ARKANSAS REPORTS

VOL. 78

CASES DETERMINED

IN THE

Supreme Court of Arkansas

FROM

FEBRUARY, 1906, TO APRIL, 1906

T. D. CRAWFORD
REPORTER

PUBLISHED
BY THE
STATE OF ARKANSAS
1906

COPYRIGHT 1907
BY O. C. LUDWIG
SECRETARY OF STATE OF ARKANSAS

Rec. April 18, 1907

LITTLE ROCK
DEMOCRAT PRINTING & LITHOGRAPHING CO.
1907

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.

MEMORANDUM

Owing to illness, Chief Justice HILL was absent from the sittings of the court after September 30, 1905, until April 2, 1906. He did not, therefore, participate in any opinions delivered between those dates. In other words, he did not take any part in the opinions reported in 76 Arkansas after page 500, in 77 Arkansas, or in any of the cases reported in the present volume preceding page 299.

TABLE

OF CASES REPORTED

A

Adams *v.* State 16
Alexander *v.* Beekman Lumber Company 169
Anderson (Boggianna *v.*).... 420
Arkadelphia Lumber Company *v.* Mann 414
——— *v.* Smith..... 505
Arkansas S. W. Ry. Co. v. Dickinson 483
Arkansas Stables *v.* Samstag. 517
Arnold *v.* McBride 275

B

Bagnell Timber Company (Cook *v.*) 47
Baker *v.* Brown Shoe Co.....501
Banks (Underwood v.) 30
Barton-Parker Mfg. Co. *v.* Taylor 586
Baskins (Choctaw, O. & G. Rd. Co. *v.*) 355
Beekman Lumber Co. (Alexander *v.*) 169
Benton *v.* State 284
Blanks (Reynolds *v.*) 527
Block *v.* Shaw 511
Bodenheimer (Liddell *v.*).... 364
Boggianna *v.* Anderson..... 420
Bogan (St. Louis, I. M. & S. Ry. Co. *v.*)..... 173
Bonanza Mining & Smelter Co. *v.* Ware 306
Boyett *v.* Cowling 494
Boyles (St. Louis, I. M. & S. Ry. Co. *v.*)..... 374
Breckinridge *v.* Breckinridge. 598
Brewer (Singer Mfg. Co. *v.*). 202
Brinkley Car Works & Mfg. Co. (Swing *v.*)..... 198
Brooks *v.* Hornberger 595
Brown Shoe Co. (Baker *v.*).. 501
Bruton (Coffin *v.*)..... 162
Burks *v.* State 271
Butler *v.* Dodson 569
Butt, *Ex parte* 262

C

Caldwell (Smith *v.*)..... 333
Cantwell (Choctaw, O. & G. Rd. Co. *v.*) . 331
Carr (Ft. Smith Light & Traction Co. *v.*)..... 279
Central Coal & Coke Co. *v.* Gregory 43
Chicago, R. I. & P. Ry. Co. *v.* Langley 207
Choctaw, O. & G. Rd. Co. *v.* Baskins 355
——— *v.* Cantwell..... 331
Clark (Leidigh & Havens Lumber Co. *v.*)..... 539

Coffin *v.* Bruton 162
Continental Casualty Co. (Matthews *v.*) 81
Cook *v.* Bagnell Timber Company 47
Cottonwood Lumber Co. *v.* Hardin 95
Coulter *v.* Sypert 193
Cowling (Boyett *v.*) 494
Cross (Little Rock & H. S. W. Rd. Co. *v.*) 220

D

Dawson *v.* Owen 93
Dickinson (Arkansas S. W. Ry. Co. *v.*) 483
Dixon (Rucker *v.*) 99
Dillard *v.* Nelson 237
——— (St. Louis, I. M. & S. Ry. Co. *v.*) 520
Dobbins (Little Rock Ry. & El. Co. *v.*) 553
Dodson (Butler *v.*) 569
Drainage District, &c., (Ritter *v.*) 580
Drake v. Pope 327
Driver *v.* Planters' Mut. Ins. Assoc. of Ark. 127

E

Equitable Manufacturing Co. *v.* Thomasson 240

F

Fielder *v.* Warner 158
Fineran (Weil *v.*) 87
Fort Smith Light & Traction Co. *v.* Carr 279
Fort Smith Suburban Ry. Co. *v.* Maledon 366
Fox *v.* Spears 71
Frazier v. Poindexter 241

G

Gallaher *v.* State 299
German Nat. Bank (Greeson *v.*) 141
Goddard *v.* State 226
Gottlieb *v.* Rinaldo 123
Goza (Wade *v.*) 7
Grandstaff (Harris Lumber Co. *v.*) 187
Green (Little Rock Ry. & El. Co. *v.*) 129
Greeson *v.* German Nat. Bank 141
Gregory (Central Coal & Coke Co. *v.*) 43
Grimmett *v.* Ousley 304

H

Hall (Spencer Medicine Co. *v.*) 336
——— *v.* Wellman Lumber Co. 408
Hall & Brown Co. *v.* Louisiana & N. W. Rd. Co. 536
Hardin (Cottonwood Lumber Co. *v.*) 95
Harris Lumber Co. *v.* Grandstaff 187
Hicks (Little Rock Traction & El. Co. *v.*) 597
Hornberger (Brooks *v.*) 595
Hudgins (Scoggin *v.*) 531
Hunt (Whetstone *v.*) 230

J

Jacks *v.* Reeves 426
Jackson (St. Louis, I. M. & S. Ry. Co. *v.*) 100

James (St. Louis S. W. Ry. Co. *v.*) 490
Jarrett (Main *v.*) 137
Jenkins *v.* Jenkins 388
Johnston (Thomas *v.*) 574

K

Kansas City So. Ry. Co. (Lane *v.*) 234
Kaufman *v.* Kelley 176
Kavanaugh (St. Louis S. W. Ry. Co. *v.*) 468
Kelley (Kaufman *v.*) 176
Kelly (Pine Bluff & W. Ry. Co. *v.*) 83

L

Lane *v.* Kansas City So. Ry. Co. 234
Langley (Chicago, R. I. & Pac. Ry. Co. *v.*) 207
Lee *v.* Spears 77
Leidigh & Havens Lumber Co. *v.* Clark 539
Lemley (Rugg *v.*) 65
Lewis *v.* State 40
——— *v.* State 567
Liddell *v.* Bodenheimer 364
Liebke (Tillar *v.*) 324
Little Rock & H. S. W. Ry. Co. *v.* Cross 220
——— *v.* McQueeney..... 22
Little Rock Ry. & Electric Co. *v.* Dobbins 553
——— *v.* Green 129
Little Rock Traction & Electric Co. *v.* Hicks 597
Louisiana & N. W. Rd. Co. (Hall & Brown Co. *v.*) ... 536

M

McBride (Arnold *v.*) 275
McCall (Strayhorn *v.*) 209
McCulloch *v.* Mutual Reserve Fund Life Assoc. 32
McCuin *v.* Merchants Grocery Co. 63
McNutt *v.* McNutt 346
McQueeney (Little Rock & H. S. W. Rd. Co. *v.*)..... 22
Main *v.* Jarrett 137
Maledon (Fort Smith Suburban Ry. Co. *v.*) 366
Mann (Arkadelphia Lumber Co. *v.*) 414
Marshall *v.* St. Louis, I. M. & S. Ry. Co. 213
Matthews *v.* Continental Casualty Co. 81
May (Pippin *v.*) 18
Merchants Grocery Co. (McCuin *v.*) 63
Meredith (Reeder *v.*) 109
Metzger (Pratt *v.*) 177
Mutual Reserve Fund Life Assoc. (McCulloch *v.*) 32
Myers *v.* State 302

N

Nelson (Dillard *v.*) 237

O

O'Neal *v.* Richardson 132
Ousley (Grimmett *v.*) 304
Owen (Dawson *v.*) 93

P

Palmer (Rice *v.*) 432
Pine Bluff & W. Ry. Co. *v.* Kelly 83

Pippin *v.* May 18
Planters' Mut. Ins. Assoc. of Ark. (Driver *v.*) 127
Plumlee (St. Louis S. W. Ry. Co. *v.*) 147
Poindexter (Frazier *v.*) 241
Pope (Drake *v.*) 327
Porter *v.* St. Louis S. W. Ry. Co. 182
Pratt *v.* Metzger 177

R

Raines (Western Union Tel. Co. *v.*) 545
Reeder *v.* Meredith 109
Reeves (Jacks *v.*) 426
Reynolds *v.* Blanks 527
Rice *v.* Palmer 432
Richardson (O'Neal *v.*) 132
Rinaldo (Gottlieb *v.*) 123
Ritter *v.* Drainage District, &c., ... 580
Rucker *v.* Dixon 99
Rugg *v.* Lemley 65

S

St. Louis, I. M. & S. Ry. Co. *v.* Bogan 173
——— *v.* Boyles 374
——— *v.* Dillard 520
——— *v.* Jackson 100
——— (Marshall *v.*) 213
——— *v.* Saunders 589
——— *v.* Stone 318
——— (Tiffin *v.*) 55
——— *v.* Tomlinson 251
St. Louis Refrigerator & W. G. Co. (Swing *v.*) 246
St. Louis S. W. Ry. Co. *v.* James 490
——— *v.* Kavanaugh 468
St. Louis S. W. Ry. Co. *v.* (Porter *v.*) 182
——— *v.* Plumlee 147
——— *v.* White Sewing Mach. Co. 1
Samstag (Arkansas Stables *v.*) 517
Saunders (St. Louis, I. M. & S. Ry. Co. *v.*) 589
Schmutz *v.* Special School Dist. of Little Rock 118
Schnabaum (Wynne *v.*) 402
Scoggin *v.* Hudgins 531
Shaw (Block *v.*) 511
Shell *v.* Young 479
Singer Mfg. Co. *v.* Brewer... 202
Smith (Arkadelphia Lumber Co. *v.*) 505
——— *v.* Caldwell 333
Smythe (Tipton *v.*) 392
Spears (Fox *v.*) 71
——— (Lee *v.*) 77
Special School Dist. of Little Rock (Schmutz *v.* 118
Spencer Medicine Co. *v.* Hall. 336
State (Adams *v.*) 16
——— (Benton *v.*) 284
——— (Burks *v.*) 271
——— (Gallaher *v.*) 299
——— (Goddard *v.*) 226
——— (Lewis *v.*) 40
——— (Lewis *v.*) 567
——— (Myers *v.*) 302
——— (Weatherford *v.*) 36
Steadman (Stecher Cooperage Works *v.*) 381
Stecher Cooperage Works *v.* Steadman 381
Stone (St. Louis, I. M. & S. Ry. Co. *v.*) 318

Strayhorn *v.* McCall 209
Swing *v.* Brinkley Car Works & Mfg. Co. 198
——— *v.* St. Louis Refrigerator & W. G. Co. 246
Sypert (Coulter *v.*) 193

T

Taylor (Barton-Parker Mfg. Co. *v.*) 586
Thomas *v.* Johnston 574
Thomasson (Equitable Manufacturing Co. *v.*) 240
Tiffin *v.* St. Louis, I. M. & S. Ry. Co. 55
Tillar *v.* Liebke 324
Tipton *v.* Smythe..... 392
Tomlinson (St. Louis, I. M. & S. Ry. Co. *v.*) 251

U

Underwood *v.* Banks..... 30

W

Wade *v.* Goza 7
Ware (Bonanza Mining & Smelting Co. *v.*) 306
Warner (Fielder *v.*) 158
Weatherford *v.* State 36
Weil *v.* Fineran 87
Wellman Lumber Co. (Hall *v*). 408
Western Union Telegraph Co. *v.* Raines 545
Whetstone *v.* Hunt..... 230
White Sewing Mach. Co. (St. Louis, S. W. Ry. Co. *v.*)... 1
Wynne *v.* Schnabaum 402

X

Young (Shell *v.*) 479

CITED BY THE COURT

TABLE OF CASES

A

Abbett *v.* C., M. & St. P. Ry. Co., 30 Minn. 482 61
Acklen's Ex'or *v.* Hickman, 63 Ala. 494 5
Adams *v.* Noble, 120 Mich. 545 69
Aiken *v.* Gill, 23 Ark. 477 419
Alford *v.* State, 69 Ark. 436 ....476, 477
Allison *v.* State, 74 Ark. 444 362
Andrews *v.* Simms, 33 Ark. 774 75
Anthony *v.* Casey, 5 Am. St. Rep. 279 250
Apperson *v.* Moore, 30 Ark. 56 515
Arkansas & La. Ry. Co. *v.* Stroude, 77 Ark. 109 333
Arkansas Central Rd. Co. *v.* Jackson, 70 Ark. 295 510
Arkansas Fire Ins. Co. *v.* Wilson, 67 Ark. 553 205
Arkansas Telephone Co. *v.* Ratteree, 57 Ark. 429 429
Armstrong *v.* St. P. & P. C. & I. Co., 48 Minn. 113 341
Arnold *v.* D. & H. C. Co., 125 N. Y. 15 218
Atkins *v.* Swope, 38 Ark. 528 171
Atterberry *v.* State, 56 Ark. 515 ... 81
Attorney General *v.* Drummond, 1 Dr. & W. 353 206
Augusta S. R. Co. *v.* W. & T. R. Co., 74 Fed. 522 184
Austin *v.* Fitchburg R. Co., 172 Mass. 484 108

B

Baker *v.* Board, 40 Ia. 226 465
Baker *v.* Brown Shoe Co., 78 Ark. 501 573
Ballard *v.* Noaks, 2 Ark. 45 306
Bank of Malvern *v.* Burton, 67 Ark. 426 350
Bates *v.* Ball, 72 Ill. 108 51
Batten *v.* McGowan, 1 Metc. 533 .. ..461, 463
Baxter *v.* Brooks, 27 Ark. 173 .. ..456, 459, 461
——— *v.* Latimer, 116 Mich. 356 454
———*v.* Sherman, 73 Minn. 434 245
Bauer *v.* St. Louis, I. M. & S. Ry. Co., 46 Ark. 388 108
Belfield *v.* National Supply Co., 189 Pa. St. 189 245
Belk *v.* Hamilton, 130 Mo. 292 20
Bender *v.* Bean, 52 Ark. 132 16
Bennett *v.* State, 62 Ark. 516 290
Berry *v.* Linton, 1 Ark. 252 596
Berger *v.* State, 50 Ark. 20 126
Berton *v.* Anderson, 56 Ark. 470, 474 534
Bett *v.* Carter, 2 Lowell, 458 515
Bigelow *v.* Bemis, 84 Mass. 496 ....398, 400
Binns *v.* State, 35 Ark. 118 228
Birdsong *v.* Birdsong, 2 Head, 290 .. 54
Black *in re*, 52 Kansas, 64 228
Blanchard *v.* Raines, 20 Fla. 467 579
Bliss *v.* Bliss, 7 Bosw. 344 245
Bluedorn *v.* Mo. Pac. Ry. Co., 108 Mo. 439 108
Bodine *v.* Arthur, 91 Ky. 53 233
Bobo *v.* Bryson, 21 Ark. 388 75
——— *v.* State, 40 Ark. 224 365

Bond *v.* Railroad Co., 45 Wis. 579.. 450
Bonner *v.* D., L. & W. R. R. Co., 39 N. J. L., 189..... 60
Border City Ice Co. *v.* Adams, 69 Ark. 219.....343, 345
Borough of York *v.* Forscht, 23 Pa. St. 391..... 489
Boyd *v.* Bryant, 35 Ark. 69..... 462
Boynton *v.* Ashabranner, 75 Ark. 415 13
——— *v.* Ashabranner, 75 Ark. 514 99
Bradley *v.* Veazie, 47 Me. 85..... 266
Brennan *v.* Hoff, 1 Hilt. (N. Y.), 151 489
Brinkley Car Co. *v.* Cooper, 60 Ark. 549 261
Brodie *v.* Watkins, 33 Ark. 545..... 92
Brown, *In re,* 135 U. S. 703..398, 399, 401
——— *v.* Bradlee, 156 Mass. 28.... 488
——— *v.* Chicago, etc., Ry. Co., 59 Kan. 70 218
Bruce *v.* Baxter, 7 Lea, 477..... 211
Brush *v.* Peterson, 54 Iowa, 243.... 211
Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 467..... 503
Buchanan *v.* Cleveland Linseed Oil Co., 91 Fed. 88..... 245
Burke *v.* Dulaney, 153 U. S. 228.. .....241, 589
——— *v.* Wells, Fargo & Co., 34 Cal. 61 489
Burks *v.* State, 72 Ark. 461..... 294
Burr *v.* Lamaster, 30 Neb. 688..... 69
Burris *v.* State, 38 Ark. 221..... 290
Burton *v.* Baird, 44 Ark. 556..... 126

C

Cain *v.* Commissioners, 86 N. C. 8.. 466
Caldwell *v.* Hammons, 40 Ga. 342.. 233
Carman *v.* Steubenville & I. R. Co., 4 Ohio St. 390..... 373
Carpenter *v.* Dressler, 76 Ark. 400.. 13
——— *v.* Hammer, 75 Ark. 347..379, 428
——— *v.* Thornburn, 76 Ark. 578.. .....333, 577, 579
Carroll *v.* Clark, 21 Ark. 500..... 251
Carroll County *v.* Smith, 111 U. S. 566 453
Carson *v.* Levee District, 59 Ark. 513 462
——— *v.* McCaslin, 60 Ind. 334.... 233
Carter *v.* Burnham, 31 Ark. 212.... 321
Caulkins *v.* Fry, 35 Conn. 170.... 51
Cavanaugh *v.* Buehler, 120 Pa. St. 441 129
Cavender *v.* Waddingham, 5 Mo. App. 457..... 51
Central Rd. & Banking Co. *v.* Cheatham, 85 Ala. 292.....486, 487
Chamberlin *v.* Ossipee, 60 N. H. 212 5
Cheney *v.* Libbey, 134 U. S. 68.... 578
Chesapeake & O. R. Co. *v.* Hennessy, 96 Fed. 713..... 218
Chicago & N. W. Ry. Co. *v.* Ward, 61 Ill. 130..... 218
——— *v.* Prescott, 59 Fed. 237..... 61
Childers *v.* Duval, 69 Ark. 336.... 453
Chilson *v.* Jennison, 60 Mich. 235.. 177
Chism *v.* Martin, 57 Ark. 83..... 499
Choctaw, O. & G. Rd. Co. *v.* Baskins, 78 Ark. 355..... 524
——— *v.* Jones, 77 Ark. 367..... 157
Chrisman *v.* Carney, 33 Ark. 316... 321
Christmas *v.* Russell, 5 Wall. 290.. 398
Church *v.* Gallic, 75 Ark. 507..... 391
Cincinnati, N. O. & Tex. Pac. Ry. Co. *v.* Int. Com. Com., 162 U. S. 184 185
Citizens Assoc. *v.* Perry, 156 U. S. 709 123
Citizens Street Ry. v. Steen, 42 Ark. 321 561
Cleveland, C. C. & St. L. Ry. Co. *v.* Keeby, 138 Ind. 600 61
Coleman *v.* Beach, 97 N. Y. 545.... 233
Coles *v.* Trecothik, 9 Ves. Jr. 234.. 115
Collier *v.* Cowger, 52 Ark. 322.... 535
——— *v.* Frierson, 24 Ala. 108..442, 443
Collins *v.* Paepcke-Leicht Lumber Co., 74 Ark. 81..... 481

Colonial & U. S. Mtge. Co. *v.* Jeter, 71 Ark. 185.....181, 335, 577
Colorado National Bank *v.* Boettcher, 5 Col. 190..... 493
Colvert *v.* Millstead, 5 Leigh, 88 ... 211
Commonwealth *v.* Bell, 166 Pa. St. 405 17
——— *v.* Jenkins, 10 Gray, 485.... 273
Conrad *v.* Griffey, 11 How. 480.... 274
Cook *v.* Martin, 75 Ark. 40..... 115
——— *v.* Paul, 66 L. R. A. 673..... 70
Corbell *v.* Childers, 17 Oreg. 528.... 177
Corbett *v.* McDaniel, 77 Ga. 544.... 463
Cornish *v.* Johns, 74 Ark. 231..... 115
Cossart *v.* State, 14 Ark. 538....265, 266
County of Cass *v.* Johnson, 95 U. S. 360 453
County Seat of Linn County, 15 Kan. 500..... 476
Cowley *v.* Spradlin, 77 Ark. 190.... 16
——— *v.* Thompson, 77 Ark. 186.... 16
Cranmer *v.* Kohn, 7 S. D. 247..... 344
Crary *v.* Ashley, 4 Ark. 203..... 306
Cribbs *v.* Benedict, 64 Ark. 584.... 584
Crutcher *v.* Trabue, 5 Dana, 82.... 211
Cutter *v.* Gillette, 163 Mass. 95.... 343
Cutting *v.* Florida Ry. & Nav. Co., 46 Fed. 641..... 185

D

Dabbs *v.* State, 39 Ark. 353..... 456
Danley, *ex parte,* 24 Ark. 1..... 448
Darden *v.* State, 73 Ark. 315..... 428
Darling *v.* Conklin, 42 Wis. 478.... 177
Darlington *v.* Western Union Tel. Co., 127 N. C. 448..... 553
Davenport *v.* Burke, 91 Mass. 116.. 177
Davis *v.* Gaines, 48 Ark. 370..... 462
——— *v.* Railway, 53 Ark. 128.....261
——— *v.* Smith, 130 Mass. 113..... 20
Denham *v.* County Com'rs, 108 Mass. 202..... 20
Dennis *v.* Maxfield, 10 Allen, 138.. 344
Denver R. Co. *v.* Roberts, 6 Col. 333 322
Dey *v.* Dunham, 2 Johns. Ch. 191... 211
Dickinson *v.* Marsh, 57 Mo. App. 566 493
Dillahunty *v.* Railway Co., 59 Ark. 629 535
Directors, etc., *v.* Wanless, L. R., 7 Eng. & Ir. App. 12..... 61
Doran *v.* Butler, 74 Mich. 643..... 166
Downing *v.* C. R. Ry. 43 Iowa, 96.. 373
Driver *v.* Evans, 47 Ark. 297..... 13
Dudley *v.* Bolles, 24 Wend. 465.... 273
Dudley E. Jones Company *v.* Daniel, 67 Ark. 206.....503, 504
Duffie *v.* Pratt, 76 Ark. 74..... 181
Du Hadaway *v.* Driver, 75 Ark. 9... 277
Durst *v.* Burton, 47 N. Y. 167..... 400

E

Eason *v.* State, 11 Ark. 481..... 456
Eddy *v.* Powell, 49 Fed. 814..... 61
Ellicott *v.* Pearl, 10 Pet. 412..... 274
Ellsworth *v.* Hale, 33 Ark. 637..... 412
Ewald *v.* Chicago & N. W. R. Co., 5 Am. St. 178..... 510

F

Fallbrook Levee Dist. *v.* Bradley, 164 U. S. 112..... 584
Fell *v.* Newberry, 106 Mich. 542.. .....344, 345
Ferren *v.* Old Colony R. Co., 143 Mass. 197..... 108
Finley *v.* Hogan, 60 Ark. 499..... 399
First National Bank *v.* Security Bank, 61 Minn. 25..... 69
Flannagin *v.* Chicago & N. W. R. Co., 50 Wis. 462..... 218
Flood *v.* Flood, 5 Bush, 167....351, 352
Fordyce *v.* Jackson, 56 Ark. 602.. .....76, 105
——— *v.* Nix, 58 Ark. 136....380, 561
Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168 387
Foster *v.* Pitts, 63 Ark. 387.....560, 561
——— *v.* State, 45 Ark. 328..... 290
Fraker *v.* St. P., M. & M. Ry. Co., 32 Minn. 54..... 218

Franklin *v.* Miller, 4 A. & E. 599.. 341
Freel *v.* State, 21 Ark. 213..... 228
French *v.* Taunton Branch Rd., 116 Mass. 537..... 60
Friend *v.* Smith Gin Co., 59 Ark. 86 494
Frizzell *v.* Duffer, 58 Ark. 612..... 350
Frost *v.* Knight, L. R. 7 Exch. 111.. 342
Furlow *v.* State, 72 Ark. 384..... 489

G

George *v.* Clagett, 7 Term R. 359.. 245
Gibbs *v.* Adams, 76 Ark. 575..... 482
Gibson *v.* Green, 89 Va. 524..... 211
——— *v.* Herriott, 85 Ark. 75..... 115
——— *v.* Holden, 115 Ill. 199..... 70
Gill *v.* Gill Martin's Ch. Dec. 40.... 482
——— *v.* Gill, 69 Ark. 596..... 482
Gillespie *v.* Palmer, 20 Wis. 572.. .....450, 453
Giillshannon *v.* Stony Brook R. Corp., 10 Cush. 228..... 510
Gilman *v.* Eastern Rd. Corp., 87 Am. Dec. 635..... 510
Goodfellow *v.* Boston, etc., R. Co., 106 Mass. 461..... 108
Gore *v.* Gibson, 13 Mees. & W. 623.. 51
Govan *v.* Jackson, 32 Ark. 553..... 463
Graham *v.* McReynolds, 90 Tenn. 673 273
——— *v.* Remmel, 76 Ark. 140..241, 589
Gray *v.* Hartford Fire Ins. Co., 1 Blatch. 280..... 35
Greany *v.* Long Island R. Co., 101 N. Y. 419..... 360
Gregory *v.* McDowel, 8 Wend. 435.. 400
Green *v.* Caulk, 16 Md. 556..... 5
Greer *v.* Fontaine, 71 Ark. 605.... 277

H

Haggart *v.* Chapman & Dewey Land Co., 77 Ark. 527..... 412
——— *v.* Ranney, 73 Ark. 344..... 13
Hall *v.* Flanders, 83 Me. 242..... 493
Hamilton *v.* State, 62 Ark. 543.... 38
Handlin *v.* Davis, 81 Ky. 34..... 115
Hanks *v.* Harris, 29 Ark. 323..... 350
Hanly *v.* Watterson, 39 W. Va. 214 314
Hatch *v.* Hutchinson, 64 Ark. 119.. 129
Hatton *v.* Holmes, 97 Cal. 208..... 166
Hauselt *v.* Harrison, 105 U. S. 401.. 137
Hawkins *v.* Barney, 5 Pet. 451... 398
Head *v.* State, 44 Miss. 731..... 273
Healy *v.* Conner, 40 Ark. 352..... 350
Hecht *v.* Skaggs, 53 Ark. 291.... 534
Hecksher *v.* Shoemaker, 47 Pa. St. 249 129
Hempstead County Bank *v.* Hempstead County, 74 Ark. 37..... 192
Henderson *v.* Mack, 82 Ky. 379.... 233
——— *v.* Smith, 26 W. Va. 829.... 166
Herron *v.* State, 51 Ark. 133..... 126
Hewitt *v.* Cory, 150 Mass. 445..... 273
Hickman *v.* Stout, 2 Leigh, 6..... 211
Hickox *v.* Naugatuck R. Co., 31 Conn. 284..... 322
Higgins *v.* Gager, 65 Ark. 604..... 117
Hindman *v.* O'Connor, 54 Ark. 627.. 115
Hinshaw *v.* State, 147 Ind. 334.... 273
Hipp *v.* Board, 62 Mich. 456..... 466
Holland *v.* Chicago, N. & St. P. Ry. Co., 18 Fed. 243..... 108
——— *v.* Rogers, 33 Ark. 251..... 321
Hollingsworth *v.* State; 53 Ark. 387 294
Holroyd *v.* Marshall, 10 H. L. Cas. 191 515
Hopwood *v.* McCausland, 120 Iowa, 218 314
Houston *v.* Smythe, 66 Miss. 118.. 580
Houston & Tex. Cent. R. Co. *v.* Smith, 51 S. W. 506..... 108
Houston Direct Nav. Co. *v.* Ins. Co. of No. America, 89 Tex. 1..... 186
Howard *v.* Stillwell & Bierce Mfg. Co., 139 U. S. 199..... 344
Howcott *v.* Kilbourn, 55 Ark. 213.. 321
Hudson *v.* Hudson, 6 Munf. 356.... 211
Hunter *v.* Patterson, 142 Mo. 310.. 232
Hunt *v.* Wyman, 100 Mass. 198.... 126
Hyde *v.* State, 52 Miss. 665..... 499

Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332 322
Imboden *v.* Hunter, 23 Ark. 622 115
Insurance Companies *v.* Weides, 14 Wall. 375 5
Interstate Com. Com. *v.* Bellaire, Z. & C. Ry. Co., 77 Fed. 942 185
Iron Mt. & Helena R. Co. *v.* Stansel, 43 Ark. 275 117
Irwin *v.* Irwin, 52 S. W. 927 352
Isaacson *v.* N. Y. Cent. R. Co., 94 N. Y. 278 322
Ish *v.* Morgan, 48 Ark. 213 578

J

Jacks *v.* Reeves, 78 Ark. 426 379
Jackson *v.* Jones, 22 Ark. 158 117
——— *v.* Lamphire, 3 Pet. 280 398
Johns *v.* Fritchey, 39 Md. 258 51
Johnson *v.* Milling, 16 Q. B. Div. 460 343
——— *v* State, 68 Ark. 401 81
——— *v.* Supervisors, 61 Iowa, 89 .. 20
——— *v.* Trippe, 33 Fed. 530 314
——— *v.* Wilson, 2 N. H. 202 500
Jones *v.* Chiles, 4 J. J. Marsh. 610 .. 211
——— *v.* Daniels, 67 Ark. 206 573
——— *v.* Malvern Lumber Co., 58 Ark. 125 361
——— *v.* State, 61 Ark. 102 38
——— *v.* State, 107 Ala. 93 273
Judkins *v.* Railroad Co., 80 Me. 417 218

