Kirby's Digest, § § 1826 and 1830. It was therefore immaterial to appellant as to the offense for which he was convicted and sentenced, provided the proof sustained the verdict as to either offense. The presumption will be, on a general verdict, that the verdict was responsive to the proof; and if appellant desired to avail himself of a lack of proof to support one of the counts in the indictment, he should have moved to have the jury designate the offense for which they convicted before they were allowed to separate. The question under consideration was thus ruled in *State* v. *Carter*, 18 S. E. (N. C.) 577, and *Nelson* v. *State*, 52 Wis. 534.

While the evidence of appellant's guilt is not satisfactory to us, it is sufficient to support the verdict.

Affirmed.

WATERMAN v. IRBY.

Opinion delivered October 14, 1905.

76 551
77 194

76 551
f78 69

76 551
88 372

76 551
90 245

1. PRAYER FOR RELIEF—MISTAKE.—If the complaint states, and the proof establishes, facts sufficient to constitute a cause of action, relief should not be denied because the plaintiff is mistaken in the relief asked. (Page 553.)
2. SAME—AMENDMENT TO CONFORM TO PROOF.—Where the complaint asked for cancellation of defendant's tax deed, but the defendants, in their answer, treated the complaint as seeking a redemption, and tendered an issue as to the right to redeem, and the proof, without objection, was directed to that issue, the prayer of the complaint must be treated on appeal as amended to conform to that issue. (Page 554.)
3. REDEMPTION FROM TAX SALE—BURDEN OF PROOF.—The burden of proof rests upon one who seeks to redeem land from a tax sale to sustain his own claim of title. (Page 554.)
4. DONATION DEED—PRESUMPTION.—A donation deed from the State is *prima facie* evidence of title, under the act of Dec. 23, 1840. (Page 554.)
5. SAME—WHEN PRESUMPTION NOT OVERTURNED.—The presumption in favor of a donation deed is not overcome by proof that the forfeitures of the land in question for certain years were void if there was no

proof that the State's title thereto was based on forfeitures for either of those years. (Page 554.)

6. TAX TITLE—RIGHT TO REDEEM.—One whose ancestor paid the taxes on land under color of title has a lien thereon which entitles him to redeem the land from a tax forfeiture. (Page 554.)

7. SAME—TERMS OF REDEMPTION.—In suit to redeem land from a tax forfeiture, the court should order the redemption only upon the payment of all taxes and of the cash value of improvements, and should not order the land sold in aid of the effort to redeem. (Page 555.)

8. SAME—TIME FOR REDEMPTION.—In a tax redemption proceeding, the court should not fix the time for plaintiff to redeem, as the time is fixed by statute. (Page 555.)

Appeal from Desha Chancery Court.

M. L. HAWKINS, Chancellor.

Reversed in part.

STATEMENT BY THE COURT.

This is a suit in equity brought by Stephen W. Irby, a minor, suing by next friend, against the defendants, Waterman, Witherspoon and Smith, to redeem lands of the plaintiff sold for taxes. He claims title to the lands in question under a donation deed from the State to Warren C. Irby, dated February 12, 1872, and alleges that the latter, on August 4, 1874, conveyed the lands to Joseph F. Irby, plaintiff's father, who died December 9, 1886, leaving the plaintiff his only heir at law. He further alleges that Joseph F. Irby paid taxes on the lands from the date of the conveyance to him until his death, and that said Warren C. Irby and Joseph F. Irby made valuable improvements on said lands, and occupied the same from 1872 to 1886, a period of more than fourteen years. Waterman purchased the land at tax sale on June 11, 1891, and, after receiving a deed, went into possession, and made valuable improvements on the land, and subsequently sold portions thereof to Witherspoon and Smith.

The defendants answered, denying that plaintiff has any interest in the land, or is entitled to redeem, and alleging that the forfeiture for taxes upon which the State's title to the land was based was void on account of certain alleged defects in the assessment and sale. The cause was heard by the court upon the pleadings, depositions of witnesses and documentary evidence, and a final decree was rendered, finding that the plaintiff was

the owner of the lands at the time of the tax sale to defendant Waterman, and is entitled to redeem therefrom; that said defendants had expended the sum of $957.50 in taxes and improvement, and were entitled to re-imbursement of that sum, less the rents $453.32 received since the offer to redeem, leaving the net sum of $504.18, which was declared to be lien upon said lands; that, upon the payment of said sum by plaintiff, the lands would stand redeemed from said sale, and the tax deed to defendant Waterman be canceled, and that, if the same be not paid on or before the day fixed by the court, the lands be sold by the commissioner of the court, and the proceeds be applied in discharge of said lien, and balance be paid to the plaintiff.

The defendants appealed.

Mehaffy & Armistead, and *E. S. Pindall,* for appellants.

The controversy is settled by Kirby's Digest, § 5061; and appellee, though a minor, is not excepted. 53 Ark 418; 71 Ark. 117; 57 Ark. 523; 58 Ark. 151; 59 Ark. 460; 60 Ark. 499; *Id.* 163; 71 Ark. 390. It was error to award immediate possession, and to provide for sale by commissioner.

J. W. Dickinson, for appellee.

Appellee is entitled to redeem. 69 Ark. 132; 52 Ark. 132; Sand & Hill's Dig. § 4596.

McCULLOCH, J., (after stating the facts.) 1. Counsel for appellants contend, first, that the chancellor erred in treating this as a suit to redeem. The complaint contains all the allegations essential to that relief, and no other, though the prayer is only that the tax sale be canceled, and the land decreed to belong to the plaintiff.

Under a prayer for general relief, the court may grant any relief that the facts stated and proved will warrant, although it may be inconsistent with the special relief prayed. *Kelly's Heirs* v. *McGuire,* 15 Ark. 555; *Shields* v. *Trammell,* 19 Ark. 62; *Dews* v. *Cornish,* 20 Ark. 332; *Chaffe* v. *Oliver,* 39 Ark. 531. If the complaint states, and the proof establishes, facts sufficient to constitute a cause of action, relief should not be denied because the plaintiff is mistaken in the relief asked. *Ashley* v. *Little Rock,* 56 Ark. 391.

Moreover, the defendants in their answer treated the complaint as seeking a redemption, and tendered an issue as to the right to redeem. The proof was, without objection, all directed to that issue, and the prayer of the complaint must be treated as amended to conform to that issue. *Davis* v. *Goodman,* 62 Ark. 262. The appellants cannot take advantage here, for the first time, of a defect in the prayer for relief.

2. It is next contended that the tax sale, which was the basis of the State's donation deed to Warren C. Irby, was void, and that on that account the alleged title of appellee failed.

The burden was upon appellee to prove that he was the owner of the lands at the time of the tax sale to Waterman, and to sustain his claim of title he introduced the donation deed and copy of the certificate of improvement. This made a *prima facie* case, and cast upon appellants the burden of showing that the tax forfeiture was invalid. *Thornton* v. *St. L. Refrigerator & Wooden Gutter Co.,* 69 Ark. 424. The statute in force at the time of the donation in question provided that the donation deed and certificate of improvements "shall be evidence in all the courts of a good and valid title in the donee, his heirs and assigns, and shall be evidence that the lands had been regularly forfeited by the original owner, that the State had properly donated its right thereto, and such evidence shall be received by the courts." Act Dec. 23, 1840.

Appellants, to sustain their attack upon the donation deed, introduced in evidence the records of the levying court and the record of tax sales for the years 1865 and 1866, which tended to show that the lands were sold for taxes and cost in excess of the amount lawfully assessed. There is no proof, however, in the record that the State's title was based on forfeitures for either of those years, and the *prima facie* case made out by the donation deed is not overcome. There may have been a valid forfeiture subsequent to those years, and, in giving force to the statute, we must presume that there was until the contrary be shown.

The right of appellee to redeem the land must also be sustained upon another ground, about which there is no dispute in the pleadings. His ancestor, who held under the donation deed, paid taxes on the lands for a number of years, and, having

a lien therefor, it constituted such an interest in the lands as entitled him to redeem. *Smith* v. *Thornton,* 74 Ark. 572. The writer hereof does not approve the doctrine just stated. He expressed his dissent therefrom in the case just cited; but the question must now be treated as settled by the decision in that case, and it is conclusive of the case at bar.

3. The chancellor erred in decreeing a sale of the lands for the amount found to be due appellants by appellee to accomplish the redemption. The right to redeem from tax sales is one conferred by statute upon the terms therein named, *i. e.* the payment of all taxes and cash value of improvements. Kirby's Digest, § § 7095, 7115. When the amount is ascertained, it must be paid before the redemption is accomplished. The court should not order the lands sold in aid of the effort to redeem. If the claimant asserts the right to redeem, he must pay the proper amount when ascertained.

Nor should the court have fixed any time within which appellee should redeem. The statute fixes the time, and appellee may still redeem by paying the amount fixed by the court.

The decree is affirmed, in so far as it declares the right of appellee to redeem and fixes the amount to be paid in redemption, but is reversed as to the order for sale of the lands.

ST. LOUIS, MEMPHIS & SOUTHEASTERN RAILROAD COMPANY.

v. GARNER.

Opinion delivered October 14, 1905.

1. WRONGFUL KILLING—RIGHT OF FATHER TO SUE.—A father, as next of kin of an adult intestate, has no right to bring an action to recover damages for the wrongful killing of such intestate where there is a personal representative. (Page 557.)
2. SAME—FATHER'S DAMAGES.—In an action to recover damages resulting to a father from the killing of an adult son, substantial damages cannot be recovered, in the absence of proof that the father had a

reasonable expectation of pecuniary benefit from the continued life of the son. (Page 557.)

Appeal from Randolph Circuit Court.

R. P. MACK, Special Judge.

Reversed.

L. F. Parker and *Orr & Luster,* for appellant.

Plaintiff had no right to maintain this action. 53 Ark. 117; 13 S. W. 803; 52 Fed. 373; 91 Mo. 91; 16 S. W. 487; (Wash.) 40 L. R. A. 822; 4 L. R. A. 261. Sec. 5912, Sand. & Hill's Dig.; Tiffany, Death by Wrongful Act, p. 139, § 116; 130 U. S. 201, etc. Plaintiff was not entitled to recover in this action, for the reason that there was absolutely no evidence even tending to show that plaintiff was in any pecuniary way damaged by the death of his son, that he received any pecuniary benefits from his son's earnings at the time of his death, or that he had any reasonable expectation of doing so in the future. 41 Ark. 387; 55 Ark. 462; 18 S. W. 628; 57 Ark. 377; 21 S. W. 887; 51 Ark. 509; 4 L. R. A. 296; 73 S. W. 542; 62 S. W. 561; 5 L. R. A. 172; 76 S. W. 931; 28 L. R. A. 573.

The statute is plain in its provision that "the jury may give such damages as they shall deem a fair and just compensation with reference to the *pecuniary injuries* resulting from such death." Sand. & H. Digest, § 5912.

BATTLE, J. "On the 25th. day of September, 1902, one Joseph Garner, a man about 22 years of age [we quote from appellant's brief] was at the depot at Biggers, a station in Randolph County, when one of defendant's engines, nearly out of water, was ready to make a quick run to a water tank about twenty miles north. Joseph tried to persuade Bud Smith and John Burries to ride the engine with him, but they both declined, and warned Garner that it was dangerous, and he might get hurt. Garner replied, 'By God, I am going to ride it anyway,' and he asked Perkins, the brakeman, if he could ride, and Perkins told him: 'No; you might get hurt; we are in a hurry.' Garner expressed himself as 'not giving a damn if he did; he was going to ride it,' and when the engine pulled out, Garner stepped up on the step at the rear end of the tender, and held to the bar near the top. The engine moved off at a rapid rate, and had gone about half a mile when Garner fell from his position, and in falling struck his head on some hard substance, from the effect of

which injuries he died the next day, without ever recovering consciousness. J. D. Garner, the father of Joseph, brought this suit to recover damages which he had sustained on account of the death of his son, alleging that 'the injuries received by the said Garner, of which he died, were due to the negligence of said defendant, its agents and employees, in running the train at such an unusual and dangerous rate of speed that by reason of it Garner was thrown to the ground with great violence and received the injuries of which he died; and that thereby the defendant became liable in damages to plaintiff in the sum of nineteen hundred and ninty nine dollars.'

"Defendant in its answer denied specifically the allegations in the complaint, and stated that Joseph Garner was a trespasser on defendant's engine; that he had been warned of the danger, and assumed the risk of the rapid speed of the train, and that his own negligent acts contributed to his injuries; that plaintiff was not the proper party to bring the suit; that there was an administrator of the estate; that plaintiff was not damaged, was not entitled to recover, etc.

"A trial was had before a special judge with a jury Plaintiff failed absolutely to show in any way that he received any pecuniary benefits from his son's earnings at the time of his death, or that he had any reasonable expectation of doing so in the future. He also showed that there was an administrator of the estate of Joseph Garner, deceased."

The jury brought in a verdict for plaintiff for $500, and the defendant appealed.

The plaintiff (appellee) had no right to bring or maintain this action, there being a personal representative of the deceased. Kirby's Digest, § 6290; *Davis* v. *Railway Co.*, 53 Ark. 117.

The appellee was not entitled to recover in this action, because there was no evidence tending to show that he was pecuniarily damaged by the death of his son, the deceased; that he received any part of his son's earnings; that the son gave any assistance to the father, contributed money to his support; or that the father had a reasonable expectation of pecuniary benefit from the continued life of the son. *Fordyce* v. *McCants*, 51 Ark. 509.

Judgment reversed, and the action is dismissed.

SHELBY v. BURROW.

Opinion delivered October 14, 1905.

1. AGENCY—RIGHT OF AGENT TO SUE.—Kirby's Digest, § 6002, providing that a person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted, makes no change in the law. (Page 560.)

2. SAME—UNDISCLOSED PRINCIPAL.—Where an agent, or a subagent for him, makes a valid contract with a third person in his own name, without disclosing his principal, the contract is binding upon the agent in his individual capacity, and either party to it can enforce it against the other, independently of the undisclosed principal. (Page 560.)

Appeal from Conway Circuit Court.

N. T. HAWKINS, Special Judge.

Affirmed.

Sellers & Sellers, for appellant.

1. The contract was the basis of the action, and, there being no proof that any cotton was raised on the farm of M. D. Shelby, no recovery could be had. 36 So. 1005; 56 Atl. 672.

2. Appellee was not the real party in interest. 15 Enc. Pl. & Pr. p. 713; Kirby's Dig. § § 6001. 6002, 6004. An assignor cannot sue in his own name. 15 Enc. Pl. & Pr. p. p. 709, 715; Kirby's Digest, § 5999; 1 Ark. 220; 31 Ark. 597; 4 *Id.* 535. Nor can he sue as one in whose name a contract is made for the benefit of another. Kirby's Digest, § 6002; 22 Enc. Pl. & Pr. 175; 25 Cal. 26; 48 Mo. App. 65; 30 Mo. 389; 104 *Id.* 270; 12 *Id.* 433; 69 N. Y. 280; 36 Kans. 250; 15 Enc. Pl. & Pr. p. 719; 65 Ark. p. 30. See also 73 Cal. 522; 59 Am. Rep. 541; 39 Am. St. 39; 47 N. Y. 233; 26 Or. 186; 92 Hun, 133.

3. The contract was void, there being no agreement or contract with or for the benefit of the Moose Gin Co. 123 Mass, 28; 25 Am. Rep. 9; 3 Sm. & G. 101. An offer to buy of one cannot be accepted by another who succeeds to the business; 9 Cyc. p. 403, n. 19; 32 N. Y. App. Div. 592; 97 Mass. 303. An offer to buy or sell is not assignable. 2 H. & N. 564; 127 U. S. 387; 64 E. C. L. 310; 37 Ark. p. 193. So, a contract by an agent claiming to represent one person, while in reality he

represents another, is absolutely void. 37 Oh. St. 356; 117 Mass 23; 1 Am. & Eng. Enc. p. 418, 2 col. of notes; 33 Am. Dec. p. 702 and notes; 3 App. Cases. 459; 64 N. Y. App. Div. 109; 96 Fed. 164.

Charles C. Reid, for appellee.

1. Burrow was the real party in interest, being the owner of the legal title, and has the right to sue. 69 Ark. 66; 36 Ark. 456, 463; 58 Ark. 487; 100 Fed. 56; 65 N. Y. Sup. 733. The legal owner is the real party in interest. 16 Pac. 236; 24 S. W. 567; 42 N. W. 319; 43 N. W. 715; 72 Pac. 744. He may maintain the action though he made the contract for the benefit of another. 65 Ark. 30; 48 Ark. 355.

2. He could sue as agent of the Moose Gin Co. 16 Enc. Pl. & Pr. 890, 897; 46 N. W. 335; Bishop on Contracts, § 356; Mechem on Agency, § § 754, 755.

3. A cotton factor has a beneficial interest, and can maintain an action in his own name. Mechem on Agency, Sec. 756. There was no fraud—can be none without injury, 53 Ark. 275; 43 Ark. 456.

BATTLE, J. On the 25th day of June, 1900, M. D. Shelby and C. C. Burrow entered into a written contract in the words and figures following:

"MORRILTON, ARK., June 25, 1900.

"This contract, entered into this 25th day of June, by and between M. D. Shelby and C. C. Burrow & Co., of Little Rock, witnesseth:

"That C. C. Burrow & Co. have this day bought of M. D. Shelby one hundred round bales at seven and forty-hundredths (7.40) cents per pound, to be delivered at Morrilton on or before the 15th day of December 1900. Cotton to be gathered in good condition off of the farm of M. D. Shelby in bottom.

"M. D. SHELBY,

"C. C. BURROW & Co., (Heagan)."

J. M. Heagan, by the express authority of Burrow, made this contract in his name. In this way the cotton was purchased for the Moose Gin Company. At the time the contract was entered into, no principal was disclosed to Shelby by Burrow, or Heagan acting for him. Shelby thought and believed he was selling, and intended to sell, the cotton to Burrow for his use

and benefit. He would not have sold to Moose Gin Company, because he believed it was insolvent. Shelby failed to deliver the cotton, and refused to perform the contract. Burrow brought this action to recover damages sustained by the nonperformance. The question is, can he maintain the action? Shelby insists that he made no contract with Moose Gin Company, or for its benefit, and, Burrow having purchased the cotton for it, the sale is void.

In this case Burrow was the agent of Moose Gin Company, and Heagan acted as his agent, with the express consent of his principal. Heagan was the subagent of Burrow. The cotton was purchased by Burrow in his own name, without disclosing his principal. Shelby believed that he was purchasing for his own benefit. This did not render the contract invalid. An agent can make a valid contract with a third person in his own name, without disclosing his principal. Such contract is binding upon the agent in his individual capacity, and either party to it can enforce it against the other, independently of the undisclosed principal. "In such case the agent is, in contemplation of the law, the real contracting party, to whom the promises of the other were made, and who is entitled to enforce them." He can sue upon the contract, and can, unless the principal intervenes, "recover the full measure of damages for its breach, in the same manner as though the action had been brought by the principal." Mechem on Agency, § § 755, 763; Clark & Skyles on Law of Agency, pages 1331, 1341.

The fact that the contract was made by a subagent does not alter the case. The subagent acted for the agent with the consent of the principal, and his acts as such were valid and binding.

The statutes in this State make no change in the law allowing an agent to sue on a contract made in his own name. Kirby's Digest, § 6002; 2 Clark & Skyles on the Law of Agency, § 615; *Considerant* v. *Brisbane,* 22 N. Y. 389.

This case is unlike *Boston Ice Co.* v. *Potter,* 123 Mass. 28, cited by appellant. In that case Potter had had a contract with plaintiff Ice Company, and had terminated it, and made another with the Citizens Ice Company. The Citizens Ice Company sold out its business to the plaintiff company, which continued

to supply ice to the defendant without informing him of the change. On an action on account for ice actually delivered and used, the court held that no recovery could be had, saying:

"A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into."

In that case the defendant made no contract with the plaintiff as principal or agent. In this case he selected and determined with whom he would contract, and made a contract which is binding on both parties, and can be enforced by either party against the other. *Hamet* v. *Letcher,* 37 Ohio St. 356, another case cited by appellant, is unlike this. In that case one Rohner represented to Hamet that he was the agent of Letcher & Company, a firm who were buying hogs, and as such agent bought a lot of hogs from Hamet, paying him part of the purchase price. Hamet delivered the hogs to him, and he sold them to Letcher & Company, as his own, they paying him full value for them. Letcher & Company were ignorant of the fraud by which they were obtained. Hamet sued Letcher & Company for their value, and recovered. In that case there was no sale of the hogs. They were not sold to Rohner, nor to Letcher & Company, because Rohner was not their agent; and they were still the property of the plaintiff.

We hold that the contract of Burrow and Shelby is valid, and that Burrow can lawfully sue and recover thereon.

Judgment affirmed.

BRADSHAW v. STATE.

76 562
77 443

Opinion delivered October 21, 1905.

LIQUORS—NON-INTOXICATING COMPOUND.—Kirby's Digest, § 5093, makes it unlawful to sell, as a beverage, any compound or preparation containing alcohol, whether intoxicating or not.

Appeal from Pope Circuit Court.

WILLIAM L. MOOSE, Judge.

Affirmed.

Brooks & Hays, and *Sam R. Chew,* for appellant.

The amount of alcohol in the drink, as shown by the proof, is not sufficient to bring its sale within the meaning of the statute.

Robert L. Rogers, Attorney General, for appellee.

MCCULLOCH, J. The appellant, Henry Bradshaw, was tried and convicted under an indictment charging him with the unlawful sale, without license, of certain liquor.

No objection has been made, either here or below, to the form of the indictment, and the proof was directed to a sale by appellant of a compound or preparation called "Uno," containing alcohol. It was agreed at the trial below that appellant had sold this preparation as a beverage, without license; "that it has the general appearance of beer; foams, sparkles, and has the color and taste of beer; that a person could not contain enough of it to intoxicate; and that it is used in lieu of the stronger beverages, and almost universally sold in prohibition districts." It was shown by the testimony of other witnesses not to be intoxicating, but to be a "mild, pleasant, and agreeable soft drink, and one in which there is no harm, and from the use of which no intoxication or other deleterious effects can follow."