K

Keating *v.* Korfhage, 88 Mo. 524 .. 69
Kelly *v.* Chicago, St. P., M. & O. Ry. Co., 35 Minn. 490 218
Kenney *v.* Knight, 127 Fed. 403 344
Kennon *v.* W. U. Tel. Co., 126 N. C. 235 ..... 550, 553
Kenny *v.* Hazeltine, 6 Humph. 62 .. 129
Keough *v.* Foreman, 33 La. Ann. 1434 51
Keyser *v.* Hitz, 133 U. S. 138 519
Kiernan *v.* Blackwell, 27 Ark. 235 .. 419
Kimm *v.* Griffin, 67 Minn. 25 .... 69, 70
King-Ryder Lumber Co. *v.* Cochran, 71 Ark. 55 261
Kinzey *v.* Kinzey, 115 Mo. 496 354
Kipp *v.* Silverman, 25 Mont. 296 .. 273
Knight *v.* Shelton, 134 Fed. 423 .. .. 447, 453
Koch *v.* Kimberling, 55 Ark. 547 .. 379
Koehler *v.* Hill, 60 Ia. 545 .. 442, 443, 445
——— *v.* Lange, 60 Iowa, 543 .. 463, 465
Koshkonong *v.* Burton, 104 U. S. 668 398
Krone *v.* Krone, 37 Mich. 308 400

L

Lake Shore & M. S. Ry. Co. *v.* Richards, 152 Ill. 59 ..... 341, 343
Lake Shore, etc., Ry. Co. *v.* Prentice, 147 U. S. 107 ..... 560, 561
Lamb *v.* Medsker, 74 N. E. 1012 232
Lawrence *v.* LaCade, 46 Ark. 378 .. 212
Lawrence *v.* Rokes, 61 Me. 38 211
Lawson *v.* Glass, 6 Col. 134 5
Lavigne v. Lee, 71 Vt. 167 273
Leigh *v.* Evans, 64 Ark. 26 251
Letchworth *v.* Vaughan, 77 Ark. 305 205
Levy *v.* Very, 12 Ark. 148 306
Liddell *v.* Bodenheimer, 78 Ark. 364 228
Limberg *v.* Glenwood Lumber Co., 49 L. R. A. 33 157
Little *v.* Banks, 77 Hun, 511 205
Little Rock & F. S. Ry. Co. *v.* Barker, 33 Ark. 372 261
——— *v.* Blewitt, 65 Ark. 235 .... 60, 359
——— *v.* Cagle, 53 Ark. 347 510
——— *v.* Eubanks, 48 Ark. 460 361
Little Rock Granite Co. *v.* Shall, 59 Ark. 408 205
Little Rock, M. R. & T. Ry. Co. *v.* Leverett, 48 Ark. 333 361
Little Rock Traction & Electric Co. *v.* Walker, 65 Ark. 149 564
Little Rock Vehicle & Imp. Co. *v.* Robinson, 75 Ark. 548 294

Litz *v.* Goosling, 19 S. W. 527.... 314
Livingston *v.* Cochran, 33 Ark. 306 481
Louisville & N. R. Co. *v.* Eubank, 184 U. S. 47..... 187
Lowenstein *v.* McCadden, 54 Ark. 13 239
Luther *v.* Borden, 7 How. 1....445, 463
Lux *v.* Haggin, 69 Cal. 255..... 211
Lynn *v.* Lumber Co., 105 La. 455... 511

M

McCann *v.* Smith, 65 Ark. 305..... 16
McCarthy *v.* Quimby, 12 Kan. 494.. 400
McChesney *v.* Davis, 86 Ill. App. 380 .....69, 70
McCord *v.* State, 83 Ga. 521..... 273
McCracken *v.* Moody, 33 Ark. 81.. 397
McCulloch *v.* Campbell, 49 Ark. 367 424
McDaniel *v.* Park, 19 Ark. 671.... 342
McGee *v.* Smitherman, 69 Ark. 632 .....76, 105
——— *v.* White, 66 Fed. 502..... 60
McKee, *Ex parte*, 18 Mo. 600..... 266
——— *v.* Jones, 6 Pa. 425..... 273
McKenzie *v.* State, 11 Ark. 594.... 353
McMillan *v.* Philadelphia Company, 159 Pa. 142..... 314
McNeil *v.* Garland, 27 Ark. 343.... 251
McQueeny *v.* Phoenix Ins. Co., 52 Ark. 257 117
McShan *v.* McShan, 56 Miss. 413.. 196
Magruder *v.* Gage, 33 Md. 344.... 126
Maine *v.* Cumston, 98 Mass. 317.... 69
Martin *v.* Halbrooks, 55 Ark. 569.. 145
——— *v.* L. R. & F. S. Ry. Co., 62 Ark. 158.....60, 61, 359
——— *v.* Tennison, 56 Ark. 291.... 239
Mason *v.* Vestal, 88 Cal. 396..... 273
Matteson *v.* Moulton, 11 Hun, 268.. 493
——— *v.* Moulton, 79 N. Y. 627.. 493
Maury *v.* Lewis, 10 Yerg. 118..... 211
Maxwell *v.* Pittenger, 3 N. J. Eq. 156 51
Mead *v.* Boston, 3 Cush. 404..... 489
Meigs *v.* Roberts, 162 N. Y. 371.. .....398, 399
Memphis Trust Co. *v.* St. Francis Levee District, 69 Ark. 284..... 121
Mercein *v.* People, 25 Wend. 64.... 195
Merrigan *v.* B. & A. Rd., 154 Mass. 189 61
Metcalf *v.* Seattle, 1 Wash. 303.... 453
Miles *v.* Bradford, 22 Md. 170..... 463
Miller *v.* Nuckolls, 77 Ark. 64..... 388
Million *v.* Taylor, 38 Ark. 428.... 116
Missouri, etc., Co. *v.* Cape Girardeau & S. W .Ry. Co., 1 Int. Com. Com. Rep. 30..... 185
Montague *v.* Forward, 2 Q. B. [1893] 351..... 245
Montgomery County Fiscal Court *v.* Trimble, 104 Ky. 629..450, 451, 453
Moore *v.* Gordon, 44 Ark. 334..... 160
Morrell *v.* Noyes, 56 Me. 458..... 515
Mountain Park Terminal Ry. Co. *v.* Field, 76 Ark. 239..... 86
Mueller *v.* Bethesda Mineral Spring Co., 88 Mich. 390..... 344
Munday *v.* Vail, 34 N. J. L. 422... 250
Munn *v.* Illinois, 94 U. S. 134..... 98
Myers *v.* Hawkins, 67 Ark. 413..... 412

N

Neal *v.* Brandon, 74 Ark. 321..... 379
Nebraska Nat. Bank *v.* Walsh, 68 Ark. 433..... 353
Nelson *v.* McEwen, 35 Ill. App. 100 69
New Jersey Fruit Exchange *v.* Central R. Co., 2 Int. Com. Com. Rep. 142..... 185
New York, C. & St. L. R. Co. *v.* Perriguey, 138 Ind. 414..... 46
New York & N. E. Rd. Co. *v.* Bristol, 151 U. S. 556..... 584
Niagara Fire Ins. Co. *v.* Boon, 76 Ark. 153..... 212
Nicholls *v.* Scranton Steel Co., 137 N. Y. 471..... 341
Nichols *v.* Stewart, 20 Ala. 358.... 274

Nolen *v.* Harden, 43 Ark. 307.....212
Northern Pac. R. Co. *v.* Everett, 152 U. S. 107..... 108

O

Oakland Paving Co. *v.* Hilton, 69 Cal. 479..... 443
Oakland Savings Bank *v.* Murfey, 68 Cal. 459..... 166
Official Receivers, 13 App. Cas., L. R. 1888, 533..... 515
Osborne *v.* Lindstrom, 9 N. D. 1..... 400
Overman *v.* Hoboken City Bank, 31 N. J. L. 564..... 493

P

Pacific Mut. L. Ins. Co. *v.* Walker, 67 Ark. 147..... 565
Packet Co. *v.* McCue, 17 Wall. 508 510
Paine *v.* Hill, 7 Wash. 437..... 341
Paris Mercantile Co. *v.* Hunter, 74 Ark. 615..... 596
Pease *v.* Dibble, 57 Ga. 446..... 129
Peay *v.* Western Union Telegraph Company, 64 Ark. 538..... 549
People *v.* Cassell, 5 Hill, 165..... 266
——— *v.* Doyell, 48 Cal. 90.... 273, 274
——— *v.* Edwards, 93 Cal. 157..... 454
——— *v.* Goodwin, 22 Mich. 496... 461
Perkins *v.* State, 4 Ind. 222..... 273
Petty *v.* State, 76 Ark. 515..... 6
Phillips *v.* Culliton, 26 N. E. 137.. 353
——— *v.* Mayer, 7 Cal. 81..... 129
——— *v.* Phillips, 9 Bush, 183..351, 352
Phoenix Ins. Co. *v.* Flemming, 65 Ark. 54..... 76
——— *v.* Public Parks Amusement Co., 63 Ark. 202..... 117
Pinet *v.* Montague, 103 Mich. 516 341
Pittsburg, etc., Ry. Co. *v.* Machler, 158 Ind. 159..... 584
Platt *v.* Eggleston, 20 Ohio St. 414.. 69
Pleasant *v.* State, 15 Ark. 649.... 266
Polk *v.* State, 45 Ark. 165..... 290
Pope *v.* Tunstall, 2 Ark. 209..... 306
Pratt *v.* Meyer, 75 Ark. 206..... 179
Prescott & N. Ry. Co. *v.* Smith, 70 Ark. 179..... 158
Price *v.* White, 70 Ga. 381..... 129
Prince *v.* Heylin, 1 Atk. 494..... 211
Prohibitory Amendment Cases, 24 Kan. 700..... 443
Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 803..... 561

Q

Quertermous *v.* Hatfield, 54 Ark. 16 578
Quinn *v.* Sewell, 50 Ark. 380..... 245

R

Rabone *v.* Williams, 7 Term R. 360.. 245
Railway Co. *v.* Beard, 56 Ark. 309.. 345
——— *v.* Chriscoe, 57 Ark. 194.... 260
——— *v.* Cullen, 54 Ark. 431..... 359
——— *v.* Davis, 56 Ark. 51..... 561
——— *v.* Dodd, 59 Ark. 317..... 350
——— *v.* Hall, 53 Ark. 10....333, 561
——— *v.* Hopkins, 54 Ark. 213... 429
——— *v.* Johnson, 59 Ark. 122.... 61
——— *v.* Knott, 54 Ark. 424..... 372
——— *v.* Mitchell, 57 Ark. 418..... 429
——— *v.* Shoecraft, 53 Ark. 96.... 251
——— *v.* Tippett, 56 Ark. 457..... 359
——— *v.* Triplett, 54 Ark. 289.... 350
——— *v.* Yarborough, 56 Ark. 612 .....62, 594
Ramsey *v.* Holmes Elec. Pro. Co., 55 N. W. 391..... 344
Ratliffe *v.* Marrs, 87 Ky. 26..... 232
Red *v.* State, 4 O. S. W. 408....273, 274
Reed *v.* Spaulding, 42 N. H. 114... 273
Regina *v.* Boyes, 1 B. & S. 311.... 267
Rex *v.* Foxcraft, 2 Burr. 1017...450, 452
Reynolds *v.* Railway Company, 59 Ark. 171 86
Rice *v.* Palmer, 78 Ark. 432.471, 500, 501
Richardson *v.* Matthews, 58 Ark. 484 520
——— *v.* Tobey, 121 Mass. 457.... 69

Riley *v.* Norman, 39 Ark. 158..... 211
Robbins *v.* Kimball, 55 Ark. 414.... 206
Roberts *v.* Williams, 15 Ark. 43.... 20
Roche *v.* Ullman, 104 Ill. 11..... 69
Rodman *v.* Zilley, 1 N. J. Eq. 320.. 51
Roper *v.* Johnson, L. R. 8 C. P. 167 343
Ross *v.* Royal, 77 Ark. 324..... 399
Rousch *v.* Duff, 35 Mo. 312..... 493
Ruddell *v.* Childress, 31 Ark. 511.. 456
Russell *v.* Hudson River Rd. Co., 17 N. Y. 134 5
Rust Land & Lumber Co. *v.* Isom, 70 Ark. 99..... 566
Ryan *v.* Cumberland, etc., R. Co. 23 Pa. St. 384..... 510
——— *v.* Varga, 37 Iowa, 78..... 465

S

Sackett *v.* Kellogg, 2 Cush. 91..... 177
St. Louis & S. F. Rd. Co. *v.* Carlisle, 75 Ark. 560..... 236
——— *v.* Crabtree, 69 Ark. 134.... .....60, 105, 359, 526
St. Louis, A. & T. Ry. *v.* Anderson, 39 Ark. 167..... 86
St. Louis, I. M. & S. Ry. Co. *v.* Baker, 67 Ark. 531..... 59
——— *v.* Barnett, 65 Ark. 255..... 157
——— *v.* Bennett, 53 Ark. 208..... 486
——— *v.* Dawson, 68 Ark. 1..... 110
——— *v.* Denty, 63 Ark. 184..... 260
——— *v.* Higgins, 53 Ark. 458..... 108
——— *v.* Johnson, 74 Ark. 372..... 359
——— *v.* Landers, 67 Ark. 514..... 237
——— *v.* Luther Hitt, 76 Ark. 224.. 60
——— *v.* Martin, 61 Ark. 549..... .....359, 360, 361
——— *v.* Norton, 71 Ark. 314..... 76
——— *v.* Pickett, 70 Ark. 226..... 208
——— *v.* Power, 67 Ark. 142..... 561
——— *v.* Pritchett, 66 Ark. 46..... 76
——— *v.* Tomlinson, 69 Ark. 489.. .....60, 61, 565
——— *v.* Tomlinson, 78 Ark. 215.. ..... 361, 524
——— *v.* Touhey, 67 Ark. 209..... 219
St. Louis S. W. Ry. Co. *v.* Warren, 65 Ark. 624..... 76
——— *v.* Wilson, 70 Ark. 136....133, 561
St. Louis S. W. Ry. Co. *v.* Costello, 63 Ark. 32..... 236
——— *v.* Grayson, 72 Ark. 119..... 462
——— *v.* Russell, 62 Ark. 186..... 260
Sanford *v.* Scott, 3 Conn. 244..... 177
Sannoner *v.* Jacobson, 47 Ark. 31.. 69
Saranac Land & Timber Co. *v.* Comptroller, 177 U. S. 318....398, 399
Schramm *v.* O'Conner, 98 Ill. 541.. 51
Schumaker *v.* Heinemann, 99 Wis. 251 344
Seamster *v.* Blackstock, 83 Va. 232 250
Seaver *v.* B. & M. Rd. Co., 14 Gray, 466 510
Secombe *v.* Kittelson, 29 Minn. 555 443
Semenza *v.* Brinsley, 114 E. C. L. 467 245
Seymore *v.* Spring Forest Cemetery Assoc., 26 L. R. A. 859..... 317
Shattuck *v.* Byford, 62 Ark. 431.... 350
Shelby *v.* Burrow, 76 Ark. 558..... 330
Shoner *v.* Penn. Ry. Co., 130 Ind. 170 .....108, 109
Shorter University *v.* Franklin, 75 Ark. 571 379
Sidway *v.* Nichols, 62 Ark. 154.... 277
Simpson *v.* Commissioners of Mecklenburg, 84 N. C. 158.....463, 466
Small *v.* Swain, 1 Me. 133..... 177
Smith v. Caldwell, 78 Ark. 333..... 577
——— *v.* Chicago Ry., 38 Iowa, 518. 373
——— *v.* Maginnis, 75 Ark. 472.... 166
——— *v.* Proctor, 130 N. Y. 319.... 453
——— *v.* Smith, 71 Mich. 633..... 232
Sohn *v.* Waterson, 17 Wall. 596.... 398
Somers *v.* Wright, 115 Mass. 292... 344
Sparks *v.* Farish, 71 Ark. 117..... 99
Springfield & M. R. Co. *v.* Henry, 44 Ark. 360..... 86
——— *v.* Rhea, 44 Ark. 258..... 86
Spring Garden Bank *v.* Hulings Lumber Co., 3 L. R. A. 583..... 318

Stanley *v.* Aetna Ins. Co., 70 Ark. 107 294
——— *v.* Wilkerson, 63 Ark. 556.... 5
State *v.* Ashley, 1 Ark. 511..... 455
——— *v.* Bach Liquor Co., 67 Ark. 163 .....266, 270
——— *v.* Cady, 46 La. An. 1346.... .....273, 274
——— *v.* Carl, 43 Ark. 353..... 126
——— *v.* Flint, 60 Vt. 304..... 274
——— *v.* Fairchild, 15 Ark. 619..... 456
——— *v.* Grace, 20 Ore. 154..... 453
——— *v.* Gulf, C. & S. F. Ry. Co. 44 S. W. 542..... 185
——— *v.* Harmon, 31 Ohio St. 250 463
——— *v.* Harrison, 113 Ind. 434... 454
——— *v.* Johnson, 26 Ark. 281..... 500
——— *v.* Lansing, 46 Neb. 514..... 500
——— *v.* Longlie, 5 N. Dak. 594... 453
——— *v.* McBride, 4 Mo. 303..... 442
——— *v.* Marlow, 15 Ohio St. 134.. 461
——— *v.* Moore, 76 Ark. 197..... 462
——— *v.* Quarles, 13 Ark. 307..... 266
——— *v.* Parish, 79 N. C. 610..... 273
——— *v.* Powell, 77 Miss. 545..... .....442, 443, 445, 447, 450, 467
——— *v.* Reed, 62 Me. 129..... 274
——— *v.* Scoggin, 10 Ark. 326..... 117
——— *v.* Sloan, 66 Ark. 575..... 462
——— *v.* Swift, 69 Ind. 505..... 443
——— *v.* Taylor, 134 Mo. 109..... 273
——— *v.* Thaden, 43 Minn. 253.... 268
——— *v.* Timme, 54 Wis. 318..... 443
——— *v.* Vincent, 24 Iowa, 570..273, 274
——— *v.* Wallis, 57 Ark. 64....241, 589
——— *v.* Wurts, 45 L. R. A. 251 ..... 443, 445
Stetler *v.* Chicago & N. W. Ry. Co. 49 Wis. 609..... 510
Stewart *v.* People, 23 Mich. 74.... 273
Stiewel *v.* Fencing District, 71 Ark. 17 584
Stone *v.* Bott, 45 L. R. A. 251..... 441
Sturges *v.* Crowinshield, 4 Wheat. 122 398
Sturm *v.* Boker, 150 U. S. 312..... 126
Sulek *v.* McWilliams, 72 Ark. 67.. 277
Sullivan *v.* Shailor, 70 Conn. 733.. 245
Sutherland *v.* First Nat. Bank, 31 Mich. 230..... 129
Sweeney *v.* State, 35 Ark. 586..... 228

T

Taft *v.* Commonwealth, 158 Mass. 526 20
Tagg *v.* Bowman, 108 Pa. St. 273.. 246
Taylor *v.* Beckham, 108 Ky. 278.... ..... 461, 463
——— *v.* Purcell, 60 Ark. 606..... 51
——— *v.* Spear, 6 Ark. 382..... 251
Terry *v.* Anderson, 95 U. S. 628. 397, 399
Texarkana Gas & Electric Co. *v.* Orr, 59 Ark. 215..... 350
Thompson *v.* Parker, 68 Ark. 388... 211
Thweatt *v.* Freeman, 73 Ark. 575.92, 115
Tiffin *v.* St. Louis, I. M. & S. Ry. Co., 74 Ark. 55..... 359
Tillar *v.* Bass, 57 Ark. 179..... 482
Tobey *v.* Burlington, C. R. & N. R. Co., 94 Iowa, 256..... 108
Tomblin *v.* Fish, 18 Ill. App. 439... 69
Towson *v.* Denson, 74 Ark. 303...97, 98
Turner *v.* Huff, 46 Ark. 222..... 321
Turner *v.* New York, 168 U. S. 90 .....98, 398, 399
Tyler *v.* Moore, 42 Pa. St. 376..... 232
——— *v.* Tyler, 1 Hill, Eq. 77..... 273

U

Ullmann *v.* Hannibal & St. J. R. Co. 67 Mo. 118..... 372
United States *v.* Behan, 110 U. S. 338 .....343, 344
——— *v.* Burr, 25 Fed. Cas. 38..... 268
——— *v.* Chicago, K. & S. R. Co., 81 Fed. 787..... 185
——— *v.* Green, 3 Mason, 482..... 195
University of N. C. *v.* McIver, 72 N. C. 76 442

V

Vance *v.* Austelle, 45 Ark. 400..450, 453
——— *v.* Vance, 108 U. S. 514..398, 399

Van Hook *v.* Whitlock, 2 Edw. Ch. 307 211
Van Winkle *v.* Satterfield, 58 Ark. 621 .....92, 342
Vaughan *v.* State, 58 Ark. 362....38, 293
Verser *v.* Flood, 37 Ark. 30..... 197
Vogel *v.* People, 37 Ill. App. 388.... 177

W

Wadsworth *v.* Goree, 10 So. 848.... 413
Wakeman *v.* Wheeler & W. Mfg. Co., 101 N. Y. 205..... 344
Waldron, *Re,* 13 Johns. 418..... 195
Walker *v.* Oswald, 68 Md. 146..450, 453
Ward *v.* Magness, 75 Ark. 12..228, 365
Ware *v.* Allen, 128 U. S. 590..... 241
Waterman *v.* Hawkins, 75 Ark. 120. 462
Waterman *v.* Irby, 76 Ark. 551.... 69
Watson *v.* Houston & T. C. Ry. Co., 58 Tex. 434..... 218
——— *v.* Pugh, 51 Ark. 218..... 578
Weaver *v.* Arkansas Nat. Bank, 73 Ark. 462..... 241
Webb *v.* Smith, 40 Ark. 17..... 481
Webber *v.* Davis, 66 Ark. 195..... 92
Wells *v.* Nat. Life Assoc., 99 Fed. 222 .....343, 344
Wells *v.* Parker, 76 Ark. 41..... 428
Wemple *v.* Stewart, 12 Kan. 494.... 400
West *v.* Whitaker, 37 Iowa, 598.... 465
Western Coal & M. Co. *v.* Jones, 75 Ark. 76 293
Western Tie & Timber Co. *v.* Newport Land Co., 75 Ark. 286..... 412
Western Union Tel. Co. *v.* Church, 57 L. R. A. 905..... 553
Western Union Telegraph Co. *v.* Kirkpatrick, 76 Tex. 217..... 551
Westinghausen *v.* People, 44 Mich. 265 443
Wheelhouse *v.* Parr, 141 Mass. 593.. 126
Wheelock *v.* Boston, etc., Ry. Co., 105 Mass. 203..... 61
White *v.* Beal & Fletcher Gro. Co., 65 Ark. 278.....503, 504
——— *v.* McCracken, 60 Ark. 613.. 76
——— *v.* Ward, 26 Ark. 445..... 115
Whitney *v.* Whitney, 5 Dana, 331.. 211
Wight, *in re,* 139 U. S. 136..... 228
Wilbur *v.* Flood, 16 Mich. 40..... 294
Wilkinson *v.* Flowers, 37 Miss. 579. 211
Williams *v.* Dorris, 31 Ark. 466.... 482
——— *v.* Ewing, 31 Ark. 234..... 534
——— *v.* Insurance Company, 20 Vt. 222 35
——— *v.* State, 66 Ark. 246..... 76
Willis *v.* State, 67 Ark. 234..... 290
Wilson *v.* Anthony, 19 Ark. 16..... 211
——— *v.* Iseminger, 185 U. S. 57... 398
Withers *v.* Reynolds, 2 B. & Ad. 882 341
Wolcott *v.* Mount, 38 N. J. L. 496.. 344
——— *v.* Whitcomb, 40 Vt. 40..... 20
Worman *v.* Hogan, 78 Md. 152.... .....441, 443, 445, 462
Wright *v.* Campbell, 27 Ark. 646.... 114
——— *v.* Reusens, 133 N. Y. 298... 205
Wyllis *v.* Haun, 47 Iowa, 614..... 166

Y

Yeaton *v.* B. & L. Rd., 135 Mass. 418 218
Young *v.* Stevenson, 75 Ark. 181... 428

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* WHITE SEWING MACHINE COMPANY.

Opinion delivered February 17, 1906.

1. EVIDENCE—MEMORANDUM—PAST RECOLLECTION.—Where a telegraph operator testifies that he did not send a certain message himself, and has no present recollection that it was sent, but swears, from contemporaneous memorandum made by him, that at the time it was made he knew that the message was sent, the memorandum in connection with his testimony is admissible to prove that the message was sent. (Page 3.)
2. APPEAL—PRESUMPTION.—Where a witness swears from a contemporary memorandum made by him that he had "knowledge" of the facts therein recited, and the jury so find, it will not be presumed on appeal that the witness meant *information,* instead of knowledge. (Page 6.)
3. APPEAL—QUESTIONS NOT RAISED BELOW.—Questions that were conceded at the trial will not be decided on appeal. (Page 6.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield,* Judge; affirmed.

S. H. West and *Bridges & Wooldridge,* for appellant.

1. Books and records are legal evidence only when the entries are made by the person whose duty it was to have made them. Greenleaf on Ev. § 117. The entries must be shown to have been correct, and made contemporaneously with the facts

recorded. 66 Ark. 316; 60 Ark. 333. In the face of positive testimony that the message was not received by defendant company, and lack of legal evidence that it ever left the office of the "Big Four Railroad," plaintiff can not recover. 57 Ark. 461.

2. Plaintiff should not be permitted to recover without proof of the insolvency of the consignee at the time it attempted to stop the goods in transit. 26 Am. & Eng. Enc. Law (2 Ed.), 1084.

J. H. Harrod, for appellee.

McCULLOCH, J. This is an action brought by the White Sewing Machine Company, a foreign corporation doing business at Cleveland, Ohio, against the St. Louis Southwestern Railway Company to recover, by way of damages, the price of a lot of sewing machines shipped over defendant's road to a firm of merchants at Buffalo, Texas. It is alleged that the consignees became insolvent, and that the plaintiff, in exercise of its right to stop the goods in transit, notified the defendant, while it had the machines in its possession, to hold them subject to their (plaintiff's) order, but that the defendant negligently failed to comply with the instruction, and delivered the machines to the insolvent consignees, to the damage of the plaintiff in the sum of the price of the machines.

The facts are that the machines were shipped from Cleveland, Ohio, over the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, commonly designated in the testimony as the "Big Four Railroad." That company executed a through bill of lading to the point of destination, Buffalo, Texas. The Big Four Railroad operated from Cleveland, Ohio, to Cairo, Illinois, and the machines were transported by it to the latter point, whence they were conveyed by transfer steamer across the Mississippi River and delivered to the defendant company at Bird's Point, Mo.; that place being about six miles distant from Cairo, where the office of the Big Four Railroad was located. Whilst the machines were in custody of the defendant at Bird's Point, the plaintiff notified the Big Four Railroad to hold the machines and not to deliver them to the consignee. It is claimed that this notice was communicated by telegraph from the office of the Big Four

at Cairo to the agents of defendant at Bird's Point. This is denied by defendant, and the case turns upon this question alone. The court submitted the question to the jury upon proper instructions, and the jury found in favor of the plaintiff on the issue.

It is contended by the defendant that there is no evidence at all that the notice was ever communicated to or received by it, and that the court should have given a peremptory instruction to return a verdict in favor of the defendant.

All of the agents and employees of defendant in the Bird's Point office who could have received the notice or known of its receipt, if it had been sent, testified that no such message or notice was ever received; and the question whether or not there was any evidence tending to show the communication of the notice depends upon a construction of the testimony of witness R. H. York, who was a telegraph operator in the Big Four office at Cairo.

A telegraph message was, at the time of the taking of proof in the case, found on file in the Big Four office at Cairo, purporting to give directions from the freight agent of that company at Cairo to the agent of defendant company at Bird's Point, to hold the freight shipment in question for further instructions. The original message is shown to be in the handwriting of Browning, a clerk in the Big Four office, who testified that he wrote the message on the date it purports to have been sent out. The service marks on the message, "E. M.," indicating the sending operator, and "B. D.," indicating the receiving operator, are proved to be in the handwriting of York. York testified that the marks were in his handwriting, but that the fact that they were written in ink and apparently with his right hand indicated that he did not send the message. He testified positively that he did not send the message himself. His deposition, taken sometime before the date of the trial, was read in evidence by the plaintiff, and contained the following statement: "A message (referring to the message in question) was sent to H. A. Williamson at Bird's Point on that day, but was not sent by me. The service marks are in my handwriting, but telegram was sent by operator E. M., whose name I do not recall. I would not have written the service marks on message until I knew that message had been transmitted and was received O. K." At the trial of the cause the defendant introduced York as a witness, and he again testified concerning the

service marks, that he did not send the message himself, and did not know which operator in the office sent it. He stated, however, that "every indication is on the message to show that it was sent," and that "I must have had some knowledge of the transmission of the message, or I would not have put it (the service mark) there."

Was this sufficient evidence to go to the jury that the message was sent to and received by appellant's agent at Bird's Point, to whom it was directed? No objection was made as to the competency of the statements, the only question being as to its sufficiency.

Learned counsel for appellant contend that the service marks were inadmissible, as well as insufficient, as evidence of the transmission of the message, because, according to customs prevailing in the telegraphic offices, they should have been made by the operator who sent the message, and whose duty it was to note the service marks upon it. They cite authority, perhaps sustaining their contention, to the effect that where original entries upon shop books and the like are sought to be introduced as evidence, the entries must be shown to have been made by the person whose duty it was to make them—that such entries are not, of themselves, admissible as evidence of the facts recited. 1 Greenleaf, Ev. § 120.

It will be observed, however, that the entries alone are not relied upon as proof of the transmission, but they were introduced in connection with the testimony of York, the man who made them. He says, in effect, that, though he has no present recollection of the transmission of the message, he had personal knowledge of its transmission when he made the notation of the service marks.

"Some courts are willing to receive such entries where the person making them verifies their correctness on the stand and the original observer, salesman, etc., is dead or otherwise unavailable. Other courts go even further, and admit them without accounting for the original observer, on the sound consideration that it is practically impossible in mercantile conditions to trace and procure every one of the many individuals who reported the transaction." 1 Greenl. Ev. (16 Ed.), § 120*a*.

This principle is fully recognized by this court in the case of *Stanley* v. *Wilkerson,* 63 Ark. 556.

The notation or memorandum was competent as evidence of the past recollection of the witness York. He said, in effect: "I did not send the message myself, and have no present recollection that it was sent, but I state, from this memorandum appearing in my handwriting, that I knew when I made it that the message had been sent." 1 Wigmore on Ev. § § 744-752; 1 Greenleaf on Ev. § 439; *Chamberlin* v. *Ossipee,* 60 N. H. 212; *Lawson* v. *Glass,* 6 Colo. 134; *Acklen's Ex'or* v. *Hickman,* 63 Ala. 494; *Insurance Companies* v. *Weides,* 14 Wall. 375; *Russell* v. *Hudson River Rd. Co.,* 17 N. Y. 134; *Green* v. *Caulk,* 16 Md. 556.

"It is today generally understood that there are two sorts of recollection which are properly available for a witness—past recollection and present recollection. * * * In the former sort, the witness is totally lacking in present recollection and can not revive it by stimulation, but there was a time when he did have a sufficient recollection and when it was recorded, so that he can adopt this record of his then existing recollection and use it as sufficiently representing the tenor of his knowledge on the subject. * * *

"(1) The record * * * must have been made at or about the time of the event recorded. Whether in a given case it was made so near that the recollection may be assumed to have been then sufficiently fresh must depend on the circumstances of the case. (2) The witness need not have made the record himself; the essential thing is that he should be able to guaranty that the record actually represented his recollection at the time, and this he may be able to do, either by virtue of his general custom in making such records, or (as in the common case of an attesting witness) by an assurance that he would not have made the record if he had not believed it correct." 1 Greenl. Ev. (16 Ed.), § 439a, 439b.

The rule is concisely stated by the Supreme Court of Alabama in *Acklen's Ex'or* v. *Hickman, supra:* "If, however, the witness go further, and testify that at or about the time the memorandum was made he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present,

positive statement of the witness, affirming the truth of the contents of the memorandum."

This doctrine finds approval in the decision of this court in the recent case of *Petty* v. *State,* 76 Ark. 515, though the precise question we have now was not involved, and we entertain no doubt that it is sound, and is well supported by authority.

The testimony of witness York brings itself squarely within the rule stated above. It is urged that the witness may have recorded only his information as to the transmission of the message, and not his personal knowledge of that fact. We must, however, accept the statement as we find it in the language of the witness, and give it the strongest probative force which the jury might have accorded it. He said that he must have had knowledge of the transmission, or he would not have written the service marks on the message. We can not presume that the witness meant information when he said knowledge. It was possible for him to have had personal knowledge of the transmission of the message without having transmitted it himself. He may have been present and heard it. He was not examined as to his means of knowledge, and we can not say what they were, but the jury were warranted in accepting his unqualified statement that he did know. If the message was sent, it must have been received by the telegraph operator in the office of appellant at Bird's Point. The testimony of York was sufficient to justify the jury in finding that it was sent and received.

With the weight of the evidence, we have nothing to do. There was sufficient evidence to go to the jury on this question, and their finding upon the disputed issue of fact is conclusive upon us.

Learned counsel for appellant also contend that the case should be reversed because there was no proof of the insolvency of the consignee, and the consequent right of appellee to stop the goods in transit, nor that the whole price of the machines was lost to appellee by the delivery to the consignee. It is too late to raise that question here, as in the trial below appellant's counsel expressly declared in open court when the case was submitted that no other question was involved in the case except that of notice to the defendant of the directions to stop.

The case must be determined here upon questions raised and determined below.

Affirmed.

---

78 86 7 104

WADE v. GOZA.

Opinion delivered February 17, 1906.

1. EQUITY—WHEN TRANSFER TO LAW PROPER.—Where the pleadings and evidence show that the defendant in a suit in equity to quiet title to land is in actual possession, it is proper, on motion of the plaintiff, to transfer the cause to the law court. (Page 12.)
2. ANSWER—DENIAL OF INFORMATION—SUFFICIENCY.—An answer which, in response to a certain allegation of the complaint, states that defendant "is not advised" that such allegation is true, and "has no information" as to its truth, is insufficient to put such allegation in issue. *Haggart* v. *Ramey*, 73 Ark. 344, followed. (Page 12.)
3. INCOMPETENT EVIDENCE—UNCONTROVERTED FACT.—The admission of incompetent evidence to prove a fact alleged by the complaint and not denied by the answer is not prejudicial. (Page 13.)
4. SECONDARY EVIDENCE—PREJUDICE.—The admission of secondary evidence without accounting for the failure to produce the best evidence is not error where it is not objected to, and no motion was made to exclude it. (Page 13.)
5. APPEAL—GENERAL OBJECTION TO SEVERAL INSTRUCTIONS.—A general objection to a series of instructions in mass is insufficient if any one of them is correct. (Page 13.)
6. CROSS-APPEAL—QUESTIONS RAISED.—A cross-appeal brings up only questions decided in favor of appellant or any co-appellee against the appellee praying the cross-appeal. (Page 14.)
7. BANKRUPTCY—REVERSION OF SURPLUS.—Where an assignee in bankruptcy for any reason failed to dispose of certain land belonging to an adjudged bankrupt, such land, after the bankruptcy proceeding had terminated, reverted to the bankrupt. (Page 15.)
8. LIMITATION AS TO TAX TITLE—RUNNING OF STATUTE.—The two years statute of limitation applicable to possession under tax titles (Kirby's Digest, § 5061) is reckoned from the date of the tax deed, where the tax purchaser was then in possession claiming under it, till the beginning of the suit against him for possession. (Page 15.)

Appeal from Chicot Circuit Court; *Zachariah T. Wood,* Judge; reversed.

On May 13, 1901, James M. Goza and Lizzie F. Kimberlin filed a complaint in the Chicot Chancery Court against J. W. Wade (and certain other parties who have not appealed), setting up, in substance, that plaintiffs were sole heirs at law and devisees under the will of Aaron Goza, who died seized and possessed of the south half of south half of section 6, township 18 south, range 1 west; that on an unnamed date the south half of the southeast quarter was patented to Hoggart Clopton, and that on the 20th day of January, 1855, the south half of the southwest quarter was patented to John A. Craig by the State, and that the same had been granted to the State as swamp and overflowed land, and that Aaron Goza held by mesne conveyances from said patentees. That according to their best information defendants "claim title to said lands under divers tax sales, deeds and conveyances, which plaintiffs allege are void and vest no title in said defendants," and prayed that "plaintiffs' title to said land be quieted and confirmed." They made no offer to refund any taxes paid or improvements made, nor filed any affidavit of tender, nor did they ask for possession of the land.

Defendant answered, in substance, that he had no information that the land had been granted to the State as swamp and overflowed land, or that the State had patented south half of southeast quarter of section 6 to Hoggart Clopton, or south half of southwest quarter to John A. Craig, as no such grant or patents were of record, and he moved that the alleged patents be filed with the complaint. He denied that plaintiffs were heirs or devisees under the will of Aaron Goza; set up the new matter that Aaron Goza was adjudged a bankrupt on April 17, 1868, by the United States District Court, and that the register of said court, with full power, conveyed all the property owned by Goza to Thomas H. B. Lawrence, as assignee. He alleged that said lands became subject to taxation, and were sold for the nonpayment of taxes due thereon, and that the State became the purchaser. That the Commissioner of State Lands conveyed the said land to him, and that he took possession more than two years

before the institution of this suit, and has continuously held such possession adversely to all persons, and was, at filing of the answer, in possession; that he had spent in taxes and improvements the sum of twenty-five hundred dollars, for which he prayed if title should fail; and demurred to complaint on the ground that it did not state a cause of action.

On September 3, 1902, he filed amendment to his answer, in substance, that plaintiffs were guilty of gross laches in asserting title; that they more than thirty-five years ago abandoned the lands, and made no claim thereto until the institution of the suit; that they had paid no taxes for thirty-five years, and all the time defendant and his grantor had been paying taxes and claiming title, and asked that the suit be dismissed for want of equity.

On September 10, plaintiffs filed a motion to transfer this cause to circuit court.

On September 10, 1902, defendant further amended his answer as follows: "Comes the defendant to this suit, and states that he has in good faith paid for and improved the lands on which he resides, involved herein, believing himself to have a good and sufficient title thereto, and he prays this court that the conveyances under which plaintiffs hold their alleged title to these lands be forever barred by this court and canceled, and plaintiffs be enjoined from asserting any rights to the lands involved herein under their said alleged title by reason of their laches, or from using the said deeds as evidence in any action affecting the title to said lands wherein these defendant are concerned; that defendant's titles be forever quieted; and defendant further prays that the motion filed herein to transfer this cause to the circuit court be denied."

Plaintiffs, over defendant's objection, introduced a certificate of J. W. Colquitt, Commissioner of State Lands, to prove that the land was entered by Craig and Clopton, without accounting for the failure to produce the original deeds.

It was proved that defendant was in possession of the land. Plaintiffs moved the court to transfer the cause to the circuit court, which was done, over defendant's objection.

It was proved that plaintiffs' ancestor, Aaron Goza, was in 1869 decreed a bankrupt, and all of his property ordered sold. There was evidence that defendant had made certain improve-

ments and paid some taxes. Certain instructions, which need not be set out, were given at the instance of plaintiffs.

Defendant asked the court to give the following instruction, which was refused, viz.:

"2. The jury are instructed that if the ancestor of plaintiffs was by the District Court of the United States on the 17th day of April, 1868, declared a bankrupt, and a referee appointed, and the property of said Aaron Goza placed in the hands of an assignee by a valid conveyance from said referee, it divested said Aaron Goza of all legal and equitable title in any property that he might own within the jurisdiction of the United States, and before plaintiffs can sustain this action they must show a valid conveyance out of the said assignee in bankruptcy to some one under whom they claim." The court refused to give the instruction as asked, but modified it by adding at the end of the instruction the following clause, "or that the lands were not disposed of by the referee in the administration of said bankrupt's estate."

Defendant asked the court to give the following instruction, which was refused, viz.: "4. The jury are instructed that, even though your verdict should be for the plaintiffs, you can not assess damages for rents, or offset such damages against any amount that shall be found for defendants for their taxes, purchase money, improvements and interest."

The court also refused defendant's request to give the following:

"6. The jury are further instructed that in computing the two years you will take the time evidenced by the deeds respectively of the defendants where the proof shows that they were in possession at the date of their deeds to the present time, and not merely to the institution of this suit," etc.

In lieu of instruction 6 asked, the court gave the following:

"6. The jury are instructed further that in computing the two years you will take the time evidenced by the deeds respectively of the defendants where the proof shows that they were in possession at the date of their deeds to the filing of this suit," etc.

Defendant filed his motion for a new trial, setting up as errors:

1. That the chancery court erred in overruling answer and

motion to dismiss the suit for laches, abandonment and want of equity.

2. That it erred in transferring the cause to the circuit court over the prayer of appellant against the transfer.

3. That it erred in admitting, over exceptions of appellant, the certificate of sale by the Land Commissioner of the State to John A. Craig and Hoggart Clopton, without proof that the land had been confirmed to the State as swamp and overflowed land by the United States.

4. That the court erred in giving the following instructions for appellees over objection of this appellant numbered 3, 5, 7, 8 and 10.

5. That the court erred in refusing to give instructions numbered 4 and 5 asked by appellant.

6. That it erred in refusing to give instructions numbered 2 and 6 as asked by appellant and in modifying them.

The motion for new trial was overruled, and defendant appealed.

Baldy Vinson, for appellant.

The demurrer should have been sustained. If the sale for taxes and deed thereunder are void, it is because of some fact which must be pleaded and proved to enable the court to set them aside, if the object is to remove them as a cloud on the title. 38 Cal. 679; 4 Ohio Cir. Ct. 499; 9 Ore. 89; 22 Fed. 865; 27 Ark. 414; 22 Atl. 286; 46 Ark. 96. Under appellant's amended answer, showing his possession of the land under a deed valid on its face, long payment of taxes, abandonment of the land by appellees, and valuable improvements made by appellant, the chancery court should have retained jurisdiction to grant the relief prayed for and quiet the title. Sand. & H. Dig. § 5761; 56 Ark. 79; 24 Tex. 417; 61 Tex. 514; 2 Wash. 106; 11 Ill. 558; 5 Watts & S. (Pa.), 359; 16 Pa. St. 305. Recitals of the assignee in bankruptcy that no title remained in the bankrupt are taken as *prima facie* true, and can not be collaterally impeached. Bankrupt Act 1867, sec. 38; 10 N. B. R. 305; 21 Vt. 409; 5 N. B. R. 152. The certificate of the State Land Commissioner was incompetent without proof of title in the State from the United States.

47 Ark. 297. The court erred in refusing instructions 4 and 5. There was no offer to refund taxes and improvements, and the statute only authorizes judgment for possession, which was not prayed for. Sand. & H. Dig. § 2597; 65 Ark. 305; 52 Ark. 132. Not being a possessory action, it was error to refuse instruction 6 and give it as modified. 24 Ark. 519; 61 Ark. 456. A plaintiff can not recover upon a case not made by his bill. 46 Ark. 96.

B. F. Merritt, for appellees.

The statute confers power to place the successful party in possession, whether the cause be tried in the law or chancery court. Kirby's Digest, § 6518; 57 Ark. 594. Under the issues as made up and the proof, it was mandatory on the court to transfer to the law court. Digest, *supra.*

Upon discharge of plaintiff's ancestor in bankruptcy without sale or application of the lands, title revested in the ancestor and descended to plaintiffs. 40 Ark. 366. The two years' statute of limitation does not apply in this case. The sale under overdue tax proceedings was void. 63 Ark. 1; 71 Ark. 310. None but the seven years' statute of limitation could apply in any event, and in this the proof fails. Certificate of donation would not give color of title so as to put the statute in motion. Kirby's Digest, § 5056; 42 Ark. 305; 83 S. W. 947; 47 Ark. 528; 67 Ark. 184; 1 Am. & Eng. Enc. Law (2 Ed.), 846.

WOOD, J. 1. The issue, as made by the complaint and answer and the proof that had been taken at the time the motion to transfer to the law court was made, presented a cause for the law court. Moreover, appellant did not except to the ruling of the court transferring the cause to the law court; and, as this court had jurisdiction under the issues presented, no error is shown in this respect.

The answer and proof showed, when the motion to transfer was passed on, that appellant was in possession of the lands in suit. Appellant did not insist on the demurrer nor motion to dismiss in the court below. He answered and went to trial on the merits, and he can not complain here. There is no error presented in the first and second grounds of the motion for new trial.

2. The complaint with sufficient definiteness set up that the

land in controversy "had been granted to the State of Arkansas by the United States as swamp and overflowed lands." A duplicate of the patents is proffered with the complaint, and filed as exhibits D and E. The answer in response to these allegations says that defendant is "not advised that they (the lands) were granted to the State as swamp and overflowed lands," and that defendant has no information "that the lands were patented to the State as swamp and overflowed lands." This presented no denial of the allegations of the complaint that these lands were duly granted to the State by the United States Government as swamp and overflowed lands. *Haggart* v. *Ranney,* 73 Ark. 344.

3. The third ground of the motion for new trial assigns as error the admission of the certificate of the State Land Commissioner of the sale by the State to Craig and Clopton of the land in controversy, without proof that the land had been confirmed to the State by the United States as swamp and overflowed land. The allegations of the complaint as to this, being sufficient and not denied, must be taken as true, and there was no error presented by this assignment.

True, appellant called for the patents to Craig and Clopton in the answer, but he went to trial without insisting upon a ruling on his motion to produce them; and when the certificate of the Land Commissioner was offered as evidence, appellant did not object to same, nor move afterwards to exclude it on the ground that it was not the best evidence, and not competent as secondary evidence until the proper foundation had been laid for its introduction by a showing that the patents to Craig and Clopton were lost, destroyed, or otherwise beyond the power of appellees to produce them. It thus appears that appellant in the court below did not avail himself of the rule applicable in such cases as declared by this court in *Driver* v. *Evans,* 47 Ark. 297; *Boynton* v. *Ashabranner,* 75 Ark. 415, and *Carpenter* v. *Dressler,* 76 Ark. 400.

4. Nothing is presented for our consideration in the fourth ground of the motion for new trial, which is as follows: "That the court erred in giving the following instructions for appellees, over objections of this appellant, numbered 3, 5, 7, 8 and 10." The bill of exceptions recites that "the court gave, over the objections of defendant, the following instructions, "setting them out and numbering them consecutively 3, 5. 7, 8 and 10." The

objection to the instructions given was in gross, and at least one of the instructions was correct.

5. The fifth ground of the motion for new trial is "that the court erred in refusing to give instructions numbered 4 and 5 asked by appellant." Number 5 is as follows: "5. The jury are instructed that under no circumstances presented in this case can they find a verdict for plaintiffs for possession of the land involved in this suit." Request for instruction number 5 should have been granted. It appeared that appellant Wade was in possession of the land claimed by him under a donation deed good on its face, based on a sale of forfeited lands to the State October 25, 1882. It is contended by appellees that this sale was void for the reason that the decree of the Chicot Chancery Court, rendered at an adjourned term thereof beginning on the 25th day of September, 1882, ordering the lands re-assessed and sold was void. But this contention is not established by the proof. We have searched the records in vain to find when this land was forfeited, and how it was sold. If sold under a decree of the Chicot Chancery Court, at an adjourned term beginning September 25, 1882, which was void because rendered by a special judge when the regular judge of the circuit was at the same time holding court elsewhere, the record nowhere shows it. True, we find among the papers what purports to be an original bill of exceptions in the case of James M. Goza *et al.* *v.* H. S. Caldwell *et al.*, pending in the Chicot Circuit Court, in which it appears that James M. Goza *et al.*, the plaintiffs, appealed from a judgment in favor of certain defendants in that suit, towit: Asbury Moses, Jane Jones, S. B. Brown, James Brown and Henry Love, and that the bill of exceptions sets forth the decree of the Chicot Chancery Court at the adjourned term beginning September 25, 1882, which appellee contends renders the sale and donation deed under which appellant claims title herein void. But that bill of exceptions, even if it disclosed what appellee claims for it, was never embodied in the transcript of this record.

The appeal by appellees here against the parties named in that bill of exceptions, and in whose favor judgment was rendered in the court below, was never perfected by the filing of the transcript in this court, as the law requires. Appellees prayed a cross-appeal in this case December 9, 1905. But this cross-appeal only

brings up questions decided in favor of appellant or any co-appellee against the appellee praying cross-appeal. Section 1225, Kirby's Digest. And we can only look to the transcript of the record in this court to determine what those questions are. Now, the parties who were joined with Wade as defendants in the court below, and in whose favor judgment was rendered, have not appealed, and Wade's appeal brings up no question against them. They are not co-appellees with the appellees, Goza and Kimberlin. They are therefore not parties to this record. So we find nothing in this record to impeach the donation deed of Wade. The court erred, therefore, in not granting appellant's request for instruction number five.

6. The giving of this would have rendered the granting of requests asked by him unnecessary. But, in view of a new trial in which the same questions may be raised, it is proper to say that we find no error in the refusal of the court to grant appellant's requests for instructions two and six.

The court properly submitted the questions embraced in these instructions in those numbered two and six which were given. It was a question for the jury, under the evidence, as to whether or not the title to the land in controversy had passed out of Aaron Goza by the proceedings in bankruptcy. If the lands for any reason were not disposed of by the referee in bankruptcy, such title as Goza had at the beginning of such proceedings reverted to him upon their termination. "Where a surplus remains in the hands of the assignee or trustee, after the proceeding has terminated, and the debts proved, if any, have all been paid, such surplus reverts to the bankrupt." In equity he would be the owner of such real estate as might remain, even if a decree were necessary to revest title in him. 16 Am. & Eng. Enc. Law, 699, 700, notes. The court did not err in adding the clause, "or that the lands were not disposed of by the referee in the administration of the bankrupt's estate," to appellant's request for instruction two, and giving it as thus modified.

Likewise, the court properly modified appellant's request for instruction number six by making it show that the statute of limitations would be reckoned from the date of the deeds, where the parties were then in possession claiming under them, till the beginning of the suit against them for possession. If they had not

acquired title under their donation deed by the two years' statute of limitations prior to the institution of the suit for possession, they could not acquire it after that time, and while such suits were pending. Of request numbered four by appellant and refused, it suffices to say that it is impossible to forecast what would be a proper instruction upon the question of taxes, interest, improvements and rents. For we can not anticipate what the proof on another trial may develop as to those. But nearly all questions that can arise concerning these matters have already been passed upon by this court in some recent cases. See *Bender* v. *Bean,* 52 Ark. 132; *McGann* v. *Smith,* 65 Ark. 305; *Cowley* v. *Spradlin,* 77 Ark. 190; *Cowley* v. *Thompson,* 77 Ark. 186.

For the error of the court in refusing to grant request of appellant for instruction number five, the judgment is reversed, and the cause is remanded for new trial.

ADAMS v. STATE.

Opinion delivered February 17, 1906.

INCEST—EVIDENCE—PRIOR INCESTUOUS ACTS.—In a trial for incest it is competent for the State to prove acts of incest between the parties prior to the specific act charged, though an indictment therefor would be barred by the statute of limitation, as such evidence tends to show the probability of the commission of the offense charged.

Appeal from Ouachita Circuit Court; *Charles W. Smith,* Judge; affirmed.

H. P. Smead, for appellant.

Robert L. Rogers, Attorney General, for appellee.

Prior acts of incest between the same parties may be proved. Underhill, Crim. Ev. 475. There was positive evidence of the commission of the crime within three years. Evidence of other incestuous acts between the same parties did not prejudice the

defendant, and was admissible as tending to show the opportunities and inclinations of the parties.

BATTLE, J. At the October, 1904, term of the Ouachita Circuit Court the grand jury returned into court an indictment against F. P. Adams, charging him with incest committed by having illicit intercourse with his niece, she being an unmarried woman and he a married man; and at the October, 1905, term of that court he was tried upon a plea of not guilty, found guilty as charged in the indictment, and his punishment was assessed at three years imprisonment in the penitentiary. He appealed to this court.

In the trial of appellant for the offense charged against him, evidence was adduced by the State, over the objections of the appellant, to prove illicit relations between him and the niece mentioned in the indictment, which occurred more than three years before the finding of the indictment. The evidence tended to prove that these illicit relations, constituting incest, commenced six or seven years before the finding of the indictment, and continued to the time when the act for which he was indicted was committed. This evidence, although it discloses other acts of incest with the same niece, the indictment for which is barred by the statute of limitations, is admissible for the purpose of showing the probability of the commission of the offense charged, and sustains the evidence of such offense. *Commonwealth* v. *Bell*, 166 Pa. St. 405.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

PIPPIN v. MAY.

Opinion delivered February 17, 1906.

1. ROAD—WHEN PUBLIC.—A road established under Kirby's Digest, § 3010, providing that when it is necessary for the owner of land to have a private road to a public road or watercourse, the county court may order such road to be laid off over the land of another, though called a private road because the cost of opening and keeping it in repair is not to be borne by the general public, but by the individual who petitions for its establishment, is in fact a public road. (Page 20.)
2. SAME—WHEN NECESSARY.—Kirby's Digest, § 3010, providing that when it is "necessary" for the owner of land to have a private road to a public road or watercourse, the county court may order it to be laid off over another's land, does not require that the petitioner should show an absolute necessity for such road by showing that he had no other means of reaching the public highway; if the road which petitioner already has is at times difficult to travel and expensive to keep in repair, and the proposed road is better located, and can be established without great injury to any other person, it is necessary, within the statute. (Page 21.)
3. SAME.—In determining whether a road is necessary, under Kirby's Digest, § 3010, the county court should take into consideration, not only the convenience and benefit of the limited number of persons it serves, but also the injury and inconvenience it will occasion to owner of the land through which it is proposed to extend the road. (Page 21.)

Appeal from St. Francis Circuit Court; *Hance N. Hutton*, Judge; reversed.

STATEMENT BY THE COURT.

L. H. Pippin filed a petition in the St. Francis County Court for the establishment of a road from his place across land of defendant, May, to connect with the public highway. He stated in his petition, among other things, that he was the owner of eighty acres of land, N. ½, N. W. ¼, sec. 35, T. 6 N., R. 3 east, in that county, which was his homestead; that the shortest distance from his house to the public road is along the west boundary of S. W. ¼ of N. W. ¼ of sec. 35, which is only ¼ of a mile, and is on high ground where a good road can be easily made. That, as he is now situated, he is compelled to travel nearly three-quarters of a mile to reach the public road, and a large part of the distance is over low swampy land, where it is almost impossible to travel, and that on this account it is with great difficulty that

he can have ingress and egress during the winter months. He further stated that the land across which he wished to establish the road belonged to the defendant, F. G. May, who persistently refuses to sell or to allow plaintiff a right of way over the land. Wherefore he asks that viewers be appointed to view and locate a private road for him over said land.

The defendant appeared, and filed an answer, denying that it was necessary to open such road for the reason that there was already a good and sufficient road connecting the place of plaintiff with the public highway. He also alleged that the opening of the road would be a great inconvenience and loss to defendant, and he asked that the petition be refused.

The county court refused the petition. On the trial in the circuit court, where the case was carried by appeal, there was evidence tending to support the allegations of the petition, and also evidence tending to show that plaintiff had already a good and sufficient road from his place to the public highway, and that the road that plaintiff petitioned for would cut the land of the defendant into two parts, and cause him much additional expense, and that it was not necessary to open such road.

The court declared the law to be as follows, towit: "That the law of eminent domain is not involved in this case, and that one person is not entitled to a private road through the land of another, except in case of absolute necessity, and where he has no other way of ingress and egress, and that it makes no difference if he does have to travel a longer distance to reach the public highway to and from his premises, and that the fact that he does have to travel a longer route by his old road than he would have to travel by the road he applies for, as in this case, makes no difference, as it is only a matter of convenience, and not a matter of necessity to him."

John Gatling, for appellant.

Appellee, *pro se.*

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment of the circuit court, which affirmed a judgment of the county court that refused to order a road opened over the

land of defendant to connect the homestead of plaintiff with the public highway.

Our statute provides that "when the lands, dwelling-house or plantation of any person is so situated as to render it necessary for the owner thereof to have a private road from such lands, dwelling-house, or plantation to any public road or watercourse over the lands of any other person, and such person shall refuse to allow such owner such private road, it shall be the duty of the county court, on the petition of such owner. * * * to appoint viewers to lay off the same." Kirby's Digest, § 3010.

Now, this court in an early case held that, although these roads were called by the statute "private roads" because the cost of opening and keeping them in repair was not to be borne by the general public, but by the individual who petitioned for their establishment, and who was specially benefited thereby, yet that they were in fact public roads. *Roberts* v. *Williams,* 15 Ark. 43.

This view is sustained by the decisions of the courts of other States, which hold that such roads are but branches of the main public roads of the State, and that, when established, they are for the use and benefit of the public at large, as well as the citizen to whose plantation or dwelling-house they lead. They do not become attached to his land, or a part of his property as a way that is strictly private may be owned, but, on the contrary, they are established for the use of the public as well as petitioner, and may be discontinued or changed when the public interests require it. *Belk* v. *Hamilton,* 130 Mo. 292; *Denham* v. *County Comrs.,* 108 Mass. 202; *Davis* v. *Smith,* 130 Mass. 113; *Wolcott* v. *Whitcomb,* 40 Vt. 40; *Johnson* v. *Supervisors,* 61 Iowa, 89; 1 Lewis, Eminent Domain, § 167.

"The character of a road, whether public or private, is not determined by its length or the places to which it leads, nor by the number of persons who actually use it. If it is free and common to all citizens, it is a public road, though but few people travel upon it." Elliott's Roads & Streets, § 11; *Taft* v. *Commonwealth,* 158 Mass. 526; *Roberts* v. *Williams,* 15 Ark. 43.