An analysis of the liquor proved the following to be contained therein:

Alcohol	1.84
Proteids	.50
Extractive matters	3.50
Sugar	2.50

The court refused to declare the law, as asked by appellant, that before he could be convicted it must appear that the liquor sold was intoxicating, but declared the law to be that it is unlaw-

ful to sell, without license, any compound or preparation, as a beverage, which contains alcohol.

We are asked by learned counsel for appellant to hold that it is not unlawful to sell, as a beverage, a compound or preparation containing alcohol, unless the same be intoxicating. The statute under which appellant was indicted and convicted has been otherwise construed by the decisions of this court, and we adhere to the construction heretofore given. *Bond* v. *State,* 56 Ark. 444; *Crawford* v. *State,* 69 Ark. 360.

In the case last cited the court said that "it is obvious that the liquid sold by the appellant must be a compound of one or more of the liquors under the ban of the law with other ingredients, *or* contain the elements necessary to constitute an intoxicating liquid in such form as it may be used as a beverage."

It follows from this that the sale without license of any compound containing the liquors enumerated is unlawful, whether such compound be intoxicating or not. If it contains any of the liquors enumerated, a sale thereof as a beverage is unlawful. The statute prohibits the sale, without license, of any of the liquors named, and the sale as a beverage of any compound or preparation containing them, whether it be intoxicating or not, and all intoxicating liquors of any kind.

In the case of *Bond* v. *State, supra,* this court sustained a conviction for sale of a non-intoxicating compound containing substantially the same proportion of alcohol as in the liquor which appellant sold.

Affirmed.

JOHNSON *v.* WYNNE.

Opinion delivered October 21, 1905.

76 563
d89 206

AGENCY—RATIFICATION.—One can not be held to have ratified the unauthorized acts of an assumed agent unless he knowingly approved of the agent's acts, or accepted the fruits thereof.

Appeal from Clay Circuit Court, Western District.

ALLEN HUGHES, Judge.

Reversed.

STATEMENT BY THE COURT.

James Johnson and James H. Davidson were the owners of a saloon business at Poplar Bluff, Missouri. They were also engaged in operating a sawmill near Corning, Ark. Johnson resided at Corning, and looked after the business there, while Davidson had charge of the saloon business at Poplar Bluff. About the time Johnson and Davidson engaged in the saloon business, they borrowed one thousand dollars from the Bank of Corning, and W. R. Wynne signed the note that they executed for the loan. He had no interest in the loan, and was only a surety. Johnson and Davidson paid about $200 on the note, and the balance, about $850, remained unpaid, and was eventually paid by Wynne, the surety. About the time Wynne paid the balance due on the note, one Philo Powell made an agreement with Johnson to buy his interests in the saloon business at Poplar Bluff. Johnson offered to sell if Powell would pay $50 cash and take Johnson's place in assuming the debts of the firm, and specially to make some arrangement by which Johnson could be released from liability to Wynne for the sum he had paid the bank for Johnson and Davidson. Powell accepted the offer, though the evidence as to whether he did so unconditionally or not is conflicting. In pursuance of this agreement, he went to see Wynne, who offered to turn over to him his claim against Johnson and Davidson, provided Powell would give his own note for the amount of the claim, and secure it by a mortgage on his land. Powell executed the note and mortgage, and left the same with an attorney to be delivered to Wynne if Powell consummated the purchase of the saloon. To enable Powell to convince Johnson that Powell could take up Johnson and Davidson's note and release him from liability to Wynne, Wynne turned over to Powell the note to the bank which he had paid as surety. Powell carried his note to Johnson, and Johnson testified that Wynne told him that any trade he made with Powell would be all right, as Powell had secured him by a mortgage; that he (Johnson) then sold his interests in the saloon to Powell; that Powell paid him $50 in

cash, and indorsed on the note that Johnson was released from liability thereon, and agreed to assume Johnson's part of the other saloon debts; that he then delivered Powell a writing, addressed to Davidson at Poplar Bluff, stating that he (Johnson) had sold his interest in the business to Powell. Johnson further testified that this was an absolute sale of his interest in the saloon, and that it was understood that in part consideration thereof he was discharged from liability to Wynne on the bank note.

On the other hand, there was evidence tending to show that this discharge of Johnson was on condition that Powell, after invoice of the saloon stock, should accept Johnson's interest and also deliver his note and mortgage to Wynne in settlement of the amount paid by Wynne to the bank for Johnson and Davidson; that Powell ascertained that the debts of Johnson and Davidson in the saloon business equalled the assets, and refused to accept them; that thereupon Davidson paid him back the money he had paid Johnson, and Powell took up the note and mortgage which he had executed to Wynne and placed in the hands of a lawyer, and the trade between him and Wynne was rescinded.

Soon after this Davidson sold out the saloon business at Poplar Bluff to a third party. The consideration was $2,800, which was paid in two notes of $1,000 each, payable to Johnson and Davidson, one note for $300, and a sight draft for $500, The $500 draft and one of the notes for $1000 were deposited in the bank of Corning by Davidson, and so much as was collected thereon placed to the credit of Johnson and Davidson. The other note for $1,000 was used to pay off debts of Johnson and Davidson in St. Louis.

As to whether any of the proceeds of this sale came to the hands of Johnson, the evidence was conflicting, but it was not disputed that a part of it was used to pay debts of Johnson and Davidson.

The court, among other instructions to the jury, gave the following instruction, at the request of plaintiff, over the objection of the defendants:

"If you find from the evidence that the defendant Johnson was released from his liability on the note sued on in this case, and that the consideration for said release was the sale by Johnson to one Philo Powell of Johnson's interest in a saloon that

belonged to Johnson and Davidson, and that Davidson afterwards sold the whole saloon, and took in part payment notes of J. D. Morris, payable to Johnson and Davidson, and that Davidson afterwards indorsed one of said notes to the Bank of Corning as collateral to secure the indebtedness of Johnson and Davidson to the Bank of Corning, then, if you find from a preponderance of the evidence that Johnson afterwards, knowing of the transfer, urged the collection of said note when it came due, or if you find that any of the proceeds of the sale was paid on the debts of Johnson and Davidson, and that Johnson knew of it and consented thereto, you will find for the plaintiff."

There was a verdict in favor of plaintiff. Defendant filed a motion for a new trial, and, the same being overruled, the defendant appealed.

J. N. Moore, J. L. Taylor and *F. G. Taylor,* for appellants.

Instruction 1 was erroneous in placing appellee in inconsistent positions. Instruction 3 was erroneous in recognizing a rescission made without authority from Johnson. 64 Ark. 213; Bishop on Contracts, § 812; *Ib.* (2 Ed.), § 823. In order to rescind, it is necessary first, within reasonable time, to give notice of the intention, second to make, or offer, restitution of anything of value received under contract. 24 Am. & Eng. Enc. Law, pp. 645-6. Release of one of several jointly, or jointly and severally bound, is a release of all. 16 Ark. 331; 44 Ark. 349; 45 Ark. 290; Daniel, Neg. Inst., § 1294.

D. Hopson, for appellee.

A judgment of a trial court will not be disturbed if there is evidence to support it. 23 Ark. 131; 40 Ark. 168; 57 Ark. 577; 58 Ark. 125; 44 Ark. 556; 46 Ark. 542. Erroneous instruction is no cause for reversal unless it is apparent that the jury was misled. 62 Ark. 228; 59 Ark. 431; 46 Ark. 485. Nor is it error to refuse instructions substantially covered by instructions already given. 34 Ark. 383; 34 Ark. 550; 43 Ark. 184.

RIDDICK, J., (after stating the facts.) This is an action by Wynne, a surety, against Johnson and Davidson, the two principals in the note paid by the surety. It is admitted that the surety paid the note, and, so far as the defendant Davidson is concerned, the evidence shows no defense whatever. But there

was evidence tending to show that one Powell purchased the interest of Johnson in the saloon business of Johnson and Davidson and that it was agreed between himself and Johnson and Wynne that Powell should assume the debt of Johnson to Wynne, and that Johnson should be released from further liability to Wynne for that debt. There was at least some evidence tending to show that this trade was consummated, and that Johnson was released, and that, with Wynne's knowledge and consent, an indorsement to that effect was made on the note which Wynne had paid. The defendant Johnson set up this agreement for a release as a bar to the action of Wynne. Counsel for Wynne contend that the trade between Powell and Johnson was never consummated, and that Johnson was never released, and that if it was consummated it was afterwards rescinded. They say further that, after the negotiations of Powell for the purchase of an interest in the saloon were broken off, Davidson, acting for Johnson, agreed with Powell to rescind the contract of purchase and release, and thereupon repaid to Powell the money he had paid Johnson on his purchase, and, acting for himself and Johnson, sold the saloon business to a third party, and took the purchase money notes in the name of Johnson and Davidson, and deposited them in the bank to the credit of Johnson and Davidson; that so much of the notes as was collected was placed to their credit and drawn out by them; and that this conduct of Johnson was a ratification of the acts of Davidson in rescinding the contract of purchase with Powell, and in selling the business to another party for the benefit of himself and Johnson. If Johnson did these acts with knowledge of the attempted rescission made by Davidson with Powell, and knowing the fact that Davidson was selling the saloon business as the property, not of Davidson and Powell, but as the property of himself and Johnson, this contention would be sound. But a ratification presupposes a knowledge of the act ratified, and before the acts of Johnson referred to can be treated as a ratification of the rescission made for him by Davidson with Powell it must be shown that he had some notice of such acts of Davidson, and that with this knowledge he accepted the fruits of the rescission, or acted in a way that showed that he approved of the acts of his agent.

Counsel for plaintiff, by the instruction asked by him, which is set out in the statement of facts, and which the court gave, seems to admit that there was evidence tending to show that Johnson had sold his interest in the saloon business to Powell, and that in consideration thereof Wynne had released his claim against Johnson for money paid as surety, but he contends that, if this was so, and if Davidson afterwards sold the saloon, and took notes payable to himself and Johnson, and Johnson afterwards urged the collection of those notes, or consented that the proceeds should be applied to the debt of Johnson and Davidson, he was then liable to Wynne in this action. But this contention does not seem to us to be sound. We must keep in mind that, if the sale by Johnson of his interest in the saloon business to Powell was actually consummated, and if, in consideration thereof, Wynne released his claim against Johnson for money paid, that sale and release could not, in the absence of fraud, be set aside without the consent of Johnson. It is true that if Davidson, acting for Johnson, agreed with Powell to rescind it, and Johnson afterwards ratified this act of Davidson's, the rescission would be in effect the act of Johnson, and would bind him. But, as we have before stated, in order to show a ratification by Johnson, it must be shown by evidence, either direct or circumstantial, that Johnson had notice of the act done by his agent. And right on this point is where the instruction given by the court at the request of counsel for plaintiff seems to us to be defective, for it makes Johnson liable to Wynne in this action if he urged the collection of the notes taken by Davidson in the name of Johnson and Davidson, in payment of the saloon business, or if Johnson consented that any of the proceeds of said notes should be paid on the debts of Johnson and Davidson, regardless of whether at that time Johnson had notice of Davidson's attempted rescission of the contract of sale and release made by Johnson with Powell and Wynne or not. Now, if Johnson had been released from this claim of Wynne, then, in the absence of any knowledge by him of the attempted rescission made by Davidson with Powell, it cannot be said as a matter of law that the mere fact that he urged the collection of the notes given to Davidson in the name of Johnson and Davidson amounted to a ratification of the rescission. It is a well-known fact that the partnership

name often remains the same after the personnel of the firm has changed. The new firm may carry on business under the old name. If Johnson had no notice of the fact that Powell had attempted to rescind his contract of purchase, he might have urged the collection of the debts, not because the money was coming to him, but to aid the new firm which had assumed the debts of the old firm, and in whose success he was interested to that extent. It can not therefore be said, as a matter of law, that such action on his part amounted to a rescission, though it might be potent evidence tending to show such rescission. If, after having sold his saloon business to Powell, Johnson treated the proceeds of that business as his own, this would no doubt be evidence, probably very strong evidence, that the sale to Powell had not been consummated; or, if consummated, that it had been rescinded; but the instruction complained of did not submit that question to the jury, but told them, as a matter of law, that if Johnson urged the collection of notes given for the saloon business, they should find for the plaintiff. The latter clause of this instruction was, in view of the facts, specially objectionable. It, in effect, told the jury to find for the plaintiff if any of the proceeds of the sale of the saloon business was with Johnson's consent paid on the debts of Johnson and Davidson. Now, as before stated, the evidence shows that Powell agreed to take Johnson's place and assume his part of the debts. When the saloon business was sold, it was entirely proper that the proceeds should go to the payment of the creditors of that business, and the fact that Johnson consented that this should be done did not set aside a release made by Wynne, or give Wynne the right to sue him, for the payment of the debt was a part of the contract of release.

The questions in this case are, first, did Wynne, in consideration of a sale by Johnson of his interest in the saloon business to Powell, release Johnson from the debt which he now claims against him. Second, if there was such a sale and release, did Johnson ratify the subsequent agreement of the other parties thereto with Davidson that it be set aside? The evidence, we think, tends to show that he did; but that was a question for the jury, which in our opinion was not properly submitted.

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

WOOD v. PLANTERS' OIL MILL.

Opinion delivered October 21, 1905.

1. SALE—BREACH OF CONTRACT.—Where plaintiff contracted to sell defendant 100 tons of cotton seed at a certain price, and, after delivering 5 tons, defendant requested that the delivery be postponed for a week or so, and thereafter refused to receive the cotton seed, telling plaintiff to go and sell them, and defendant would pay the loss, whereupon plaintiff at once sold them at a loss of $200 on the contract price, an instruction that if the contract was broken by a refusal to accept and pay for the seed, "the measure of damage would be the actual loss to plaintiff by reason of such breach, not exceeding the difference between the price agreed upon and what the plaintiff could have, with reasonable diligence, sold the seed for in the market upon receipt of notice of defendant's refusal to accept them," was confusing, as the first refusal to receive the seed did not constitute a breach of the contract. (Page 573.)
2. SAME—WAIVER OF BREACH.—Mere silence will not constitute a waiver of a breach of contract; it is only where a party is silent when he ought to speak that he will be estopped to speak. (Page 574.)

Appeal from Conway Circuit Court.

CARROLL ARMSTRONG, Special Judge.

Reversed.

STATEMENT BY THE COURT.

This is a suit by the appellant to recover damages from the appellee for breach of contract in refusing to accept and pay for 100 tons of cotton seed sold by appellant to appellee at $17 per ton.

Appellee answered, admitting the contract of purchase as alleged by plaintiff and the receipt of five tons of the seed, which it paid for, denied a breach of the contract by it, and on

counterclaim alleged a breach of the contract by appellant, and asked damages therefor.

It appears that on October 16, 17, or 18, 1902, appellant sold to appellee 100 tons of cotton seed at $17 per ton, and on the same day he sold to the Morrilton Cotton Oil Company 100 tons of seed at the same price. On October 20 appellant sent seven, eight or ten wagons of seed to appellee, commencing on that day to deliver the seed under the contract. Appellee received four loads, and refused to receive any more at that time, and on the next day, October 21st, wrote appellant the following:

"Mr. W. L. Wood, Farm:

"DEAR BILL:—I cannot receive your seed for a week or so yet. Do not send them until I notify you. Say nothing about this for my good as well as yours. Will explain when I see you.

"PLANTERS' OIL MILL,

By O. T. BENTLEY."

Upon receiving this note appellant proceeded to deliver the 100 tons of seed he had sold the Morrilton Cotton Oil Company. On November 1, 1902, appellant offered to resume delivery of seed to the appellee under the contract, but appellee refused to receive them at this time, telling appellant that he "would have to go sell them, and that whatever his damages were in the final outcome of the transaction it would pay."

Appellant on the same day sold the seed to the Morrilton Cotton Oil Company at $14.80 per ton, the price of seed at that time, representing a loss to appelleant of $209 on the contract price. On November 24th, appellant and appellee's agent, Bentley, met at Spear Hotel in Morrilton, and appellant demanded of appellee $209.

Up to this point there is no conflict in the evidence, but appellee refused to pay the $209, claiming that up to the time the demand was made it had not broken the contract; that as no time was specified for the delivery of the seed, it was still within the terms of the contract by being willing to receive the seed at the contract price, so soon as it could arrange a proper place to receive them. Appellee was permitted, without objection from appellant, to testify to the effect that it never did refuse to receive the seed under the contract; that what it did was only with the view of getting more time to prepare a place where

they could be safely stored, and that appellant never refused to deliver the seed under the contract until seed had advanced in price to nineteen dollars per ton, and that then he refused to deliver them altogether.

The following instructions were given at the request of appellee over the objections of appellant:

"2. If the contract was made as claimed by plaintiff, and was broken by defendant by a refusal to accept and pay for the seed, the measure of damage would be the actual loss to plaintiff by reason of such breach, not exceeding the difference between the price agreed upon and what the plaintiff could have, with reasonable diligence, sold the seed for in the market upon receipt of notice of defendant's refusal to accept them."

"3. If, at the time defendant notified plaintiff that no more seed could be taken at that time, seed were still worth as much as defendants had agreed to give, it was the duty of the plaintiff to sell to other parties and prevent a loss; and if he failed to do so when with reasonable diligence he could have done so, he could not recover in this suit more than nominal damages."

"5. If, after the contract was broken (if it was broken), O. T. Bentley, the agent of defendants, met plaintiff, and notified him that defendant was in a position to take the seed under the contract, and plaintiff assigned as a reason for not delivering them that the roads were in too bad condition, and Bentley notified him that he could deliver them after the roads improved, and plaintiff agreed to do so, or by his silence or conduct led Bentley to believe that he had agreed to the proposition, and intended to carry out the agreement as originally made, and these facts appear from the evidence, you would be justified in finding that plaintiff had waived any former breach; and, if you so find, the verdict should be for the defendant, unless it is shown that he afterwards offered to deliver the seed, and defendant refused to accept them."

Appellee abandoned its counterclaim. The verdict and judgment were for appellee.

W. P. Strait, for appellant

No question of waiver of the breach or confession and avoidanse was raised by the pleadings, and it was error to give

instructions 4 and 5 for appellee. 29 Ark. 500; 41 *Id.* 393; 60 *Id.* 606; 11 Enc. Pl. & Pr. p. 665, 626. Instruction 5 is otherwise erroneous. 24 Ark. 251; 55 *Id.* 423; 62 *Id.* 135, 316; 58 L. R. A. 788 and notes, etc.

Nos. 2 and 3 are abstract, and have no application to this case. 16 Ark. 628; 14 *Id.* 530.

Charles C. Reid, for appellee.

1. Instruction No. 4, on the subject of waiver of breach of contract, was warranted by the testimony. No specific objection was made to it, and the pleadings will be treated as amended to conform to the testimony. 1 Sneed (Tenn.), 417; 3 Cold. 178; 40 Ark. 352; 44 *Id.* 524; 54 *Id.* 289; 59 *Id.* 215; 24 *Id.* 326; 62 *Id.* 262. Where testimony is introduced, without objection, covering an issue not in the pleadings, the pleadings are considered as amended, and it is the duty of the court to instruct the jury on the issue. 46 Iowa, 60; 74 Ga. 534; 69 *Id.* 252; 3 Watts (Penn.), 50; 80 Minn. 408; 57 S. C. 507; 25 Cal. 460.

2. There is nothing to show that the motion for new trial was overruled, nor that time was given to file bill of exceptions. A recital in the bill of exceptions is not sufficient; it should be shown by record entry. 34 Ark. 698; 47 *Id.* 508; 31 *Id.* 725.

W. P. Strait, for appellant in reply:

In this case the pleadings were not defective or imperfect—the issue was clear-cut, and the pleadings were not amended. Appellant objected to instructions on outside issues. The instructions were erroneous and prejudicial. 30 Ark. 62; 29 *Id.* 500; 41 *Id.* 393; 46 *Id.* 132; 13 *Id.* 88; 7 *Id.* 516.

WOOD, J., (after stating the facts.) The cause, as we view the undisputed proof, was presented to the jury upon an erroneous theory. The instructions for appellee were not grounded upon the undisputed evidence. The second instruction assumes that it was the duty of appellant to have exercised reasonable diligence to sell the seed "upon receipt of notice of the defendant's (appellee's) refusal to accept them." There is no contention, either in the pleadings or the proof on the part of appellee, that it refused to accept the seed in a manner to breach the contract.

It denies any breach, and claims that the notice to appellant of its inability to receive the seed was merely a postponement of the delivery until such time as it could safely receive them, and that appellant acceded to this; and appellant makes no claim, as we understand his evidence, that the contract was broken by appellee until it had directed appellant to sell the seed, and had thus indicated its intention not to receive them. The direction to appellant to sell, according to the evidence on both sides, was some ten days or two weeks after the written notice and request to appellant to delay the delivery of the seed. So this instruction is not based on the evidence.

Number three for appellee was erroneous for the same reason. The proof on the part of appellant shows that he did not claim a breach of the contract by appellee until it refused to accept the seed and directed him to sell same, promising to save him from loss. The second and third instructions for appellee seem to be predicated upon the theory that the written notice from appellee to appellant might be treated as a breach of the contract. There is nothing in the proof to justify this. Neither side claims this as a breach, and it certainly could not have been the duty of appellant to sell the seed until there was a breach of contract, and appellee could not complain of a failure to make a sale when there was no failure, and when the sale was made by the direction and consent of appellee.

Instruction number five is likewise abstract and erroneous for the lack of evidence to support it. If it could be said that appellant, by failing to object to the evidence, if any, tending to show a waiver of breach of contract, thereby consented that such issue might be presented, although not raised by the pleadings, still the instruction was erroneous in telling the jury that if appellant "by his silence or conduct led Bentley to believe," etc. There is no evidence of a waiver of breach by silence. Nor indeed, if there was a breach of contract, is this a case where it was waived by silence. It nowhere appears that silence of appellant, if he was silent, changed in any manner the status of appellee after the alleged breach occurred. It is not shown wherein appellant was in duty bound to speak, in order to prevent some financial loss to appellee. *Fox* v. *Drewry*, 62 Ark. 316.