The road which petitioner sought to have established in this case would have been for the use of the public generally whenever they saw fit to use it as well as petitioner, and, had it been established, would have been in law a public road, though the cost of

maintaining it would have rested on petitioner. It being a public road, it was not, we think, required that plaintiff should establish an absolute necessity for such road by showing that he had no other means of reaching the public highway. The fact that there is already a road leading from his place to the public highway does not conclusively show that the road that he petitioned for is not necessary.

We agree with the circuit judge that the mere fact that the road that the petitioner now has is some longer than the one he seeks to have established does not justify the court in ordering this road opened if to do so will result in great injury and inconvenience to the defendant. But if the road that he now has is not only longer but, on account of the wet and swampy condition of the land across which it is located, is at certain seasons of the year boggy and difficult to travel and very expensive to keep in good condition, and if the proposed road is better located, and can be established without great injury to the defendant, we think that, within the meaning of the statute, it is necessary. If such are the facts, the petition should be granted, and viewers appointed to locate the road and assess the damages.

In determining whether such a road is necessary, the court must, of course, take into consideration, not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend it. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not.

The evidence in this case is not such as would justify us in disturbing a finding of the court against the petitioner, but it appears that the court did not pass on the question of whether the road was necessary within the meaning of the statute as above defined, but held that there must be an absolute necessity for such a road, and that, if the public highway could be reached by plaintiff in any other way, no relief could be granted. There are, no doubt, cases in other States to sustain this view, but, following the case of *Roberts* v. *Williams,* above cited, we are of opinion that the law of this State is different, and that the statute of eminent domain can be used to establish this road if the present road is, on account of its location, impracticable and insufficient.

The judgment is therefore reversed, and the cause is remanded for a new trial.

---

78 22
80 535

78 22
f 83 68

78 22
f88 210

78 22
f90 112

LITTLE ROCK & HOT SPRINGS WESTERN RAILROAD COMPANY v. MCQUEENEY.

Opinion delivered February 17, 1906.

1. RAILROADS—CONSTRUCTION OF LOOKOUT STATUTE.—Kirby's Digest, § 6607, providing that "it is the duty of all persons running trains upon any railroad to keep a constant lookout for persons and property upon the track," etc., requires a lookout to be kept by persons running cars and engines in a railroad yard. (Page 28.)

2. SAME—DUTY TO KEEP LOOKOUT.—A watchman on duty whose business is to go through the railroad yards to guard and close the open cars, and to see that they are not broken into, has the implied duty of looking after the unloaded cars, and it is his duty to warn a drayman engaged in unloading a car of the approach of a train or to give notice of his presence upon the track to those in charge of the train. (Page 28.)

3. INSTRUCTIONS—WHEN DEFECT CURED:—An incomplete instruction upon the subject of contributory negligence may be aided by other and more explicit instructions given upon the same subject. (Page 29.)

Appeal from Garland Circuit Court; *Alexander M. Duffie*, Judge; affirmed.

B. S. Johnson, for appellant.

1. A railway company owes a trespasser on its tracks no duty save to refrain from doing him wanton injury after his presence is known. 45 Ark. 246.

2. The first instruction given by the court was erroneous and misleading. The "lookout statute" does not apply to a case of this character. Defendant was not required to keep a lookout for persons and property off the track nor adjacent to the cars. 57 Ark. 464. If plaintiff was a licensee, the defendant owed him

the duty only to use ordinary care to prevent injury. 57 Ark. 136; 26 Ark. 513.

3. The court erred in giving instructions numbered 4 and 6. There was no evidence that any employee who had charge of looking after the unloading of cars knew the plaintiff was unloading a car.

4. The court erred in its ninth instruction. Where the plaintiff's own testimony raises the presumption of contributory negligence on his part, then the burden rests on him to overcome that presumption. 48 Ark. 130; 51 Ark. 556; 46 Ark. 193.

Wood & Henderson, for appellee.

1. Appellant, after delivery of the bill of lading and location of the car on the team track had the right to open the car and unload the freight at any time within reasonable business hours. 18 Minn. 133, 154.

2. There was no error in instruction numbered 1. The statute was not intended to limit the duty of lookout to persons and property literally upon the track. If he were a licensee, ordinary care under the facts and circumstances of this case would require a constant lookout. 72 Ark. 572.

3. Contributory negligence as a defense must be affirmatively proved by the defendant. 58 Ark. 125; 48 Ark. 348; *Ib.* 475; 46 Ark. 436.

BATTLE, J. James McQueeney, in his lifetime, brought this action against the Little Rock & Hot Springs Western Railroad Company, to recover damages suffered from personal injuries occasioned by the negligence of the defendant, alleging in his complaint that on the 3d day of September, 1902, at Hot Springs in this State, while the plaintiff was engaged in unloading a freight car on defendant's railroad, the servants, agents and employees of the defendant wrongfully, negligently, maliciously and willfully ran a freight car against the wagon upon which he was standing with such force as to throw him to the ground and inflict upon him great personal injuries.

Defendant answered, denying the material allegations in the complaint, and alleging that any injuries received by the plaintiff were due to his own contributory negligence.

The plaintiff recovered a verdict and judgment against the defendant for $4,000; and it appealed.

The evidence in this case tended to prove the following facts:

The Waters-Pierce Oil Company owned a carload of freight which appellant placed on its team or wagon track to be unloaded. On the 3d day of September, 1902, in the forenoon, the agent of the oil company obtained the bill of lading for the goods in the car, and, in company with McQueeney, the teamster for said company, went to the car and opened it, and McQueeney commenced unloading by taking the freight therefrom and hauling it to the warehouse of the oil company. He continued the unloading and, at sometime between four and five o'clock in the afternoon, had hauled about nine or ten loads, and there were yet in the car not quite two loads. Upon returning to the car between the hours named for another load, he found the car closed. Wright, *alias* Rice, an employee of appellant, had just closed it, and was still in the yard. McQueeney informed him that he had not unloaded the car, and that he had made a mistake in closing it. McQueeney then, between four and five o'clock in the afternoon, with the assistance of A. J. Austin, the night watchman for appellant, in the presence of Earl Sanders, the agent of appellant in charge that day, and of Wright, opened the car, and proceeded to unload it. Upon leaving the car with another load, he spoke to Austin, and told him there was still a part of a load in the car, and that he would return for it, and requested him not to close the car, which he agreed to. McQueeney carried the load he then had on his wagon to the warehouse of the oil company, and at five minutes before six o'clock started back to the car for the remaining goods. He had a good team, and made a quick trip, and returned to the car about six o'clock, and, after putting his wagon in position, began to unload. He made nine trips back and forth between his wagon and the car, and was standing on the back end of his wagon in the act of rolling a barrel of oil from the door of the car to his wagon, on his tenth trip, when a car upon the same track was moved up by employees of appellant without, according to the testimony of one witness, ringing the bell of the engine or giving any other warning. The moving of the car caused another car to strike McQueeney's wagon, turn it over, and throw him violently to the ground. He was sixty years old at the time of this

accident, but was a strong, healthy man, and had for the fourteen years previous to that time "been in the continuous employment of the Waters-Pierce Oil Company in hauling freight from the railroad and to customers. His work required of him heavy lifting, which he had done without difficulty." His injuries received from the fall were serious. "He was unable to work, being paralyzed in one leg and injured in his back and one arm and on one side of his head. For a time his paralysis affected his speech. He suffered great pain from the time of the accident up to the time of the trial, which was over a year, and was still suffering at the time of the trial. For a considerable time his suffering was severe. He was still partially paralyzed at the time of the trial, and was then so helpless that he could not dress himself without assistance. He had not been able to work from the time of the accident up to the trial, and was still not able to do work. * * * At the time of the accident he had steady employment at the salary of $50 per month and perquisites in the way of oil and fuel furnished him by the Waters-Pierce Oil Company, worth $10 per month, making his earnings equal to $60 per month. His expectancy of life was 14.09 years."

When McQueeney returned to the car that he had been unloading the last time before the accident, it was open and in the same position and condition it was in when he left it at the time he told Austin he would return for the remnant of the freight. Austin had complied with his promise. This was in the apparent scope of his authority, which was to close and seal cars when he found them open, and to go through the yards and see that no one was molesting them, to guard them and see that they were not broken into. It was a rule of the defendant that no freight should be delivered or cars unloaded after six o'clock in the afternoon, but there is no evidence that McQueeney had notice of this rule. The team track on which the car unloaded by McQueeney stood was straight, and the fireman on the engine which caused the accident could easily have seen McQueeney's wagon if he had looked in that direction, the direction in which the engine moved.

The court gave the following instructions to the jury, at the instance of plaintiff, over the objections of the defendant:

"No. 1. It is the duty of all persons running trains in this State upon any railroad to keep a constant lookout for persons

and property upon the track of any and all railroads; and if any persons or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and responsible to the persons injured for all damages resulting from neglect to keep such lookout, and the burden shall devolve upon such railroad to establish the fact that his duty has been performed. But you are further instructed that the failure to keep a constant lookout would not render the railroad liable if the plaintiff himself was a trespasser in going upon said track, or was guilty of any act of negligence contributing to the injury of which he complains.

"No. 4. If you find that the employees of defendant who had charge of looking after the unloading of cars on its tracks knew that plaintiff was engaged in unloading a car, and that he was upon defendant's yards for that purpose after business hours, and you further believe from the evidence that the plaintiff did not know that he was violating any rule or custom of the company, then you will find that defendant owed him the duty not to injure him by any negligent act of its employees in moving cars on said yard.

"No. 6. You are instructed that if you find from the evidence that the plaintiff had spoken to the watchman of the defendant that he was going to return for the last of his freight in a car, and that said watchman knew that plaintiff was hauling freight from said car, and that said watchman had the right and it was his duty to close said car, and that plaintiff did return and found said car at the same place and in the same condition as when he left the same, and you further find that the plaintiff believed, as an ordinary prudent man, that he had a right to unload his freight at the time, then he would not be a trespasser; and if he was injured by negligence of any employee in charge of said train, you will find for the plaintiff.

"No. 9. The burden is on the plaintiff to show, by a preponderance of the evidence, that the defendant was guilty of negligence, and that he was injured by such negligence, to entitle him to recover in this action; and if you find from the evidence that the defendant was negligent, and that the plaintiff was injured thereby, then, in order to defeat his recovery on the ground

that he was guilty of contributory negligence, the burden is on the defendant to show such contributory negligence by a preponderance of the evidence."

And the court modified the second and third instructions asked by the defendant, so as to read as follows:

"No. 2. If you believe from the evidence that the plaintiff went late in the evening, after business hours, to the yards of the defendant, and after he had been told by the person whose duty it was to seal or open the cars that he could not get into the car that day, then he would be a trespasser, and the railroad company owed him no duty until his presence there was discovered by the persons in charge of the train; and if you believe from the evidence that they had not seen him, and did not know of his presence near the car until after the injury, your verdict must be for the defendant.

"No. 3. One who voluntarily goes into the yards of a railroad company after it is getting dark, crossing one or two tracks to get there, and after he knows the car has been sealed up to prevent any more unloading that day, is a trespasser, and would be guilty of contributory negligence, and can not recover for injuries received while there."

And gave the following at the instance of the defendant:

"No. 5. One who is injured by the mere negligence of another can not recover, either at law or in equity, any compensation for the injury if he, by his own ordinary negligence, 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; therefore, if you find from the evidence in this case that the plaintiff's own negligence or fault either caused or contributed to the injury, he can not recover.

"No. 7. If you believe from the evidence that the servants in charge of the train which caused the injury did what men of ordinary prudence and caution would have done under the circumstances, then defendant was not guilty of negligence, and is not liable; but, even if you should believe that defendant is guilty of negligence, still, if plaintiff by his own negligence or fault contributed to the injury, or if his negligence or fault co-operated with the acts of the defendant and caused the injury, your verdict must be for the defendant."

The jury returned a verdict in favor of the plaintiff against the defendant for $4,000, and the court rendered judgment accordingly.

The defendant objected to the instruction numbered one, given at the request of the plaintiff, because it makes applicable to this case the act of the General Assembly, entitled "An act to better protect persons and property upon railroads in this State," approved April 8, 1891. Kirby's Digest, § 6607. It argues that this act does not require a lookout to be kept by persons running cars and engines in a railroad yard. To sustain this contention, it will be necessary to hold that the tracks in the yards do not constitute a part of the railroad. But this is not true. Every track necessary to its operation is a part of the railroad. The act was obviously intended for the protection of persons and property upon railroad tracks, and all tracks and cars moved thereon come within its provisions. Persons and property upon any railroad track need and are entitled to its protection. The act makes no exceptions, and applies to all cases which come within the mischief intended to be remedied and within its object.

The act was applicable to the case before us. In the yard in which the accident complained of happened were team or wagon tracks upon which freight cars were placed to be unloaded. The car which the plaintiff was unloading at the time he was hurt was upon one of these tracks. He was unquestionably in need of protection, and was entitled to compensation for the injury he received, unless he contributed to it by his own negligence.

The objection urged by the defendant against the instruction numbered four, given at the request of plaintiff, is that there was no evidence to show "that any of defendant's employees who had charge of looking after the unloading of cars on its tracks knew that plaintiff was engaged in unloading a car, and that he was in defendant's yards for that purpose after business hours." Were there such employees who had such knowledge? Between four and five o'clock in the afternoon of the day on which the accident occurred, plaintiff, in the presence of Sanders, who was then and there in charge, and Wright, who had closed the car, with the assistance of Austin, the night watchman, opened the car and proceeded to unload it. He continued to unload until, according to some of the evidence, about twenty-five minutes after six o'clock

in the afternoon, and this was at sunset. No employee could reasonably suppose that he would quit unloading when he hauled away the last load when so little was left in the car at that time to be taken away. Austin, the night watchman, knew he was unloading at the time he was injured, and permitted him to do so. But it is said that he had no authority to look after the unloading of cars. The evidence showed that it was a part of his duty to close and seal cars when he found them open at a time when they should be closed, and at such times to go through the yards and see that no one was molesting them, to guard them and see that they were not broken into. This clearly implied the authority to look after the unloading of cars when he was on duty. He knew that the plaintiff was unloading the car, and through him the defendant had notice, and it was his duty to the plaintiff and defendant to warn him of his danger or give notice of his presence upon the track to those in charge of the train in the yard, and to give the notice in time to avoid injury. There was no evidence that plaintiff knew or ought to have known of any rule of the defendant prohibiting him from unloading the car after six o'clock p. m.

What we have said in reference to instruction numbered four applies to instruction numbered six.

Defendant objects to the instruction numbered nine, because it withdraws from the consideration of the jury the evidence of contributory negligence adduced by the plaintiff. But this defect was covered by other instructions. This instruction does not tell the jury what they should do in the event they found from the evidence adduced by the plaintiff that he was guilty of contributory negligence, but the court in other instructions told them that if they found from the evidence that the plaintiff's own negligence or fault either "caused or contributed to the injury, he could not recover." "From the evidence" necessarily means all the evidence in the case, which includes the evidence adduced by the plaintiff.

We think that the evidence is sufficient to sustain the verdict in this court.

Judgment affirmed.

UNDERWOOD v. BANKS.

Opinion delivered February 17, 1906.

REAL ESTATE BROKER—IMPLIED AUTHORITY.—A real estate broker, employed to sell land for a certain commission, has no implied authority to bind his principal in addition thereto by purchasing an abstract of the title at the latter's expense.

Appeal from Lonoke Circuit Court; *George M. Chapline,* Judge; affirmed.

George Sibly, for appellant.

Letters introduced do not establish a valid contract. Conceding that a contract of agency was established, no power was conferred to employ counsel and make abstract of title, and can not be implied. Beach on Agency, § 288. The parties must have authority to contract in relation to the subject-matter. *Ib.* § 300. And the authority of the agent is limited to the contract. *Ib.* § § 306, 307 and 318. He is entitled to compensation only upon performance of duties authorized and according to instructions. *Ib.* § 597.

T. C. Trimble, Joe T. Robinson and *T. C. Trimble, Jr.,* for appellee.

The only questions involved were questions of fact. The findings of the court, sitting as a jury, are sustained by the evidence, and will not be disturbed. 53 Ark. 527; *Ib.* 537; 54 Ark. 229; 59 Ark. 329; 57 Ark. 577; 46 Ark. 524; 47 Ark. 196; 50 Ark. 511; 13 Ark. 317; 51 Ark. 115; *Ib.* 324. A new trial will not be awarded unless there is no evidence to sustain the verdict. 17 Ark. 449; 19 Ark. 671; 24 Ark. 251.

BATTLE, J. The plaintiff, W. R. Banks, alleged in his complaint that he was engaged in buying and selling real estate in the year 1901, and while so engaged the defendant, Minnie V. Underwood, employed him to sell certain lands which she represented to him as belonging to her, and agreed to pay him five per cent. commissions on the amount of the sale, if he sold; that he sold the lands for $1,500, and paid the defendant $50 of this sum, and that she refused to comply with her contract and convey the lands to the purchaser. He further alleged that she caused and induced

him to employ certain attorneys to "investigate, correct and adjust the title to the lands," and "to resist litigation then pending, and indirectly relating to the title to said property and affecting the same in the Lonoke Probate Court," and for their services paid $50, and caused him to have made an abstract of title to the lands at an expense of $35. And he asked for judgment against the defendant for the sum of $210.

The defendant being a non-resident of this State, the plaintiff caused a warning order against her to be made and published, and sued out an order of attachment, and caused it to be levied on certain lands as the property of the defendant.

The defendant answered, and admitted that she agreed to pay to the plaintiff five per cent. commissions on the price of land if he sold; denied representing to him that the lands belonged to her; admitted that she received the $50 from the plaintiff; denied authorizing plaintiff to employ attorneys or to pay for their services.

The parties waiving a jury, the issues were tried by the court. After hearing the evidence adduced by the parties, the court found that the defendant employed the plaintiff to sell the lands, and agreed to give him five per cent. commissions on the amount of the purchase price; that he sold the lands for $1,500, and that she is indebted to him therefor in the sum of $75; that $50 of the purchase money was paid to her; that an abstract of title to the lands was made, for which plaintiff paid $35; and that she is indebted to him in the sum of $75 on account of sale, in the sum of $50 on account of part of the purchase money paid, and in the sum of $35 for abstract; and rendered judgment against her in favor of the plaintiff for $171, and sustained the attachment. Defendant appealed.

There is no evidence to show that appellee was authorized to procure an abstract of title to the lands, or that appellant agreed to pay for it. All that appellant promised to pay appellee for his services was five per cent. commissions on the amount of the sale. The court, therefore, erred in finding that appellant was indebted to appellee for the abstract. In other respects the evidence sustains the findings of the court. The order of attachment being lawfully sued out, the appellant was liable for the cost of the attachment. The appellee was entitled to a judgment for $125

and six per cent. per annum interest from day on which this action was commenced, and for costs.

The judgment of the circuit court is reversed, and the cause is remanded, with instructions to the court to enter a judgment in accordance with this opinion.

McCULLOCH v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

Opinion delivered February 17, 1906.

INSURANCE—BOND—CONTRACTUAL LIMITATION.—An action on the bond of a life insurance company which is conditioned that the company shall promptly pay all claims accruing by virtue of any policy issued by it is barred if suit is not brought within one year after the death of the assured where the policy which is the basis of the action stipulates that the company "shall not be liable, nor shall any suit or proceeding be brought, after the lapse of one year from date of the death" of the assured.

Appeal from Pulaski Circuit Court; *Edward W. Winfield*, Judge; affirmed.

STATEMENT BY THE COURT.

In December, 1893, Dr. McCulloch died in this State. He held a policy on his life for $10,000 in the Mutual Reserve Fund Life Association. The beneficiaries in this policy were his two sons, Gilbert and Ben McCulloch, who were minors at the time of the death of their father. He left a will, directing that his wife should be appointed guardian of his sons without bond. This was done, and the company paid the money to her.

Afterwards when the sons became of age, one of them brought this action against the company and its bondsmen to recover his portion of the amount due on the policy.

The bond to the State of Arkansas, given by the insurance company as principal and the Union Guaranty & Trust Company as surety in the sum of twenty thousand dollars, has a condition in it that if the association "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 said company upon the life of any citizen of Arkansas when the same shall become due, then this obligation shall be void; otherwise, to remain in full force and effect."

The plaintiff alleged that no guardian was ever legally appointed for him; that he was entitled to half of the amount due on the policy; that the company had never paid the amount to him or to any one for him; that, by reason of the failure of the company to pay him, the conditions of its bond were broken. Wherefore he asked judgment for the $5,000 and interest.

The company filed an answer, in which it pleaded payment, and further pleaded the statute of limitations, and that the suit was not commenced within one year after the death of the assured. The policy contained the following provision: "Said association shall not be liable, nor shall any suit or proceeding be brought, after the lapse of one year from the date of the death of said member."

The circuit court held that this provision was valid, and that, as the action was not commenced within that time, no recovery could be had, and gave judgment for defendant. Plaintiff appealed.

Wood & Henderson, for appellant.

The execution of the bond was a voluntary act on the part of the company. By doing so, and the bond containing no stipulation limiting the time of bringing suit, it thereby waived that provision in the policy. 19 Am. & Eng. Enc. Law, 104; May on Ins. (3 Ed.), § 488; 98 N. W. 522; 52 Ark. 11. If his remedy on the policy were barred, that did not affect his right to recover on the bond. 19 Am. & Eng. Enc. Law (2 Ed.), 152, and note; 26 Ohio, 543; 77 Fed. 929. The same rule applies here as for the collection of a debt by foreclosure of a mortgage, though the debt itself be barred by the statute of limitations. 19 Am. & Eng. Enc. Law (2 Ed.), 177-8.

2. The payment to Maggie G. McCulloch was not such as to bind appellant and release appellee on its bond. Execution of bond by a guardian is a prerequisite to his appointment as such. Kirby's Digest, § § 3780 to 3782. Until such bond is executed, he

can not collect and receive the estate of the minor. 32 Ark. 97; 63 Ark. 380; 33 L. R. A. 759. The provision of the will could not change the operation of the statute. Kirby's Digest, § § 3763, 3757-8.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1. The validity of the stipulation in the policy limiting the time of bringing suit is well settled. 7 Wall. 386; May on Ins. § 478 and authorities cited. It is binding upon an infant beneficiary. 11 Fed. 280; 71 Tex. 579. Plaintiff's recourse upon the bond is limited to his rights under the policy. Kirby's Digest, § § 4339, 4376.

2. The execution of bond is not a condition precedent to the grant of letters of administration or guardianship, and innocent parties have a right to rely upon letters duly authenticated. 14 Ark. 300; Kirby's Digest, § § 3754-3780; 80 N. Y. 140; 84 N. Y. 48; 5 Johns. Chy. 343; 44 Ohio, 637; 37 Am. Dec. 301; 8 Pick. 149. The statute, Kirby's Digest, § 3782, is directory merely, and does not purport to vitiate letters issued without bond. 14 Ark. 300. See also 1 Woerner on Administration, § 253; 91 U. S. 243; 79 Am. Dec. 62; 96 Ga. 322; 2 Doug. (Mich.), 433; 23 Minn. 84. The regularity of the appointment can not be questioned in a collateral proceeding. 39 Ill. 563; 48 Ill. 17; 7 Lans, 429.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment of the circuit court holding that the right of action which accrued to plaintiff as one of the beneficiaries in a policy of insurance was cut off by the provision in the policy which limited the time for bringing the action on the policy to one year after the death of the assured. As plaintiff did not bring this action either within a year of the death of the assured or within a year of his arriving at age, it is evident that he is cut off by this provision of the policy, if it applies to this kind of an action.

But counsel for appellant contends that this is not an action on the policy, but on the bond given by the company to the State for the payment of the policies issued by the company. He contends that the principle which governs here is the same as that which applies in an action to foreclose a mortgage given for

the security of a debt, where the fact that the right of action on the note or account secured is barred does not impair the remedy by foreclosing the mortgage if a longer period of limitation be applicable to the mortgage. 19 Am. & Eng. Enc. Law (2 Ed.), 177. But the facts here do not seem to us to bring this case within that rule. This is not the ordinary case of a debtor giving to a creditor security for a debt which is a lien on property. It is the case of an insurance company executing a bond to the State in compliance with the statute of the State designed to protect its policy-holders in the State by compelling the company to carry out its contracts made in this State. There was, we think, no intention of the Legislature to enlarge or extend the liability of the company.

Now, the right of action on the bond may not be affected by the limitation in the policy, but the question of whether plaintiff is entitled to recover does depend not only on the bond, but also on the form of the policy. Although the limitation as agreed in the policy may not, strictly speaking, operate to bar the action on the bond, yet no recovery can be had unless something is due plaintiff on the policy. For, while this is an action on the bond, the right to recover, as before stated, depends on the policy also. In order to recover, the plaintiff must show, not only the execution of the bond, but that there is something due him on the policy which the company has refused to pay. But the condition in the policy that the company shall not be liable unless suit is brought within one year has a very different effect from that of the statute of limitations on a debt. The statute of limitations affects the remedy only. The debt still exists; and if it be secured by a mortgage which is not barred, the mortgage may be foreclosed and the debt collected, though no action could be brought on the debt itself. But, by this clause in the policy, the company owes nothing if suit be not brought within one year. After that time not only the remedy but the debt itself is gone, and there is no right to recover, for that was the condition upon which the promise to pay the amount of the policy was made. *Williams* v. *Insurance Co.*, 20 Vt. 222; *Gray* v. *Hartford Fire Ins. Co.*, 1 Blatchf. 280, s. c. 6 Fed. Cases, 788; 2 May on Insurance, § 482; 4 Cooley, Briefs on Ins. 3969.

In this case the company attempted in good faith to carry

out its policy. It paid the amount of the policy to the mother of the plaintiff, who had been appointed his guardian, and she testified in this case that she spent the money for his benefit; but as she had executed no bond, it is doubtful if this payment to her would have protected the company, had this action been commenced in time. But it was not, and by the terms of the policy the company is no longer liable. So far as the policy is concerned, it must now be conclusively presumed that the company owes the plaintiff nothing on its policy.

As before stated, we do not think it was the intention of this statute to enlarge the liability of the company and to permit a recovery on the bond when nothing was due on the policy. We are therefore of the opinion that the circuit court correctly held that, under the circumstances of this case, there was no liability on the bond.

Judgment affirmed.

McCULLOCH, J., took no part in the decision of this case.

WEATHERFORD v. STATE.

Opinion delivered February 17, 1906.

1. INSTRUCTION—INTEREST OF ACCUSED IN RESULT.—It was not error to charge the jury that they had the right, in estimating the weight to be attached to the testimony of the accused, to consider his interest in the trial and verdict. (Page 38.)
2. CONTINUANCE—DILIGENCE.—It was not error to refuse to grant a continuance on account of the absence of a witness if the motion did not state where the witness could be found nor whether his attendance could be procured by a continuance. (Page 38.)
3. SAME.—A continuance on account of the absence of a certain witness living in another county was properly denied to the defendant where his motion stated that he "had just been advised that said witness will not be able to be present at this term of court on account of sickness, that as soon as he learned of this he had a subpœna issued for him," but did not show that he made any effort to procure his attendance until he learned that he was sick and could not attend. (Page 39.)

4. EVIDENCE—HEARSAY.—Refusal of the court, in a murder case, to permit defendant to prove what a surgeon said in regard to an operation performed on deceased was not error where the record does not show that the surgeon was beyond the court's jurisdiction or unable to attend, or that any offer was made to show what he had previously testified as a witness. (Page 39.)

Appeal from Randolph Circuit Court; *John W. Meeks,* Judge; affirmed.

H. L. Ponder, for appellant.

Robert L. Rogers, Attorney General.

1. There was no abuse of discretion in refusing the motion for continuance.

2. The court's right to instruct the jury as to the weight to be attached to the defendant's testimony is fully settled. 62 Ark. 556.

RIDDICK, J. The defendant, Jake Weatherford, was indicted by the grand jury of Randolph County for murder in the second degree for killing Joseph Williams by striking him on the head with a bottle.

The evidence shows that on 6th of November, 1904, Weatherford and Williams and some other young men were playing cards in a thicket. They had whisky, which several of them drank. They wagered small sums of money on the game which they were playing, and the result was that defendant lost what small amount of cash he had, which was less than a dollar. After this he started away. As he went away, he picked up a sack of crackers which belonged to Williams, and which he had placed on the ground near where the game was being played. Weatherford opened the sack of crackers, and began to eat some of them. In doing so he tore the sack and scattered some of the crackers on the ground. Williams then said to him: "If you want some of those crackers, eat them like a man, but do not waste them in that way." Weatherford then threw the sack down. There is a conflict in the evidence as to what happened afterwards.

The witnesses for the State say that Williams went to where the crackers were scattered on the ground, and began to pick them up, and that while he was doing this Weatherford turned back and hit him on the head with a bottle he held in his hand. On the

other hand, the witnesses for the defendant testified that Williams, when Weatherford threw the crackers down, went up to him and attempted to cut him with a knife, and that Weatherford then hit him with a bottle.

The effect of the blow was that Williams was knocked down and became unconscious not long afterwards. He was taken home. Doctors were sent for, who took out a piece of the skull, and found that there was a large amount of clotted blood next to the brain, and that the brain itself had been injured by the blow. Williams never regained consciousness, and died that night. The defendant was convicted of involuntary manslaughter, and sentenced to one year in the penitentiary.