If appellee violated the contract, it would require something more than mere silence upon appellant's part to constitute a waiver thereof, under the facts as disclosed by this record.

For the errors pointed out the judgment is reversed, and the cause is remanded for a new trial.

---

76 575
78 482

76 575
84 363
84 364

GIBBS v. ADAMS.

Opinion delivered October 21, 1906.

1. HOMESTEAD—BURDEN OF PROOF.—The burden is on one who claims a homestead to prove that he is entitled to the exemption. (Page 577.)
2. SAME—SEPARATION OF LAND FROM DWELLING HOUSE.—The mere fact that land is separated from the dwelling house by a street is not conclusive against the right to claim it as a part of a homestead exemption, though that fact may be considered in connection with other evidence. (Page 577.)
3. SAME—OCCUPANCY—INTENTION.—When a debtor sells his home and absconds, and his wife moves a few household goods into a dilapidated cabin on land which creditors are about to seize, all the circumstances must be considered to determine whether the claim of a homestead is made by her in good faith and with present intent to occupy the land as a home, or whether it is only colorable and made to shield the land from creditors. (Page 577.)

Appeal from Hot Spring Chancery Court.

LELAND LEATHERMAN, Chancellor.

Affirmed.

Mehaffy & Armistead and *Duffie & Duffie,* for appellants.

A homestead may include land separated by an easement, and yet retain the exempt character. Waples, Homestead and Exemptions, p. 150; Thompson's Homestead and Exemptions, p. 136; *Ib.* p. 112. A garden separated by a street may be part of an exempt homestead. 49 S. W. Rep. 633. The phrase "one town or city lot" includes the ground on which the head of the family has a house, with the appurtenances used as a home. 25 Ark. 101; Waples, Homestead and Exemptions, 232; Thompson, Homestead and Exemptions, pp. 88, 89. Actual occupancy is

not necessary to impress the homestead character. 69 Ark. 596. The wife may claim the husband's exemptions, even though he be an absconding debtor or fugitive from justice. 59 Ark. 211. And, in case of abandonment by the husband, she becomes the head of the family. 46 Ark. 159; 48 Ark. 539; 12 Am. & Eng. Enc. Law (2 Ed.), p 94.

E. H. Vance, Jr., for appellees.

Land separated by a street from the lot on which the dwelling house stands does not constitute a part of the homestead. Thompson on Homestead and Exemption, § 128; *Ib.* § 151, p. 152. Intention merely, not carried into effect, is not sufficient to impress the homestead character. 31 Ark. 466, and authorities there cited. Kerr on Realty, Vol. 2, secs. 1552, 1553, and cases cited; 57 Ark. 179. Occupation as a residence, subsequent to the levy of an attachment, will not enable defendant to hold the land as a homestead, exempt from sale under a judgment sustaining the attachment. 51 Ark. 84; 69 Ark. 109.

RIDDICK, J. This is a controversy between E. Adams and other creditors of W. T. Gibbs and his wife, Sidney Gibbs, over a piece of land which she claims as a homestead, and exempt from execution against her husband. The chancery court, to which the case was transferred, held that the evidence failed to show that the land was a homestead, and ordered the land sold to pay the debts. Mrs. Gibbs appealed.

Briefly stated, the evidence shows that W. T. Gibbs owned about two acres and a half of land in the town of Malvern, on which was his dwelling and homestead. A street of the town divided the land in two parts. On one side was the dwelling house and 1.40 acres of land; on the other about 1 acre of land, on which was a wagon yard and barn and a small one-room house, formerly used in connection with the wagon yard as a camp house. These last named buildings were in a bad state of repair. Sometime in March, 1902, Gibbs and his wife sold the 1.40 acres of land on which their dwelling was located. Gibbs also endeavored to sell the other acre. Shortly after this sale Gibbs abandoned his wife and family, and left for parts unknown, but sent a message to his wife, directing her to move into the small house across the road which had been used as a camp house. Mrs. Gibbs had

a small amount of furniture and household goods carried across the street and placed in the camp house. The witnesses say that this furniture and goods was of little value. Some of them say that all of it was not worth over five dollars. After the attachments were levied Mrs. Gibbs made no attempt to occupy the house, and neither she nor any member of her family has ever lived in it. In fact, the witnesses say that the roof of the cabin was so full of holes, and the structure so dilapidated that it was not suited for a human habitation.

Now, a homestead in an incorporated town is, by our Constitution, limited to one acre. Art. 9, § 5. The burden was on the homestead claimant to show, either that this land across the street from the dwelling, and which she now claims, was a part of the homestead upon which she lived, or that it had been impressed as a homestead after the sale of the other homestead. The mere fact that the land was separated from the dwelling house by a street is not conclusive of the question, but that fact may be considered in connection with other evidence. There was over an acre of land across the street where the dwelling was located; and when that fact is considered, the evidence as to the boundaries of this homestead is not clear and definite enough to show that the acre in controversy is a part of the old homestead.

Gibbs, of course, had the right to establish a new homestead after the sale of the old homestead. In his absence his wife was the head of the family, and we may concede that her acts done in his absence, but with his sanction, may be treated as his acts; but the evidence makes it very doubtful as to whether Mrs. Gibbs ever had any present intention of occupying this cabin on this lot as a home. She may have formed the intention of occupying it at some future time after it had been repaired and rendered fit for a habitation, but the intention to make it her home in the future did not protect it from the attachment lien. *Tillar* v. *Bass,* 57 Ark. 179.

It is true that the mere fact that the cabin was small and in a dilapidated condition does not show that it was not a homestead. A thatched-roofed cabin, however humble, even a canvass tent, may be a homestead, if the owner actually dwells in it, and has his home there. But when a debtor sells his home and

absconds, and his wife moves a few household goods into a dilapidated cabin on land which creditors are about to seize, the court must consider all the circumstances to determine whether the claim of a homestead is made in good faith, and with an intention to occupy it as a home, or whether it is only colorable and made to shield the land from creditors.

We have examined the evidence in this case, and, while there is room for a difference of opinion, we think that the evidence, taken as a whole, fails to show that the land claimed was a homestead.

Judgment affirmed.

---

76 578
78 335
78 577
78 579

76 578
83 524

76 578
f87 600

CARPENTER v. THORNBURN.

Opinion delivered October 21, 1905.

1. SALE OF LAND—FORFEITURE.—Where a contract for the sale of land expressly stipulated that time was of the essence of the contract, and that the vendee's right to purchase depended upon the prompt payment of five notes as they fell due, failure to pay the last note operated as a forfeiture from which equity will not relieve. (Page 581.)
2. SAME—NECESSITY OF TENDER OF DEED.—Where a contract for sale of land stipulated that, if the vendee paid the five rent notes as they fell due, he should have two months in which to exercise his option to purchase by the payment of a further sum, the vendor was not required to execute a deed to the vendee until all the payments were made. (Page 582.)

Appeal from Arkansas Chancery Court.

JOHN M. ELLIOTT, Chancellor.

Affirmed.

STATEMENT BY THE COURT.

In December, 1896, Joseph Thornburn, being the owner of 445 acres of land in Arkansas, entered into a contract with W. N. Carpenter by which he agreed to lease the land to Carpenter for five years for a specified rent for each year, to be paid on the first day of November of each year, commencing with the year

1897 and ending with the year 1901. The aggregate amount for all the years was nearly nine hundred dollars.

The contract, among other matters, contained the following stipulations:

"Time being of the essence of this contract, it is especially agreed and understood that if either of said rent notes, and the sums to be paid as rent, be not promptly paid at maturity, or if the taxes due for any one of the years above mentioned be not promptly repaid to said lessor, then this lease, including the option to purchase hereinafter mentioned, shall, without notice, terminate and cease, and the lessor shall be entitled to immediate possession of the leased property, and said lessee shall be liable to said lessor for such of said rent notes as may have matured and remain unpaid. * * * If the said lessee shall have paid the rent notes above mentioned, together with any additional sums above provided for as rent, and any attorney's fees that said lessor may have to pay for collecting said notes after their maturity, then said lessee shall have, for the period between November 1, 1901, and January 1, 1902, the option to purchase said lands for the sum of $768, * * * of which $8 shall be paid in cash."

Then follows a statement showing that the balance was to be paid in ten annual installments of $76 each, with interest added. The lessor also stipulated that, upon the payment of the five rent notes as provided in the contract and the further sum of $8, he would execute a warranty deed to the lessee conveying the land to him, taking a trust deed from him securing the payment of the notes for $760 and interest.

Carpenter paid the first four rent notes as they fell due, but failed to pay the last rent note for $190.70, which fell due on the 1st. of November, 1901. Thornburn elected to declare that the option to purchase had been forfeited, and in February, 1902, brought an action at law on the unpaid rent note to recover the amount due on same and interest.

In April, 1902, Carpenter filed an answer, alleging that the contract was in fact an agreement to purchase, not to rent, land; that he had paid all of the five notes designated as rent notes in the contract, except the last, and that he would have paid that note but for the fact that plaintiff had failed to execute

and tender to him a deed as required by the contract; that he had entered upon the land under his contract, and made valuable improvements thereon; that he was then, and had been at all times, ready and willing to pay the $190.70 and the further sum of $8.00 to plaintiff, as required by the contract, and would have done so had a deed been tendered by plaintiff. He tendered the money in court, and offered to pay the same at any time a deed was delivered to him. He asked that the case be transferred to the equity docket, that his answer be taken as a counterclaim, and that plaintiff be compelled to specifically perform his contract.

Plaintiff filed a reply to the counterclaim, in which he admitted that defendant had made some improvements not exceeding a hundred dollars in value, but alleged that the land had been injured more by defendant's cutting timber upon it than it had been benefited by improvements made. He denied that defendant had been ready and willing to pay the rent note now due, but alleged that defendant had been warned by the agent of plaintiff and importuned to pay said note, and avoid the forfeiture of the contract, but had refused to do so, and that plaintiff had exercised his right under the contract, and declared the forfeiture. He asked that the cross-complaint of defendant be dismissed, and that he have judgment for his debt.

The case was transferred to the equity docket, and heard on the pleadings and exhibits thereto. The chancellor found that the contract between plaintiff and defendant was a rent contract with option to purchase; that if the defendant had paid the note sued on at maturity, he would have had the right to purchase the land, but that he had not done so; and that by the terms of the contract such failure to pay terminated the defendant's right to purchase, and that plaintiff was entitled to recover. He therefore gave judgment in favor of plaintiff for the amount of his note and interest.

Defendant appealed.

H. A. & J. R. Parker, for appellant.

The indenture being, in effect, a contract of sale, the plaintiff ought to have tendered a deed. 28 Ark. 27; *Ib.* 78; *Ib.* 127; *Ib.* 175; 26 Ark. 292; 13 Ark. 163; 44 Ark. 192; 51 Ark. 333; 29 Ark. 303. Equity will relieve from, but never inflict, forfeiture. 17 Fed. 561; 20 Fed. 345; Bishop on Contracts, § § 417, 418; Fetter

on Equity, p. 23; *Ib.* p. 107; 20 N. W. 222; 16 Neb. 202; 134 U. S. 68; 49 Fed. 305; 74 Fed. 52.

John F. Park, for appellee.

If the time limited by the contract in which to exercise an option to purchase has elapsed, a tender is of no avail, and equity will not compel conveyance. 57 L. R. A. 173; 17 N. E. Rep. 60; 21 S. W. 970; 68 Md. 21. And, time being of the essence of the contract, equity will respect that provision. 7 Ves. 270; 4 Bro. C. C. 469; Fry, Spec. Perf. § § 711, 712, 713; 9 Am. Law, Reg. 146; 1 Johns. Ch. 369; 2 Story's Eq. Jur. § 76; Pomeroy on Eq. Jur. § 445; 69 Am. St. Rep. 17; 3 Iowa, 158; 45 S. W. Rep. 275; 162 U. S. 404; 104 U. S. 301; Bispham's Eq. § 392; 8 Am. Eng. Dec. in Eq. 224; 134 U. S. 68. Payment of the rent note sued on was a condition precedent to the option to purchase. 54 Ark. 16.

RIDDICK, J., (after stating the facts.) This is an action to recover the amount due on a note given for rent of land. The defendant admits the execution of the note, and states that, though it purports to be for rent, it was in fact executed for a part of the purchase price of the land, and that he is ready now, and has always been ready and willing, to pay it if plaintiff will execute a deed to the land. He contends that, as equity abhors forfeitures, he has still the right to pay the note and the remainder of the price and take the land. The law on this point, so far as it applies to this case, is very clearly stated by Prof. Pomeroy as follows: "It is well settled that when the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity can not relieve a vendee who has made default. With respect to this rule there is no doubt; the only difficulty is in determining when time has thus been made essential. It is also equally certain that, when the contract is made to depend upon a condition precedent,—in other words, when no right shall vest until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times,—then also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent." 1 Pom. Equity, § 455; *Quertermous* v. *Hatfield,* 54 Ark. 16.

Now, in this contract the parties expressly stipulated that time was of the essence of the contract. The right of the defendant to purchase the land depended under the contract upon the prompt payment of the five rent notes as they fell due. Until he had paid those notes, he had under his contract no right to purchase. If he had paid those notes promptly, the last of which was due on the 1st of November, 1901, he had under the contract the option to purchase the land at any time between that date and the first of January following. That is to say, if he had paid the rent notes, he would then have had two months in which to exercise his option to purchase. But he did not pay the last note. His excuse for this failure is that the defendant failed to tender him a deed. Now, an examination of the contract will show that plaintiff was not required to execute the deed to defendant until all the rent notes and the further sum of eight dollars had been paid. The failure of the defendant to tender a deed was no legal excuse for the failure to pay the note, for the payment of all the rent notes was a condition precedent upon which the right of purchase depended. The pleadings show that defendant made an offer to pay this note in his answer, but that was long after the maturity of the note, and after the time when the option to purchase would have expired, even had the note been paid. The contract may be a harsh one, but it contravenes no rule of public policy. The parties made it, and the courts cannot alter it. *Cheney* v. *Libby*, 134 U. S. 68.

On the whole case, we are of the opinion that the judgment of the chancellor is right, and it is therefore affirmed.

NOE v. LAYTON.

Opinion delivered October 21, 1905.

1. EQUITY—RELIEF AGAINST JUDGMENT AT LAW.—It is not enough to warrant the interference of equity with a judgment at law that an accident has prevented the losing party from pressing a motion for

new trial based upon technical errors occurring at the trial sufficient to warrant a reversal on appeal; it must appear that it would be contrary to equity and good conscience to allow the judgment to be enforced. (Page 588.)

2. LANDLORD'S LIEN—WAIVER.—Where a tenant sold a crop on which his landlord had a lien, and the landlord received payments from the tenant, knowing that they were derived from the sale of such crop, he will be held to have ratified the sale and waived the lien. (Page 588.)

Appeal from Marion Chancery Court.

T. H. HUMPHREYS, Chancellor.

Affirmed.

J. W. Black, for appellant.

Equity will relieve against hardship caused by unavoidable accident, fraud or mistake. 61 Ark. 341; 38 Ark. 283. Having demurred to the petition, the facts alleged therein are admitted, and can not be controverted. Bliss, Code Pl. (2 Ed.), sec. 418; 10 Conn. 62; 22 N. Y. 472.

J. C. Floyd, and *Wood Bros.*, for appellee.

A court of equity will not interfere unless the judgment complained of gives the successful party such an advantage as it cannot, in good conscience, permit to stand. Beach, Mod. Eq. Jur. § 664; 61 Ark. 341; *Ib.* 356; 51 Ark. 341; 13 Ark. 600. Nor will it interfere unless the petition shows that substantial injustice, or failure of justice, has occurred. 48 Ark. 535; 40 Ark. 551; 50 Ark. 458, and cases cited above.

BATTLE, J. This case was before this court in October, 1901, on appeal by T. S. Noe. A. S. Layton was appellee. The judgment appealed from was reversed, and the cause was remanded for a new trial, as will more fully appear in 64 Ark. 880. Since then A. S. Layton has died, and the action has been revived in the name of W. E. Layton, as administrator of the estate of A. S. Layton, deceased. The action was brought by A. S. Layton against Noe to recover possession of a bale of cotton. A new trial was had in the Marion Circuit Court on substantially the same testimony as in the former trial, and a verdict and judgment were rendered for plaintiff, Layton. Appellant filed his motion for a new trial, which was overruled, and asked for an appeal to Supreme Court, which was granted, and appellant was given twenty days in which to file his bill of exceptions, and by

agreement of appellant's counsel and the Hon. E. G. Mitchell, the circuit judge of the 14th judicial circuit of Arkansas, before whom said cause was tried, the bill of exceptions was to be signed at the Marshall Circuit Court, the week following the Marion Circuit Court, which would be within the twenty days' time given appellant in which to file his bill of exceptions. When counsel for appellant appeared at the Marshall Circuit Court with his bill of exceptions duly prepared, the circuit judge, the Hon. E. G. Mitchell, had vacated the bench, and gone to Western Oklahoma, a distance of eight hundred or a thousand miles, thereby rendering it impossible for appellant to secure the signature of the circuit judge to his bill of exceptions, and have same filed in the circuit clerk's office within the twenty days allowed, thereby cutting him off from his right of appeal, unless this court holds that the chancery court has the right to grant relief in such cases by allowing a new trial.

Noe on the 16th day of October, 1903, filed in the Marion Chancery Court a petition for a new trial, and stated in substance as follows:

"That at the August term, 1903, of the Marion Circuit Court, the case of W. E. Layton, administrator aforesaid, *v.* T. S. Noe, was tried. The trial was before a jury, and the verdict and judgment were for W. E. Layton, administrator. That at the same term of the circuit court, and within three days after the rendition of the judgment, T. S. Noe filed a motion for a new trial, which was overruled, exceptions were saved, and an appeal was prayed and granted. That twenty days were given T. S. Noe in which to prepare and file his bill of exceptions. That appellant's attorneys represented two other parties whose cases were decided at the same August term of the court, in which they appealed, and were given twenty days to prepare and file bill of exceptions, and they as diligently as they could got up bills of exceptions. It was further understood and agreed by the parties and the Hon. E. G. Mitchell, judge of the circuit court, that bills of exceptions should be prepared and presented to the judge at the Searcy court at its next term, to be held the next week, beginning Monday, the 7th day of September, 1903, and that on Wednesday, September 9, 1903, the appellant, through one of his attorneys, attended the Searcy Circuit Court with the

bills of exceptions prepared to present to the judge for his signature. This was five days before the expiration of the twenty days given for filing bill of exceptions. That Judge E. G. Mitchell had, on Tuesday, after opening court in Searcy County, vacated the bench and caused the election of a special judge, the Hon. J. C. Floyd, who had been of Layton's counsel in the Marion Circuit Court, and that the regular judge, the Hon. E. G. Mitchell, before the arrival of the appellant's attorney, departed this State, and remained out of it until after the expiration of the twenty days given for filing the bill of exceptions in the Marion Circuit Court.

"Appellant was informed and believed that the circuit judge had gone to Beaver City, Okla. Ter., a point so remote from this State that it would have been impossible to have reached him, obtained his signature, and returned to this State in time to file the bill of exceptions within the twenty days, which expired on September 14, 1903. Appellant states that, by reason of the foregoing facts, he was prevented from filing his bill of exceptions, and his right of appeal was cut off, thereby causing plaintiff a great and irreparable wrong.

"Plaintiff further states that the facts, as shown by the evidence on the trial of the cause in the circuit court, were as follows, towit: In 1899, Alex and Andy Davis, brothers, raised crops on the lands belonging to and in the possession of T. S. Noe, the complainant here, and under an agreement with them Noe furnished the lands, farm implements, work animals and feed for same, and supplies to the Davises for raising a crop during the year 1899. That Noe was to give the Davises for raising crop one-half thereof, after deducting therefrom the value of supplies furnished the Davises by him. Noe furnished them at the store of J. S. Cowdrey, in Yellville, Ark., with supplies to the following amounts,—to Andy Davis, $25.77; to Alex Davis, $21.58. The amount of cotton raised under said agreement going to Alex Davis, and subject to lien for supplies, was 500 pounds in the seed, and the amount going to Andy Davis under the agreement was 900 pounds in the seed, subject to the lien for supplies. T. S. Noe had the part of Alex Davis brought and placed in his crib, and afterwards he and Andy Davis hauled both parcels to the gin and placed it there for ginning. In order

to keep his accounts with the Davises correctly, the cotton was placed in the gin in the name of Alex and Andy Davis. Noe gave direction to the ginner, in the presence of Andy Davis, as the aggregate amount of cotton was too small to make two bales, to place it all in one bale, and then told Andy Davis that he (Noe) would go to town and learn whether the best prices were paid for cotton in the seed or in the bale, and allow the Davises the best price therefor. After the cotton was baled, ginned and numbered, Alex Davis (without the knowledge or consent of Noe) went to the ginner, and got the number of the bale and its weight on a piece of paper signed by the ginner, and, with this only to support his statement that he and his brother owned a bale of cotton, sold the same to I. J. Baker, the agent of A. S. Layton (the defendant's intestate) for $29.64. Afterwards, when Noe learned of the sale of the cotton, he went to Baker and Layton, and told them that he had a landlord's lien on the same, and then took the cotton from the gin, and hauled it to McBee's Landing on White River, a distance of some eight or ten miles from Hurt's gin, where the cotton was ginned. This gin was situated two or three miles from Yellville, where Layton lived, and did business, and the cotton was never in Layton's possession. After Noe hauled the cotton off, Layton brought suit in replevin, and took possession of the cotton. Before Noe hauled the cotton away, towit: on November 12th and November 20th, Andy Davis paid $12 on his supply account on the first date, and $5 on the latter date. Andy Davis testified that this was from money received from the sale of the cotton. The evidence is conflicting whether Noe knew that these payments were from the Layton money, before he hauled the cotton off. Alex Davis never paid a cent on his supply account, and had abandoned all claim to the cotton in behalf of Noe before the cotton was placed in the gin.

"The bill of exceptions prepared to be presented to the Hon. E. G. Mitchell, the judge of the Marion Circuit Court, by complainant's attorneys, is filed herewith, made a part hereof, and marked exhibit 'A.' * * *

"And that the Hon. Circuit Judge, E. G. Mitchell, committed errors during the trial prejudicial to this appellant, to which appellant excepted at the time, and that the verdict of the jury was without evidence to support it, and the judgment unjust

and inequitable. That appellee, through the replevin suit, procured possession of the bale of cotton in question, valued at $30.29, and converted it to his own use.

"Wherefore plaintiff prays that this cause be heard, and that the defendant be compelled to submit to a new trial at law, or that he be ordered to return to the plaintiff the $30.29, the value of the cotton, with interest, and pay all costs and for all other equitable relief."

The instructions given by the court to the jury and copied in the writing attached to the petition, called bill of exceptions, and made exhibit, so far as is necessary to copy in this opinion, are as follows:

"No. 1. This is a cause in which A. S. Layton is the plaintiff, said A. S. Layton being dead; and the suit, revived in the name of W. E. Layton, seeks by replevin to recover a bale of cotton of the value of $30.29 from the defendant, T. S. Noe. Before the plaintiff can recover, the burden is on him by a preponderance of the evidence to show that he is the owner and entitled to the possession of the cotton. Plaintiff claims that he bought the cotton from the Davis Brothers. It is admitted that the Davis Brothers were tenants or employees of the defendant, Noe, and admitted that the Davis Brothers got supplies from the defendant for which he is entitled to a lien. I instruct you that this lien on the cotton raised by the Davis Brothers continued to the cotton gin, where it was hauled and ginned, and he, the defendant, had the right of possession to it at the gin, notwithstanding the fact that the Davis Brothers had taken the ginner's receipt and sold it to Layton, unless Layton showed by a preponderance of the evidence that when he bought the cotton from the Davis Brothers, Noe, the defendant, consented to the sale at the time the same was made, or that he afterwards, and before the bringing of this suit, waived his lien and released same."

"No. 2. I instruct you that if you find from the preponderance of the evidence that the defendant Noe was in possession of the cotton in controversy, and while in such possession he knew that Davis Brothers had sold the same to Layton, and that Layton had bought in good faith, believing that Davis Brothers had the right to sell, and afterwards that defendant accepted part of the money paid by Layton to Davis Brothers, he thereby

ratified the sale, and you will find for the plaintiff, although you may believe that at the time the sale was made Davis Brothers had no right to sell the cotton."

The defendant, Layton, filed a demurrer to the petition, and the court sustained it, and dismissed the petition for want of equity, and the plaintiff, Noe, appealed.

In *Whitehill* v. *Butler,* 51 Ark. 341, it is said: "It is not enough to warrant the extraordinary interference of equity with a judgment at law that an accident has prevented the losing party from pressing a motion for a new trial based upon technical errors occurring at the trial, even though they might be sufficient to warrant a reversal on appeal. *Johnson* v. *Branch,* 48 Ark. 535. A party who has obtained judgment after a full investigation of the controversy by a competent tribunal will not be forced by a court of equity to submit to a new trial, unless justice imperatively demands it. It must clearly appear to that court that it would be contrary to equity and good conscience to allow the judgment to be enforced, else it declines to impose terms upon the prevailing party."

In the case before us the appellant, Noe, had a lien on the cotton in controversy for supplies furnished the Davis Brothers. Alex Davis, one of the owners of it, sold it to A. S. Layton, without the knowledge or consent of Noe. Andy Davis paid to Noe out of the proceeds of the sale on November 12th and 20th, 1899, $17, on the amount he and his brother were owing for supplies. Appellant, in his petition, alleges that "the evidence is conflicting as to whether Noe knew that these payments were from the Layton money before he hauled the cotton off." He fails to show in any way what this evidence was. He shows that he testified that he did not know, but does not show the evidence which conflicted with his on that point. In "Exhibit A" to his petition it appears that the court instructed the jury that, if they found from the preponderance of the evidence that Noe accepted part of the money paid by Layton to Davis Brothers or either of them, and knew that it was the money paid by Layton to the Davis Brothers for the cotton, they would find for Layton. The jury returned a verdict in favor of Layton, and thereby found that Noe knew that the money received by him was a part of the proceeds of the sale of the cotton. Construing the petition

and the exhibits, which were made a part thereof, together, it is evident that the jury found from the evidence that Noe knew, at the time he received the money, that it was a part of the proceeds of the sale of the cotton to Layton. Unless they did, they could not, under the instructions of the court, have returned the verdict. If this finding be true, Noe thereby ratified the sale to Layton, and he is not, in law or equity, entitled to the possession of the cotton.

The verdict being sustained by evidence, the judgment he attempts to appeal from is not reversible; and there is no equity in his petition for a new trial.

Decree affirmed.

---

76 589
82 150

76 589
186 486

KANSAS CITY SOUTHERN RAILWAY COMPANY v. EMBRY.

Opinion delivered October 21, 1905.

1. APPEAL—HARMLESS ERROR.—Where an agreement reducing the liability of a railway company for the loss of freight was neither pleaded nor proved, it was not prejudicial error to permit plaintiff to prove that she never made such an agreement, nor to instruct the jury that she was not bound thereby. (Page 593.)

2. CONNECTING CARRIERS—PRESUMPTION IN CASE OF DAMAGE.—In the absence of evidence locating the damage to goods in transit over two connecting lines, a *prima facie* presumption arises that the last carrier is the negligent one; and this presumption is not overcome by proof that the injury occurred after the property had been discharged by the initial carrier at a station in charge of a joint agent of the carriers, though the agent had not performed some act, such as executing receipt or the like, necessary to constitute a delivery as between the two carriers. (Page 593.)

3. SAME—LIABILITY FOR ACTS OF JOINT AGENT.—Where connecting carriers jointly employ a common agent in the prosecution of a joint enterprise as carriers, they become jointly liable for his defaults. (Page 594.)

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

Affirmed.

STATEMENT BY THE COURT.

This is an action brought by appellee in the Miller Circuit Court against appellant, the Kansas City Southern Railway Company, to recover damages to a piano and sewing machine shipped by plaintiff over defendant's road.

The complaint alleges, in substance, that on September 13, 1901, plaintiff shipped a piano and sewing machine from South McAlester, Indian Territory, to Texarkana, Arkansas, bill of lading being issued at South McAlester, Indian Territory, to be delivered at Texarkana, Ark., in good condition and with the proper care; but that at Howe Junction, a station on said defendant's railway, said piano and sewing machine were put on the railway platform, and by the wilful negligence of the defendant, its agents and employees, were exposed to a severe rain for a period of several hours without protection of any kind, and the piano was thereby damaged in the sum of $250, and said sewing machine was damaged in the sum of $20.

Defendant in the answer denied each and every allegation of the complaint.

The cause was tried before a jury, and a verdict returned in favor of the plaintiff fixing damages at $185 on the piano, and $15 on the sewing machine.

The articles in question were shipped from South McAlester, Indian Territory, to Texarkana, Ark., over the Choctaw, Oklahoma & Gulf Railroad from the initial point of shipment to Howe Junction, at which point the two roads cross, thence to Texarkana over appellant's road, and the bill of lading was issued by the agent of the first-named railroad company at South McAlester. The bill of lading contains a stipulation limiting the liability of the connecting carriers to the damages accruing on their respective lines. The two companies maintained a joint station at Howe Junction, with joint agents in charge thereof.

Mrs. C. D. Payne, the mother of the plaintiff, testified that the piano and sewing machine were shipped from South McAlester to Texarkana by her on the 12th of September, 1901, and that she obtained the bill of lading; the piano and sewing machine being the property of her daughter, Mrs. Embry, who was ill at the time. Continuing, this witness said: "It was raining

when we left South McAlester. When I got to Howe, it was about 10 o'clock or 10:30. I had to wait for the Kansas City Southern there for a while. When I got on the platform, it was still raining. I noticed the piano on the platform. It was a little station. It was over on one side, and I got off on the other side. I wanted to see if it was my piano. I left my daughter, who was sick, in the station, and went over there, and found it was. I went to the freight office, and asked the agent about it. I said: 'I shipped that piano yesterday evening, and I see it is in the rain.' He said, 'Yes, I will go have it put in.' He got two negroes, and went, and had it put in, in my presence, in the freight office. I left there about 11 o'clock."

Witness further testified that the piano and machine had been wet and badly damaged. That the piano cost $525, and that the machine cost $65.

C. D. Payne testified that he examined the piano and sewing machine after they arrived at Texarkana, found that they were in bad condition, having been wet. The machine was rusted from dampness, and the parts of the piano were all damp or wet.

The defendant, to maintain the issues upon its part, introduced the deposition of W. C. Charles, who testified in substance that he was the joint agent at Howe for both roads; that he was there in their employ in September and October, 1901. That he remembered the piano very distinctly. It was received from the west sometime during the night over the Choctaw, Oklahoma & Gulf Railroad, and was unloaded by the trainmen on the platform, and remained some time after it was unloaded. On his arrival in the morning at the office he saw the piano sitting on the platform, and was told by the night operator that it was unloaded from an eastbound train. Didn't know whether they refused to set it under, but anyway it was not sitting under the eave of the roof, and had been out in the rain. "My recollection is that the freight remained in Howe about 12 or 15 hours, and was shipped out that evening by the Kansas City Southern local train. I did open the box containing the piano, after taking it into the depot, and, as stated before, I found the piano covered with dust which showed conclusively that there had'nt been a drop of rain touched it. Freight was not in possession of the Kansas City Southern until it had been placed inside of the freight

building and transfer made." The witness also stated, in reference to the custom of receiving freight by one road from the other at Howe, that there was no written or verbal instructions that he knew of. It was simply a custom; the mere fact of freight arriving at the depot would not constitute a delivery until the transfer was made; that he knew of no rules or regulations on the subject—simply referred to the custom.

Defendant introduced as witnesses other employees at Howe Junction, who testified in substance the same as the foregoing. One of them made the following statement concerning the handling of freight at Howe Junction: "As I understand it, when freight is delivered, and we get the bill, we write up the bill, and register it to the Kansas City Southern books as received for shipment. Until this bill is registered, I understand that it is the property of the Choctaw, until they receive the bill, and it is registered up. I know we had'nt registered this bill to the Kansas City Southern."

The court charged the jury, in substance, that if the freight agent at Howe Junction was the joint agent of boths roads, and if the piano and machine were exposed to rain while at the station, the defendant was liable for the damage caused thereby.

Read & McDonough, for appellant.

It was error to admit parol testimony to vary the written contract. No liability upon connecting carrier until after delivery to it. Such damages, only, can be recovered as are in contemplation of the parties. Plaintiff was bound by the provisions of the bill of lading. 50 Ark. 397.

Webber & Webber, for appellee.

A release couched in terms unintelligible to plaintiff was no notice to her. Deposit of the goods with the carrier for transportation is delivery. Hutchinson, Carriers, 2d. Ed. § 100; 83 Am. Dec. 143; 87 Am. Dec. 301. Maintaining joint agents, the unloading of freight by one road was constructive delivery to the other, and they become jointly liable for their agent's default. Hutchinson on Carriers, 2d Ed. § 90; *Ib.* § § 158-169; 28 C. C. A. 146; 6 Cyc. 486, note 10; 5 Otto, 43-48; 46 Ark. 226; 60 Ark. 333.

McCULLOCH, J., (after stating the facts.) 1. Counsel for appellant assign as error the ruling of the court in permitting Mrs. Payne, witness for appellee, to testify as to conversation

with the railroad agent at South McAlester. She testified that she had no knowledge of an indorsement made on the bill of lading by agent reducing, in case of loss, the value of the articles down to $5 per hundredweight; denied that she received reduced freight rate on the shipment; and stated that the agent said to her: "We are responsible for your goods or any damage to your goods." Counsel also contend that the court erred in its instruction to the effect that the indorsement on the bill of lading reducing the value of the articles down to $5 was not binding on appellee if she contracted to pay the highest rate for freight, and had no knowledge of the indorsement. We need not determine whether the evidence was competent, or the instruction in question proper, as there was no prejudice to appellant in either ruling. Appellant did not plead the release, and, as the same was not in issue, no harm resulted in permitting appellee to prove that she did not agree to the release, nor in instructing the jury that she was not bound by the indorsement. Nor is any release sufficiently proved. The bill of lading shows on its face an indorsement of the abbreviation, "Rel. Val. $5 Cwt." Nothing appears on the bill of lading nor in the testimony to explain what the terms imply, though counsel argue that they imply an agreement to reduce the value of the property, in case of loss or damage, down to $5 per hundredweight. The court cannot assume that they mean any such thing. The bill of lading contains a clause providing that, "in case of loss or damage sustained by any property herein receipted for, whereby any liability or responsibility may be incurred, *the amount of loss or damage shall be computed at the value or cost of the articles herein mentioned at the place and time of shipment.*" In the face of this provision no ambiguous stipulation limiting liability can be allowed to prevail against it.

2. It has been several times held by this court, and the rule is undoubtedly supported by substantially all the authorities, that, "in the absence of evidence locating the damage to goods in transit over several connecting lines, a *prima facie* presumption arises that the last carrier is the negligent one." *St. Louis S. W. Ry. Co.* v. *Birdwell,* 72 Ark. 502; *St. Louis, I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 112, 83 S. W. 333.

In this case there is evidence that the damage occurred while the property was at a station maintained jointly by both carriers, and the presumption still arises, until the contrary is shown by evidence, that the damage occurred after the delivery to appellant as the last carrier. Appellant seeks to overcome this presumption by proving a prevailing custom that, notwithstanding the fact that the freight is discharged at a station in charge of a joint agent of the two companies, and is then negligently exposed to injury, it is not considered as delivered to the last carrier until a record showing a delivery to the last carrier is made by the joint agent upon the books. We cannot approve any such doctrine. The two carriers were both liable for the negligence of their common agent; and, as against the person whose property was damaged thereby, the responsibility cannot be shifted by showing that the common agent had not performed some act, such as executing receipt or the like, necessary to constitute a delivery as between the two principals. The rule is correctly announced in Hutchinson on Carriers, § 169, that "where they (connecting carriers) jointly employ a common agent in the prosecution of a joint enterprise as carriers, they become jointly liable for his defaults." See also 1 Elliott, Railroads, § 1447.

The undisputed testimony in this case shows that the piano and machine arrived at Howe Junction during the night, and were allowed to remain on the open platform exposed to the rain until nine or ten o'clock the succeeeding morning. Plaintiff's witness testified that she saw it there about ten o'clock on the platform in the rain, and called the attention of the station agent to it. The agent testified that his attention was called to the exposed condition of the piano by Mrs. Payne as late as 9 o'clock next morning, and that it had been rained on. He is not certain whether it was then raining. This makes out a clear case of negligence, for which the appellant is liable.

Affirmed.

BEAVERS v. SECURITY MUTUAL INSURANCE COMPANY.

Opinion delivered October 21, 1905.

1. FIRE INSURANCE—REMOVAL OF PART OF GOODS.—An instruction that if the assured removed the insured stock of goods, or any part of it, from the building except in the usual course of business, this would be a fraud on the insurer which would discharge it from liability, is erroneous, in the absence of any stipulation to that effect in the policy. (Page 597.)
2. SAME—LOSS OCCURRING THROUGH INSURED'S NEGLIGENCE.—It was error to instruct the jury that if the loss occurred either through the negligence of the insured or was the result of his own wrong, the insurer would not be liable, in the absence of such a provision in the policy. (Page 597.)
3. SAME—NEGLECT TO PRESERVE PROPERTY.—A provision in a fire insurance policy that the company shall not be liable for loss caused "by neglect of the insured to use all reasonable means to save and preserve the property at or after a fire, or when the property is endangered by fire in neighboring premises" only requires the insured to exercise care in saving and preserving the property at and after the fire, and prevents a recovery for loss of so much of the property as could have been saved by the insured with the exercise of due care. (Page 597.)
4. SAME—ABSTRACT INSTRUCTIONS.—Where the policy did not contain the usual iron safe clause, it was error to instruct the jury as if it had been included in the policy. (Page 598.)

Appeal from Yell Circuit Court.

WILLIAM L. MOOSE, Judge.

Reversed.

STATEMENT BY THE COURT.

This is an action to recover upon a fire insurance policy issued by the Security Mutual Insurance Company to appellant in the sum of $1500 on his stock of merchandise in a store house at Greenville, Ark. The jury returned a verdict in favor of the defendant, and the plaintiff appealed. The policy was issued September 24, 1901, and the property was destroyed by fire on the night of February 13, 1902.

The suit is for the full amount of the policy, and performance on the part of the plaintiff of the requirements of the policy is alleged in the complaint. The answer admits the issuance of the policy, but alleges that it was procured by plaintiff upon his false and fraudulent representations as to the value of the prop-

erty insured; that the plaintiff had failed, in violation of the terms of the policy, to take an inventory of said property and keep the same, together with his books showing his purchases, sales, etc., in an iron safe or safe place other than in the store; that before the fire plaintiff moved all, or nearly all, of the insured property from the store, and that the same was not destroyed; that he had, in violation of the terms of the policy, made false oath concerning the loss; that he had failed to comply with the terms of the policy in furnishing proof of loss; and that the loss occurred by the wrongful act or negligence of the plaintiff.

The plaintiff testified that he took an inventory of the insured stock of merchandise on January 1, 1902, which amounted to $4,475.89; that subsequent to that date he had purchased goods amounting to $585.95, and that, according to his daily cash and credit sales, he had sold $193.80 for cash and $1,067.96 on credit, and had on hand at the time of the fire property of the value of as much as $4000. He also testified that he had no iron safe, but had preserved the inventory taken January 1, 1901, and his accounts books running since that date, having the inventory taken and cash book in use before January 1, 1901, destroyed by the fire. He also testified that he furnished proof of loss in accordance with the terms of the policy, and had submitted to an examination under oath as provided in the policy.

The defendant introduced proof tending to establish the fact that plaintiff had, before the fire, removed a large quantity of goods from the store, and that the store was set on fire. Witnesses testified that when the fire was in progress they discovered evidences of the presence of coal oil in the house, and, after the fire, saw that a hole had been punched in the coal oil tank or can from which the oil could have escaped. Some of them testified that the back door of the store was found open when the fire was discovered. The plaintiff introduced proof in rebuttal, tending to contradict the statements of defendant's witnesses.

The court, over the objections of plaintiff, gave the following instructions:

2. "If you find from the evidence that the plaintiff Beavers removed his property or any part of it from the building before the fire except in the usual course of business in selling goods,

this would be a fraud on defendant, and you should find for the defendant.

"3. If you find from the evidence that the loss occurred either through the negligence of the plaintiff or was the result of his own wrong, you must find for defendant."

Sam T. Poe and *Bullock & Davis,* for appellant.

It was prejudicial error to instruct upon a hypothesis not supported by the proof. 70 Ark. 441. Instruction No. 2 was erroneous in assuming that the removal of any part of the goods before the fire, except in the usual course of business, invalidated the policy. Instruction No. 3 was erroneous in assuming that negligence on the part of plaintiff invalidated the policy.

Mehaffy & Armistead, for appellee.

McCULLOCH, J., (after stating the facts.) 1. The court erred in instructing the jury that if plaintiff "removed his property *or any part of it* from the building before the fire, except in the usual course of selling goods, this would be a fraud on defendant," and would discharge the defendant from liability under the policy. This is not the law. There is no stipulation in the policy preventing the insured from reducing the amount of his stock of goods in any manner that he saw fit. The only stipulation in this regard found in the policy is that the company "shall not be liable beyond three-fourths of the actual cash value of personal property at the time any loss or damage occurs."

2. The court also instructed the jury that if "the loss occurred *either through the negligence of the plaintiff or was the result of his own wrong,*" the defendant would not be liable. This was erroneous. The policy contains no stipulation exempting the company from liability where the loss occurred through the negligence of the insured, nor does the law create or imply such an exemption. There is a provision in the policy that the company should not be liable for loss caused "by neglect of the insured to use all reasonable means to save and preserve the property at or after a fire, or when the property is endangered by fire in neighboring premises." This part of the contract only requires the insured to exercise care in saving and preserving the property at or after the fire, and prevents a recovery for loss of so much of the property as could have been saved by the insured

with the exercise of due care and the use of reasonable means. *German-American Ins. Co.* v. *Brown,* 75 Ark. 251.

The law is well settled that the insurer is liable, even though the negligent act of the insured or his servants be the proximate cause of the damage through the fire. Kerr on Insurance, p. 358; 2 May on Insurance, § 408; Ostrander on Insurance, § 192; *Johnson* v. *Berkshire Mut. Ins. Co.,* 4 Allen (Mass.), 388; *Enterprise Ins. Co.* v. *Parisot,* 35 Ohio St. 35; *Phenix Ins. Co.* v. *Sullivan,* 39 Kan. 449; *Columbia Ins. Co.* v. *Lawrence,* 10 Pet. 507; *Mickey* v. *Burlington Insurance Co.,* 35 Iowa, 174.

The law on this subject is stated by a learned text writer as follows: "Mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy. Indeed, one of the principal objects of insurance against fire is to guard against the negligence of servants and others; and, therefore, while it may be said generally that no one can recover compensation for an injury which is the result of his own negligence or want of care, the contract of insurance is excepted out of the general rule. Nor does it make any difference whether the negligence is that of the insured himself or of others." 2 May on Insurance, § 408.

The instruction complained of was highly prejudicial to appellant, as the jury may have found, from the testimony tending to show that the door of the store was found open, coal oil spilled on the floor and a hole in the oil can, that there was negligence on the part of appellant or his agents.

3. Appellant complains at the giving of several instructions on motion of appellee, and of one given on the court's own motion, after the jury had deliberated for a time and returned into court without a verdict, concerning the duty of appellant to keep his books of account in an iron safe or to preserve them in some other safe place. There is no condition or agreement in the policy, nor elsewhere, imposing such duty, so far as the record shows; therefore the instructions on this subject were abstract.