These young men were hardly more than boys, the defendant being 21 and deceased 20 years of age. It is evident that the killing was not intentional, but the evidence fully supports the finding that it was not done in self-defense, and that the defendant is guilty of some degree of homicide. As the jury found him guilty of the lowest degree of homicide, the judgment must be affirmed, unless there was some prejudicial error in the proceedings at the trial.

The court instructed the jury fully as to the law of the case, and the only complaint made is that he told the jury that they had the right, in estimating the weight to be attached to the testimony of the defendant, to consider his interest in the trial and verdict. But this court has repeatedly held that it was not error for the trial judge to give such an instruction. *Hamilton* v. *State,* 62 Ark. 543; *Jones* v. *State,* 61 Ark. 102; *Vaughan* v. *State,* 58 Ark. 362.

It is also insisted that the court erred in refusing to grant a continuance on motion of defendant on account of the absence of Lucian Pickett and Dr. P. McCabe. But the motion for continuance did not state where Lucian Pickett could be found. It stated that subpoenas had been issued to three different counties in the State, Union, Howard and Randolph, and that the sheriff of each county made return that he was not to be found in his county. It not being shown that the attendance of the witness could be procured by a continuance, it was within the discretion of the presiding judge to overrule the motion for continuance on that ground.

As to the other witness, it was not shown that any effort had been made to secure his attendance. In fact, the affidavit states that defendant "had just been advised that said witness will not be able to be present at this term of court on account of sickness, that as soon as he learned of this he had a subpoena issued for him."

The defendant attempts to excuse his failure to use any effort to procure the attendance of the witness by saying that the witness had been put under recognizance by the justice of the peace to appear at court. But that was evidently for the appearance of the witness before the grand jury at the January term. There is no showing that the witness had ever been ordered to attend the circuit court as a witness for defendant. As defendant made no effort to secure the attendance of the witness until he learned that he was sick and could not attend, it may have caused the court to suspect that this belated effort was not to get the witness but to get a continuance. The affidavit does not tell who advised the defendant that the witness could not attend, and is not supported by the affidavit of any one who knew that the witness was in fact sick. He was shown to be absent; but as he lived in another county, and had never been subpoenaed, that was to be expected. The court, we think, committed no error in overruling the motion.

Another ground of error set up in the motion for new trial is that the court erred in refusing to allow defendant to show what Dr. McCabe testified before the county judge in the hearing of an application for bail. But the only reference to this matter we find in the transcript is as follows, towit: "Counsel for defense asks to prove what McCabe said in regard to the operation, and was overruled by the court." But what McCabe said would be hearsay, and the record does not show affirmatively that McCabe was beyond the jurisdiction of the court or unable to attend, or that any offer was made to show what he had previously testified as a witness.

On the whole case, we find no error, and the judgment must therefore be affirmed.

LEWIS v. STATE.

Opinion delivered February 17, 1906.

1. MOTION FOR NEW TRIAL—SUFFICIENCY.—A ground of a motion for new trial which is not responsive to the ruling of the court complained of, as reflected by the bill of exceptions, will not be considered. (Page 42.)
2. HOMICIDE—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.—Where the State's testimony in a murder case tended to show that defendant was guilty of murder in the second degree, and defendant's testimony that he was not guilty of so high a degree, and the jury found him guilty of murder in the second degree, the verdict will not be disturbed, although the punishment seems severe under the facts disclosed by defendant's testimony, if the State's testimony would have supported a verdict for the higher offense. (Page 42.)

Appeal from Hempstead Circuit Court; *Joel D. Conway,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was indicted for the crime of murder in the first degree, was tried upon this indictment, and convicted of murder in the second degree, and his punishment fixed at twenty-one years in the penitentiary.

Appellant killed one Carl Michael. He admitted the killing; and, according to appellant's statement, he had been out hunting squirrels, and was returning home, when Michael overtook him. Appellant was afoot, and Michael was on horseback. Michael rode up behind appellant, and told him to hold up. Appellant turned, and saw Michael who passed under a certain haw bush, and came "right up to" appellant, and said to him, "Jett" (using profane language), "you're going to pay me for that lumber." Appellant denied owing him for any lumber. Michael called him a "damned liar," and appellant turned to walk away. Michael told him to hold on. Appellant started to walk away again. Michael said, We are going to settle it now." Appellant turned toward him, and Michael "had his hand in his bosom." Appellant, quoting his testimony, "asked Michael not to do that, but he did not heed me; he put his hand in his bosom, and when he did that, I shot him and ran." Further along in his testimony he says: "About the time that defendant hallooed, I put a shell of large shot into my gun, as I apprehended having trouble." He also shows

that he and Michael were not on good terms; says that Michael and his father had accused him of stealing lumber from them; that this charge was false, and that they had some words about this on the day before the killing at Michael's mill, when he and young Michael came near having a fight. He also told of another occasion, when he and young Michael had some unpleasant words, and Michael had told him on that occasion the following: "You can fix yourself; I will see you later about this." He says that he had been informed afterwards that Michael had said that if appellant did not want to have trouble with him (Michael), appellant had better stay off of the road. He had also heard that Michael had said he was going to whip appellant the first opportunity.

The theory of the State was that appellant had killed Michael by lying in wait on the roadside behind a log, and had fired upon him from ambush. There was testimony on behalf of the State that tended to support this theory.

On behalf of the State one W. W. Michael, the father of deceased, testified without objection as follows: "On the day before the killing the defendant came over to our mill in response to my request. I asked him how it was that the lumber I had missed was traced to his possession, and he said he didn't put it there. I told him that two parties had told me that they saw him take it, and one told me that he had found it in his possession. He said he didn't put it there; and if he did, he didn't give a damn. The deceased, who was twenty-five or thirty feet away, replied, "That would show your disposition." Defendant said, "You come up the road, and I'll fix you!"

Cross-examination. "Mr. Tiner told me where the missing lumber was concealed, and I found it under a tree top, near defendant's building.

The bill of exceptions recites: "The defendant asked to introduce George Green on the proposition of having been with Jett Lewis the day the lumber was missing, and the court refused to allow the testimony introduced, and defendant excepted."

The motion for new trial contains the following:

"11. That the court erred in refusing to allow the witness George Green, introduced on behalf of the defendant, to testify in relation to certain lumber claimed to have been stolen by said

defendant from the deceased and his father, which said testimony was in direct rebuttal of the testimony of witness W. W. Michael, who had testified on behalf of the State that he had found the said lumber in the possession of the defendant, and whose testimony was prejudicial to the defendant, if not rebutted and unexplained, and that the said testimony of said George Green was admissible and relevant to the issue, and was material to the issue in this case."

Jobe & Eakin, and *C. C. Hamby,* for appellant.

Robert L. Rogers, Attorney General, for appellee.

WOOD, J., (after stating the facts.) We find no reversible error in the instructions of the court. They cover the various phases of the evidence, and are in accord with principles announced in many decisions of this court. We find it unnecessary to review them critically, for the reason that appellant's own evidence, we think, would fully justify the jury in returning against him a verdict for murder in the second degree.

2. The refusal of the court to permit appellant "to introduce George Green on the proposition of having been with Jett Lewis[the appellant] the day the lumber was missing" was not error. It had no connection whatever with the case, in the form presented. The fact of George Green having been with the appellant on the day the lumber was missing throws no light, that we can see, upon the fatal rencounter. Moreover, if this were error, it is not preserved in the motion for new trial. For the 11th ground of the motion is the only one that calls attention to the refusal of the court to allow George Green to testify, and it is not responsive to the ruling of the court as reflected by the bill of exceptions.

If appellant were only guilty of murder in the second degree, as the jury finds, the punishment seems severe under the facts as disclosed alone by his testimony, but we have not been asked, and do not feel at liberty, to reduce the punishment, since we would not have disturbed a verdict for a higher degree.

Affirmed.

CENTRAL COAL & COKE COMPANY *v.* GREGORY.

Opinion delivered February 17, 1906.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.—For an injury caused solely by the negligence of a fellow-servant the master is not liable; as where a servant was injured in an explosion of gas in a mine caused solely by the negligence of fellow-servants who, with open lamps, ventured into a part of the mine where they, by the master's rules, were forbidden to go.

Appeal from Sebastian Circuit Court, Greenwood District; *Styles T. Rowe,* Judge; reversed.

STATEMENT BY THE COURT.

The acts of Congress (March 3, 1901; July 1, 1902) provide: "That the owners or managers of every coal mine shall provide an adequate amount of ventilation of not less than 83 1-3 cubic feet of pure air per second, or 5000 cubic feet per minute for every 50 men at work in said mine, and in like proportion for a greater number, which air shall by proper appliances or machinery be forced through such mine to the face of each and every working place, so as to dilute and render harmless and expel therefrom the noxious or poisonous gas." The injury for which appellee sued occurred in the Indian Territory.

The appellee grounds his action on an alleged violation of this statute, and also charges that appellant "did not thoroughly inspect said mine for gas, and did not warn said plaintiff, its servant, of the existence of gas in said mine, and did not mark as dangerous the places where gas was known by the defendant to exist, * * * and did not employ competent and experienced fellow-servants to work with plaintiff, but instead employed one Floyd Oder, and put him in charge of said mine as gas inspector; that he was incompetent and careless, and that appellant knew this, or by the exercise of ordinary care could have known it." Appellee charges that the negligence of appellant in the particulars named caused an explosion in the mine, which "badly burned and injured him upon his head, face, neck, arms, hands, ears, eyes, back and body." He laid his damages at $1,000. The appellant denied all the material allegations of the complaint, and set up contributory negligence of appellee, and that the explosion was caused by the negligence of fellow-servants.

There was a jury trial, and verdict and judgment for appellee in the sum of $500.

The undisputed testimony showed about the following facts: "That Floyd Oder was fire boss; that it was the duty of the fire boss to inspect the various parts of the mine, and if he found a place unsafe or a place that required additional ventilation, certain marks, called a "dead line," were made, which marks indicated that the points in the mine beyond them were not in a safe condition for work, and that no persons should go beyond these marks; that these marks were well understood by all the employees. On the morning of the accident, it appears that the fire boss examined the working places, and found the ventilation good up to a point between rooms 25 and 26, at which point a dead line was placed, indicating that there was danger beyond that point, and that no one should go beyond this line. Near this point, but on the safe side of the dead line and where the ventilation was good, and no gas existed, rock had fallen, and plaintiff, with one or two others, was engaged at work removing this fall. Beyond rooms 25 and 26, and within the dead line, were rooms 21, 22 and 23, which were the working places of coal miners by the names of Fields, Kincaid, McMillian and Peek. When these men started to their respective working places, they traveled down the entry upon which their working places opened, and upon which were the rooms 25 and 26, and in which entry the fall occurred at which plaintiff was at work; but when they reached the danger signal, knowing the meaning of this and that the rules of the company forbade their going further until the part of the mine beyond the danger line had been pronounced safe, they stopped.

One of the witnesses describes what took place in the mine as follows: "I was working in the 8th east entry on the morning of the explosion. My work was running from rooms 26 and up to 28. Was working with open lamp. Hill, Hamilton, Gregory and myself were all at work there with open lamps on our caps. The air was good and all right where we were at work—could tell this by the place being cleared up, which indicated a good current of air. The 8th east entry went on from room 26, and extended to rooms 24, 23, 22, and so on to 1. The dead line I saw was about room 26, and this dead line indicated there was danger from

gas beyond that. I saw George Peek, Jerry Kincaid, William Fields and Will McMillian, coal miners, just before the explosion, sitting down near the dead line, but on the safe side. They had open lamps, to my best judgment. They had their lights burning on their heads, all four of them. I don't know exactly how long this was before the explosion, something like five or ten minutes. I went down between rooms 26 and 27 and saw them there, then turned back, going towards room 28, and as I went back I heard them walking away from there, going in an opposite direction towards the place from which the explosion came. The last I saw of them was about room 26, and they turned away, and went towards room 22. I didn't look after them, but the last time I saw them they had their lights on their heads.

There was an allegation in the complaint to the effect "that the gas and coal dust which defendant had negligently allowed to accumulate in the mine became ignited by some of defendant's servants going into said mine with an open lamp."

The appellant, among others, asked the following instructions, which the court refused:

6. "If the evidence shows the part of the mine in which the explosion occurred before it happened had been dead-lined, and that before it had been pronounced safe by the fire boss Kincaid, Fields, Peek and McMillian went into that part of the mine with open lamps, and the gas which caused the explosion was thereby ignited, then the proximate cause of the accident was the negligence of these parties in going into that part of the mine with open lamps; and, they being fellow-servants of the plaintiff, he is not entitled to recover.

7. "If the evidence shows it was against the rules of defendant for its employees to go into any working place that had not been first examined and found safe by the fire boss, or against such rules for them to go to any part of the mine that had been "dead-lined;" that, in violation of such rule or rules, Field, Kincaid, Peek and McMillian went with open lamps over this dead-line and to a place that had not been examined and found safe, and that some of them set off the gas which caused the explosion, then plaintiff can not recover, the explosion being caused by the negligent acts of the fellow-servants of plaintiff."

The court also refused others of same purport. Appellant

also asked the court to direct the jury to return a verdict in its favor.

Ira D. Oglesby, for appellant.

The evidence fails to disclose any negligence or breach of duty on the part of appellant, but it does establish the fact that the injury complained of was the result of negligence of fellow-servants.

J. E. Whitehead, for appellee.

1. The duty of ventilation was imperative upon the appellant, and no act of a fellow-servant can excuse its neglect. 12 Am. & Eng. Enc. Law (2 Ed.), 905*d.*, and notes 4, 5, 6 and 7.

2. The allegation of injury to the ears was sufficient to authorize proof of injury to the hearing. 115 Ind. 443; 102 Mich. 153; 128 N. Y. 681; 54 Pac. 985; 135 Ill. 511.

WOOD, J., (after stating the facts.) Requests for instructions six and seven should have been granted. They were based upon the evidence. Also other instructions of similar purport.

We are also of the opinion that the court should have given the peremptory instruction to return a verdict for the appellant. The undisputed evidence showed that appellant had not failed to ventilate the mine where appellee was at work. In that compartment the air was all right. The act of Congress required that the air be forced through to the working places. This was done, and the places that were not fit for working places on account of the accumulation of gas or poisonous air were properly "dead-lined." This is all that could be required by the exercise of reasonable prudence. But, if it were conceded that the company was negligent in allowing the gas to accumulate beyond room 26, it had given the necessary and proper warning to its employees of the danger, and they understood it thoroughly. This being true, we do not see how it can be said that the negligence of appellant contributed to or was concurrent in the injury; much less, that it was the proximate cause thereof. It seems clear to us that the injury here complained of, upon the undisputed facts, was caused solely by the negligence of fellow-servants, for which the master was in no wise responsible. *New*

York, Chicago & St. Louis R. Co. v. *Perriguey,* 138 Ind. 414, and many cases cited therein.

Reverse, with directions to dismiss the cause of action.

COOK v. BAGNELL TIMBER COMPANY.

Opinion delivered February 17, 1906.

1. RESCISSION OF CONTRACT—DRUNKENNESS.—In equity, as well as at law, in the absence of fraud or imposition, it is only when one is so completely intoxicated as to be incapable of knowing what he is doing, or of understanding the consequences of his acts, that his contracts, entered into while in that state, are thereby rendered void. (Page 51.)
2. APPEAL—OBJECTION NOT RAISED BELOW.—Where plaintiff in the court below treated defendant's answer as tendering a certain issue, and the cause was tried on that theory without objection to the sufficiency of the answer, plaintiff will not be heard, on appeal, to say that no such issue was tendered. (Page 53.)
3. FRAUD—INADEQUACY OR EXCESSIVENESS OF CONSIDERATION.—While the inadequacy or excessiveness of consideration of a contract may be a circumstance tending to establish the perpetration of a fraud, it does not, of itself, when good faith is affirmatively shown, constitute such a fraud or imposition as will afford grounds for setting aside the contract. (Page 54.)
4. CONTRACT—DEALING WITH SOBER OR INTOXICATED PERSON.—One who deals with a sober man upon equal footing owes him only the duty not to mislead him to his prejudice by a material false representation concerning the subject-matter, or by a failure to disclose a material fact within his knowledge which the circumstances make it his duty to disclose; but one who deals with a person whom he knows to be partially intoxicated owes him the further duty not to take advantage of his condition by knowingly imposing a harsh contract upon him (Page 54.)

Appeal from Cross Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

STATEMENT BY THE COURT.

This is a suit in equity brought by the Bagnell Timber Company against J. M. Cook and R. N. Cook to cancel and rescind a written contract for the sale of timber by defendants to the

plaintiff, and to recover the price of the timber paid to the defendants.

The defendants kept a saloon and grocery store at Fair Oaks in Cross County, and owned a tract of land, containing 411.72 acres, situated about two miles distant from their place of business.

The plaintiff is a foreign corporation, doing business in Arkansas through its agent, Mr. Richard Jackson, of Paragould.

On September 5, 1902, one Morris Powers, who had been making railroad ties for plaintiff, negotiated with defendants for the purchase of all the oak timber on the land, and agreed to pay the defendants $400 for same. This occurred in defendants' saloon and store at Fair Oaks. On the same day Powers and one of the defendants went to the office of an attorney in Wynne, and procured the preparation of a written contract for the sale of the timber in accordance with the verbal agreement made earlier in the day. A copy of the contract was forwarded by mail to Mr. Jackson with a letter written for Powers by the attorney, instructing Jackson to send the money to the Cross County Bank at Wynne, to be paid over to the Cooks when the contract should be properly signed. Jackson, on receipt of the letter and copy of the contract, addressed the following letter to the defendants:

"Paragould, Ark. Sept. 6, 1902.

"J. M. & R. N. Cook, Fair Oaks, Ark:

"Gentlemen—I have a letter from Morris Powers, of Hamlin, saying he had bought 411.72 acres of timber from you for $400, with a copy of contract enclosed. I hand you the copy of the contract, and, if it is all right, you can notify me. I will send check on the receipt of your advice that it is all right with you; I will also write to Mr. Powers by today's mail to the same effect. The letter from Mr. Powers was written by Mr. Patterson, of Wynne, which says, 'Send to the bank.' There is no use of this. Send to me. You can write or wire me that it is all right, and the check will be sent."

On September 8th defendants replied by telegraph to this letter as follows:

"Your letter received today. Everything O. K. You can send check.

[Signed] "J. M. & R. N. COOK."

Thereupon Jackson sent check for $400 to defendants, and they executed and delivered to him the contract conveying the timber on the land to plaintiff. Shortly afterwards plaintiff discovered that the timber on the land was of little value, demanded a rescission of the contract, and offered to reconvey the timber to defendants. Upon refusal of defendants to rescind the contract and to refund the money, this suit was brought to compel the rescission.

In the complaint it is alleged that the timber on the land is of no value, and that defendants were well aware of that fact when they sold it to Powers; that Powers was intoxicated at the time, and did not know what he was doing, and that defendants induced him, while intoxicated, to purchase the timber. It is also alleged that Jackson had no knowledge or information as to the value of the timber, and relied solely upon the assurance contained in defendants' telegram as to the value of the timber.

The defendants in their answer denied all the allegations of fraud or misconduct in the sale, or that they knew the value of the timber at the time of the sale, or had any better means of information than plaintiff as to its value. They alleged that the contract was fairly entered into, and that the timber was worth the price paid.

The court rendered a decree in favor of the plaintiff for rescission of the contract, and the defendant appealed.

J. T. Patterson and *Murphy & Lewis,* for appellants.

1. No construction can be placed on appellants' telegram save willingness to enter into the contract of sale. Having equal opportunity with appellants to ascertain the amount and value of the timber, appellee had no right to rely on their statements, if any had been made. 1 Ark. 31; 26 Ark. 28; 11 Ark. 58; 7 Ark. 166; 84 S. W. 1036.

2. The drunkenness must be excessive, such as to suspend the reason and create impotence of mind, in order to enable a party to avoid his contract. 5 Mo. App. 457; 60 Ark. 610; 14 Cyc. 1103; 35 Conn. 170; 72 Ill. 108. The evidence does not show such inadequacy of price as to raise any presumption of fraud. The sale should stand. 84 S. W. 1036, 1037; 11 Ark. 58; 71 Ark. 309.

J. D. Block, for appellee; *F. H. Sullivan,* of counsel.

A contract may be void, (1) for intoxication alone where it is such as temporarily to dethrone the reason, (2) where it is of a lesser degree if it is induced or procured by the other party to the transaction, and (3) where the bargain is an unfair one. 60 Ark. 610; 14 Cyc. 1105; 17 Am. & Eng. Enc. Law (2 Ed.), 403; 54 L. R. A. 440, note. Under the latter conditions, inadequacy of consideration is evidence of fraud. 1 N. J. Eq. 357; 2 Head (Tenn.), 297; 1 Biss. 128. Concealment by one party of material facts of which he knows the other is ignorant constitutes fraud. 7 Ark. 166; 14 Ark. 21; 30 Ark. 230; 35 Ark. 483; 38 Ark. 334.

The chancellor's findings of fact will not be disturbed unless the evidence is clearly against it. 68 Ark. 134; 71 Ark. 605.

McCULLOCH, J., (after stating the facts.) Appellee's assertion of the right to a rescission of the contract is based upon two grounds, viz: The alleged intoxicated condition of Powers when he negotiated the contract with appellants, and the failure of appellants to disclose information as to the true value of the timber in response to the letter written them by Mr. Jackson. The latter grounds may be disposed of by saying that the letter of Jackson can not be construed as a request for information as to the value of the timber, nor as an expression of reliance upon the judgment of appellants as to the value. "I hand you a copy of the contract," the letter stated, "and if it is all right you can notify me. I will send check on receipt of your advice that it is all right with you." There is nothing in this to have put appellants upon notice that they were expected to inform the writer of the value or quantity of timber bargained for. On the contrary, they had a right to presume that Jackson was relying upon the judgment of Powers, who was an experienced timber man, and was engaged in the business of making railroad ties for appellee in that locality. Nor can a warranty of the quantity of the timber be implied from the circumstances under which the bargain was negotiated and consummated. The tract of timber land was open to the inspection of either party alike, and the undisputed testimony shows that appellants had owned the land scarcely a month, had never inspected it, and had no information as to the quantity of timber except that there were about 35 acres of the tract cleared and in cultivation. The parties were dealing with each

other upon equal footing, and mere inadequacy of the consideration, however gross, will not avoid the contract.

The controlling principles as to the right to rescind a contract because of intoxication are fully stated by this court in the case of *Taylor* v. *Purcell,* 60 Ark. 606. "It is only when one is so completely intoxicated as to be incapable of knowing what he is doing," said the court, "or of understanding the consequences of his acts, that his contracts, entered into while in that state, are thereby rendered void. 2 Kent, Com. 451; *Gore* v. *Gibson,* 13 Mees. & W. 623; *Bates* v. *Ball,* 72 Ill. 108; *Schramm* v. *O'Conner,* 98 Ill. 541; *Johns* v. *Fritchey,* 39 Md. 258. Where the defense is that the contract or note was procured through fraud, the court or jury trying the case may take into consideration, along with the other surrounding circumstances, the condition of the contracting parties at the time of making the contract, whether either of them was to any extent under the influence of intoxicating drink, in order to determine whether the contract was procured through fraud or not. But, in the absence of fraud, the intoxication to invalidate a contract must be such as to temporarily dethrone reason and judgment."

The case in which this doctrine is announced was an action at law to recover upon a contract where the defendant pleaded intoxication as a defense, but no different rule prevails in equity where suit is brought to rescind the contract. 14 Cyc. p. 1106; 2 Pom. Eq. Jur. § 949; 1 Story, Eq. Jur. § 231; *Rodman* v. *Zilley,* 1 N. J. E. 320; *Maxwell* v. *Pittenger,* 3 N. J. E. 156; *Keough* v. *Foreman,* 33 La. Ann. 1434; *Caulkins* v. *Fry,* 35 Conn. 170; *Cavender* v. *Waddingham,* 5 Mo. App. 457.

Judge Story states the rule thus: "But, to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can, in no just sense, be said to be a serious and deliberate consent on his part, and without this no contract or other act can or ought to be binding by the law of nature. If there be not that degree of excessive drunkenness, then courts of equity will not interfere at all unless there has been some contrivance or management to draw the party into drink,

or some unfair advantage taken of his intoxication to obtain an unreasonable bargain or benefit from him." 1 Story, Eq. Jur. § 231.

The evidence in this case does not establish intoxication on the part of Powers to the extent that he was incapable of knowing what he was doing or of understanding the consequences of his acts. At most, it shows only that he was under the influence of liquor to such extent as to materially affect his judgment.

It is true, Powers says in his deposition, "I could not have known what I was doing;" but he does proceed to relate many of the details of the negotiations between himself and Cook, as well as some of the incidents of the meeting in the office of the attorney in Wynne when the contract was prepared, and he states that Cook first proposed to accept $2.00 per acre for the timber, which offer he (Powers) declined and offered to give $1.00 per acre. Both of the Cooks testify that he was not excessively drunk when he made the trade.

There is no proof at all that Powers' state of intoxication was induced by appellants, or that any advantage was sought or taken of his condition except that they made a bargain with him which subsequently developed to be a disadvantageous one for the purchaser of the timber. This, however, was through no fault or connivance of appellants, so far as the testimony discloses. As we have already stated, appellant had owned the land only about a month, and had no information concerning the quantity of timber thereon. They were wholly without experience in the timber business, whilst Powers was an experienced timber man, was then engaged in working timber into ties in that locality, and appellants had reason to believe that he had recently estimated the timber on this land. It is not claimed that they made any representations to Powers or any one else concerning the quantity or quality of timber on the land—the record is utterly void of any evidence of such representation, either directly or by inference. Nor is there anything in the attitude of the parties toward each other which called for a statement from one to the other as to knowledge concerning the quantity of timber. It is clearly a case where both parties "guessed at" the quantity of timber on about 375 acres of timber land without inspecting it, and the party who was worsted in the bargain is without remedy for relief

against its hardship. Doubtless, Mr. Jackson was under the belief that Powers had inspected and estimated the timber, and relied upon his (Powers') judgment as to its quantity and value, but that is his misfortune. Appellants were without fault, so far as the proof discloses, and they can not be held responsible because Powers failed in his duty, nor can their bargain be annulled on that account, however improvident and burdensome to appellee it may appear to be.

We are therefore of the opinion that the learned chancellor was wrong in his conclusion, and that his decree annulling the contract must be reversed, with directions to dismiss the complaint for want of equity. It is so ordered.

ON REHEARING.

Opinion delivered April 30, 1906.

McCULLOCH, J. We are asked to grant a rehearing and affirm the decree on two grounds: First, that the answer does not put in issue the question of Powers' total intoxication; and, second, that, a state of partial intoxication being established by the evidence, gross excessiveness of price paid for the timber is sufficient to avoid the contract of sale.

On the first-named proposition, it is sufficient to say that the plaintiff accepted the answer as tendering an issue as to the degree of Powers' intoxication, and proceeded to introduce proof on the subject. It is true that the answer contained no express denial of the allegation in the complaint that Powers was totally intoxicated and wholly incapacitated from making a contract; but, unless that allegation be treated as denied, no defense at all was tendered by the answer. The plaintiff treated that issue as properly tendered, tried the case on that theory without objection to the sufficiency of the answer, and can not now be heard to say that the answer tendered no defense.

It is contended that the grossly excessive price which Powers agreed to pay for the timber was sufficient to avoid the contract and justify the chancery court in setting it aside.

Continuing the quotation from Story in the section referred to in the original opinion, it is said:

"For, in general, courts of equity, as a matter of public policy, do not incline on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practised." 1 Story, Eq. Jur. § 231.

The rule deducible from this statement, and from all the authorities, is that the contract of a person partially intoxicated at the time will not be set aside because of his intoxication. That condition results from his own act, and entitles him to no consideration whatever in either a court of law or of equity. It is not because of his intoxication that courts will annul the contract, but because of some fraud or imposition perpetrated by the person who takes advantage of his condition to make a contract with him. The courts merely grant relief from the fraud or imposition perpetrated. Therefore, while the inadequacy or excessiveness of the consideration for the contract may be a circumstance tending to establish the perpetration of a fraud, it does not, of itself, when good faith is affirmatively shown, constitute such a fraud or imposition as will afford grounds for setting aside a contract. *Birdsong* v. *Birdsong*, 2 Head (Tenn.), 290.

This view, it is argued, puts a partially intoxicated person upon precisely the same plane as a perfectly sober man, with reference to his right to avoid a contract. Not so. One who deals with a sober man upon equal footing owes him only the duty not to mislead him to his prejudice by a material false representation concerning the subject-matter, or by a failure to disclose a material fact within his knowledge which the circumstances may make it his duty to disclose, whereas one who deals with a person whom he knows to be partially intoxicated owes him the duty not to take advantage of his condition by knowingly imposing a harsh contract upon him.

In either case equity will give relief from a contract induced by material false representations which were relied upon, or by

failure to disclose material facts when peculiar circumstances existed which called for such disclosure; but only in the case of the drunken man will knowledge of the drunkenness, coupled with knowledge of the harshness or improvidence of the contract, be deemed such a fraud or imposition as affords ground for relief.

Rehearing denied.

WOOD and RIDDICK, JJ., dissent.

78	55
78	359
79	141
80	188
81	326

78	55
e85	333
85	496

78	55
88	176
88	177

TIFFIN *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered February 24, 1906.