Reversed and remanded for a new trial.

FRANK v. DUNGAN.

Opinion delivered October 21, 1905.

[76 599
d79 176

76 599
85 394
85 518

76 599
88 26

1. JUDGMENT—PRESUMPTION ON COLLATERAL ATTACK.—Under Const. 1874, art. 7, § 40, providing that justices of the peace have jurisdiction in matters of contract where the amount in controversy does not exceed $300, excluding interest, and in all matters of damage to personal property where the amount in controversy does not exceed the sum of $100, a judgment in the circuit court for $106 "for the unlawful conversion of money" will be presumed, on collateral attack, to be valid, as based on a matter of contract. (Page 600.)

2. GARNISHMENT—LIABILITY OF GARNISHEE.—An employee will not be required in garnishment proceedings to pay over to a creditor of his employee the amount of the latter's wages if at the time and after the service of the writ of garnishment the employee had collected and failed to pay over to the employer amounts in excess of his wages. (Page 601.)

3. TRIAL—MISLEADING INSTRUCTION.—A misleading and abstract instruction should not be given to the jury. (Page 602.)

Appeal from Pulaski Circuit Court.

EDWARD W. WINFIELD, Judge.

Reversed.

Noel Loeb, for appellant.

Garnishment proceedings based upon a judgment that is void for want of jurisdiction are also void. 2 Shinn, Attachments and Garnishments, § 660; 37 Ill. App. 393; 26 Ind. 441; 24 Ohio St. 481; 59 Texas, 3.

McCULLOCH, J. Appellees, Dungan & See, recovered judgment in the circuit court, on appeal from a justice of the peace, against Duke White for the sum of $114, and subsequently filed allegations and interrogations, and caused a writ of granishment to be issued and served on appellant, Aaron Frank, requiring him to answer in what sums he was indebted to said White, etc. Appellant answered the garnishment on the return day of the writ, stating that he had become indebted to said White in the sum of $42 for salary from the date of service of the writ of garnishment until the return day thereof, but that White had, during said period, become indebted to him (appellant) in a sum in excess of $42 for money collected by White, owing to appellant for laundry work, and that appellant was therefore not indebted

to White on or after the service of the writ in any sum. Appellees filed their denial of the truth of appellant's answer, and upon the issue thus made a trial was had before a jury, which resulted in a verdict and judgment for the plaintiffs. Appellant contends, first, that the circuit court was without jurisdiction to render the judgment in favor of appellees against White, and that the judgment, being void, could not support the garnishment proceedings against appellant.

The judgment and proceedings in the suit against White are not brought up in the record of this case, but at the trial below it was agreed that the judgment in favor of appellees against White for $114 was rendered by the circuit court on appeal from a justice of the peace in an action to recover "the sum of $106.46 for the unlawful conversion of money belonging to said plaintiffs, converting the same to his own use."

The Constitution of this State confers civil jurisdiction upon justices of the peace concurrent with the circuit court in matters of contract, where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest, and in all matters of damage to personal property, where the amount in controversy does not exceed the sum of one hundred dollars. Const. 1874, art. 7, § 40.

It has been held by this court that the last-named provision of the Constitution means all injuries which one may sustain in respect to his ownership of personal property, and that a justice of the peace has jurisdiction in all matters of damage resulting from the loss, conversion or destruction of personal property, as well as injury to it. *Stanley* v. *Bracht,* 42 Ark. 210; *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 47 Ark. 59; *Park* v. *Webb,* 48 Ark. 293.

It is not shown in this record the manner by which White came into possession of the funds of appellees, whether rightfully or wrongfully; but in either event a contract to return would be implied, and upon this implied contract the plaintiff could elect to sue, instead of suing for the conversion. *Bowman* v. *Browning,* 17 Ark. 599; *Hudson* v. *Gilliland,* 25 Ark. 100; *Chamblee* v. *McKenzie,* 31 Ark. 155; 21 Enc. Pl. & Pr. p. 1022, and cases cited.

There are authorities holding that where the property has not been converted into money, the plaintiff cannot waive the

tort, and sue upon an implied contract, his only remedy being trover; but even in those cases there is found a distinction where "a contract may exist and at the same time a duty is superimposed or arises out of the circumstances surrounding or attending the transaction, the violation of which duty would constitute a tort." "In such cases," it is said, "the tort may be waived, and assumpsit be maintained, for the reason that the relation of the parties out of which the duty violated grew had its inception in contract. These relations are usually those of trust and confidence, such as those of agent and principal, attorney and client, or bailee and bailor." *Tuttle* v. *Campbell,* 74 Mich. 652.

So, in the case at bar there may have been an express agreement to return the money belonging to appellees, or there may have been a relation, arising out of the manner in which the defendant came into possession of the money, from which an agreement to return it was implied, and in either event appellees could waive the tortious conversion, and sue upon the contract. The kind of remedy adopted is not shown, further than as stated in the bill of exceptions that it was an action "for the unlawful conversion of money belonging to said plaintiffs," and, for aught that appears to the contrary in this record, an express contract to return the money, or facts from which the law would imply a contract to return it, may have been alleged and proved. We must indulge a presumption in favor of the jurisdiction of the court until the contrary appears.

Cases may be found in which it is held that jurisdiction cannot be enlarged by suing upon an implied contract, and waiving the tortious conversion of personal property, other than money; but we need not pass upon that question, inasmuch as the property converted was money belonging to plaintiffs, and, as we have stated, a contract to return may have been alleged and proved. We will not, therefore, disturb the judgment on this ground.

It is urged by counsel for appellant that the verdict is without evidence to sustain it, and also that the court erred in its instruction. We think that both these contentions are well taken, and that the judgment must be reversed on both grounds. It appears that the defendant, White, was employed by appellant at a salary of $14 per week as driver of a laundry wagon. His duties were

to deliver laundry and collect the accounts due appellant from his customers for laundry work. The total amount of the weekly accounts or laundry tickets against customers in his territory were charged to him when the packages of laundry were put in his possession for delivery to customers. He made settlement at the end of the week, in which he deducted from his collections the amount of his salary and paid the balance to appellant. The uncontradicted evidence shows that, at the time and after the service of the writ of garnishment in this case, the defendant White had collected and failed to pay over to appellant amounts in excess of his salary, and was, therefore, indebted to appellant. Under those circumstances appellant could not be required to pay over upon garnishment salary which he had agreed to pay White. He was not indebted to White, and had no funds in his hands belonging to White.

The only testimony relied upon by appellees to sustain a verdict was alleged contradictory statements made by appellant and Nelson Frank, a witness introduced by him, at a former trial. We do not, however, find those contradictions to be material, and neither of the alleged contradictory statements shows any indebtedness of appellant to White. There is no proof in the case that appellant was indebted to White at or after the service of the writ, and proof of contradictory statements does not render him liable for any part of appellee's judgment against White. The burden was upon them to prove that appellant was indebted to White, and that burden is not successfully borne by merely proving contradictory or unsatisfactory statements made by appellant and his agents as to his transactions with White.

The court instructed the jury that if the "charges made against the defendant White by the garnishee Frank were only conditional liabilities, which in fact did not mature, and not *bona fide* liabilities, then they were not such charges as could be claimed against the plaintiffs." This was erroneous. There was no evidence to support it, and, besides, the jury might have understood from it that appellant could not be allowed to deduct from White's salary laundry accounts against customers which he had failed to collect, and for which he was liable to appellant, merely because the accounts might be subsequently paid by the customers.

The judgment is reversed, and the cause remanded for a new trial.

---

76 603
s 84 398

LACY v. MORTON.

Opinion delivered October 28, 1905.

1. TRIAL—WRITTEN INSTRUCTION—DIRECTION OF VERDICT.—A direction to the jury to return a verdict is not an instruction, within the constitutional requirement that all instructions shall be in writing on the request of either party. (Page 605.)
2. LEASE—CONSTRUCTION.—Where an agreement of lease provided for the payment of a fixed rent, but stipulated that in the event of a partial overflow the lessees should, on the first day of June, notify the lessor whether they claimed damages to the crop, and that, if no agreement could be made between them as to the amount of reduction, then the lessees should receive one-third of the corn and other feed products and one-fourth of the cotton and cotton seed, it was immaterial whether the notice of intention to claim damages for a partial overflow was given on the first of June or prior thereto. (Page 606.)
3. SAME—REDUCTION OF RENT—FORFEITURE.—Where an agreement of lease stipulated that, in case the lessees claimed a reduction in the rent on account of a partial overflow, they should give notice to the lessor, who should have the use of the gin house and machinery for a year, the fact that the lessees continued to use the machinery after notifying the lessor of their claim for a reduction of rents on account of a partial overflow did not forfeit their right to such reduction. (Page 607.)
4. SAME—Where an agreement of lease stipulated that in case of a partial overflow the lessees might claim a partial reduction in rent, and, in case of disagreement as to the amount of reduction, that the lessor should receive one-third of the feed products, and it was proved that there was a disagreement as to the amount of the reduction claimed, the failure of the lessees to gather part of the grass crop, if a violation of the contract, did not operate as a forfeiture of the right to a reduction on account of the overflow. (Page 607.)

Appeal from Desha Circuit Court.

ANTONIO B. GRACE, Judge.

Reversed.

STATEMENT BY THE COURT.

J. G. Morton was in 1902 the owner of a plantation in Desha County known as the "Creek Place" and his wife, Carrie Morton, owned a plantation in the same county known as "Mound Place." In that year they leased both of those places to J. E. Lacy, C. A. Lacy and A. Kimball, who signed the contract as Lacy Brothers & Kimball. The lease was for a term of three years. The lessees were to pay an annual rental of $2000, but the contract provided that if an overflow prevented the production of a crop no rent should be paid. The contract also contained the following stipulation:

"In the event of a partial overflow of said land, second parties shall notify first parties on the first day of June of such year if they claim damage to crop thereby. If no agreement can be made between the parties hereto as to the amount of reduction in rent for that year on account of said damage, then first parties shall receive as rent for such year one-third of all the corn, hay, and other feed products of the land, and one-fourth of the cotton and cotton seed, and shall have the use of the gin house and the machinery for that year."

These places were near the Mississippi River, and in March, 1903, were partially overflowed. On the 7th day of April, 1903, the lessee sent by registered mail a letter to J. G. Morton as follows:

"DEAR SIR:—Would like to meet you in Arkansas City sometime the latter part of this month, in order that we might adjust the rent matter, as you know the place has suffered from overflow. Hoping to hear from you at an early date."

Morton replied to this letter, but the nature of the reply is not shown.

In July there was another partial overflow. In October the lessees notified the lessors that they were holding one-third of the corn and one-fourth of the cotton subject to their order.

The lessors demanded payment of the rent in full, and afterwards brought this action on the contract to recover of the lessees $2,000 for rent of 1903.

The lessees filed an answer, setting up that there had been

a partial overflow, that they had notified the lessors thereof, but were unable to come to any agreement with them in reference to the rents, and were ready and willing to deliver them the portion of the crop as provided in the contract when there had been a partial overflow and failure to agree on the rents.

On the trial the court directed the jury to return the following verdict, which was prepared by the court: "We, the jury, by direction of the court find for the plaintiff in the sum of $2,025. J. S. Warrenner, Foreman."

The defendants appealed.

Taylor & Jones, for appellants.

Notice of the damage given on a day previous to the time mentioned in the contract is a sufficient compliance with the contract. 31 Me. 290; 9 Cyc. p. 726 g. There being some evidence to sustain appellants' contention, it was error to direct a verdict against them. Const. art. 7, § 23. The court's refusal to reduce his instruction to writing was in violation of the Constitution. 72 Ark. 400.

E. S. Pindall, and *Campbell & Stevenson,* for appellees.

The courts, as also the parties, are bound by the undisputed conditions of the contract. 72 Ark. 490.

The preparation of the verdict for the jury was not a charge or instruction in the sense in which those terms are used in the Constitution. 121 Ind. 541; 73 Ind. 577, 579; 95 Ind. 170-5; 63 Pac. 969-70; 10 Okla. 424; 46 N. E. 540-43; 56 N. E. 51-53.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment against defendants for rent of land.

After hearing the evidence, the court directed a verdict for the plaintiffs, and refused to put this direction to the jury in writing, further than to write out the verdict and tell one of the jurors to sign. Counsel for defendants contend that this direction to return a verdict was an instruction, and that the presiding judge erred in refusing to reduce it to writing. But this contention cannot be sustained. The object in having the presiding judge to reduce his instructions to writing, when requested by either party, is to avoid any controversy about the language or meaning of the court's charge to the jury when the case is submitted to the jury. But this provision of the law has no applica-

tion to a case when the judge is of the opinion that there is nothing to be submitted to the jury. and disposes of the case by directing them to return a verdict for one of the parties for a designated amount. In such a case the form of the instruction or the particular words used by the judge are of no moment, for the act of the jury in returning the verdict is merely formal. The direction to return a certain verdict is in fact a withdrawal of the case from the jury and a decision by the court. The judgment itself shows this, and there is no possibility of a mistake as to the action of the court, and no necessity for reducing the particular words used by the court to writing. In this case the presiding judge prepared the verdict, and recited therein that it was returned by the direction of the court. Nothing more could be asked.

The reasons which influenced the judge to direct a verdict are not stated in the record, but from the argument of counsel we infer that the presiding judge was of the opinion either that the notice given by the lessees to the lessors that there had been an overflow was not sufficient, or that it was not given at the time required by the contract. Now, the provision of the contract in reference to notice is that "in the event of a partial overflow of said lands second parties shall notify first parties on the first day of June of such year if they claim damage to the crop thereby." When we remember that this was a contract between the owners of the plantations and their lessees, it is evident that there was nothing formal about the notice required. It is not even required that the notice should be in writing. The intention was that the lessors should have notice of this overflow and of the claim for a reduction of the rent by the first of June. The evidence shows, we think, that they were given notice of that by a letter mailed by lessees on the 7th of April, which plaintiffs must have received a few days afterwards, for the letter was answered.

It is contended with much force that this notice was of no effect because not given on the first of June, as provided in the contract. But we think that such construction of the contract would be entirely too strict. If the notice was given prior to the first day of June, the parties had notice on that day, which was a substantial compliance with the terms of the con-

tract. So soon as the overflow came, and it was certain that damage was caused thereby, we think the lessees had the right to give the notice required by the contract. If, after the overflow and notice thereof, the parties could not, or did not, agree on the amount of the reduction in rent, the contract fixes it by providing that the rent shall then be one-fourth of the cotton and one-third of the corn, hay, and other products of the land for that year.

The contract also provided that in the event of an overflow the lessor should have the use of the gin house and machinery for that year. But neither the fact that the lessees continued to use the gin, nor the fact that they did not cut and gather the Bermuda grass on the place, forfeited their right to the reduction in the rent provided for in case of overflow. If the lessees used the gin, they are liable to the lessors for the rental value thereof for that season; and if they failed to gather any crop they were required by their contract to gather, then they are, by such contract, responsible to the plaintiffs for one-third the value thereof. Whether Bermuda grass was a crop covered by the contract is a question of fact about which we express no opinion.

There was evidence tending to show that there had been a partial overflow and damage to crop of defendants, that plaintiffs had notice thereof, and that defendants were not liable for the $2000 as rents for that year, but for a part of the crops produced and for the use of the gin house and machinery. We are therefore of the opinion that the presiding judge erred in withdrawing the case from the jury.

Judgment reversed, and cause remanded for a new trial.

HAAS v. LOUISIANA & ARKANSAS RAILWAY COMPANY.

Opinion delivered October 28, 1905.

CARRIER—LIABILITY FOR BAGGAGE.—Where a passenger delivered his baggage to the agent of a carrier for shipment, the carrier became

liable, in the absence of special instruction by the passenger relieving it of this duty, for failure to carry it to its destination within a reasonable time.

Appeal from Lafayette Circuit Court.

CHARLES W. SMITH, Judge. Reversed.

Searcy & Parks, for appellant.

Instruction No. 2. was erroneous. When the agent took charge of the telescope for the purpose of forwarding it to its destination, the company became responsible. 6 Cyc. 414c.

But the liability of the company commenced when the conductor accepted the goods for transportation. It was, therefore, error to refuse instruction No. 4 asked by plaintiff. 60 Ark. 338; 6 Cyc. 431.

Moore & Moore, for appellee.

The court will not disturb the finding of the jury on a question of fact where there is any evidence to sustain it. 48 Ark. 495; 51 Ark. 467; 57 Ark. 577.

It was not within the real or apparent scope of the conductor's authority to receive the baggage for defendant for transportation. Huffcutt on Agency, 2d Ed. 130-131, 147; 6 Cyc. 671 and cases cited; 3 Barb. (N. Y.) 388.

In the absence of proof of notice to defendant of the character of the goods, or that it had reason to know from the appearance of the telescope that it contained articles not usually carried as baggage, no recovery could be had. 63 Ark. 344; 65 Ark. 366.

BATTLE J. A. Haas & Son, on April 13, 1903, commenced an action against the Louisiana & Arkansas Railway Company to recover the sum of one hundred and thirty dollars, alleging that their traveling salesman, J. E. Whitesides, delivered to the defendant at Alberta, La., a certain telescope or 'grip,' containing trousers of the value of $130, to be transported to Sibley, La., and delivered to the plaintiffs; and that the defendant had failed to carry and deliver the same as it agreed to do, and that it was wholly lost to the plaintiffs.

The defendant answered, and denied that the telescope or 'grip' had been delivered to it for transportation, or that it had ever received the same.

The facts in the case are, substantially, as follows: On the 23d of June, 1902, J. E. Whitesides, who was at that time in the

employment of A. Haas & Son in the capacity of traveling salesman, went in defendant's train from Minden to Alberta, La., taking with him his samples in two trunks and a telescope, which were checked to Alberta and put off there. Whitesides, finding that no sales could be made by him at Alberta, did not open his samples there, but, after seeing them put off, allowed them to lie by the track until the next train going to Sibley arrived. When this train arrived, he had his baggage, or a part thereof, put on it by one of the train crew and another person. Whitesides did not check his baggage, because he did not have time to do so. Afterwards in going through the baggage car he found that his telescope or "grip" had not been put on the train. At the first telegraph station he sent a telegram to O. W. Todd, who at this time was manager of the Bienville Lumber Company's store, at Alberta, La., and defendant's agent at the same place. Whitesides and Todd differ as to the contents of the telegram. Whitesides testified that he instructed Todd to send telescope on the train, and Todd, that he thought he instructed him to give the telescope to the porter on the train. On the receipt of the telegram Todd found the telescope on the outside of the store door, one hundred feet from the railway track. He put it on the inside of the store, where baggage for the railroad is kept. Afterwards he delivered it to the porter on the train, to be delivered to Whitesides at Sibley. Plaintiff never received the telescope.

The court instructed the jury over the objections of the plaintiff in part as follows:

"No. 2. If the jury believe from a preponderance of the testimony in this case that the goods in question were left on the platform or store gallery of the Bienville Lumber Company, at Alberta, La., and that O. W. Todd, upon receipt of the telegram from plaintiff's agent, delivered said goods to the porter on the carrier's train as a friendly act for the accommodation of the said plaintiff's agent, the jury must find that said Todd in so doing was acting as the agent for the plaintiffs, and that such act would not render defendant company liable for the loss of the goods."

The jury returned a verdict in favor of the defendant, and the plaintiff appealed.

The court erred in giving the instructions as stated. Todd had no authority to deliver the telescope of the plaintiff to the porter on defendant's train. unless he was authorized to do so by the plaintiff or defendant. Plaintiff's agent, who sent the telegram, says he did not give him such authority, and there is no evidence that the defendant did so. Todd was the agent of the defendant at Alberta. He took charge of the telescope for shipment. It then became the duty of the defendant, in the absence of special instructions of plaintiff relieving it of this duty, to carry it to its destination in a reasonable time. Failing to deliver the property, it became liable to the plaintiff for the value of it.

Reversed and remanded for a new trial.

APPENDIX
I.

IN MEMORIAM

ARTHUR NEILL

On May 3, 1905, Arthur Neill, a member of the bar of this court, died.

At a meeting of the court held on Saturday, July 15, 1905, present the judges and members of the bar, the Hon. Daniel W. Jones, with appropriate remarks, presented the following resolutions:

Mr. Chairman:

Acting under the mandate of the bar to prepare a suitable memorial touching the character of our late associate and brother, Arthur Neill, we submit the following:

Arthur Neill was born in Batesville, Arkansas, March 19, 1870, and died at the home of his parents in that city on May 3, 1905.

He was the eldest son of General and Mrs. Robert Neill, his father being a distinguished and highly respected citizen of Arkansas, who achieved renown in the Confederate army, and after the war was a member of Congress from the Second district of this State.

Arthur Neill was a graduate of the public schools of the city of Batesville, and of Arkansas College. He took a literary course in Vanderbilt University. He was a graduate from the law school of the University of Arkansas, and further pursued his studies in his father's office. In 1891 he was admitted to the bar, and began his active practice as partner of his father. He continued in the active practice of his profession in Batesville until 1896, when he accepted the position of private secretary to Governor Dan W. Jones, and became a resident of Little Rock. He soon became well known and respected in Little Rock. At the outbreak of the Spanish war he was adjutant general of the State Guard, and to him fell much of the labor of organizing the State Militia for service in the United States Army. His painstaking work and fine executive ability won for him reputation and friends throughout the State. At the close of Governor Jones' second term he was one of the best known and most respected men in the State.

At this time he resumed the practice of his profession in partnership with Governor Jones. His fine ability as a lawyer and sterling traits of character soon brought to him a choice practice that was growing rapidly until the failure of his health. He was a slave to duty and his studies, but his physical strength was not equal to his zeal, and in July, 1904, he was stricken with nervous prostration, which culminated in his death.

At the time of his death he was secretary of the Arkansas Bar Association.