1. TRIAL—REFUSAL TO GIVE ADDITIONAL INSTRUCTION.—It was not error to refuse to give an instruction upon a subject covered by an instruction already given. (Page 58.)
2. RAILROAD CROSSING—DUTY TO LOOK AND LISTEN.—The general rule is that it is negligence as matter of law for one approaching a railroad crossing to fail to look and listen for the approach of trains, and only in exceptional cases is it proper to submit to the jury the question whether or not the failure to exercise such caution is negligence. (Page 59.)
3. SAME—WHEN FAILURE TO LOOK AND LISTEN NOT EXCUSED.—The fact that a flagman was usually stationed at a certain crossing to warn travelers, and that no flagman was in sight when deceased attempted to cross, did not excuse deceased for failure to use his senses to discover the peril of an approaching train. (Page 61.)
4. TRIAL—FAILURE TO INSTRUCT—ABSENCE OF REQUEST.—Failure of the trial court to instruct upon a certain subject will not be considered on appeal where there was no request therefor. (Page 62.)
5. EVIDENCE—OPINION.—A witness should not be permitted to testify that in his opinion a certain railroad crossing is dangerous, as the situation of the crossing can be detailed to the jury. (Page 62.)
6. SAME—COMPETENCY.—The dangerous character of a certain railroad crossing can not be proved by showing how many persons had been killed at such crossing, as the killings might not have been due to the character of the crossing. (Page 62.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield*, Judge; affirmed.

STATEMENT BY THE COURT.

This is an action brought by Mrs. E. E. Tiffin, as administratrix of the estate of her son, James Roy Tiffin, deceased, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for the killing of said decedent. Two causes of action are set forth in the complaint in different paragraphs, one to recover for pain and suffering endured by the deceased, and the other to recover damages sustained by the plaintiff as next of kin by reason of loss of the earnings of her son.

A trial of the cause before a jury resulted in a verdict in favor of the defendant, and the plaintiff appealed.

Deceased was thirteen years of age, and is proved to have been exceptionally bright and intelligent for his age. He was run over and fatally injured by a train at the crossing of Newton Avenue, one of the principal thoroughfares in the city of North Little Rock. The defendant has two tracks crossing Newton Avenue at the place where the injury occurred, one of which was the main track and the other a switch track, and at all hours of the day there were engines and trains passing at that place. It is alleged that, by reason of the great number of trains passing over the tracks at said crossing and the number of people traveling along the avenue, the crossing was a particularly dangerous one. Negligence of the defendant contributing to the injury is alleged in the following particulars: (a) In the failure of the employees operating said train to ring the bell and blow the whistle as said train approached the crossing; (b) in not having gates at said crossing to keep the traveling public from crossing said tracks while trains were being moved; (c) in not having said crossing properly guarded and watched; and (d) in the fact that the flagman kept by the defendant at said crossing was not at his post.

The answer contained specific denials of all the charges of negligence, and alleged that the injury was caused by the contributory negligence of the person injured.

Newton Avenue runs nearly due north and south, and the railroad track intersects it diagonally, running northwest and

southeast. Deceased was injured about noon. He approached the crossing from the west, when it was blocked by a slowly-moving freight train going southeast on the track nearest to him, and stopped within a few feet of the train to wait for it to pass. As soon as the rear end of the last car had passed the point where he was standing, ten or twelve feet, he crossed the first track, and, as he attempted to cross the next track, he was run over by the tender of a backing engine, which was moving at a rapid speed in the opposite direction.

The testimony was conflicting as to whether or not the bell or whistle was sounded on the engine. No gates or other barriers were maintained by the defendant at the crossing, but a watchman or flagman was kept posted there, whose duty it was to flag trains and to warn passing travelers of the approach of trains. The testimony tended to show that at the time of the injury the flagman on duty was on the opposite side of the street from deceased, where he had gone to warn or stop a man in a wagon who was attempting to cross. Deceased had a bicycle, and was observed with it standing by his side while he was awaiting the passage of the first train. A witness testified that he walked across the tracks, rolling the bicycle along by his side. The flagman and the fireman on the engine testified that deceased was riding the bicycle when he attempted to cross, and the latter said that deceased fell from the bicycle on the track.

J. H. Harrod, for appellant.

1. The court erred in refusing testimony to show that the crossing was a dangerous place, and that the precautions taken by the company were insufficient. 110 U. S. 47.

2. It was error to refuse the sixth instruction asked by plaintiff. 144 U. S. 419; 86 Ky. 578; 35 L. R. A. 155.

3. The duty to stop, look and listen is not absolute and imperative. It is sometimes for the jury to say whether the failure to look and listen is excusable. 65 Ark. 235. See also 2 Wood's Ry. Law, 1313, 1314 and 1318.

B. S. Johnson and *J. E. Williams,* for appellee.

1. The witness having detailed the facts as to the conditions existing at the crossing, it was for the jury to determine whether it was dangerous, and the opinion of the witness was properly excluded. 56 Ark. 612.

2. The sixth instruction confined the jury to one specific question, and the ninth, given at plaintiff's request, fully covered the question. Plaintiff can not complain. 67 Ark. 532.

3. That it is the duty of one approaching a railroad crossing to look and listen for approaching trains is settled. 65 Ark. 238; 76 Ark. 224; 69 Ark. 135; 54 Ark. 431; 62 Ark. 156. Appellant can not complain that instructions were not sufficiently specific without having made request for modification or more specific charge. 56 Ark. 602; 69 Ark. 637; 65 Ark. 619; *Ib.* 255; 73 Ark. 535; *Ib.* 594; 56 Ark. 602.

McCULLOCH, J., (after stating the facts.) 1. Error of the court is assigned in its refusal to give to the jury the sixth instruction asked by appellant, which is as follows:

"If you find from the testimony that the crossing at which deceased received his injuries was so dangerous that it was necessary for the safety of travelers on the street for the railroad company to keep gates at said crossing, you are instructed that a failure to keep gates at such crossing was negligence. And if you find from the evidence that there were no gates at said crossing, and further find from the evidence that such failure to keep gates was the cause of James Roy Tiffin's injury and death, or find that if there had been gates at said crossing he would not have been injured, your verdict will be for the plaintiff on both causes of action, unless the deceased was guilty of contributory negligence."

We do not find it necessary to determine whether or not this instruction contained a correct statement of the law applicable to the case, inasmuch as we conclude that the giving of the ninth instruction asked by appellant covered the point contended for, and all prejudice was removed thereby. That instruction is as follows:

"If you find from a preponderance of the testimony that it was necessary to protect the public traveling on Newton Avenue for the defendant to keep said crossing watched and guarded, and if you find from the preponderance of the testimony that the defendant did not exercise reasonable care to keep the crossing watched and guarded, and you further find from a preponderance of the testimony that the injury and death of Roy Tiffin was caused by the negligence of the defendant in not exercising reas-

onable care to have said crossing properly watched and guarded, you will find for the plaintiff on both causes of action, unless the deceased was guilty of negligence that contributed to his injury and death."

We think that the above instruction fully placed before the jury the measure of the duty of the railway company, and that appellant was not prejudiced by the refusal to give the sixth instruction. The instruction given permitted the jury to say, from the testimony, that it was necessary, in order to protect travelers on the street from the danger of passing trains, that the company should have provided gates or other barriers or watchmen to flag trains and warn travelers, and that the failure to provide either or all of those means of protection was negligence. Therefore, no error was committed in refusing to instruct the jury specifically that the failure to provide gates amounted to negligence if gates were necessary to the protection of travelers. *St. Louis, I. M. & S. Ry. Co.* v. *Baker,* 67 Ark. 531.

2. It is also contended that the court erred in giving the following instruction, and others of like import, at the request of the defendant:

"5. It is the duty of a person approaching a railroad crossing to look and listen for approaching trains. This duty requires him to look in every direction from which he knew a train might approach, and continue on his guard until the danger is passed; and when, by the due exercise of care in this respect, the danger could have been discovered and avoided, no recovery can be had. Therefore, if you find from the evidence in this case that the plaintiff's intestate, Roy Tiffin, started and went onto the crossing without looking in the direction from which the train came after he started to go across the track, when by looking he could have seen the train approaching and avoided the injury, then he was guilty of contributory negligence, which bars a recovery, and your verdict must be for the defendant."

It is urged that these instructions improperly declared it to have been the absolute and imperative duty of deceased to look and listen for the approach of another train before going upon the track, and that it was properly a question of fact for the determination of the jury whether under the circumstances the failure to look and listen was negligence.

It has been repeatedly held by this court that it is negligence for one approaching a railroad crossing to fail to look and listen for the approach of trains, and that only in exceptional cases is it proper to submit to the jury the question whether or not the failure to exercise such caution is negligence. *L. R. & Ft. S. Ry. Co.* v. *Blewitt,* 65 Ark. 235; *St. L. & S. F. R. Co.* v. *Crabtree,* 69 Ark. 135; *St. L., I. M. & So. Ry. Co.* v. *Luther Hitt,* 76 Ark. 224.

In none of the cases decided by this court are any of the recognized exceptions found save in *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson,* 69 Ark. 489, where it was held that a passenger or his escort attempting to pass an intervening track to reach a depot or train under circumstances which justified him in believing that he was invited by the company to pass over the track could not, as a matter of law, be declared guilty of negligence, but that it was a question for the jury, after considering all the circumstances, to say whether or not he failed to exercise ordinary care. In neither the Blewitt nor the Hitt case, *supra,* are there found facts which form exceptions to the general rule that the failure to look and listen for approaching trains is negligence *per se,* and should be so declared as a matter of law. The exceptions to the general rule usually fall within the following classes of cases (2 Wood on Railroads, pp. 1523, 1525.)

(1) Where the circumstances are such that it would have availed nothing in preventing the injury if the injured party had looked and listened. This exception is recognized in the case of *Martin* v. *L. R. & Ft. S. Ry. Co.,* 62 Ark. 156, where it is said that "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."

(2) Where the circumstances were so unusual that the injured party could not reasonably have expected the approach of a train at the time he went upon the track. *French* v. *Taunton Branch Rd.,* 116 Mass. 537; *McGhee* v. *White,* 66 Fed. 502; *Bonnell* v. *D., L. & W. R. R. Co.,* 39 N. J. L. 189.

(3) Where the injured person was a passenger or escort going to or alighting from a train, and hence under an implied invitation and assurance by the company that he could cross the

track in safety. *Railway Co.* v. *Johnson,* 59 Ark. 122; *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson, supra; Wheelock* v. *Boston, etc., Ry. Co.,* 105 Mass. 203.

(4) Where the direct act of some agent of the company had put the person off his guard, and induced him to cross the track without precaution. 3 Elliott on Railroads, § 1171; 2 Wood on Railroads, p. 1546; *Chicago & N. W. Ry. Co.* v. *Prescott,* 59 Fed. 237; *Eddy* v. *Powell,* 49 Fed. 814; *Merrigan* v. *B. & A. Rd.* 154 Mass. 189; *Directors, etc.* v. *Wanless,* L. R. 7 Eng. & Irish App. 12; *Cleveland, C. C. & St. L. Ry. Co.* v. *Keely,* 138 Ind. 600; *Abbett* v. *C., M. & St. P. Ry. Co.,* 30 Minn 482.

The facts of this case do not bring it within either of the exceptions stated. Deceased did not go upon the track by invitation of the company; he was not misled by any act of the servants of the company, nor were the circumstances so unusual that he could not have reasonably expected another train to pass the crossing at that time. On the contrary, the uncontradicted proof showed that trains were constantly passing that point. The witnesses for plaintiff testified that trains passed there at all hours of the day so frequently that it was difficult for travelers to find an opportunity to cross the tracks. It was contended by the plaintiff that it was an extraordinarily dangerous place on that account. The jury were justified in finding that, as soon as the train on the main track passed the crossing, deceased, without looking or listening for another train, attempted to cross the switch track and was struck down. If he did this, he was guilty of contributory negligence, and there can be no recovery. This brings it squarely within the decision of this court in *Martin* v. *Little Rock & F. S. Ry. Co.,* 62 Ark. 156, holding that such an act was negligence.

Learned counsel insists that deceased might have been lulled into a feeling of security by the fact that a flagman was usually stationed at the crossing to warn travelers of approaching trains, and that under those circumstances it should have been left to the jury to say whether or not ordinary care required him to use his senses in discovering the approach of the train. We do not think so. It might have been different if he and the flagman had been standing in plain view of each other, so that he could reasonably expect warning from the latter of an approaching

train. He could then have assumed that no train approached because no warning was given. But such is not the state of the case. He and the flagman were not in view of each other, and he was not misled by the inaction of the latter. He was about to occupy a position fraught with unusual danger, and it was his imperative duty to make use of his senses to discover the peril and avoid it.

Deceased was a lad of unusual degree of intelligence for his years, and the court, in its instructions, treated him as having full measure of discretion attributable to an adult. No objections to the instructions were made on this score, and appellant acquiesced in this treatment of the question of the care exercised by deceased. No instruction was asked that the jury might consider his age in determining the degree of care exercised in crossing the track. We are therefore not at liberty to discuss the propriety of such an instruction, and what its effect might have been.

We are of the opinion that the case was fairly submitted to the jury upon the issues involved, and that the evidence was sufficient to support the verdict.

The evidence discloses a most distressing injury, but the jury have said by their verdict, upon proper instructions, either that the servants of the company were guiltless of any negligent act, or that the deceased was guilty of negligence which caused or contributed to the injury; and it would be an invasion of the province of the jury for us to disturb the verdict.

3. The court refused to permit appellant to ask E. O. Manees whether or not the crossing was dangerous, and refused to permit her to ask Kilfoy, the flagman, how many men had been killed there since he had commenced working there. This is assigned as error. Neither of these questions were proper. Both of these witnesses, as well as others, testified in detail concerning the crossing, its situation, the number and frequency of trains passing, etc. It was not competent for the former to state his opinion as to the dangerous character of the crossing. The subject did not call for expert testimony, but was one from which the jury were properly left to draw their own conclusions. *Railway Co.* v. *Yarborough,* 56 Ark. 612.

Nor was it competent to show how many persons had been killed at the crossing. The injuries sought to be proved by the

witnesses may have been caused by negligence of the servants of the company or by the negligence of the persons injured, and the testimony did not tend to establish the dangerous character of the situation.

Judgment affirmed.

McCUIN v. MERCHANTS GROCERY COMPANY.

Opinion delivered February 24, 1906.

EVIDENCE—RELEVANCY.—Where in an attachment suit, a stranger intervened, claiming to have bought the attached goods from the defendants, it was not error to refuse to permit the intervener, as evidence of the good faith of his purchase, to prove that defendants had, some six weeks or two months previously, offered to sell the goods to others, as such evidence, without proof of the circumstances under which the offers were made, would not tend to prove defendants' good faith in selling to the intervener.

Appeal from White Circuit Court; *Silas D. Campbell,* Special Judge; affirmed.

Action by Merchants Grocery Company against Honea & Son to recover upon account for goods sold. An order of general attachment was sued out and levied on a stock of goods in the possession of E. J. McCuin. McCuin interpleaded, and a trial upon the interplea resulted in a verdict and judgment in favor of the plaintiff, and the intervener appealed to this court.

There were four other cases involving the same question upon the same facts, and, by stipulation of parties, they abide the result of this case.

Grant Green, for appellant.

1. Testimony as to previous efforts to sell, such efforts not being too remote to form a part of the *res gestae,* was admissible to show the *bona fides* of this transaction. 20 Ark 592; 59 Ark. 303; 43 Ark. 99; 12 Ark. 782; 14 Ark. 138.

2. Fraud will not be presumed. It must be clearly estab-

lished by competent evidence. 11 Ark. 378; 38 Ark. 419; 45 Ark. 492; 20 Ark. 216; 18 Ark. 123; 31 Ark. 554; 33 Ark. 259; *Ib.* 727. A merchant, though in failing circumstances, has the right to sell his stock at a fair market price, and a purchaser from him in good faith acquires good title. 32 Ark. 163; 30 Ark. 417; 49 Ark. 20.

McCULLOCH, J. Honea & Son were insolvent, and, while in that condition, delivered their stock of goods to appellant, a brother-in-law of the senior member of the firm, pursuant to an alleged sale to him for cash. The inventory of the goods, taken at cost prices, amounted to something over $1,300, and $900 was the price alleged to have been paid therefor by appellant.

The creditors of Honea & Son attacked the alleged sale on the ground that it was fictitious and fraudulent.

Appellant and Honea testified that the sale was made in good faith, without any fraudulent intent, for a valuable and adequate consideration, and without notice or information on the part of appellant as to the insolvency of Honea & Son. Other witnesses corroborated them as to the fact that a sale was made and a part of the price paid. Appellee relied upon certain circumstances developed by the testimony, and contradictory statements of appellants concerning the sale, to show that the sale was fictitious, and made, if at all, for the purpose of cheating and hindering the creditors of Honea & Son, and that appellant knew of the insolvency of the firm, and knowingly participated in the fraud.

The evidence tending to show the relationship of the parties, the inadequacy of the price alleged to have been paid for the goods, the unsatisfactory explanation given by appellant of the source whence he procured the money with which he purchased the goods, and his reasons for making the purchase and the circumstances under which the alleged sale was negotiated and consummated, were sufficient to justify the jury in finding that the sale was not made in good faith, but was a fraudulent contrivance to defraud the creditors of Honea & Son. We can not say that there was not evidence of a substantial character in support of the verdict.

Nor do we find any error in the instructions of the court.

The court modified several instructions asked by the interpleader, refused two, and gave several of its own motion and on motion of appellee. Upon the whole, we are convinced that all the issues were fully and fairly submitted to the jury upon proper instructions. The refused instructions were fully covered by those given.

Appellant also complains at the ruling of the court in refusing to permit him to prove that Honea & Son had previously offered to sell their stock of goods to two other persons—one about two months and the other about six weeks before the alleged sale to appellant. We can not see that this was material to the issue, which was as to the *bona fides* of the sale to appellant. Honea & Son might properly have testified that, at or about the time of the alleged sale to appellant, they openly attempted to sell their stock of goods for the purpose of raising funds to pay creditors or for re-investment or some other legitimate purpose not in fraud of creditors, but proof of isolated efforts to sell the stock at a different time and under, perhaps, different circumstances was not material. They were too remote in point of time to be considered as a part of the *res gestae.* No prejudice resulted from exclusion of the testimony.

Upon the whole case, we find no error, and the judgment is affirmed.

RUGG v. LEMLEY.

78 65
90 245

Opinion delivered February 24, 1906.

1. EQUITY JURISDICTION—CHARGE ON LAND.—Under an agreement of an adjacent proprietor to pay part of the cost of a party wall when he commenced to use it, a charge is created in the nature of an equitable lien upon the lot upon which the wall is erected, which is enforcible in equity. (Page 69.)

2. SAME—EFFECT OF PRAYER.—Where a complaint in equity stated an equitable cause of action, jurisdiction was thereby conferred on that court, although the prayer asked only for such relief as could have been granted at law. (Page 69.)

3. COVENANT RUNNING WITH LAND—PARTY WALL.—An agreement of an adjacent landowner to pay for the use of a party wall is a covenant which runs with the land, and the right to recover the agreed sum passes to the grantee of the original builder under his deed to the land. (Page 69.)

Appeal from Garland Chancery Court; *Leland Leatherman*, Chancellor; affirmed.

STATEMENT BY THE COURT.

The plaintiffs, B. L. Lemley and M. F. Work, are the owners of lot 27 in block 89 in the city of Hot Springs, on which is situated a two-story brick building, the center of the south wall of the building being on the line between lots 47 and 48. Lot 48 is owned by D. C. Rugg, who leased the same to defendant Ed Spear. This suit was brought in chancery by the plaintiffs, Lemley and Work, against defendants Spear and Ledwidge (a building contractor) to enjoin them from using the south wall of plaintiff's building as a party wall in the construction of a new building on lot 48. It is alleged in the complaint that the wall is wholly upon lot 47, and is the property of plaintiffs, and that the defendants are proceeding, without right, to cut into the wall for the purpose of joining the new building to it. A temporary restraining order was issued as prayed for, but the same was subsequently dissolved when it was shown that the wall was a party wall on the line between lots 47 and 48.

On motion of defendant Spear, his lessor, D. C. Rugg, the owner of lot 48, was made a defendant in the cause.

After the dissolution of the temporary restraining order, the plaintiffs filed an amendment to their complaint, praying that if the court should determine that the wall described in the complaint is a party wall and equally on lots 47 and 48, the plaintiffs recover of defendant Rugg one-half of the original cost of the wall.

After the dissolution of the injunction, Alma B. Womack, the widow of J. P. Warren, deceased, filed her intervention in the cause, in which she alleges that said Warren in his lifetime was the owner of lot 47; that while such owner, by agreement between himself and D. C. Rugg, he erected upon the division line between lots 47 and 48 a brick wall (the wall in question); that at the time of the erection of said wall the portion

of said lot 48 on which said wall was built was placed in the possession of said J. P. Warren, with the agreement and understanding by the owner of said lot 48 that whenever the wall was used by the owner of said lot 48, Warren should be paid one-half the price or value thereof; that said agreement was oral; that said wall then became the personal property of said Warren; that Warren subsequently died, leaving the intervener, his widow, and also leaving a will, by and in which he bequeathed to the intervener all his personal property; that by virtue of said will the said wall, and the agreement with reference thereto, became the personal property of the intervener; that the wall is of the value of $550; that recently D. C. Rugg, who is now the owner of said lot 48, by an agreement with the defendant Spear, as his tenant has made use of the wall, by attaching thereto the sleepers and joists of the house that Spear is erecting on said lot 48, by virtue of all of which she alleges that D. C. Rugg is indebted to her in the sum of the value of said wall.

Defendant Rugg filed demurrers to the intervention of Mrs. Womack and the complaint of the plaintiffs, which were both overruled by the court, and he then filed his answer, in which he denied specifically all the material allegations contained in said interplea.

Rugg also filed his motion to transfer to the law court, which was overruled. Upon final hearing, the chancellor rendered a decree in favor of the plaintiffs, Lemley and Work, against defendant Rugg for the recovery of the sum of $475, with interest, one-half of the cost of the wall, and "that, upon the payment of the judgment aforesaid by D. C. Rugg, * * * his heirs and assigns, shall hold, have and enjoy the easement of the party wall situate on part of said lot 47 owned by the plaintiffs herein for the life of said wall; also to include that part of said wall on said lot 47, but in common with plaintiffs, their heirs and assigns, as to that strip of land actually covered by said party wall as well as the wall itself appurtenant to both lots."

The intervention of Mrs. Womack was dismissed for want of equity. Rugg and Mrs. Womack appealed to this court.

M. S. Cobb, for appellant Rugg.

1. The demurrer to the amended complaint should have been sustained, or, when overruled, the cause should have been

transferred to the law court. 1 Ark. 31; 23 Ark. 746; 31 Ark. 411; 32 Ark. 562; 74 Ark. 81; 73 Ark. 462; 30 Ark. 89.

2. A promise by an adjoining lot owner to the builder of a party wall to compensate him for the use thereof is personal to the promisee, and not a covenant running with the land. 66 L. R. A. 673 and notes.

Wood & Henderson for appellant Womack.

The allegations show that Spear was destroying plaintiff's property, and was doing and threatening to do continuing acts of trespass. In such cases equity will grant relief. 32 Ark. 478, 489; 11 Ark. 304; 33 Ark. 633; 43 Ark. 119; 51 Ark. 264; 26 Fed. 218. Equity will also take jurisdiction to prevent a multiplicity of suits. 33 Ark. 633. Having jurisdiction for one purpose, it will retain it to settle all questions arising in the case. 30 Ark. 278; 34 Ark. 410; 37 Ark. 164; 37 Ark. 286; 46 Ark. 96; 48 Ark. 312; 48 Ark. 544.

Greaves & Martin, for appellees.

Covenants and agreements as to party walls run with the land. 38 Hun, 510; 6 Ohio Dec. 795. An agreement whereby the lot owner is to be paid for use of a party wall by the adjoining lot owner runs with the land so as to bind a grantee of the adjoining owner. 121 Mass. 457; 19 Mo. App. 607; 46 Ga. 19; Washburn, Easements & Serv. (4 Ed.), 606, 607, 612; 20 Ohio St., 414. The word "appurtenances" in the deed, means the easement of the wall, and would pass by the deed. 39 Ark. 135.

McCULLOCH, J., (after stating the facts.) The facts of this case are practically undisputed.

There are two questions of law presented: (1) Whether the court had jurisdiction to hear and determine the cause of action against appellant Rugg for the recovery of half the cost of the wall; and (2) which of the two claimants should recover the same, Mrs. Womack, the widow and legatee of J. P. Warren, the original owner of lot 47 and builder of the wall, or Lemley and Work, the grantees of Warren under deed conveying lot 47 "with all appurtenances thereunto belonging."

The proof failed to sustain the cause of action stated in the original complaint, and the court denied the relief prayed. The

amendment to the complaint, filed after the dissolution of the injunction, stated a different cause of action and one inconsistent with the facts stated in the original complaint, but one which was cognizable in equity. The agreement of Rugg to pay part of the cost of the wall, when he commenced use of the wall, became a charge in the nature of an equitable lien upon the lot on which the wall was erected, and was enforcible in equity. Washburn on Easements & Servitudes, p. 612; *Richardson* v. *Tobey,* 121 Mass. 457; *Nelson* v. *McEwen,* 35 Ill. App. 100; *Roche* v. *Ullman,* 104 Ill. 11; *Keating* v. *Korfhage,* 88 Mo. 524; *Burr* v. *Lamaster,* 30 Neb. 688; *First Nat. Bank* v. *Security Bank,* 61 Minn. 25.

The fact that only a personal judgment against Rugg was prayed for and granted did not prevent the court from assuming jurisdiction. The statement of facts in the complaint, and not the prayer for relief, constituted the cause of action which conferred jurisdiction upon the court. *Sannoner* v. *Jacobson,* 47 Ark. 31; *Waterman* v. *Irby,* 76 Ark. 551.

The more serious question in the case is whether the agreement concerning the payment for use of the party wall is a covenant which runs with the land and the right to recover the agreed sum passes to the grantee of the original builder, under his deed to the lot, or whether it is the personal asset of the covenantee which passes to his assignee or personal representative.

Upon this question the authorities are inharmonious, but we incline to the view that the chancellor was correct in adopting the line of authorities which hold that such an agreement is a covenant which runs with the land and passes to the grantee of the original builder's lot. *Richardson* v. *Tobey,* 121 Mass. 457; *Maine* v. *Cumston,* 98 Mass. 317; *Tomblin* v. *Fish,* 18 Ill. App. 439; *McChesney* v. *Davis,* 86 Ill. App. 380; *Platt* v. *Eggleston,* 20 Ohio St. 414; *Adams* v. *Noble,* 120 Mich. 545; *Kimm* v. *Griffin,* 67 Minn. 25.

Under the contract, when the wall was built, the builder became the sole owner thereof, with an easement over the strip of the adjoining lot built upon, subject to the right of the owner of the adjoining lot to use the wall upon payment of half the cost thereof. The whole wall, together with the easement over the adjoining lot, passed under the deed executed by the builder as

an appurtenance to his lot. *McChesney* v. *Davis, supra; Kimm* v. *Griffin, supra.*

The owner of the adjoining lot, by paying half of the cost of the wall in accordance with the terms of the contract, not only obtained title to that part of the wall which was built upon his lot, but he also acquired an easement over the other lot for support of the wall. These consummated rights he obtained, not from the builder, the original owner of the lot, but through and from the person who was the owner of the lot at the time he used the wall and paid the agreed price. Though the rights of the parties were fixed by the original contract, yet the enjoyment of them was consummated only when the agreed price should be paid. Therefore, in contemplation of law, these rights were obtained through and from the present owner of the lot and wall, and he alone is entitled to the compensation.

As is well stated by the Supreme Court of Illinois in the case of *Gibson* v. *Holden,* 115 Ill. 199: "In all such cases (that is, where the title to the wall is in the builder) the title to the whole wall may be regarded as appurtenant to the lot of the builder, and so passing, by every conveyance of it, until a severance of the half by the payment of the purchase money. The sale of the half of the wall does not occur, nor the title to it pass, in those cases until the payment is made; and so necessarily it is, constructively, a sale by the assignee of so much of the wall."

The contrary view is taken by the Nebraska court, and the question is discussed with much learning and ability by that court in the recent case of *Cook* v. *Paul,* 66 L. R. A. 673, where all the authorities supporting that view are cited, but we are unable to agree with the conclusion there reached.

The decree of the chancellor is therefore affirmed.

FOX v. SPEARS.

Opinion delivered February 24, 1906.

78 71
189 539

1. EVIDENCE—PRIVILEGED COMMUNICATION TO ATTORNEY.—Under Kirby's Digest, § 3095, providing that an attorney shall be incompetent to testify "concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent," an attorney can not be compelled to disclose communications made to him by a deceased client. (Page 75.)
2. SAME—WHEN EXCLUSION NOT PREJUDICIAL.—Refusal of the court to require a witness to testify that a deceased owner of land admitted in his presence that he had made a deed to a certain person was not prejudicial where there was no evidence that such a deed was delivered. (Page 75.)
3. INSTRUCTION—REPETITION.—Refusal to give an instruction that is substantially covered by another instruction given is not prejudicial. (Page 76.)
4. SAME—PREJUDICE.—Appellant can not complain that the court gave an erroneous instruction as to his adverse possession of land if there was no evidence that he held adverse possession. (Page 76.)
5. SAME—AMBIGUITY—SPECIFIC OBJECTION.—The giving of an ambiguous instruction is not reversible error if the defects in it are not pointed out by specific objection, and no additional explanatory instructions are asked. (Page 76.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield,* Judge; affirmed.