These terse sentences recite the conspicuous milestones in the life of a true and noble man taken from us in the vigor of his young manhood, but to how many of us who knew him well do the simple words outline the life of a beautiful character, a staunch friend and an able lawyer. How many of us, his friends and acquaintances, thinking of the life of Arthur Neill, recall those incidents of his career which go to make a man's reputation. We call to mind that he was possessed of natural gifts for the law of a rare order. His love for the broad principles of justice and equity placed his reasoning above a mere calculation of technicalities. Added to this was an unusual power of discrimination and appreciation of the analogy of principle as applied to various facts. In addition to these endowments, he was possessed of extraordinary industry in his studies and great ambition in his profession. But his zeal for his profession did not prevent much study of general literature, history and the sciences. His was one of those happy intellects that are interested in everything that offers opportunity for study and deduction. His cultured mind found equal recreation in the ways of nature and in the ways of men.

In conversation he was charming, and many well remember his refined ideas and felicity of expression, and added to these was a humor and charity of thought that ever made his companion loth to part with him.

Great as the intellectual gifts and culture of any man may be, however, an estimate of his real worth is made upon analysis of his character.

Arthur Neill was a character strong and pure. Aggressive and independent in thought and action, he had a contempt for trickery and smallness, and was outspoken in his denunciation of those who merited his contempt. No ideas of policy or selfishness ever dismayed his moral courage or interfered with his independent action. Frank and truthful, there was no place in his make-up for deceit or artifice. No end of incidents in his life proclaim this as one of the predominating traits of his character. But this trait was softened by his charity of thought and generosity. Democratic in his ideas, he had the faculty of estimating people at their true worth, and the great and humble were shorn of their habiliments in his estimate of the man.

Simple in his tastes, modest, courteous, unselfish, we recall the elements of his character so well mixed that they blended into a beautiful harmony. Truly, he was a man of many parts.

In view of the matters here stated, we respectfully recommend that the meeting adopt the following resolutions:

1. *Resolved,* That the meeting fully approve the report of the committee just made as expressive of the character and virtues of Mr. Neill and of the great loss that the bar and the community have sustained by his death.

2. That to the family of the deceased we respectfully tender our most sincere sympathy and condolence.

3. That Dan W. Jones, Esq., be requested to present the proceedings of this meeting to the Supreme Court of this State; that Ashley Cockrill, Esq., be requested to present them to the Circuit Court for the Sixth Judicial Circuit; that George B. Rose, Esq., be requested to present them to the Circuit Court of the United States holding its sessions in this city.

4. That a copy of the proceedings of this meeting be sent to the family of the deceased.

J. F. LOUGHBOROUGH,
J. M. MOORE,
G. B. PUGH,
Committee.

The Chief Justice responded, and ordered that the resolutions be spread upon the record of the court, and that the court adjourn for the day out of respect to the memory of deceased.

APPENDIX

II.

OPINIONS NOT REPORTED.

Ince *v.* State; appeal from Yell Circuit Court, Danville District; William L. Moose, judge; reversed June 17, 1905; *per curiam.*

Martin *v.* State; appeal from Lee Circuit Court; Hance N. Hutton, judge; affirmed July 8, 1905; *per* Wood, J.

Moore *v.* State; appeal from Union Circuit Court; Charles W. Smith, judge; affirmed July 8, 1905; *per* Battle, J.

Bendy *v.* Mudford; appeal from Miller Chancery Court; James D. Shaver, chancellor; affirmed July 29, 1905; *per* Hill, C. J.

Fayetteville Wagon, Wood & Lumber Co. *v.* Kenefick Construction Co.; appeal from Washington Circuit Court; John N. Tillman, judge; affirmed July 29, 1905; *per* Hill, C. J.

Carter *v.* Reeves; appeal from Yell Circuit Court in Chancery; William L. Moose, judge; affirmed July 29, 1905; *per* Hill, C. J.

Crosby *v.* Henry; appeal from Miller Chancery Court; James D. Shaver, chancellor; affirmed July 22, 1905; *per* McCulloch, J.

Casteel *v.* State; appeal from St. Francis Circuit Court; Hance N. Hutton, judge; affirmed July 22, 1905; *per* Wood J.

St. Louis, I. M. & S. Ry. Co. *v.* Rowland; appeal from St. Francis Circuit Court; Hance N. Hutton, judge; reversed July 22, 1905; *per* Hill, C. J.

Hot Springs St. Rd. Co. *v.* Charlton; appeal from Garland Circuit Court; Alexander M. Duffie, judge; affirmed July 22, 1905; *per* Hill, C. J.

McGaha *v.* State; appeal from St. Francis Circuit Court; Hance N. Hutton, judge; affirmed July 22, 1905; *per* McCulloch, J.

Henslee *v.* Brewster; appeal from Boone Circuit Court; Elbridge G. Mitchell, judge; affirmed July 29, 1905; *per* Wood, J.

St. Louis, I. M. & S. Ry. Co. *v.* Shaver; appeal from Greene Circuit Court; Allen Hughes, judge; affirmed July 29, 1905; *per* Wood, J.

Henry *v.* Beal & Doyle D. G. Co.; appeal from Howard Circuit Court; James S. Steel, judge; affirmed July 22, 1905; *per* McCulloch, J.

Goley *v.* State; appeal from Union Circuit Court; Charles W. Smith, judge; affirmed July 22, 1905; *per* McCulloch, J.

Thomas *v.* Dowdle; appeal from Conway Circuit Court in Chancery; William L. Moose, judge; reversed October 14, 1905; *per* McCulloch, J.

Garrett *v.* Garner; appeal from Monroe Chancery Court; John M. Elliott, chancellor; affirmed October 21, 1905; *per* Battle, J.

III.

CASES DISPOSED OF ON MOTION.

St. Louis, Memphis & Southeastern Railway Company *v.* Smith; appeal from Clay Circuit Court; Allen Hughes, judge; appeal dismissed June 10, 1905; *per curiam.*

Schneider *v.* Deitrich; appeal from Pope Chancery Court; William L. Moose, chancellor; dismissed for non-compliance with rule nine, June 12, 1905; *per curiam.*

Brown *et al. v.* Stuck & Sons; appeal from Mississippi Circuit Court; Allen Hughes, judge; dismissed for non-compliance with rule nine, June 12, 1905; *per curiam.*

Citizens Light & Transit Company *v.* Albert Harrington, Admr.; appeal from Jefferson Circuit Court; Antonio B. Grace, judge; appeal dismissed for non-compliance with rule nine, June 12, 1905; *per curiam.*

Jacks *et al. v.* McDonald; appeal from Lee Chancery Court; Edward D. Robertson, chancellor; appeal dismissed for non-compliance with rule nine, June 12, 1905; *per curiam.*

Incorporated Town of Yellville *v.* J. N. Lowry; appeal from Marion Circuit Court; Elbridge G. Mitchell, judge; appeal dismissed for non-compliance with rule nine, June 12, 1905; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Gibson; appeal from Saline Circuit Court; Alexander M. Duffie, judge; settled and appeal dismissed, June 19, 1905; *per curiam.*

Equitable Manufacturing Company *v.* R. A. Robins; appeal from Fulton Circuit Court; John W. Meeks, judge; appeal dismissed for non-compliance with rule nine, June 19, 1905; *per curiam.*

Brown *v.* Richmond Cotton Oil Company *et al.;* appeal from Crittenden Chancery Court; Edward D. Robertson, chancellor; settled and affirmed, June 19, 1905; *per curiam.*

Fort Smith Light & Traction Company *v.* Winchester; appeal from Sebastian Circuit Court; Styles T. Rowe, judge; affirmed as a delay case, June 24, 1905; *per* Wood, J.

Brown *v.* Miller, Admr.; appeal from Johnson Circuit Court; William L. Moose, judge; dismissed for non-compliance with rule nine, July 3, 1905; *per curiam.*

Hickson *v.* Woolum; appeal from Garland Chancery Court; Leland Leatherman, chancellor; appeal dismissed for non-compliance with rule nine, July 3, 1905; *per curiam.*

S. A. Downs *v.* Edward Thompson Company; appeal from Polk Circuit Court; Joel D. Conway, judge, on exchange of circuits; appeal dismissed July 29, 1905, by consent; *per curiam.*

John Short, Administrator, &c., *v.* A. R. Lankford; appeal from Sebastian Circuit Court, Greenwood District; Styles T. Rowe, judge; settled and appeal dismissed September 30, 1905; *per curiam.*

R. O. Herbert, guardian, *et al. v.* R. J. Hill *et al.;* appeal from Sebastian Chancery Court; J. V. Bourland, chancellor; settled and appeal dismissed, September 30, 1905; *per curiam*

St. Louis, Iron Mountain & Southern Railway Company *v.* Mrs. E. B. Umphrey; appeal from Desha Circuit Court; Antonio B. Grace, judge; settled and appeal dismissed, September 30, 1905; *per curiam.*

Joseph Brown *v.* Matilda Mathews *et al.;* appeal from Grant Chancery Court; L. Leatherman, chancellor; appeal dismissed on motion, October 2, 1905; *per curiam.*

Joseph Brown *v.* J. H. Hamlen *et al.;* appeal from Grant Chancery Court; L. Leatherman, chancellor; appeal dismissed on motion, October 2, 1905; *per curiam.*

Joseph Brown *v.* Muskegon Lumber Company; appeal from Grant Chancery Court; L. Leatherman, chancellor; appeal dismissed on motion, October 2, 1905; *per curiam.*

C. S. Williamson *v.* Fannie G. Williamson; appeal from Garland Chancery Court; Alphonzo Curl, chancellor; dismissed by consent, October 7, 1905; *per curiam.*

E. J. Rhodes *v.* Mrs. Bettie Estes, Admx. of estate of K. L. Estes, deceased; appeal from Marion Chancery Court; T. H. Humphreys, chancellor; affirmed for non-compliance with rule nine, October 7, 1905; *per curiam.*

E. J. Rhodes *v.* Mrs. Bettie Estes, Admx. of estate of K. L. Estes, deceased; appeal from Marion Circuit Court; Elbridge G. Mitchell, judge; affirmed for non-compliance with rule nine, October 7, 1905; *per curiam.*

H. O. Bell *v.* Miss Florence Lenore; appeal from Sebastian Circuit Court, Greenwood District; Styles T. Rowe, judge; affirmed under rule seven, October 7, 1905; *per curiam.*

Truman B. Mills *et al. v.* H. M. Armstead; appeal from Pulaski Circuit Court, second division; E. W. Winfield, judge; appeal dismissed, October 14, 1905; *per curiam.*

Arkansas Mutual Fire Insurance Company *v.* J. M. Anderson *et al.,* under firm name of H. B. McCarroll & Sons; appeal from Yell Circuit Court, Danville District; E. W. Winfield, judge, on exchange; settled and appeal dismissed, October 16, 1905; *per curiam.*

Ed. Cornish, admr. of estate of Joseph Johns, deceased, *v.* W. H. Johns *et al.;* appeal from Drew Circuit Court; Zachariah T. Wood, judge; settled and dismissed, October 21, 1905; *per curiam.*

The Three States Lumber Company *v.* James Harper; appeal from Mississippi Circuit Court; Allen Hughes, special judge; appeal dismissed, October 23, 1905, for non-compliance with rule nine; *per curiam.*

St. Louis Southwestern Railway Company *v.* Russell Bros.; appeal from Lafayette Circuit Court; Charles W. Smith, judge; affirmed, October 30, 1905, for non-compliance with rule nine; *per curiam.*

H. C. Deal *v.* W. H Fairchild; appeal from Arkansas Chancery Court; John M. Elliott, chancellor; appeal dismissed, October 30, 1905, for non-compliance with rule nine; *per curiam.*

W. H. Fairchild *v.* H. C. Deal; appeal from Arkansas Chancery Court; John M. Elliott, chancellor; appeal dismissed for non-compliance with rule nine, October 30, 1905; *per curiam.*

Martha Patton *v.* A. F. Ford et al.; appeal from Benton Circuit Court in Chancery; John N. Tillman, judge; appeal dismissed for non-compliance with rule nine, October 30, 1905; *per curiam.*

INDEX

ABATEMENT: See FORMER ACTION PENDING; ACTIONS.

ACCOMPLICES:
corroboration of, held sufficient. *Chancellor* v. *State*, 215.

ACCOUNT:
books of, not required to be produced when. *Cauthron Lumber Co.* v. *Hall*, 1.

ACCRETION: See WATERS AND WATERCOURSES; SALES OF LAND.

ACTIONS: See ELECTION OF REMEDIES; NONSUIT; FORMER ACTION PENDING.
statutes relating to abatement and revival of actions held to apply to cases pending on appeal as well as in trial courts. *Anglin* v. *Cravens*, 122.
time of revival. *Id.*
in suit on contract no recovery in tort. *White River Ry. Co.* v. *Hamilton*, 333.
actions of slander and libel abate at defendant's death. *Miller* v. *Nuckolls*, 485.
no abatement after cause merged into judgment. *Id.*

ADMINISTRATION:
married woman in New York may act as administratrix. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere*, 377.
foreign administratrix may sue here. *Id.*

ADVERSE POSSESSION: See LIMITATION OF ACTIONS.
possession as notice of title, rights or equities of occupant. *Thalheimer* v. *Lockert*, 25.
possession of vendee or heirs adverse to vendor when. *Tillar* v. *Clayton*, 405.
natural and artificial barriers may be employed to indicate dominion over premises. *Dowdle* v. *Wheeler*, 520.
character of possession held insufficient. *Id.*

AFTER-ACQUIRED TITLE:
quitclaim deed held not to convey. *Wells* v. *Chase*, 417.
equitable title acquired by grantor held to accrue to benefit of grantee when. *Rozell* v. *Chicago Mill & Lumber Co.*, 525.

AGENCY: See INSURANCE; BROKERS.
relationship proved when. *Choctaw, O. & G. Rd. Co.* v. *Rolfe*, 220.
principal bound by fraud of agent when. *Remmel* v. *Witherington*, 373.
payment to unauthorized agent not binding on principal when. *Bank of Batesville* v. *Maxey*, 472.
unauthorized act not ratified when. *Id.*
when principal not estopped by receipt of payment. *Id.*

AGENCY:—*Continued.*
statute authorizing agent to sue did not change law. *Shelby* v. *Burrow,* 558.
right of agent for undisclosed principal to enforce contract. *Id.*
unauthorized act of assumed agent not ratified when. *Johnson* v. *Wynne,* 563.
AMENDMENT: See JUDGMENTS; PLEADING.
APPROPRIATION OF PAYMENTS: See PAYMENTS.
ARBITRATION AND AWARD:
presumption in favor of award. *Niagara Fire Insurance Co.* v. *Boon,* 153.
effect of withdrawal of one of the arbitrators. *Id.*
when award set aside for excessiveness of valuation. *Id.*
ASSAULTS:
instructions as to indecent assault held misleading. *Davis* v. *Richardson,* 348.
conviction of assault with intent to kill reduced to lower degree when. *Hinson* v. *State,* 366.
ATTORNEY AND CLIENT: See COMPROMISE; CREDITORS' SUITS.
contract to pay for attorney's services not implied when. *Davis* v. *Trimble,* 115.
APPEAL AND ERROR: See INSTRUCTIONS.
no relief granted that was not asked below. *Little Rock Ry. & El. Co.* v. *North Little Rock,* 48.
presumption on appeal that peremptory challenge of juror was allowed in apt time. *Daniels* v. *State,* 84.
question not considered below not decided. *Hot Springs Rd. Co.* v. *McMillan,* 88.
test of sufficiency of evidence to support verdict. *Davis* v. *Trimble,* 115.
sufficiency of abstract of appellant. *Beavers* v. *Security Mut. Ins. Co.,* 138.
substance of evidence should be set out to test instructions. *Id.*
competency of testimony in chancery cases not considered on appeal. *Cowling* v. *Nelson,* 153.
reversal of chancery case ordered with direction to pass upon undetermined issue. *Wagner* v. *Arnold,* 162.
question not raised below not considered. *Carpenter* v. *Jones,* 163.
effect of failure to include instructions in bill of exceptions. *J. F. Hartin Com. Co.* v. *Pelt,* 177.
not noticed if copied elsewhere. *Id.*
presumption where instructions are not copied. *Id.*
statute limiting power of circuit courts to set aside verdicts for excessiveness of damages held a restriction of appellate power of Supreme Court. *St. Louis & N. A. Rd. Co.* v. *Mathis,* 184.

APPEAL AND ERROR:—*Continued.*
appellate jurisdiction can not be enlarged or divested by Legislature. *Id.*
authority of Legislature to regulate appeal to Supreme Court. *Id.*
Kirby's Digest, § 6217, held unconstitutional. *Id.*
excessive damages remitted when. *Id.*
presumption where appellant fails to abstract evidence. *Merritt* v *Wallace,* 217.
no reversal for admission of improper testimony in chancery cause. *Waters* v. *Merit Pants Co.,* 252.
limitation to time for prosecuting appeal is one year. *Evans* v. *St. Louis, I. M. & S. Ry. Co.,* 266.
no exception when party dies during year. *Id.*
competency of evidence admitted without objection not considered. *Maxey* v. *State,* 276.
erroneous admission of evidence held not prejudicial. *Id.*
exception to evidence should be specific when. *Id.; Carpenter* v. *Dressler,* 400.
exclusion of evidence not prejudicial when. *Byrd* v. *State,* 286.
erroneous instruction not prejudicial when. *Ackerson* v. *State,* 301.
conviction of assault with intent to kill reduced when. *Hinson* v. *State,* 366.
effect of former holding on appeal as to sufficiency of evidence. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 377.
objections not raised below can not be raised here. *Kraft* v. *Moore,* 391; *Tillar* v. *Clayton,* 405.
how exception to overruling of motion for new trial preserved. *Carpenter* v. *Dressler,* 400.
res judicata pleaded in bar of right to further prosecute appeal. *Church* v. *Gallic,* 423.
objections in gross to two instructions bad if the objection to one of them was omitted from motion of new trial. *Dowell* v. *Schisler,* 482.
appeal with supersedeas does not vacate judgment, but only suspends proceedings. *Miller* v. *Nuckolls,* 485.
error in sustaining demurrer to original complaint reviewable when. *Bush* v. *Prescott & N. W. Ry. Co.,* 497.
issue not raised below not considered on appeal. *James* v. *Mallory,* 509.
excessive punishment in murder case reduced when. *Petty* v. *State,* 515.
test for reviewing testimony where trial court directed verdict. *Rodgers* v. *Choctaw, O. & G. Rd. Co.,* 520.
presumption in favor of record. *Lyon* v. *Bass,* 534.
record amendable how. *Id.*
general objection to evidence insufficient when. *Mallory* v. *Brademyer,* 538.

APPEAL AND ERROR:—*Continued.*
not error to permit evidence to be introduced to meet an issue not raised when. *Kansas City So. Ry. Co.* v. *Embry*, 589.

BETTERMENTS: See JUDICIAL SALES.

BILLS AND NOTES:
authority of non-trading firms to issue. *Alley* v. *Bowen-Merrill Co.*, 4.
want of demand and notice waived when. *Johnson* v. *Downing*, 128.
defense that note was delivered upon condition existing in parol held good. *Graham* v. *Remmel*, 140.
indorsee after maturity takes no greater rights than indorser had. *Bank of Fayetteville* v. *Lorwein*, 245.

BONA FIDE PURCHASERS: See SALES OF CHATTELS.

BONDS: See INSURANCE.

BOUNDARIES:
effect of having waterline as boundary of a named lot. *Perry* v. *Sadler*, 43.

BROKERS:
real estate broker entitled to commission when. *Hunton* v. *Marshall*, 375.
good faith due to principal. *Taylor* v. *Godbold*, 395.

BURDEN OF PROOF:
as to mitigating circumstances in murder case. *Cogburn* v. *State*, 110.
as to whole case. *Id.*
on guardian to establish validity of credit asked in account. *Merritt* v. *Wallace*, 217.
in suit to foreclose vendor's lien burden of proving payment is on vendee. *Tillar* v. *Clayton*, 405.
on one who assails an Auditor's deed to forfeited land. *Cracraft* v. *Meyer*, 450.
on State in criminal case to disprove prejudice where jury were exposed to improper influences. *Sutherland* v. *State*, 487.
instruction as to burden of proof in murder case as to mitigating circumstances held incomplete. *Tignor* v. *State*, 489. Instruction held complete. *Petty* v. *State*, 515.
is on plaintiff in ejectment. *Mallory* v. *Brademyer*, 538.
on homestead claimant. *Gibbs* v. *Adams*, 575.

CANCELLATION OF INSTRUMENTS:
patent from State procured by mistake or fraud may be canceled. *Rozell* v. *Chicago Mill & Lumber Co.*, 525.
complaint asking cancellation not demurrable for laches when. *Id.*

CARNAL ABUSE: See RAPE AND CARNAL ABUSE.

CARRIERS: See RAILROADS.
penalty imposed by State for excessive charge for interstate transportation held repealed by interstate commerce act. *Spratlin* v. *St.*

CARRIERS:—*Continued.*
Louis S. W. Ry. Co., 82.
presumption where person rides on freight train. *St. Louis, I. M. & S. Ry. Co.* v. *Reed*, 106.
right of person riding on through freight train to recover for injuries received. *Id.*
complaint against carrier for failure to furnish car for shipping freight held to show proper demand for cars. *Choctaw, O. & G. Rd. Co.* v. *Rolfe*, 220.
complaint alleging place where demand for cars was made held sufficient. *Id.*
sufficiency of allegation of tender of freight for shipment. *Id.*
relationship of agency proved how. *Id.*
general and special damages recoverable for delay in shipment. *Id.*
passenger guilty of contributory negligence can recover when. *Kansas City So. Ry. Co.* v. *McGinty*, 356.
when carrier owes to passenger duty to protect him. *Id.*
duty toward passenger's escort. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere*, 377.
negligence of railway company in writing pass not proximate cause of assault on passenger by conductor. *St. Louis, I. M. & S. Ry. Co.* v. *Harrison*, 430.
inconveniences of freight train assumed by passenger. *Rodgers* v. *Choctaw, O. & G. Rd. Co.*, 520.
duty of carrier to passenger on freight train. *Id.*
failure of carrier to provide closets on train not proximate cause of injury when. *Id.*
liable for injury to negligent passenger after his peril discovered. *Id.*
presumption in case of damage to goods in transit over connecting lines. *Kansas City So. Ry. Co.* v. *Embry*, 589.
liability of connecting carriers for negligence of joint agent. *Id.*
liable for lost baggage when. *Haas* v. *La. & Ark. Ry. Co.*, 607.