Mehaffy & Armistead and *W. M. Lewis,* for appellant.

1. Witness Wassell was called upon in the capacity of a scrivener only. The relation of attorney and client did not exist between him and Spears; but, if in any sense he was acting as an attorney, it was as attorney for both parties jointly, and in such case the rule as to privileged communications does not prevail. 1 Greenl. on Ev. (16 Ed.), § § 239, 245.

2. The court erred in the fifth, sixth and seventh instructions given for appellee; the error in the 7th being to create the belief that adverse possession could not be deduced from circumstances or made out by circumstantial evidence. 70 Ark. 312.

J. W. & M. House, for appellee.

1. If an attorney acts for several clients, he can not testify as to confidential transactions and communications in which all

are interested, without the consent of all. 91 Am. St. Rep. 926; 21 Ark. 388; Kirby's Digest, § 3095; 33 Ark. 774; 20 Colo. 127.

2. A judgment will not be reversed for a refusal to give an instruction asked for, if substantially the same instruction has been given. 52 Ark. 180; 23 Ark. 282. An appellant will not be heard to complain of an erroneous instruction for the appellee, if one to the same effect has been given at his request. 60 Ark. 250; 87 S. W. 129. Instruction 7 is the law. Adverse possession is to be taken strictly—is not to be made out by inference, but by clear and positive proof, and every presumption is in favor of possession in subordination to the title of the true owner. Tyler on Ejectment, 74; 2 Am. St. Rep. 744; 55 Ark. 105; 35 Am. St. Rep. 368; 75 Am. Dec. 658; 73 Am. Dec. 740. As to effect of fiduciary relations on adverse possession, see 18 Ark. 495; 33 Ark. 633; 53 Ark. 532. See also 43 Ark. 490; 65 Ark. 426.

3. Possession of land by one not the owner is not *prima facie* adverse, and the burden is upon the party relying upon it to prove all the essential elements of an adverse possession. 28 Am. Rep. 151; 96 Am. St. Rep. 82.

4. Payment of the consideration is not such a part performance as will take a parol contract for the sale of land out of the statute of frauds. 38 Am. St. Rep. 116, 133; 55 Am. Dec. 580; 28 Am. Dec. 50; 70 Am. Dec. 460; 1 Ark. 421; 18 Ark. 467; 21 Ark. 533; 32 L. R. A. 799; 8 Am. & Eng. Enc. Law (1 Ed.), 742; 1 Sch. & Lef. 40; *Ib.* 123, and many other authorities.

BATTLE, J. Annie Spears brought this action against A. H. Fox to recover a lot and a half of a lot in the city of Little Rock. She alleged in her complaint that this property belonged to William Spears in his lifetime; that Josiah Spears was his only child, and she was the only child of Josiah Spears; that her father died intestate, and left William Spears surviving him; and that William Spears, while seized and possessed of the property sued for in this action, died intestate, and left her his only heir him surviving.

The defendant answered and denied the material allegations of the complaint; and alleged that he, on the 15th of September, 1888, purchased the property of William Spears, and took possession thereof, and thereafter held the same adversely; and

pleaded seven years adverse possession in bar of plaintiff's right to maintain this action.

Plaintiff recovered judgment for one-half of the property in controversy, and the defendant appealed.

The evidence adduced at the trial tended to prove that appellee, Annie Spears, and Emma Fox, wife of appellant, are the only heirs of William Spears; and that he died seized of the property in controversy, and intestate.

There was evidence adduced by the appellant tending to prove that he purchased the property of William Spears on the 15th day of September, 1888, but took no deed, and thereafter held possession of the same.

In the progress of the trial S. S. Wassell testified that he knew Williams Spears in his lifetime, and the following interrogatories were propounded to him:

"Q. Did you ever have any talk with William Spears with reference to this property on Second and Byrd streets?"

"Q. Mr. Wassell, tell whether or not Mr. Spears in 1888 or 1899 got you to draw a deed to a part of his property, stating at the time that he was deeding it to Asa Fox, and told you that he had sold the property on the corner of Second and Byrd streets to A. H. Fox, and wanted you to draw a deed of that property from him to A. H. Fox; that is, to the property in controversy, and whether you drew the deed at his request?"

And he declined to answer them on the ground that the relation of attorney and client existed between him and William Spears, and they (questions) asked him to divulge privileged communications from his client to him. The court sustained him and refused to compel him to answer. He was thereupon excused and retired. Afterwards he was recalled, and testified in response to interrogatories as follows:

"Q. When you were called upon by Mr. Spears to write the deed for Asa Fox, had Spears made any statement to you with reference to Ad Fox's property?"

"A. Yes, sir."

"Q. Had you been employed with reference to Ad Fox's property at that time?"

"A. No."

"Q. I mean with reference to any transaction between Spears and Ad Fox?"

"A. I might say that along about that time I was employed by them jointly, Spears and Ad Fox."

"Q. But at the time you were called upon with reference to the Asa Fox deed, you were not called upon as an attorney with reference to the Ad Fox property?"

"A. Yes; it was all about the same matter—in reference to these deeds he wanted me to draw. I was attorney for both of them, Mr. Spears and Ad Fox."

"Q. (by the court.) Did the relation of attorney and client exist between you and Mr. Spears at that time?"

"A. With reference to these papers, it did. Of course, I could only have gone to see him in a professional capacity with reference to these papers."

"Q. (by the court.) Did Mr. Spears employ you as an attorney, consult with you and talk to you about these matters, and get your advice about them in the relation of attorney and client?"

"A. I could not have talked with him in any other capacity than that of an attorney."

He was asked, "Is it not true that at the time you were called upon to draw the deed for Asa Fox, Mr. Spears stated to you that he had made a deed to Ad Fox for this property down there?" The apppellee objected to the question, the court sustained the objection, and the appellant excepted.

The court instructed the jury, over the objections of the appellant, in part, as follows:

"5. The jury are instructed that if they believe from the testimony that the defendant and William Spears entered into a contract for the sale and purchase of the land in controversy, and that such contract was oral and not in writing, then, in order to take such contract out of the statute of frauds by reason of the possession of the defendant, it must appear from the evidence that the defendant took possession of said property solely under the contract and in reference exclusively to it.

"6. The jury are instructed that, to constitute a valid and effectual adverse possession, the possession must have been hostile in its inception, that is, from the time the defendant claims he purchased the property; that no possession could be adverse except

where the person in possession held for himself to the exclusion of all others and under a claim of title entirely antagonistic to that of the true owner.

"7. Adverse possession is to be taken strictly and not to be made out by inferences, but it must be established by proof. Every presumption is in favor of possession, subject to the title of the true owner."

And the court gave the following at the request of the appellant:

"7. If you find that the defendant entered into a verbal contract for the purchase of the land in question, and took possession of it under the contract, and solely in reference to it, these facts take the case out of the statute of frauds, and the contract is as good to prove the sale as if it was in writing; and if you find that the defendant, while continuing in possession, made the payment agreed upon, his title became perfect, and is good against the claim of the plaintiff, although he has no deed or other written evidence of title.

"8. If you find from the evidence that the defendant was in possession of part of the property in controversy as a tenant of William Spears, and while in such possession purchased the property, then, to constitute possession under such purchase, it is not necessary to actually change the possession; it is sufficient if the defendant at once asserted and claimed ownership and continued to do so. Such acts constitute a holding adverse to the former owner and landlord, the former owner and landlord having knowledge thereof, and the statute of limitations begins to run from the time of such adverse acts."

The trial court did not err in refusing to require witness Wassell to answer the first two questions propounded to him The relation of attorney and client existed between him and the William Spears mentioned therein, and the appellant by the questions sought a disclosure of privileged communications from client to attorney. The witness, under the laws of this State, was not at liberty to do so without the consent of client first had and obtained. Kirby's Digest, § 3095; *Bobo* v. *Bryson,* 21 Ark. 388; *Andrews* v. *Simms,* 33 Ark. 774.

After the witness was recalled and he testified that he was employed by Spears and appellant jointly, the question which he

refused to answer were not again propounded, but he was asked: "Is it not true that at the time you were called upon to draw the deed for Asa Fox, Mr. Spears stated to you that he had made a deed to Ad Fox for this property down there?" The failure and refusal to answer this question was not prejudicial, for appellant did not claim or prove that any such deed had been delivered to him, and without delivery it could have been of no effect.

The instruction numbered 5, and given over the objection of appellant, was substantially covered by instruction numbered 7, given at his request. He ought not to complain. His objection to it is that it is not based upon the evidence. But we think that he is mistaken. There was sufficient evidence upon which to base it.

Appellant's objection to the instruction numbered 6, and given over his objection, is that it told the jury to find in favor of appellee as to adverse possession, unless the possession of appellant was hostile from the time when he claimed to have purchased the property. This was error, but it was not prejudicial. There was no evidence, and he did not claim, that it was hostile, if it ever was, from any other period of time.

Instruction numbered 7, given over the objections of appellant, is ambiguous. As we understand it, it means that possession is presumed to be in subordination to the title of the true owner, until the contrary is proved. The defects in it should have been pointed out by specific objections, and appellant should have asked additional explanatory instructions, which was not done. A general objection was not sufficient. *Fordyce* v. *Jackson,* 56 Ark. 602; *White* v. *McCracken,* 60 Ark. 613; *St. Louis, I. M. & S. Ry. Co.* v. *Waren,* 65 Ark. 624; *McGee* v. *Smitherman,* 69 Ark. 632; *St. Louis, I. M. & So. Ry. Co.* v. *Norton,* 71 Ark. 314; *St. Louis, I. M. & So. Ry. Co.* v. *Pritchett,* 66 Ark. 46; *Williams* v. *State,* 66 Ark. 246; *Phoenix Ins. Co.* v. *Flemming,* 65 Ark. 54.

Construing the instructions as a whole with reference to the evidence in the case, we find no reversible error in them.

The evidence is sufficient to sustain the verdict of the jury.

Judgment affirmed.

LEE v. STATE.

Opinion delivered February 24, 1906.

1. APPEAL—HARMLESS ERROR.—The admission of incompetent hearsay evidence tending to prove an established and undisputed fact is not prejudicial. (Page 79.)
2. EVIDENCE—COMPETENCY.—In a prosecution for manslaughter, in which the question of malice and premeditation was not involved, evidence of another that the accused went to town on the day of the killing for the purpose of procuring evidence to put deceased under bond to keep the peace was neither competent nor material. (Page 80.)
3. CRIMINAL LAW—ADMONITION TO JURY.—Where the record in a criminal case shows that the jurors were kept in charge of an officer, and were properly admonished at each adjournment, as required by Kirby's Digest, § 2390, except once when the court merely admonished the officer to "see that nobody talks to them, and don't you talk to them, and don't you let anybody else talk to them, and keep their minds free from anything until the proper time," this admonition, though addressed to the officer, instead of the jury, was sufficient (Page 80.)
4. SAME—WAIVER OF OBJECTION FOR FAILURE TO ADMONISH JURY.—Where the jury are kept together in charge of an officer, and are permitted to retire without being admonished, the accused waives the right to take advantage of the omission by failing to ask for an admonition of the jury. (Page 80.)

Appeal from Polk Circuit Court; *S. A. Downs,* Special Judge; affirmed.

Hal L. Norwood and *Scott & Head,* for appellant.

It was error to exclude testimony to prove that defendant had gone to Wilton to obtain evidence to put deceased under a peace bond. It was competent as tending to prove defendant's motive. 49 Iowa, 328. Past threats, hostile acts and circumstances tending to show malice on the part of deceased toward the defendant are admissible for the purpose of showing apprehensions of personal danger from the deceased. 17 Ga. 465; 11 Tex. App. 289; 11 Ind. 23; 56 Cal. 251; 20 So. 232; 68 Ala. 156; 71 Ala. 351. Threats are admissible for the purpose of showing the motives of both parties. 29 Ark. 248; 69 Ark. 149.

The instruction asked by defendant, defining what the jury might consider in determining whether it appeared to defendant that his life was in danger, from the threats and harsh treatment of deceased and his going continuously armed, should have been

given. 10 So. 650; 81 S. W. 387; 61 S. W. 123; 55 S. W. 282; 89 S. W. 840. It was error not to administer to the bailiff in charge of the jury the statutory oath. 16 N. E. 81; 44 Ill. 452; 58 N. E. 620; 68 Ark. 401.

Robert L. Rogers, Attorney General, for appellee.

The defendant, being present and failing to object to the omission to repeat the admonition to the jury, can not raise the question now. 56 Ark. 518. The jury were not permitted to separate, hence 68 Ark. 401 does not apply.

McCULLOCH, J. A judgment of conviction against appellant in a former trial was reversed by this court (*Lee* v. *State,* 72 Ark. 436), and upon another trial he was again convicted of the crime of manslaughter and sentenced to a term of three years in the penitentiary. He again appeals to this court.

The facts, briefly stated, are about as follows: H. McGough, the person killed, was a constable residing at Wilton, Little River County, where the killing occurred. Appellant lived at Richmond, in Little River County. Ill feeling is shown to have existed between the parties, growing out of certain accusations against appellant of cattle-stealing and alleged mistreatment of appellant by McGough while in custody of the latter as constable.

On the day on which the killing occurred appellant came to Wilton for the ostensible purpose of procuring subpœnas for witnesses in the trial of the larceny cases against him, and also to procure evidence to put McGough under bond to keep the peace. Appellant was in the store of Smith & Coats, when McGough came into the store approaching appellant, and the latter drew his pistol and shot McGough, killing him instantly. There is conflict in the testimony as to what occurred between the two men. The evidence on the part of the State tended to show that McGough came into the store and accosted appellant in friendly terms as he approached him, and without any hostile demonstration, and that appellant drew his pistol and shot him without justification. The State's evidence tended to show that McGough was unarmed at the time; that he was in his shirt sleeves, and had left his coat and pistol in a saloon near by, and that no pistol was found upon or near his body after he was killed. Appellant testified that he went into the store of Smith

& Coats, and, while waiting for a clerk to find some cartridges for his pistol, heard a voice behind him saying "Hello, Jim!" or "Here, Jim!" and, looking around, saw McGough approaching with his hat in his left hand when he (appellant) "whirled, and turned around, and drew my pistol quick, and fired. As he drew his pistol, I drew mine." He testified that McGough had a pistol in his hip pocket, and introduced other witnesses whose testimony tended to show that a 38-caliber pistol was found near the body of McGough soon after he was killed. He also introduced testimony to the effect that McGough's reputation was that of a turbulent, dangerous, over-bearing man, and one witness testified that he told appellant that "McGough told me that his way of attacking a man was to raise the racket, and, when the man started onto him, to slap him in the face with his hat, thereby make him drop his head, then shoot him."

Much testimony was introduced on both sides as to the character of McGough, the former occurrences between the two men, and the circumstances attending the killing, and as to whether or not McGough was armed.

The State was permitted to show by a witness that immediately before the killing—just before McGough went into the store where he was killed—he said to the witness that he (McGough) stopped in the saloon, took off his pistol and coat, and hung them up. Appellant excepted, and assigns this ruling of the court as error. We think this statement was incompetent, and should not have been admitted, but we can see no prejudice resulting from it. It is undisputed that McGough had left his coat and pistol (a large one worn in a belt or scabbard) in the saloon near by, and that he was in his shirt sleeves when he was killed. It is not contended that he had this pistol with him when he was killed, but that he had a smaller one in the hip pocket of his trousers. The whole theory of the defense rested upon the contention that McGough had two pistols, one of which (the large one) he had left in the saloon, and the smaller one he carried in his hip pocket. A witness was introduced by appellant to prove that McGough said on one occasion that "he never wore pants without a little 38 S. & W. pistol in his pants' pocket. He said he carried it all the time." The whole controversy over the question as to McGough being armed was whether he had a small pistol in his

pocket at the time he was killed, and not whether he had the large pistol. The statement introduced related only to the large pistol, so it was manifestly harmless error of the court in admitting it.

Error is also assigned in the refusal of the court to permit appellant to prove by a witness that he (appellant) went to Wilton that day for the purpose of procuring evidence to put McGough under bond to keep the peace. This was not competent. Nor was it material, in view of the fact that appellant was on trial for manslaughter, and the question of malice and premeditation was not involved.

The court gave to the jury thirteen separate instructions asked by the State, and fifteen asked by appellant's counsel, and refused four asked by the latter. Error is assigned in giving some of the instructions asked by the State and refusing those asked by appellant. Without setting out the instructions or discussing them in detail, it is sufficient to say that we have considered them carefully and find no error in either giving or refusing instructions. They completely and correctly put every phase of the case before the jury, and left nothing further to be properly said in declaring the law.

It is also contended that error was committed by the court in failing to properly admonish the jury when adjournments were taken during the progress of the trial. The record shows that the members of the jury were kept in charge of an officer and not allowed to separate, and were properly admonished at each adjournment or recess except once, when the court merely admonished the officer in charge to "see that nobody talks to them, and don't you talk to them, and don't you let anybody else talk to them, and keep their minds free from anything until the proper time." This admonition was given in the presence of the jury and, though addressed to the officer in charge, was a sufficient reference to the original admonition to the jury to comply with the requirements of the statute.

Moreover, the jurors were not allowed to separate, and no prejudice is shown to have resulted from the failure to admonish. The statute requiring the court to admonish the jury is mandatory, but where the jurors are kept together, and the defendant is present when the jury retires for an adjournment of the

court, and fails to ask for an admonition to the jury, he waives it and can not, after the verdict is rendered, take advantage of the omission. *Atterberry* v. *State,* 56 Ark. 515.

This disposes also of the assignment of error in the court failing to administer the oath to the officer in charge of the jury when it retired on one occasion.

The case of *Johnson* v. *State,* 68 Ark. 401, relied upon by counsel for appellant, is not controlling in this case. There the jurors were permitted to separate without admonition, and the court held that it was reversible error where it was not affirmatively shown that they were exposed to no improper influences.

We find no error in the proceedings, and the judgment is affirmed.

MATTHEWS v. CONTINENTAL CASUALTY COMPANY.

Opinion delivered February 24, 1906.

ACCIDENT INSURANCE—TIME LIMIT.—An accident policy which insured against accidents occurring within one year from 12 o'clock noon, standard time, of the date of the policy, which was the 11th day of December, 1902, did not cover an accident which occurred in the afternoon of December 11, 1903.

Appeal from Miller Circuit Court; *Joel D. Conway,* Judge; affirmed.

L. A. Byrne, for appellant.

The law does not recognize fractions of days. The contracted liability of the company was to run one year from 12 o'clock noon, December 11, 1902, and the contract being silent as to the exact moment of time when it should cease, the whole of the day of December 11, 1903, must be counted. 1 Biddle on Ins. § § 591, 592 and foot-notes; May on Ins. (2 Ed.), § § 400, 401. When a policy expresses liability to run from a given date, the first day of the date of the policy is excluded. 167 Mass. 188; 89 Mass. 487; 1 Q. B. 402; Kirby's Digest, § 7822; 33 Ark. 423; 42 Ark. 93; 52 Ark. 265; 118 Mass. 502. At common law frac-

tions of days are not regarded, unless the contract specifically calls for a certain moment of time. 1 Pick. 495; 8 Cash. 371-373; Wood on Stat. Lim., § 54 and notes.

Glass, Estes & King and *Scott & Head,* for appellee.

The legal fiction that there are no fractions of days does not apply. By specific agreement in the contract, the exact time when the liability commenced and when it ceased is fixed. The time must be computed from 12 o'clock, noon, December 11, 1902, standard time, and necessarily ends at 12 o'clock, noon, on December 11, 1903. See 16 Ohio St. 210; 37 Ill. 240; 60 Me. 88; 60 Wis. 286.

The term "year" when used in contracts, means a calendar year of 365 days. 15 Pet. 162.

BATTLE, J. On April 11, 1904, the appellant filed her complaint, which alleges:

"That at the date of the accident hereinafter complained of the said plaintiff and her deceased husband, Ivan I. Matthews, were citizens of Miller County, Arkansas, and the defendant company was and is an incorporated accident insurance company, incorporated under the laws of the State of Indiana.

"That on the 11th day of December, 1902, while the relation of husband and wife existed between this plaintiff and the said Ivan I. Matthews, her said husband, he took out a policy of accident insurance in and with the said Continental Casualty Company, the defendant herein, whereby the said defendant undertook and did insure the said Ivan I. Matthews against loss by accident, and in case of death by accident the said company agreed and bound itself to pay this plaintiff as beneficiary in said policy the sum of one thousand dollars in case of such accident occurring 'within one year from 12 o'clock noon, standard time, of the date' of the policy.

"That the premium of said policy was duly paid and the same duly delivered to the assured, a true copy of which is attached to this complaint.

"That on the 11th day of December, 1903, about the hour of four o'clock and thirty minutes in the afternoon, standard time, and before the said policy had expired, while the said Ivan I. Matthews was hunting in Miller County, Arkansas, and while he

was attempting to cross a fence, his gun was accidentally discharged, and load took effect in his shoulder, from which he died the same day, two or three hours afterwards.

"That this plaintiff has complied with all the terms of said contract, given the notice of death, and furnished the proof of death of her said husband, but the defendant neglects and refuses to comply with the terms of said contract of insurance and pay the indemnity, although often requested, and denies liability thereunder.

"Wherefore, premises considered, plaintiff prays judgment for one thousand dollars, with interest thereon, for costs and for general relief."

The defendant demurred to the complaint. The court sustained the demurrer. The plaintiff refused to plead further; and the court dismissed the action.

The defendant insured Ivan I. Matthews against accidents occurring "within one year from 12 o'clock, noon, standard time, of the date of the policy, which was the 11th day of December, 1902." The accident to Matthews happened on the 11th day of December, 1903, at four o'clock and thirty minutes in the afternoon. Did the defendant insure Matthews against this accident? This is the only question in the case.

The parties to the contract of insurance agreed and stipulated when the year should begin. They had the right to fix the time and did so. The contract is valid, and must be enforced according to its terms. The accident did not occur within the year so fixed, and plaintiff can not recover.

Judgment affirmed.

PINE BLUFF & WESTERN RAILWAY COMPANY v. KELLY.

Opinion delivered February 24, 1906.

1. EMINENT DOMAIN—OBJECT OF PROCEEDING.—A suit by a railroad company to condemn land for right of way is a special proceeding whose

sole object is to ascertain the compensation that the railroad company shall pay for the right of way. (Page 86.)

2. SAME—MEASURE OF DAMAGES.—The measure of damages allowed for taking land for right of way is the market value of the land from the building of the road across it and from floods or overflows caused by the construction of the same. (Page 86.)

3. SAME—ABANDONMENT—DAMAGES.—Where a railroad company instituted proceedings to condemn a right of way, and used the land for a short time, and then abandoned it, the measure of damages in such case is the rental value of the land in the condition in which it was when taken for the time it was occupied, and the depreciation in value thereof by reason of timber cut and other acts done thereon by the railroad company, and the damage resulting to the remainder of the owner's land from the building of the road across it and from overflow caused by the construction thereof; but for all other damages occasioned by torts committed or wrongs done by the railway company the owners have remedies in actions to recover the same. (Page 86.)

Appeal from Grant Circuit Court; *Alexander M. Duffie,* Judge; reversed.

Austin & Danaher, for appellant.

It was error to admit testimony as to the value of timber cut, without showing that it was cut from the right of way. It was also error to admit testimony as to damage to the crops caused by fire, and the value of timber cut, both of which occurred after the suit was brought. 44 Ark. 362.

E. H. Vance, Jr., for appellees.

Where personal property is destroyed by the taking of land for a railroad right of way, its value is a proper element of damage. This rule applies in cases where growing crops are destroyed. 3 Elliott on Railroads, 1438. The assessment embraces all past, present and future damages which the location of the road may reasonably produce. Pierce on Railroads, 229; Mills on Em. Domain, § § 216, 218.

BATTLE, J. In May, 1902, the Pine Bluff & Western Railway Company instituted a proceeding in the Grant Circuit Court to condemn a portion of northwest quarter of section 18, township 5 south, range 11 west, in Grant County, in this State, for right of way for its railway.

In order to prevent any delay in the construction of its railway over the land, the judge of the Grant Circuit Court, in the

vacation of the court, designated the sum of fifty dollars to be deposited in the Merchants & Planters Bank, of Pine Bluff, Arkansas, by the railway company, subject to the order of the court, and for compensation for right of way when the amount thereof shall have been assessed, and authorized it to take possession of a right of way fifty feet wide through and across the land when the deposit was made. The deposit was made as directed, and the railway company constructed its road over the land.

Dave Kelly and N. M. A. Kelly, the owners of the land, filed an answer, and alleged that the railway company, before the proceedings to condemn right of way were instituted, without their knowledge or consent, entered upon the land and cut timber thereon, to their damage; and that, since the proceedings were instituted, the railway company, through its agents and servants, set fire out on the land, and burned six panels of their fence, and caused stock to get into their fields and destroy their crops.

Some time after filing their answer, they were allowed to amend it as follows: "That the actual damage to the land is $100, caused by the building of its dump and damming up the creek and causing the land to overflow herein since the filing of this answer. It, through its agents and servants, has 45 other trees, to defendants' damages $22.50, cut and used in January, 1903, in repairing its bridges on its road established across our land and extending its spur, which it now has abandoned."

The railway company filed a motion to strike the answer and amendment from the files of the court, and a demurrer to the same, which were overruled.

Afterwards the railway company moved to dismiss its petition for a right of way over the land, saying that it had abandoned the right of way, and removed its tracks therefrom and restored the land to its original condition; and the court dismissed the petition.

The railway company having appropriated a part of the land for a right of way for a short time, the court caused a jury to be impaneled to assess the compensation to which the owners are entitled for such use. It allowed the owners to prove that timber was cut upon their land, and the value of it, without showing that it was on the right of way, and damage to their crops caused

by stock getting into the field through a gap in the fence burned by fire alleged to have been originated by the agents or servants of the railway company. Evidence to prove such damages was admitted without regard to their being any part of the compensation for the right of way. The court instructed the jury to allow to the owners the market value of the timber cut and of the crops destroyed as damages. The court erred in admitting such evidence and instructing the jury.

The proceeding prescribed by the statutes of this State for the condemnation of land for right of way for a railroad is special. Its sole object is to ascertain the compensation that the railroad company shall pay for the right of way. *Reynolds* v. *Railway Company,* 59 Ark. 171; *Mountain Park Terminal Railway Company* v. *Field,* 76 Ark. 239. The measure of damages allowed for the taking of land for right of way is the market value of the land so taken and the damage resulting to the owner's remaining land from the building of the road across it, and from floods or overflows caused by the construction of the same. *St. Louis, Arkansas & Texas Railway* v. *Anderson,* 39 Ark. 167; *Springfield & Memphis R. Co.* v. *Rhea,* 44 Ark. 258; *Springfield & Memphis R. Co.* v. *Henry,* 44 Ark. 360.

But in this case the right of way was never acquired. It was used for a short time and then abandoned. It would reasonably follow that the measure of damages in this case is the rental value of the land taken for right of way, in the condition in which it was when taken, for the time it was occupied, and the depreciation in the value thereof by reason of the timber cut and other acts done thereon by the railway company, and the damage resulting to the remainder of the owner's land from the building of the road across it, and from the flooding or overflow caused by the construction thereof, the time of the occupancy of the same considered.

For all other damages occasioned by torts committed or wrongs done by the railway company the owners have remedies in actions to recover the same.

Reverse and remand for a new trial.

WEIL v. FINERAN.

Opinion delivered February 24, 1906.

1. CONTRACT—RIGHT TO RECOVER ON QUANTUM MERUIT.—In a suit on a contract it was not error to refuse to permit plaintiff to recover upon a *quantum meruit*. (Page 91.)
2. SAME—ACCRUAL OF RIGHT OF ACTION.—Where an attorney was employed to conduct litigation for his client for an agreed compensation, and given a written power of attorney to that effect, and such power of attorney was subsequently revoked, it was not error to instruct the jury, in a suit by the attorney to recover under the contract, that, if the revocation of the power of attorney was intended as a dismissal of plaintiff, he was entitled to sue at once on the contract. (Page 92.)
3. FRAUD—BURDEN OF PROOF.—In a suit for breach of contract wherein the defense is that the contract was procured by misrepresentation or concealment of material facts amounting to fraud, the burden of establishing such matters of defense is upon the defendant. (Page 92.)
4. ATTORNEY AND CLIENT—GOOD FAITH.—In dealings with their clients attorneys are required to exercise the utmost good faith, and to disclose to them all information in their possession as to the material facts of the case which might influence the clients in executing contracts with them. (Page 92.)
5. DAMAGES—BREACH OF CONTRACT OF EMPLOYMENT.—Where an attorney is employed to render professional services, and holds himself ready to perform them, but is prevented by the client from doing so, the measure of his damages is the compensation agreed on, less such expenses as, in the natural course of things, he would have incurred in performing the services. (Page 92.)
6. INSTRUCTION—INVASION OF JURY'S PROVINCE.—It was error, in a suit against a client by an attorney to recover a fee under contract, to instruct the jury that if defendant was induced to employ plaintiff by a false representation as to a certain matter they might find for defendant, the vice of the instruction consisting in giving prominence to the specific representation and treating it as material as matter of law. (Page 92.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace*, Judge; reversed.