CARRYING WEAPONS:
erroneous instruction as to journey not prejudicial when. *Ackerson* v. *State*, 301.

CASES OVERRULED, DISTINGUISHED, ETC.
Findley v. *Means*, 71 Ark. 289, distinguished. *Graham* v. *Remmel*, 140.
Chandler v. *Chandler*, 21 Ark. 95, distinguished, *Id.*
Johnson v. *State*, 43 Ark. 391, overruled by *Carpenter* v. *Dressler*, 405.
Beidler v. *Friedell*, 44 Ark. 411, overruled by *Carpenter* v. *Dressler*, 405.

CLOUDS ON TITLE:
plaintiff suing to quiet title must show title in himself. *Carpenter* v. *Smith*, 447.

COMPROMISE:
party to compromise which defrauds her attorney may sue to rescind, though notice of attorney's interest was not given. *Bush* v. *Prescott & N. W. Ry. Co.*, 497.

CONDITIONS:
condition precedent in municipal franchise held reasonable. *Little Rock Ry. & El. Co.* v. *North Little Rock*, 48.

CONSTITUTIONAL LAW:
Kirby's Digest, § 6217, restricting appellate powers of Supreme Court, held unconstitutional. *St. Louis & N. A. Rd. Co.* v. *Mathis*, 184.
power of courts to declare statute void as conflicting with Constitution. *State* v. *Moore*, 197.
presumption in favor of validity of statute. *Id.*
power of Legislature to determine necessary expenses of government. *Id.*
appropriation for State Guard held for necessary expense of government. *Id.*
appropriation bill held to embrace one subject. *Id.*
suspension of seduction prosecution by marriage held not a deprivation of right to speedy trial. *Burnett* v. *State*, 295.

CONTRACTS:
superintendent of salesmen liable under terms of contract for permitting overdrafts of latter when. *Wrought Iron Range Co.* v. *Young*, 18.
not implied to pay for attorney's services when. *Davis* v. *Trimble*, 115.
contract to reconstruct fence on right of way construed. *White River Ry. Co.* v. *Hamilton*, 333.
mere silence not a waiver of breach of contract when. *Wood* v. *Planters' Oil Mill*, 570.

CORPORATIONS: See FOREIGN CORPORATIONS; CREDITORS' SUIT.

CORROBORATION: See ACCOMPLICES.

COUNTERCLAIM AND SET-OFF:
employee suing for compensation held liable to counterclaim under contract when. *Wrought Iron Range Co.* v. *Young*, 18.

COURTS: See APPEAL AND ERROR.

CREDITORS' SUIT:
suit to procure receivership of insolvent corporation held to be a creditors' suit. *Bradshaw* v. *Bank of Little Rock*, 501.
creditors liable for attorney's fee in creditors' suit. *Id.*
either plaintiff or the attorney may apply for allowance of the fee. *Id.*
by whom such fee payable. *Id.*
how amount of fee determined. *Id.*

CRIMINAL LAW: See HOMICIDE; SEDUCTION; LARCENY; FORMER JEOPARDY.

CRIMINAL LAW:—*Continued.*
effect of exposure of jury to improper influences. *Sutherland* v. *State,* 487.
effect of general verdict under indictment alleging two offenses. *Cargill* v. *State,* 550.
CUSTOM AND USAGE:
evidence of custom admissible when. *Hot Springs Rd. Co.* v. *McMillan,* 88.
DAMAGES: See REMITTITUR; CARRIERS.
limit to amount of damages recoverable for loss to infant of care and training of father. *St. Louis & N. A. Rd. Co.* v. *Mathis,* 184.
how amount of damages ascertained. *Id.*
damages awarded for wrongful death held not excessive. *St. Louis, I. M. & S. Ry. Co.* v. *Robert Hitt,* 227.
instructions as to elements of damage approved. *Id.*
pecuniary condition of defendant not considered in fixing actual damages. *Davis* v. *Richardson,* 348.
otherwise in case of punitive damages. *Id.*
remarriage of widow not provable in reduction of damages for killing her husband. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 377.
$20,000 damages for killing held not excessive. *Id.*
interest recoverable on damages. *Id.*
damages recoverable by tenant for wrongful eviction by landlord. *McElvaney* v. *Smith,* 468.
when cost of two removals recoverable. *Id.*
measure of damages to crop by diverting surface water. *St. Louis S. W. Ry. Co.* v. *Morris,* 542.
father suing for death of adult son can not recover substantial damages when. *St. Louis, M. & S. E. Ry. Co.* v. *Garner,* 555.
DEATH:
damages for causing, see DAMAGES.
who may sue for, see PARTIES.
DEEDS: See TAXATION; AFTER-ACQUIRED TITLE; CANCELLATION OF INSTRUMENTS; REFORMATION OF INSTRUMENTS.
patents proved how, see EVIDENCE.
description of land as certain fr. quarter of section 22-8-22, situated in certain county, held sufficient. *Little Rock & F. S. Ry. Co.* v. *Evins,* 261.
presumption of regularity of issuance of State's patent. *Rozell* v. *Chicago Mill & Lumber Co.,* 525.
DEFINITION:
jurisdiction. *Cowling* v. *Nelson,* 152.
necessary expenses of government. *State* v. *Moore,* 203.
DIVORCE:
none granted where parties are equally at fault. *Malone* v. *Malone,* 28.

DRUNKENNESS:
power of municipal corporation to punish. *DeWitt* v. *Lacotts,* 250.
as defense in murder case. *Byrd* v. *State,* 286.

EJECTMENT:
plaintiff must recover on strength of his title. *Carpenter* v. *Jones,* 163.
how lost deed proved. *Id.*
certainty of proof required. *Id.*
issue not changed after cause is before jury. *White River Min. & Nav. Co.* v. *Langston,* 420.
defendant may rely upon weakness of plaintiff's title. *Dowdle* v. *Wheeler,* 529.
burden of proving title is on plaintiff. *Mallory* v. *Brademyer,* 538.

ELECTION OF REMEDIES:
by suing for purchase money of chattel vendor waives reservation of title. *Neal* v. *Cone,* 273.

EMINENT DOMAIN:
in proceeding to condemn right of way no defense that plaintiff is not entitled to condemn. *Mountain Park Terminal Ry. Co.* v. *Field,* 239.

EQUITY: See LACHES.
one seeking enforcement of decree rendered in his favor by mistake must show merit. *Bank of Fayetteville* v. *Lorwein,* 245.
he who asks equity must do equity. *Id.*
jurisdiction in case of fraud not ousted by providing legal remedy when. *Bush* v. *Prescott & N. W. Ry. Co.,* 497.
will not relieve against judgment at law when. *Noe* v. *Layton,* 582.

ESCAPE:
liability for conveying instrument to prisoner to facilitate. *Maxey* v. *State,* 276.

ESTOPPEL:
reciprocal effect of writ of injunction. *Little Rock Ry. & El. Co.* v. *North Little Rock,* 48.
city estopped to exercise control over streets claimed by adjacent town when. *Id.*
acquiescence of enjoined town held to create no estoppel when. *Id.*
landowner estopped from contesting right of county to condemn land for highway by accepting warrant in payment of damages assessed. *Brooks* v. *Yell County,* 67.
vendee and heirs can not dispute vendor's title. *Tillar* v. *Clayton,* 405.
principal accepting payment through unauthorized agent held not estopped thereby when. *Bank of Batesville* v. *Maxey,* 472.
creditor suing to enforce vendor's lien in deed not estopped to assert that such deed was a mortgage. *James* v. *Mallory,* 509.

EVIDENCE: See BURDEN OF PROOF; LOST INSTRUMENTS.
when parol proof of contents of writing admissible. *State* v. *Songer*, 169.
evidence held sufficient to prove relationship of agent. *Choctaw, O. & G. Rd. Co.* v. *Rolfe*, 220.
how expectancy of life shown. *St. Louis, I. M. & S. Ry. Co.* v. *Robert Hitt*, 227.
evidence of market value held sufficient. *Little Rock & S. F. Ry. Co.* v. *Evins*, 261.
effort of party to suppress unfavorable testimony provable. *Maxey* v. *State*, 286.
general exception to evidence insufficient when. *Id.; Carpenter* v. *Dressler*, 400.
opinions of non-experts as to sanity of defendant admissible. *Byrd* v. *State*, 286.
exclusion of evidence not prejudicial when. *Id.*
proof of habit of committing trespass immaterial in personal injury suit when. *Hot Springs St. Ry. Co.* v. *Bodeman*, 302.
when transcript from land office admissible to prove original entries of land. *Carpenter* v. *Dressler*, 400.
foundation for secondary evidence should be laid. *Id.*
statement of debtor held to be hearsay in suit by creditor against debtor's wife. *Terry* v. *Clark*, 435.
exemplification of record of land office inadmissible to prove patent when. *Carpenter* v. *Smith*, 447; *Covington* v. *Berry*, 460.
presumption in favor of Auditor's deed to forfeited land. *Cracraft* v. *Meyer*, 450.
presumption that Real Estate Bank lands listed for taxes were sold. *Id.*
receiver's report as evidence that Real Estate Bank lands had been sold. *Id.*
presumption in favor of official acts generally. *Id.*, p. 456.
prima facie effect of deed of swamp land. *Covington* v. *Berry*, 460.
in prosecution of stepfather for assault on stepdaughter's suitor it may be shown that accused maintained illicit relations with stepdaughter. *Littlejohn* v. *State*, 481.
defendant's self-serving declarations inadmissible. *Id.*.
record of justice of the peace not identified by stranger when. *Junior* v. *State*, 483.
opinion of witness in murder case as to whether defendant had reputation of being dangerous man is admissible. *Long* v. *State*, 493.
but not as to whether he would be likely to carry threat into execution. *Id.*
amissibility of threats in murder case. *Id.*
vendor not permitted to testify as to intention in executing bill of sale. *Russell* v. *Haltom*, 506.
presumption that State's patent was regularly issued. *Rozell* v. *Chi-*

EVIDENCE:—*Continued.*

cago Mill & Lumber Co., 525.

expert witness held to be qualified. *Mallory* v. *Brademyer*, 538.

opinion of non-expert admissible when. *Id.*

general objection to evidence insufficient when. *Id.*

when opinions of non-experts admissible. *St. Louis S. W. Ry. Co.* v. *Morris*, 542.

EXECUTIONS: See EXEMPTIONS.

mortgaged chattels are not subject to execution. *Liddell* v. *Jones*, 344.

sale under execution not invalid for failure of officer to make return. *Miller* v. *Grady*, 270.

execution first levied on personalty held prior. *Id.*

EXEMPTIONS: See HOMESTEAD.

not claimed by garnishee in chattels as against claim for purchase money. *Liddell* v. *Jones*, 344.

FIRE: See RAILROADS; INSURANCE.

FOREIGN CORPORATIONS:

suit by, held not doing business in State. *Alley* v. *Bowen-Merrill Co.*, 4.

right of foreign insurance companies to do business in State, under the anti-trust act of 1905. *Hartford F. Ins. Co.* v. *State*, 303.

right of State to exclude them. *Id.*

FORFEITURE:

relief from, not granted in equity when. *Carpenter* v. *Thornburn*, 578.

FORMER ACTION PENDING:

defense of, waived when. *Church* v. *Gallic*, 423.

FORMER JEOPARDY:

suspension of seduction prosecution by marriage not pleadable as former jeopardy on retrial. *Burnett* v. *State*, 295.

FRAUD:

complaint alleging deception held sufficient. *Bush* v. *Prescott & N. W. Ry. Co.*, 497.

when plaintiff not required to make restoration. *Id.*

concurrent remedy in equity for fraud when. *Id.*

FRAUDS, STATUTE OF:

contract of employer to pay for supplies furnished to employee held original undertaking. *Cauthron Lumber Co.* v. *Hall*, 1.

acceptance of order for carload of goods, not specified, held not binding. *Wm. Fait Co.* v. *Anderson*, 237.

promise to pay another's debt held an original undertaking when. *Long.* v. *McDaniel*, 292.

oral sale taken out of statute by part performance when. *Cross* v. *Johnston*, 363.

oral sale of chattels not enforcible when. *Taylor* v. *Godbold*, 395.

FRAUDULENT CONVEYANCES:
validity of transaction between insolvent husband and wife. *Waters* v. *Merit Pants Co.*, 252.
right of husband to prefer wife. *Id.*
necessity of corroboration of wife's testimony. *Id.*
voluntary conveyance by insolvent debtor held fraudulent, regardless of intent. *James* v. *Mallory*, 509.

GARNISHMENT:
Kirby's Digest, § 3707, held repealed. *St. Louis & S. F. Rd. Co.* v. *Bowman*, 75-32.
writ of, may be issued on justice's judgment to another county when. *Id.*
garnishee not indebted to defendant not liable. *Dalhoff Const. Co.* v. *Adams*, 98.
effect of garnishment when carried into judgment. *Liddell* v. *Jones*, 344.
effect of garnishing purchase money of chattels as to right of garnishee to claim exemptions therein. *Id.*
garnishee not liable when. *Frank* v. *Dungan*, 599.

GUARANTY: See SALES OF CHATTELS; STATUTE OF FRAUDS.

GUARDIAN AND WARD:
burden on guardian to establish validity of credits asked. *Merritt* v. *Wallace*, 217.
guardian liable for interest on unloaned funds when. *Id.*

HOMESTEAD:
claim of, not considered on appeal if not raised below. *James* v. *Mallory*, 509.
burden of proof on claimant. *Gibbs* v. *Adams*, 575.
effect of separation of land from dwelling house by street. *Id.*
bona fides of occupancy a question for jury when. *Id.*

HOMICIDE:
indictment for murder held good though "willfully" was omitted. *Daniels* v. *State*, 84.
burden of proof as to mitigating circumstances. *Cogburn* v. *State*, 110.
instruction as to burden of proof thereof disapproved. *Id.*
corroboration of accomplice held sufficient. *Chancellor* v. *State*, 215.
drunkenness no defense to murder in second degree. *Byrd* v. *State*, 286.
instruction as to accused's failure to explain circumstances disapproved. *Tignor* v. *State*, 489.
evidence of former assault by deceased on defendant admissible when. *Id.*
argument of prosecuting attorney held prejudicial. *Id.*
instruction as to burden of proof as to matters of justification or excuse held incomplete. *Id.*

HOMICIDE:—*Continued.*
opinion of witness as to deceased's reputation of being dangerous admissible. *Long* v. *State,* 493.
but not as to whether he would be likely to carry threat into execution. *Id.*
instruction as to admissibility of threat approved. *Id.*
instruction as to deceased's reputation approved. *Id.*
instruction as to burden of proof as to mitigating circumstances approved. *Petty* v. *State,* 515.
specific intent to take life necessary in murder in second degree. *Id.*
words as provocation will not reduce degree of homicide. *Id.*
but are admissible in mitigation of punishment. *Id.*
excessive punishment reduced when. *Id.*

HUSBAND AND WIFE:
validity of dealings with insolvent husband and wife. *Waters* v. *Merit Pants Co.,* 252.
how good faith of transaction proved. *Id.*
married woman may be executrix in New York. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 377.
husband buying land and taking deed in wife's name held to have made advancement. *O'Hair* v. *O'Hair,* 389.

INJUNCTION:
reciprocal effect of writ. *Little Rock Ry. & El. Co.* v. *North Little Rock,* 48.
effect of restraining adjacent town from annexing territory. *Id.*
when city estopped to exercise control over streets. *Id.*
contract implied from procuring injunction against adjacent town from annexing part of plaintiff city's territory. *Id.*
acquiescence of enjoined party held to create no estoppel. *Id.*
lies to restrain abuse of corporate powers. *Mountain Park Terminal Ry. Co.* v. *Field,* 239.

INSOLVENCY: See CREDITORS' SUIT.

INSTRUCTIONS:
general objection to several instructions in gross held insufficient when. *Wells* v. *Parker,* 41.
erroneous instruction not cured by correct one when. *Grayson-McLeod Lumber Co.* v. *Carter,* 69.
failure to instruct not considered where no request was made below. *Carpenter* v. *Jones,* 163.
conflicting instructions prejudicial error when. *St. Louis, I. M. & S. Ry. Co.* v. *Luther Hitt,* 224.
instruction held not objectionable as singling out evidence. *St. Louis, I. M. & S. Ry. Co.* v. *Robert Hitt,* 227.
instruction held not objectionable as expressing opinion on weight of evidence. *Id.*

INSTRUCTIONS:—*Continued.*
should declare law as to any theory supported by evidence. *Id.* p. 232.
should be hypothetical. *Id.* p. 232.
should be specific. *Id.* p. 233.
instructions in suit for indecent assault held misleading. *Davis* v. *Richardson,* 348.
error to give abstract instruction. *Id.*
how formal defect pointed out. *Id.*
instructions construed together. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 377.
objection to instruction for formal defect should be specific. *McElvaney* v. *Smith,* 468.
should not assume disputed fact in issue. *Id.*
objection in gross to two instructions bad where the objection to one of them was omitted from motion for new trial. *Dowell* v. *Schisler,* 482.
abstract instruction improper. *Tignor* v. *State,* 489.
when giving of improper instruction aggravated by argument. *Id.*
instruction properly refused as invading jury's province. *Long* v. *State,* 493.
abstract instruction should not be given. *Beavers* v. *Security Mut. Ins. Co.,* 595.
misleading and abstract instruction should not be given. *Frank* v. *Dungan,* 599.
direction to return verdict not an instruction and not required to be in writing. *Lacy* v. *Morton,* 603.

INDEMNITY:
effect of mortgage executed merely to indemnify surety. *Dyer* v. *Jacoway,* 171.
effect where executed to secure debt also. *Id.*
effect of indemnity executed to deceased surety. *Id.*
necessary parties in suit by creditor to be subrogated to surety's rights. *Id.*
when creditors guilty of laches in asking subrogation. *Id.*

INSURANCE: See ARBITRATION AND AWARD.
when policy of insurance reformed. *Phoenix Ins. Co.* v. *State,* 180.
notice of cancellation of policy waived when. *Id.*
authority of insurance agent to act for both parties. *Id.*
right of foreign insurance company to do business in State under anti-trust act of 1905. *Hartford Fire Ins. Co.* v. *State,* 303.
right of State to exclude them. *Id.*
authority of soliciting agent defined. *Mutual L. Ins. Co.* v. *Abbey,* 328.
authority of general agent to accept notes for premiums. *Id.*
general agent bound by acts of special agent. *Remmel* v. *Witherington,* 373.

INSURANCE:—*Continued.*
liability on bond of insurance company accrues when. *United States Fidelity & G. Co.* v. *Fultz,* 410.
when such bond retroactive. *Id.*
effect of removal of part of goods before fire on insurer's liability. *Beavers* v. *Security Mut. Ins. Co.,* 595.
effect of loss occurring through insured's negligence. *Id.*
effect of insured's neglect to preserve property. *Id.*
INTEREST: See GUARDIAN AND WARD.
recoverable on damages when. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 377.
INTERSTATE COMMERCE:
penalty imposed by State for excessive charge by carrier for transportation held repealed. *Spratlin* v. *St. Louis S. W. Ry. Co.,* 82.
JUDGMENTS:
where note was executed to person named, followed by his official title, and judgment taken accordingly, the judgment was in his favor individually. *Luster* v. *Robinson,* 255.
plea of *res judicata* unavailing if issues and relief were different. *Kraft* v. *Moore,* 391.
res judicata pleaded in bar of right to prosecute appeal further. *Church* v. *Gallic,* 423.
extent of conclusiveness of former judgment. *Id.*
when former recovery pleadable. *Id.*
validity on collateral attack of decree based upon constructive service. *Johnson* v. *Lesser,* 465.
effect of failure to make proof of publication. *Id.*
effect of failure to indorse warning order on complaint. *Id.*
judgment in slander case revived on defendant's death. *Miller* v. *Nuckolls,* 485.
appeal with supersedeas does not vacate, only suspends enforcement of, judgment. *Id.*
record of decree amended how. *Lyon* v. *Bass,* 534.
judgment at law relieved against in equity when. *Noe* v. *Layton,* 582.
judgment in justice's court for $106 for conversion of money presumed collaterally to be *ex contractu* and valid. *Frank* v. *Dungan,* 599.
JUDICIAL NOTICE:
taken of statutes of other States. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 381.
JUDICIAL SALES: See LIMITATION OF ACTIONS; PARTITION; RECEIVERS.
confirmation, though irregular, held binding. *Cowling* v. *Nelson,* 146.
when purchaser at void judicial sale entitled to betterments. *Id.*
sale of land for costs in partition proceeding held void collaterally. *Id.*
sale of school land is not. *Williams* v. *State,* 290.

JURY:
presumption that challenge was allowed before juror sworn in chief. *Daniels* v. *State*, 84.
exposure of jury to improper influence in criminal case casts on State burden of proof. *Sutherland* v. *State*, 487.
LABORERS' LIENS: See LIENS.
LACHES:
creditor asking for subrogation to rights of surety is guilty of laches when. *Dyer* v. *Jacoway*, 171.
complaint seeking to cancel State's patent not demurrable for laches when. *Rozell* v. *Chicago Mill & Lumber Co.*, 525.
LANDLORD AND TENANT:
damages recoverable by tenant for wrongful eviction. *McElvaney* v. *Smith*, 468.
cost of two removals recoverable when. *Id.*
landlord's lien waived when. *Noe* v. *Layton*, 582.
lease providing for reduction of rent in case of overflow construed. *Lacy* v. *Morton*, 603.
right to reduction of rent not forfeited when. *Id.*
LEVEES:
sufficiency of description of land in levee tax deed. *Covington* v. *Berry*, 460.
LIENS: See LANDLORD AND TENANT.
laborer's lien on crop is prior to mortgagee's. *Sheeks-Stephens Store Co.* v. *Richardson*, 282.
mortgagee of crop held to notice of laborer's lien. *Id.*
LIMITATION OF ACTIONS: See ADVERSE POSSESSION.
competency of Legislature to pass short statute as to proceedings based on void judgments. *Cowling* v. *Nelson*, 146.
statute as to void judicial sales held to run when. *Id.*
right of minors and insane persons to recover land sold at void judicial sale notwithstanding lapse of time. *Id.*
proof of payment of taxes under seven year act held insufficient. *Price* v. *Greer*, 426.
two years adverse possession under tax deed gives title. *Sibly* v. *Gomillion*, 442; *Carpenter* v. *Smith*, 447.
when statute runs against creditor's right to set aside fraudulent conveyance. *James* v. *Mallory*, 509.
statute begins to run as to nuisance when. *St. Louis S. W. Ry. Co.* v. *Morris*, 542.
begins to run against action for diverting surface water. *Id.*
who liable for diverting surface water. *Id.*
LIQUORS:
presumption where license to sell liquors is produced that majority of votes was for license. *State* v. *Songer*, 169.

LIQUORS:—*Continued.*
when such presumption not overcome. *Id.*
license to sell, is revocable privilege. In re *Sarlo,* 336.
discretion of county court in granting license. *Id.*
county court may grant conditional license. *Id.*
and may revoke for breach of condition. *Id.*
sale as beverage of non-intoxicating alcoholic compound forbidden. *Bradshaw* v. *State,* 562.

LOST INSTRUMENTS:
parol proof of loss of deed admissible. *Carpenter* v. *Jones,* 163.
how loss proved. *Id.*
certainty of proof required. *Id.*

MALICIOUS PROSECUTION:
discharge of case by grand jury is *prima facie* termination of prosecution. *Wells* v. *Parker,* 41.
binding over to grand jury is evidence, but not conclusive, of probable cause. *Id.*
whether defendant acted under advice of counsel is question for jury. *Id.*

MASTER AND SERVANT: See DAMAGES.
when master not required to furnish safe place to work. *Grayson-McLeod Lumber Co.* v. *Carter,* 69.
when master should instruct servant as to dangers of employment. *Id.*
evidence held not to establish conclusively plaintiff's contributory negligence. *St. Louis & N. A. Rd. Co.* v. *Mathis,* 184.
section hand working under direction of foreman not negligent when. *Id.*

MAXIMS:
actio personalis moritur cum persona. Miller v. *Nuckolls,* 486.

MINES AND MINING:
quitclaim deed to lode location does not convey placer claim subsequently acquired. *Wells* v. *Chase,* 417.

MISTAKE: See REFORMATION OF INSTRUMENTS; EQUITY.

MONOPOLIES:
anti-trust act of January 23, 1905, construed. *Hartford Ins. Co.* v. *State,* 303.
foreign insurance corporations prohibited from doing business when. *Id.*
right of State to exclude foreign insurance companies. *Id.*

MORTGAGES: See INDEMNITY.
mortgage held subordinate to laborer's lien on crop. *Sheeks-Stephens Store Co.* v. *Richardson,* 282.
mortgagee held to have notice of laborer's lien. *Id.*
deed absolute in form held to be mortgage when. *James* v. *Mallory,* 509.

MUNICIPAL CORPORATIONS:
city estopped to grant franchises over streets after procuring injunction to restrain adjacent town from annexing territory including them. *Little Rock Ry. & El. Co.* v. *North Little Rock,* 48.
contract implied by procuring injunction against such town. *Id.*
town held not estopped by acquiescence when. *Id.*
when annexation proceedings take effect. *Id.*
condition precedent in municipal franchise enforceable when. *Id.*
reasonableness of time for performance of such condition precedent ascertained how. *Id.*
power to declare drunkenness a nuisance. *DeWitt* v. *Lacotts,* 250.
authority to prevent nuisances and suppress disorderly conduct. *Id.*
act of May 23, 1901, relating to impounding of stock, does not repeal act of April 20, 1895. *Benton* v. *Willis,* 443.

NEGLIGENCE: See CARRIERS; MASTER AND SERVANT; RAILROADS.
plaintiff whose negligence contributed to personal injuries can not recover. *Burns* v. *St. Louis S. W. Ry. Co.,* 10.
question of contributory negligence for jury when. *St. Louis, I. M. & S. Ry. Co.* v. *Robert Hitt,* 227.
negligence of carrier in writing pass not proximate cause of assault on passenger by conductor. *St. Louis, I. M. & S. Ry. Co.* v. *Harrison,* 430.
failure of carrier to provide closets not proximate cause of injury to passenger when. *Rodgers* v. *Choctaw, O. & G. Rd. Co.,* 520.

NEW TRIAL:
not granted for newly discovered evidence when. *Hot Springs Rd. Co.* v. *McMillan,* 88.

NONSUIT:
right to take before submission. *Carpenter* v. *Dressler,* 400.
discretion of court to allow after submission. *Id.*

NOTICE: See COMPROMISE; WRITS AND PROCESS.

NUISANCES: See LIMITATION OF ACTIONS.
power of municipal corporations to punish or suppress. *DeWitt* v. *Lacotts,* 250.

PARTIES:
creditor seeking subrogation to rights of deceased surety in indemnifying mortgage should make heirs or personal representatives parties. *Dyer* v. *Jacoway,* 171.
who may sue for breach of warranty in sale of provisions. *Nelson* v. *Armour Packing Co.,* 352.
right of foreign administratrix to sue here. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 377.
father may sue as next of kin for wrongful killing of son when. *St. Louis, M. & S. E. Rd. Co.* v. *Garner,* 555.

PARTITION:
venue in suit by heirs for partition. *Cowling* v. *Nelson*, 146.
ambiguity in description of land in judgment cured when. *Id.*
when partition sale authorized. *Id.*
when sale in partition suit not authorized and invalid collaterally. *Id.*

PARTNERSHIP:
authority of member of law firm to bind copartner. *Alley* v. *Bowen-Merrill Co.*, 4.
authority of partner to buy law books and execute note in firm name. *Id.*

PATENT: See EVIDENCE; DEEDS.

PAYMENT:
to unauthorized agent not binding. *Bank of Batesville* v. *Maxey*, 472.
act of agent not ratified when. *Id.*
principal not estopped when. *Id.*
presumption of intention to apply proceeds of mortgaged property on mortgage debt. *Lyon* v. *Bass*, 534.
right of creditor to make appropriation. *Id.*

PLEADING: See CARRIERS.
an unnecessary allegation need not be made more definite. *Choctaw, O. & G. Rd. Co.* v. *Rolfe*, 223.
complaint treated on appeal as amended to conform to proof when. *McElvaney* v. *Smith*, 468; *Waterman* v. *Irby*, 551.
complaint need not deny matter of defense. *Rozell* v. *Chicago Mill & Lbr. Co.*, 525.
effect of mistake in prayer for relief. *Waterman* v. *Irby*, 551.

PRESUMPTION: See EVIDENCE.

PRINCIPAL AND AGENT: See AGENCY.

PRINCIPAL AND SURETY: See SUBROGATION.
right of surety to release debtor from indemnifying mortgage. *Dyer* v. *Jacoway*, 171.
effect where mortgage is to indemnify and secure debt. *Id.*
effect of executing indemnifying mortgage to deceased surety. *Id.*
when creditors subrogated to rights of deceased surety. *Id.*
creditors guilty of laches in asking for subrogation when. *Id.*

PRIORITY: See LIENS.

PUBLIC LANDS:
for effect of conveyance of forfeited lands, see EVIDENCE.
effect of swamp land patent. *Covington* v. *Berry*, 460.
State's patent may be canceled for fraud or mistake. *Rozell* v. *Chicago Mill & Lumber Co.*, 525.
presumption in favor of donation deed. *Waterman* v. *Irby*, 551.
such presumption not overcome when. *Id.*

RAILROADS: See CARRIERS; EMINENT DOMAIN.
not liable for injury to pedestrian on track if he was negligent

RAILROADS:—*Continued.*
unless employees were negligent after discovering peril. *Burns* v. *St. Louis S. W. Ry. Co.*, 10.
verdict disregarding testimony of employees that killing of stock was unavoidable sustained. *St. Louis & S. F. Rd. Co.* v. *Thompson*, 37.
evidence held not to overcome statutory presumption where animal was killed by train. *St. Louis, I. M. & S. Ry. Co.* v. *Kimberlain*, 100.
negligent in running train through town at high rate of speed. *Id.*
liable for injury by fire communicated by sparks from engine. *St. Louis, I. M. & S. Ry. Co.* v. *Coombs*, 132.
presumption of negligence held to arise from proof that fire was caused by engine. *Id.*
instruction as to conclusiveness of testimony of trainmen approved. *Id.*
sufficiency of appliances to prevent fire. *Id.*
verdict in stock case sustained on account of defective headlight. *St. Louis, M. & S. E. Ry. Co.* v. *Shannon*, 166.
general rule that traveler at crossing must look and listen. *St. Louis, I. M. & S. Ry. Co.* v. *Luther Hitt*, 224.
whether he is in exceptional case excusable for failure to do so is for jury. *Id.*
contributory negligence of traveler at crossing a question for jury when. *St. Louis, I. M. & S. Ry. Co.* v. *Robert Hitt*, 227.
instruction on question of contributory negligence approved. *Id.*
instruction on question of contributory negligence disapproved. *Id.*
contract to reconstruct fences on right of way construed. *White River Ry. Co.* v. *Hamilton*, 333.
instruction as to duty toward person on track approved. *St. Louis, I. M. & S. Ry. Co.* v. *Cleere*, 377.
effect of such person partially obstructing vision and hearing. *Id.*
liability toward passenger's escort. *Id.*
instruction withdrawing question of necessity of lights at station properly refused when. *Id.*

QUIETING TITLE: See CLOUDS ON TITLE.

RAPE AND CARNAL ABUSE:
conviction of carnal abuse under indictment for rape. *Henson* v. *State*, 267.

RATIFICATION: See AGENCY.

RECEIVERS:
sale by receiver held not to carry property not listed. *Crawford* v. *Stainback*, 346.

RECORD: See DEEDS.

REDEMPTION: See TAXATION.

REFORMATION OF INSTRUMENTS:
deed reformed where tract omitted by mutual mistake. *Perry* v. *Sad-*

REFORMATION OF INSTRUMENTS:—*Continued.*
Ins. Co. v. *State,* 180.
mistake in policy of insurance held ground for reformation. *Phoenix Ins. Co.,* v. *State,* 180.
reformation of deed enforced against purchaser with notice of grantee's rights. *Thalheimer* v. *Lockert,* 25.

RELEASE:
evidence admissible as tending to prove release. *Hot Springs Rd. Co.* v. *McMillan,* 88.
right of surety to release mortgage executed as indemnity. *Dyer* v. *Jacoway,* 171.

REMITTITUR:
excessive damages remitted on appeal when. *St. Louis & N. A. Rd. Co.* v. *Mathis,* 184.

REMOVAL OF CAUSES:
cause not removable as local action when. *Kansas City So. Ry. Co.* v. *McGinty,* 356.
nor for diversity of citizenship when. *Id.*
when petition for removal filed too late. *Id.*

RESCISSION: See SALES OF CHATTELS.

REVIVAL: See ACTIONS.

REVIVOR OF JUDGMENTS: See JUDGMENTS.

ROADS AND HIGHWAYS:
for road tax, see TAXATION.

RULES OF COURT:
rule as to granting changes of venue held arbitrary. *Maxey* v. *State,* 276.

SALES OF CHATTELS:
warranty waived by failure to give notice of defect in quality when. *Duffie* v. *Pratt,* 74.
contract of sale severable when. *Id.*
in severable contract rescission allowed only *pro tanto* for defect in quality as to part. *Id.*
in severable contract warranty as to quality is also severable. *Id.*
guaranty as to profits held not to effect severability. *Id.*
no implied warranty in sale of goods by description when. *J. F. Hartin Com. Co.* v. *Pelt,* 177.
none in sale of specific articles when. *Id.*
acceptance of order for carload of goods, without specifications, held not binding. *Wm. Fait Co.* v. *Anderson,* 237.
statutory remedy of specific attachment in favor of vendor held not a lien. *Neal* v. *Cone,* 273.
agreement held not to amount to reservation of title. *Id.*
mortgagee of crop held not innocent purchaser when. *Sheeks-Stephens Store Co.* v. *Richardson,* 282.

SALES OF CHATTELS:—*Continued.*
warranty in sale of provisions. *Nelson* v. *Armour Packing Co.*, 352.
privity of contract in such case. *Id.*
order not countermanded after shipment of goods. *Main* v. *Tracy*, 371.
delivery to agent held sufficient. *Russell* v. *Haltom*, 506.
instruction as to measure of damages for breach of contract held misleading. *Wood* v. *Planters' Oil Mill*, 570.
SALES OF LAND: See WATERS AND WATERCOURSES; SCHOOLS.
possession as notice of occupant's title, rights or equities. *Thalheimer* v. *Lockert*, 25.
vendee estopped to dispute vendor's title. *Tillar* v. *Clayton*, 405.
burden on vendee to prove payment of purchase money in suit to foreclose vendor's lien. *Id.*
when possession of vendee adverse to vendor. *Id.*
heirs of vendee entitled to benefit of reduction of price. *Id.*
vendor, suing to foreclose lien, must tender deed when. *Id.*
when equity will not relieve from a forfeiture. *Carpenter* v. *Thornburn*, 578.
when vendor required to tender deed. *Id.*
SCHOOLS:
sale of school lands is not judicial sale. *Williams* v. *State*, 290.
province of county court in confirming such sale. *Id.*
SEDUCTION:
suspension of prosecution on marriage not deprivation of right to speedy trial. *Burnett* v. *State*, 295.
such suspended prosecution can not be pleaded as former jeopardy. *Id.*
presumption of defendant's consent to suspension of prosecution. *Id.*
necessity of corroboration of prosecutrix. *Id.*
STATE:
contract of board of trustees for supplies of charitable institutions not enforceable when. *Bunch* v. *Tipton*, 167.
STATUTES: See CONSTITUTIONAL LAW.
when prior statute impliedly repealed. *St. Louis & S. F. Rd. Co.* v. *Bowman*, 32.
Kirby's Digest, § 3707, held to be repealed. *Id.*
Kirby's Digest, § 6315, held to be mandatory. *Anglin* v. *Cravens*, 123.
Kirby's Digest, § 4130, held mandatory. *Bunch* v. *Tipton*, 168.
bill appropriating money for State Guard held to embrace one subject. *State* v. *Moore*, 197.
anti-trust act of Jan. 23, 1905, construed. *Hartford F. Ins. Co.* v. *State*, 303.
intent learned from provisions of act. *Id.* p. 308.
if ambiguous, courts may look to current events. *Id.*, p. 309.
repeals by implication not favored. *Benton* v. *Willis*, 443.

STATUTES CITED, ETC.:

ACTS OF CONGRESS:
1887, Feb. 4, c. 104, § 6..82, 83
1890, March 2, c. 382....82, 83
REVISED STATUTES:
c. 128, § § 133, 134..... 454
MANSFIELD'S DIGEST:
§ 6419 126
KIRBY'S DIGEST:
§ 734 .....419, 527
759 459
824 323
828 323
949 504
950 504
1199 267
1227 425
1228 425
1680 277
1765 ..... 491, 492, 517
1826 551
1830 551
2005 268
2008 268
2044 297
2052-7 343
2357 85
2413 269
2550 250
2552 250
2520-54 (c. 49, subd. 24).. 213
2553 250
2754 150
2947 242
2952 243
2954 ..... 243.
2955 243
3095, subdiv. 4 436
3656 ..... 238, 399
3705 ..... 35, 36, 37
3706 ..... 36, 37
3707 ..... 34, 35
3804 219
3805 219
3808 220
4124 413
KIRBY'S DIG.:—*Continued.*
4127 413
4130 ..... 168, 413
4586 485
4631-3 ..... 35, 36
4634 36
4807 ..... 455, 459
4914 460
4966 ..... 275, 346
4967 275
5061 450
5093 562
5119 170
5120 338
5295 205
5438 250
5450 446
5451 ..... 446, 447
5461 250
5522 49
5530 64
5548 64
5785 150
5786 150
5792 150
5793 151
6002 560
6003 381
6060 148
6063 148
6064 148
6217 ..... 190, 194
6286 486
6290 ..... 381, 557
6298 123
6299 123
6300 123
6314 123
6315 123
7095 555
7115 555
7351 24
7358 24
7707 291
7823 381
7946 125

STATUTES CITED.
KIRBY'S DIG.:—*Continued.*
7943 126
7944 126
CONSTITUTION OF 1868:
SCHED. § 3 455
CONSTITUTION OF 1874:
ART. 5, § 11 ..... 197, 212
5 30 ..... 199, 205
5 31 199
7 4 191
7 40 600
9 1 346
9 5 577
10 1 211
CONSTITUTION OF 1874: *Continued*
12 11 323
14 1, 4 212
Road Tax Amendment..... 24
OTHER ACTS:
1840, Dec. 23..... 554
1868, p. 62..... 455
1868, July 23..... 285
1885, Feb. 27..... 82, 83
1895, March 11..... 284
1899, Feb. 16..... 6, 10
1899, March 18..... 429, 430
1903, March 16.....49, 64
1905, Jan. 23..... 306, 312
1905, March 17..... 198

SUBROGATION: See PARTIES; LACHES.
surety paying only part of debt can not ask subrogation to creditors' securities. *Bank of Fayetteville* v. *Lorwein,* 245.
SUPERSEDEAS: See APPEAL AND ERROR.
SURVIVAL OF ACTION: See ACTIONS.
SWAMP LAND: See PUBLIC LANDS.
TAXATION:
mode of expenditure of road tax. *Texarkana* v. *Edwards,* 22.
division of funds between urban and county highways. *Id.*
presumption in favor of validity of auditor's deed under act of 1838. *Cracraft* v. *Meyer,* 450.
effect of deed from State Land Commissioner. *Id.*
requisites of such deed. *Id.*
statutory presumption in favor of such deed not overcome when. *Id.*
presumption from fact that Real Estate Bank lands were listed for taxation. *Id.*
sufficiency of description of land in levee tax deed. *Covington* v. *Berry,* 460.
statutory presumption in favor of such deed not overcome when. *Id.*
burden of proof in suit to redeem from tax sale. *Waterman* v. *Irby,* 551.
presumption in favor of donation deed. *Id.*
such presumption not overturned when. *Id.*
lien for taxes sufficient to entitle one to redeem. *Id.*
terms of redemption. *Id.*
time for redemption. *Id.*
TELEGRAPH COMPANIES:
penalty for refusal to deliver message not recoverable when. *State* v. *Western Union Telegraph Co.,* 124.
TENDER: See SALES OF LAND.

THREATS: See EVIDENCE.

TIME:

how reasonable time ascertained. *Little Rock Ry. & El. Co.* v. *North Little Rock,* 48.

one month in particular case held unreasonable. *Id.*

TRESPASS:

plaintiff must show either possession or title. *Price* v. *Greer,* 426.

evidence held sufficient to prove. *Id.*

sufficiency of answer. *Id.*

what complaint must allege. *Id.*

TRIAL:

not error to refuse to require production of account books when. *Cauthron Lumber Co.* v. *Hall,* 1.

argument of prosecuting attorney that blind tiger man will swear lie held not reversible error. *Reese* v. *State,* 39.

whether defendant in malicious prosecution suit acted under counsel's advice is question for jury. *Wells* v. *Parker,* 41.

province of jury to determine disputed questions of fact. *Hot Springs Rd. Co.* v. *McMillan,* 88.

general exception to evidence insufficient when. *Maxey* v. *State,* 276.

argument of prosecuting attorney held not prejudicial. *Id.; Byrd* v. *State,* 286.

prosecuting attorney's argument held improper. *Hinson* v. *State,* 366; *Tignor* v. *State,* 489.

review on appeal of order directing verdict. *Rodgers* v. *Choctaw, O. & G. Rd. Co.,* 520.

province of jury to pass on weight and credibility of evidence. *Mallory* v. *Brademyer,* 538.

TRUSTS: See MONOPOLIES.

what evidence required to establish trust *ex maleficio.* *McNutt* v. *McNutt,* 14.

USAGE: See CUSTOM AND USAGE.

VENUE:

in suit by heir for partition. *Cowling* v. *Nelson,* 146.

trial court's discretion to refuse to change venue. *Maxey* v. *State,* 276.

rule of circuit court as to granting change of venue held arbitrary. *Id.*

WAIVER: See CONTRACT; LANDLORD AND TENANT.

WARRANTY: See SALES OF CHATTELS.

WATERS AND WATERCOURSES:

when accretion included in sale of land. *Perry* v. *Sadler,* 43.

when accretion not included. *Id.*

when accretion to land once begins to form, it is not lost though a creek subsequently separates the land from the accretion. *Dowdle* v. *Wheeler,* 529.

WITNESSES: See ACCOMPLICES.
not error to refuse to require witness to produce account books when. *Cauthron Lumber Co.* v. *Hall,* 1.
non-resident witness attending court exempt from process. *Martin* v. *Bacon,* 158.
wife testifying as to transaction with husband should be corroborated when. *Waters* v. *Merit Pants Co.,* 252.
right of judge to examine. *Arkansas Central Rd. Co.* v. *Craig,* 258.
witness not impeachable on collateral immaterial matter. *Hot Springs Street Ry. Co.* v. *Bodeman,* 302.
not impeachable as to immaterial matter. *Hinson* v. *State,* 366.
impeached by proof of his contradictory actions. *White River Min. & Nav. Co.* v. *Langston,* 420.
evidence held not admissible as tending to impeach witness. *Sutherland* v. *State,* 487.
WRITS AND PROCESS:
non-resident attending court as party or witness is exempt from process. *Martin* v. *Bacon,* 158.
service in such case quashed. *Id.*
effect on collateral attack of failure to make proof of publication of warning order. *Johnson* v. *Lesser,* 465.
effect of failure to indorse warning order on complaint. *Id.*

7122 057