Weil, an attorney, sued Mrs. Fineran, to recover for professional services rendered her. His complaint contains two counts, substantially as follows:

"1. On or about May 1, 1898, defendant employed him to perform for her services in his individual and professional capac-

ity whereby he would have earned, and she have become indebted to him in, the sum of $1,000; and thereafter defendant refused to permit him to perform his part of the said contract, and thereby he became damaged in the sum of $1,000.

"2. That defendant is justly indebted to him upon open account for services by him to her rendered and money for her use by him expended at her personal request of the reasonable value and agreed sum of $1,000."

Appellee denied all the material allegations.

Plaintiff, an attorney at Chicago, Ill., testified that a woman called Madam Blanche Roland, whose real name was Margaret J. Greenwood, died intestate in Pine Bluff, Ark., leaving a valuable estate; that he undertook, at the suggestion of one H. King White, of that city, to locate her heirs; that, after expending about $50 in the search, he located the defendant, who was one of the intestate's four children, and had an interview with her. The result of this interview was that on July 28, 1898, defendant agreed to pay plaintiff $100 and 20 per cent. of her interest in her mother's estate, and executed a written power of attorney, authorizing him to collect her share in her mother's estate. Subsequently plaintiff was notified that defendant had revoked the power of attorney which she had given him. Plaintiff estimated the property left by intestate to be worth $23,870.15.

The defendant testified that she had an interview with the plaintiff; that he told her that her mother had died in Little Rock, leaving an estate; that she asked him what her mother was doing in Little Rock, and he replied that she was running a boarding house; that plaintiff then told her that he had been put to so much trouble and expense that he thought she ought to employ him as her attorney; that she stated that she did not know him, and would prefer to go to her own attorney. He then told her that he had been acting at the instance of the attorney of her mother's estate, and that thereupon she said: "All right."

It seems to be conceded that intestate, at the time of her death at Pine Bluff, was conducting a house of ill-fame.

The court instructed the jury as follows:

"2. If you find from a preponderance of the evidence that defendant did enter into a contract with plaintiff to pay him the sums of money expended by him in finding her, and a

$100 fee for his services in that connection, and the further sum of 20 per cent. of any share of her mother's estate which he might recover for her, and if you further find that said contract was made in good faith, and not procured by fraud, misrepresentation or concealment of material facts on the part of the plaintiff, and that afterwards the defendant revoked the power of attorney executed by her to plaintiff, then it is for you to say whether such revocation was intended by her and understood by him as dismissing him from the case, and denying him the right to proceed and carry out his part of the contract; if you should find that it was so intended and so understood by both parties, then you should find for plaintiff such sum in damages as you believe he is entitled to recover under the other instructions given herein.

"3. If you find that the agreement about which plaintiff testified was voluntarily entered into by the defendant, then the burden of showing that her consent to the same was procured by misrepresentation or concealment of material facts amounting to a fraud is upon the defendant.

"4. The burden is on the plaintiff to show by a preponderance of the evidence that the defendant entered into the contract with him on which this action is based and for the breach of which he asks for damages.

"5. Attorneys, in dealing with their clients, are required to exercise the highest order of good faith and to disclose to them all information in their possession as to the material facts of the case which would or might influence the client in entering into or refusing to execute the contract in the issue.

"6. The court instructs the jury, if they believe from the evidence that the plaintiff is entitled to recover, the measure of damages is the amount of money he would have received had he been allowed to complete the performance of his contract, less the value of such services as he would have been required to render, and also deducting any expense which he would have been compelled to incur in carrying out the contract on his part.

"7. If the jury find from the evidence that the defendant, Mrs. Fineran, was induced to enter into the contract of employment with the plaintiff, under statements made by the plaintiff at the time or immediately preceding the making of the same, in

which he falsely magnified the amount of work, labor and expense necessary to accomplish the purposes, or by any other false representation about the place of the death of Margaret J. Greenwood, or that he falsely represented to her that it was the wish of the attorneys of her mother's estate that she should sign or enter into such contract, or that he falsely represented to her any other material fact or concealed from her any information of which he had knowledge which would have aided her in determining as to whether or not such a contract was just or equitable, then the defendant had the right, upon the discovery of such misrepresentations being false, or that important information about the estate had been concealed or was not disclosed, to repudiate the contract, and she is not liable under the same, and the jury will so find."

There was a verdict for defendant. Plaintiff filed a motion for new trial, assigning the following errors:

"1. Because the court erred in refusing to allow plaintiff's counsel to propound to him, while upon the stand, the following question, and him to answer the same:

" 'I will ask you as an attorney, taking into consideration all that you have testified to as to the services you rendered and were performed by you, and considering the value of the estate, and what you did until the time she revoked the power of attorney—now tell the jury what your services were worth.'

"2. Because the court erred in refusing to allow plaintiff's counsel to propound to him, while upon the stand, the following question, and him to answer the same:

" 'Now, Mr. Weil, I will ask you the same question that I propounded to you, leaving out reference to the estate; now state to the jury what the value of your services were worth?'

"3. Because the court erred in refusing to allow plaintiff's counsel to propound to him, while upon the stand, the following question, and him to answer the same:

"Q. 'If that property is renting for $1,800, what would be its value, say, upon the idea that money is worth 10 per cent., or 8 per cent., what would it be paying?'

"4. Because the court erred in refusing to allow plaintiff's counsel to propound to him, while upon the stand, the following question, and him to answer the same:

"Q. 'Now, include that property at, say, a valuation of $9,000, put it back in the inventory where it is excluded; what would be the valuation of the estate?'

"5. Because the court erred in its theory in the trial of this cause in not allowing the question to be submitted to the jury as to the value of the services rendered by the plaintiff to the defendant.

"6. Because the court erred in giving instructions 2, 3, 4, 5, 6 and 7, in charge to the jury over the objection of plaintiff."

The motion for new trial was overruled. Plaintiff has appealed.

Irving Reinberger and *Taylor & Jones* for appellant.

1. Appellant was entitled to recover on a *quantum meruit.* 70 Ark. 509.

2. The court erred in its instruction No. 7. Defendant having received her first information of the estate and of the death of her mother from plaintiff, it was immaterial where the mother died.

White & Altheimer, for appellee.

This case was decided on first appeal on a state of facts different from the present record. 70 Ark. 509.

1. Appellant having sued, not to recover on a *quantum meruit,* but for breach of contract and employment, the measure of damages was the amount he would have received had he been permitted to carry out the contract, less the value of services he would have been required to render, and what it would have cost him, to complete the contract. 33 Ark. 545.

2. Correct information as to the place of death of the mother was material to the appellee, to enable her to investigate and protect her interests. Appellant's failure to give such information was a breach of the duty owing from attorney to client. 33 Ark. 456; 66 Ark. 195; 73 Ark. 575.

WOOD, J. This is the second appeal. *Weil* v. *Fineran,* 70 Ark. 509. On the first appeal the only question presented was whether the trial court erred in dismissing the action for the alleged reason that it was prematurely brought. On that appeal we held that the suit was not prematurely brought, and that the lower court erred in dismissing the action. The court

did not err in treating the action as a suit for breach of the contract, and in refusing to permit appellant to recover on a *quantum meruit.* Appellant had not elected to treat the contract as rescinded, but, on the contrary, his complaint shows that he was suing for a breach of the contract, and he was asking for damages accordingly. True, we said on the former appeal: "The appellant sued for breach of contract. He was entitled to recover on a *quantum meruit.*" This clause, "He was entitled to recover on a *quantum meruit,*" doubtless misled the learned counsel for appellant to contend below and urge here that appellant should be allowed to recover for the value of his services rendered appellee. But the clause mentioned was an *obiter dictum,* as the issue presented on the former appeal clearly shows. In the present trial the lower court apprehended the issue.

No error in the court's rulings is presented by assignments of error 1, 2, 3, 4 and 5 of the motion for new trial. We find no error in the giving of the instructions numbered 2, 3, 4 and 5. The instructions properly presented the law applicable to the issue and the facts in evidence. The court erred, however, in giving instruction No. 6 as to measure of damages. *Brodie* v. *Watkins,* 33 Ark. 545. See also, *Van Winkle* v. *Satterfield,* 58 Ark. 621, on the issue of the breach of contract and the measure of damages therefor. See *Brodie* v. *Watkins, supra,* and *Webber* v. *Davis,* 66 Ark. 195, and *Thweatt* v. *Freeman,* 73 Ark. 575, on the question of the duty of good faith from the attorney to his client.

The court erred, also, in giving instruction 7 at the request of appellee. That instruction was objectionable in telling the jury that, if Mrs. Fineran was induced to enter into the contract with Weil by the "false representation about the place of the death of Margaret J. Greenwood," they might find in favor of appellee. There is nothing in the record to warrant the conclusion that appellee was induced to enter the contract on account of a false representation by appellant of the place of the death of appellee's mother, Mrs. Greenwood. Under the undisputed facts of the record, such a representation was wholly immaterial, and could not have been an inducement for entering upon the contract. There is nothing to show that appellee acted upon such representation, that she was led by it into a course of conduct that she otherwise would not have pursued, and that was prejudicial to her

interests. It is not shown that she was deceived by it, and prevented from getting information that she otherwise might have obtained that would have been beneficial to her interests. On the contrary, the undisputed evidence shows that appellee received the first information of her mother's death and of her own status with reference to the estate from the appellant. Therefore, we do not see from this record how it was material whether appellee's mother died in Pine Bluff or Little Rock. But, if it was material, appellee does not show how it was material, and how she was prejudiced by it. Yet the court treats this specific and particular representation as material in the case. The court points it out, and tells the jury that if it was false and induced the contract appellee was not liable. The instruction in this respect, we think, was highly prejudicial, because the jury may have found in favor of appellant on other alleged matters of false representation, about which there was a conflict in the evidence, and found in favor of appellee upon this one. The vice of the instruction is in giving prominence to this specific representation, and treating it as material to the contract, when there is no proof to show that it was. The question is not even submitted to the jury as to whether it was a material representation or not. The court assumes that it was.

For these errors the judgment must be reversed, and the cause remanded for new trial.

DAWSON v. OWEN.

Opinion delivered February 24, 1906.

BILLS AND NOTES—PAYMENT.—A defendant, sued on a note in justice's court, may, under an oral plea of payment, show that the note was paid by delivering to plaintiff a deed to a certain tract of land.

Appeal from Columbia Circuit Court; *Charles W. Smith,* Judge; affirmed.

Stevens & Stevens, for appellant.

It was error to permit the introduction of the deed in evidence to establish the plea of payment. Under a plea of payment, evidence of accord and satisfaction is inadmissible. 1 Cyc. 342; 24 So. 994; 57 Pac. 757; 9 N. E. 736; 16 Ark. 651. In the absence of proof that defendant had a valid title, or that he or plaintiff was in possession of the land, the deed as offered was incompetent. Sedgwick, Trial. Tit. to Land, § 792; 48 N. E. 922. An unrecorded deed is not admissible in evidence. Kirby's Digest, § 756; 40 Ark. 237. Nor is the certificate of acknowledgment evidence of execution. 38 Ark. 278. Testimony and admissions of maker of a deed are generally not admissible if it is possible to produce subscribing witnesses. 11 Am. & Eng. Enc. Law, 592; *Ib.* 493; Kirby's Digest, § 742; 2 Ark. 328. A husband can not attest wife's signature. 9 Am. & Eng. Enc. Law, 148; 21 Am. Dec. 695. To sustain a plea of payment, the defendant must show either that he paid the debt in money, or, if he paid in property, that it discharged the debt, and was accepted by the plaintiff as such payment. 3 Elliott, Ev. § 2576; 45 N. E. 518; 41 N. E. 70; 46 N. E. 537; 47 N. E. 850; 39 Am. St. Rep. 311; *Ib.* 776.

WOOD, J. The only grounds of the motion for new trial insisted upon here relate to the alleged error of the court in permitting a certain deed to be introduced as evidence. Appellant offers various reasons why this deed was not competent, none of which were tenable. The first is that under a plea of payment evidence of accord and satisfaction is not admissible. But there were no written pleadings, and appellee's oral plea was no more a plea of payment than it was a plea of accord and satisfaction. His plea was "payment of the debt, and denying that he owes the debt." That was no formal plea of payment, and under the oral plea of *nil debet,* which appellant did not object to, appellee could introduce any proof to show that he did not owe the debt. The evidence showed that appellee claimed that he paid the note by delivering to appellant a deed to a certain tract of land, and that appellant had accepted this deed in payment of his debt. The question presented to the jury was whether or not appellee had delivered, and appellant had accepted, a certain deed to certain land in settlement of the note sued on. The question was not, as appellant contends, whether the deed for various reasons, as assigned by appellant, was sufficient in law to transfer the title

to the land. The jury on the question of fact has decided in favor of appellee, and there was evidence sufficient here to support the verdict.

Affirm.

COTTONWOOD LUMBER COMPANY *v.* HARDIN.

Opinion delivered February 24, 1906.

1. DECISION—STARE DECISIS.—The holding in *Towson* v. *Denson,* 74 Ark. 303, that the payment of taxes on unimproved and unenclosed land for seven years in succession, at least three of which were made since the passage of the act of March 18, 1899 (Kirby's Digest, § 5057), operates as an investiture of title has become a rule of property. (Page 97.)
2. CONSTITUTIONAL LAW—VESTED RIGHTS.—Kirby's Digest, § 5057, providing, in effect, that the payment of taxes on unimproved and unenclosed land for seven years in succession, at least three of which are made subsequent to the passage of the act, shall operate as an investiture of title, is not unconstitutional as an arbitrary divestiture of vested rights. (Page 98.)

Appeal from Lee Circuit Court; *Hance N. Hutton,* Judge; reversed.

STATEMENT BY THE COURT.

This is an action of ejectment by W. F. Hardin against the Cottonwood Lumber Company to recover land in Lee County. The plaintiff inherited the land from one W. F. Hardin, who held it by mesne conveyance from the Government.

The defendant company and their grantors had claimed the land under color of title from 1870 to the time of action, and they had paid taxes continuously from 1870 to 1902, inclusive. The defendant alleged that it and its grantors had held the land adversely under color of title for more than seven years, and pleaded the seven years' statute of limitations. The defendant asked and the court refused to give the following instruction:

"Under the act of March 18, 1899, entitled 'An act for the protection of those who pay taxes on land,' the payment of taxes

on land by one who has color of title for seven years in succession up to the commencement of the action, at least three of such payments having been made since the passage of said act, operates as a complete investiture of title by limitation, and, under the undisputed facts in this case, the verdict must be for the defendants."

The court then of its own motion, over the objections of defendant, orally declared the law to be as follows: "Under act of March 18, 1899, where a person under color of title to unoccupied and unimproved lands has paid taxes thereon for seven years in succession, at least three of which payments being after the passage of said act, his possession is deemed to commence only from the date of the last, and not the first, payment, and that the plea of the seven years' statute of limitations can not be successfully made before the expiration of seven years from the date of the seventh payment."

The court thereupon found in favor of plaintiff, and gave judgment accordingly.

P. D. McCulloch and *Austin & Danaher,* for appellant.

This case is controlled by a former decision of this court, 74 Ark. 303, which has become a fixed rule of property, and ought not to be disturbed. 26 Am. & Eng. Enc. Law, 181; 47 Ark. 359; 55 Ark. 192; 22 Ark. 19; 44 Ark. 270; 59 Ark. 333.

H. F. Roleson, for appellees.

The act is retroactive, and therefore unconstitutional. 2 Greenleaf, 275; 11 Am. Dec. 79; Const. U. S., art. 5, Amendment XIV, § 1; art. 2, sec. 22, Const. 1874; 14 How. 488; 6 How. 332.

P. D. McCulloch and *Austin & Danaher,* for appellant, in reply.

The act is not wholly retroactive, but allows a reasonable time after its passage within which owners could pay the taxes and break the continuity of payments of those who might have been paying prior thereto. Such statutes are held as valid. 2 Lewis, Sutherland's Stat. Const. § 674; 41 Miss. 71; 94 U. S. 134. Limitation laws which operate on subsisting contracts, and laws regulating the registration of conveyances, are valid when a reasonable time is given within which the effect of the statute may be avoided and rendered harmless in respect to vested rights.

3 Am. St. Rep. 659; 95 U. S. 628; 168 U. S. 90; 177 U. S. 318; 185 U. S. 57; 162 N. Y. 371.

RIDDICK, J., (after stating the facts.) This is an appeal by the defendant, Cottonwood Lumber Company, from a judgment rendered against it in favor of W. F. Hardin for the recovery of a tract of land in Lee County. The defense of the lumber company against the action brought by Hardin to recover this land was based on the act of 1899 in reference to tax payments on wild and unoccupied land, but the case was decided by the circuit judge before the recent decision of this court in *Towson* v. *Denson,* 74 Ark. 303, in which the meaning and effect of that statute was declared and explained. By reference to the statement of the facts in this case, it will be seen that the learned circuit judge held the same opinion in reference to the meaning of the act as was held by the judges who dissented in *Towson* v. *Denson.* I concurred in the dissenting opinion delivered by Chief Justice HILL in that case, and, but for the decision of the court in that case, I should concur in the ruling of the circuit court in this case. But the judgment of this court in *Towson* v. *Denson* was rendered after argument and a careful consideration of the question presented. The question decided in that case was not one of principle, but related only to the proper interpretation of an act of the Legislature. As the meaning of the act was not clear, and as the decision was made after a full consideration of the arguments of learned counsel, I feel bound thereby, for the decision became a rule of property, which should not now be overturned unless the statute, as interpreted by the court, is unconstitutional.

The only question, then, in this case is whether the statute of 1899 in reference to the effect of payment of taxes on wild and unoccupied land is unconstitutional and void. After consideration of the question, we do not think that this contention can be sustained. Taking the act to mean what the court said it meant in *Towson* v. *Denson,* still we think the cases cited by counsel for appellant show that it is a valid law. The act declares that unimproved and uninclosed lands shall be deemed and held to be in the possession of the person who pays taxes thereon, and it contains the provision that "no person shall be entitled to invoke the benefit of the act unless he and those under whom he claims

shall have paid such taxes for at least seven years in succession, and not less than three of such payments must be made subsequent to the passage of this act." Kirby's Digest, § 5057. Were it not for the clause that requires that at least three of the tax payments must have been made after the passage of the act, it would, under the construction given it by the court in *Towson* v. *Denson,* 74 Ark. *supra,* have been clearly unconstitutional, so far as it was retrospective in character; for, if valid, it would then have divested the title of land from many of those who had neglected to pay taxes thereon and vested it in the persons who had paid these taxes continuously for seven years or over under color of title.

But when we consider this provision of the act which requires that at least three of the tax payments must have been made subsequent to the passage of this act, we can not say that the act arbitrarily attempts to divest the title of land from owners who had not paid taxes thereon, and vest it in those who had paid taxes thereon continuously for over seven years, for the provision referred to gave owners of land who had not paid taxes at least two years in which to pay taxes and obviate the effect of the statute. This provision of the act brings it within the scope and reason of those decisions that hold that limitation laws and laws regulating the registration of deeds are not unconstitutional when a reasonable time is given within which the effect of such a statute as it applies to rights of action already existing or to existing conveyances may be avoided and rendered harmless in respect to vested rights. *Munn* v. *Illinois,* 94 U. S. 134; *Turner* v. *New York,* 168 U. S. 90; *Saranac Land & Timber Co.* v. *Comptroller,* 177 U. S. 318.

As in our opinion the act of March 18, 1899, was a valid law, it follows, from the decision of the court in *Towson* v. *Denson, supra,* under the undisputed facts in the case which show a continuous payment of taxes by defendant and those under whom he holds for over thirty years under color of title and claim of ownership to the land adverse to the claim of plaintiff, that the judgment should be for the defendant.

Reversed and remanded, with an order that judgment be rendered accordingly.

McCULLOCH, J., did not participate.

78 99
c79 99

RUCKER v. DIXON.

Opinion delivered March 3, 1906.

TAX PURCHASE—CONSTRUCTIVE POSSESSION.—One who, under a void tax deed, goes into actual possession of part of the land, which is otherwise unoccupied, has constructive possession of the remainder of the tract sufficient to give title to the whole tract under the statute of limitations.

Appeal from Mississippi Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

S. S. Semmes, for appellant.

Actual possession of a portion of the land in controversy was constructive possession of the whole tract described in the deed, and adverse possession thereof by appellants for two years gave title to the whole. 71 Ark. 122; *Ib.* 393.

McCULLOCH, J. This was a suit in equity brought by Mary C. Dixon against A. G. Rucker, E. E. Rucker, A. H. Gress and Lizzie Phillips to cancel and remove, as a cloud upon the plaintiff's title to a quarter section of land in Mississippi County, a donation deed executed by the State Land Commissioner to one Crabtree, under whom the defendants claim title by mesne conveyances. The forfeiture for taxes upon which the State's donation deed is based is alleged to be void for the reasons set forth in the complaint. The defendants filed separate answers pleading adverse occupancy of the land under the donation deed to Crabtree for more than two years next before the commencement of the suit. It is conceded that the forfeiture for taxes was void. The chancellor, upon proof and agreement between counsel as to the facts, found that defendants had held actual possession of a part of the land under the donation deed for more than two years before the commencement of the suit, and dismissed the complaint as to such part of the land so held, but rendered a decree awarding to plaintiff the portion of the land not in actual occupancy.

The case is controlled by the case of *Sparks* v. *Farish,* 71 Ark. 117, which was decided by this court since the decree below. See also *Boynton* v. *Ashabranner,* 75 Ark. 514. It was there held that actual possession of part of a tract under a

donation deed describing the whole carried the constructive possession to the limits of the boundary described in the deed, so as to sustain a plea of adverse possession of the whole tract.

The decree is therefore reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

SAINT LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. JACKSON.

Opinion delivered March 3, 1906.

1. INSTRUCTIONS—GENERALITY.—One is not in position to complain of the generality of the court's charge to the jury if he failed to ask for proper instructions of a more specific nature. (Page 105.)
2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Where a servant is engaged in performing service for the master under circumstances which justify him in assuming that ordinary care will be observed to warn him of approaching danger, he is required to exercise only such care and vigilance in discovering peril and avoiding injury as is consistent with the performance of the work in which he is engaged. (Page 106.)
3. SAME—WHEN QUESTION OF CONTRIBUTORY NEGLIGENCE FOR JURY.—Where a track repairer was killed by an approaching train while he was engaged with his back to the train in tamping gravel under the ties, there being evidence that it was customary for signals to be given to laborers on the track of the approach of trains, the court could not say, as a matter of law, that deceased was guilty of negligence, but properly left it to the jury to determine from all the circumstances whether he was in the exercise of due care. (Page 106.)
4. SAME—NEGLIGENCE OF MASTER—FAILURE TO KEEP LOOKOUT.—Under the general rule that a master must exercise ordinary care to furnish the servant a safe place in which to work and to protect him from danger, it was properly left for the jury to say whether a railroad company was negligent in pushing a train of cars on to the track where deceased and other laborers were at work without having a flagman in front to keep a lookout and give signals of danger. (Page 109.)

Appeal from Franklin Circuit Court; *Jeptha H. Evans*, Judge; affirmed.

STATEMENT BY THE COURT.

This is an action brought by John E. Jackson, as administrator of the estate of Sam Jackson, deceased, to recover damages for the alleged negligent killing of plaintiff's intestate. Deceased was employed by the company as a laborer doing track and grade work, and while at his work was run over by a train of empty cars pushed by an engine. From the injury sustained it is alleged that he suffered great pain and died in about two hours thereafter. Negligence of the servants of defendant is alleged in failing to give warning, by bell or whistle, of the approach of the train, and by failing to station a flagman or watchman on the end of the train to warn the men at work on the track of the approach of the train.

The defendant answered, denying all the charges of negligence of its servants and alleging contributory negligence on the part of the deceased.

The injury occurred on November 16, 1903, near Mulberry Station, in Franklin County, where the defendant company was engaged in reconstructing its line of road and lowering the grade line. A steam shovel was operated at the place in cutting through a hill. The track on which the steam shovel was being operated had become soft and muddy from recent rains, and a large number of laborers (including deceased) were engaged in putting in gravel and sand under the ties to support the track.

Two locomotives were engaged at the place, one in hauling out the cars which had been loaded with dirt by the shovel, and the other in setting in the empty cars to be loaded, and in moving them forward as they were loaded. One engine had pulled out a long string of loaded cars, and backed them down upon a passing track, when the other engine pushed a line of empty cars upon the track where deceased and the other laborers were at work. The speed of the train was variously estimated by the witnesses at from twelve to twenty-five miles per hour. Deceased and three other men were engaged, two and two facing each other, in putting gravel and sand under a cross tie, deceased having his back to the approaching train when he was run over. Three of the men were killed, and the survivor was injured. The right arm of deceased was cut off, his cheek bone and breast bone crushed,

all the ribs on his left side broken and a hole punched in his back. He was placed in a car immediately, and taken to Mulberry, where he expired about the time the car arrived.

The survivor of the three men at work with deceased testified at the trial, and gave a detailed account of the occurrence. He said that the four men were at the time stooping over, tamping gravel and sand under the cross tie, were engaged in talking, and did not pay any attention to the approach of the train; that the train did not make much noise as it approached. He testified that he heard no signal or warning of the approach of the train, and saw no one on the end of the train. On cross-examination he was asked whether or not the men were engaged in conversation, and replied: "I do not recollect; could not tell you positively; expect maybe we were; we were always talking; I never worked in a gang in my life that were not always talking and laughing." The following question was asked him and answer returned: Q. "State to the jury if in tamping ties it does not require all your time and attention to look after that?" A. "It requires a whole lot of time and attention to look after that." He further stated that it was customary, when the engine was moving cars, to give signals by ringing the bell, and to keep a man posted on the end of the train.

Other evidence tended to show that no signal was given by bell or whistle, and no lookout kept from the front end of the train. There was also evidence tending to show that the foreman gave instructions to the men generally to keep out of the way of trains.

The following rule of the company was introduced in evidence, viz.: "When cars are pushed by an engine (except when shifting and making up trains in yards), a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

There was evidence to the effect that orders were issued daily for the two engines operated at that place to work between the stations, Dyer and Mulberry, as working limits, and that yard rules were considered as applicable between these limits.

The court, of its own motion, gave to the jury the following, which were all the instructions given:

"1. The defendant owed to the plaintiff's intestate the duty

to use ordinary care and prudence, considering the perils, dangers and necessities of the situation, to provide a reasonably safe place for plaintiff's intestate to carry on his work, but was not an insurer of his safety. Ordinary care is that care that an ordinarily prudent and careful man would have used under the circumstances given in proof. If the defendant used such care, then it is not liable in this action. If it failed to use such care to provide such a place to work, and by reason of such failure conscious suffering of plaintiff's intestate proximately resulted, then you will find for the plaintiff, unless it should appear also that plaintiff's intestate was lacking in such care for his own safety as an ordinarily prudent and careful person under all the circumstances would have exercised, in which case you should find for the defendant.

"2. If you find for the plaintiff, you will assess the damages at such a sum, not exceeding the amount claimed in the complaint, as from the evidence you may believe to be fair compensation for such conscious suffering, if such conscious suffering is shown by the proof.

"3. Contributory negligence is such a want of care on the part of plaintiff's intestate for his own safety as an ordinarily prudent and careful person would have exercised under all the circumstances, and which caused or contributed to the injury sued for in this action. The burden of showing contributory negligence is on the defendant, unless it sufficiently appears from the evidence submitted on the part of the plaintiff.

"4. Plaintiff's intestate was required to use his own senses, and to take notice of those things which an ordinarily careful and prudent person, situated as he was, would have observed, by a proper use of his senses in connection with his duties as an employee of defendant, pursuing his labor in defendant's behalf; and in this case if you find from a preponderance of the evidence that plaintiff's intestate did not do so, plaintiff can not recover. But if such is not shown, then plaintiff is not barred from a recovery on the ground of contributory negligence of his intestate.

"5. If plaintiff's intestate was absorbed in the performance of the duties of his employment, and was thus oblivious to danger, and did not see and did not hear the train approaching him, and if a man of ordinary prudence and care for his own safety, situated as plaintiff's intestate was, would have been so absorbed, so

oblivious to his surroundings, and would not have seen and would not have heard the train approaching, then plaintiff's intestate was not guilty of contributory negligence which would bar a recovery in this case.

"6. The burden of proving a want of ordinary care on the part of defendant to provide a reasonably safe place for plaintiff's intestate to work is on the plaintiff, and this must appear from a preponderance of the evidence to authorize a recovery. And the burden is on the defendant to show by a preponderance of the evidence contributory negligence which will defeat a recovery, unless such contributory negligence appears from a preponderance of the evidence submitted by the plaintiff; and if contributory negligence appears from the proof on either side, you will find for the defendant, although you may also find that defendant was guilty of negligence."

The jury returned a verdict in favor of plaintiff, assessing damages in the sum of $500, and the defendant appealed.

Oscar L. Miles, for appellant.

The case should be reversed and dismissed because (1) the records show that the company was not guilty of negligence; (2) that deceased was guilty of contributory negligence, and (3) that there was no conscious suffering on the part of deceased after he received the injury. Further, the case should be reversed and remanded because the court erred in giving its instruction numbered 5, and in refusing to give instructions numbered 1, 2, 3, 4, 5 and 6 asked by by defendant, and in refusing generally to submit defendant's theory of the case to the jury.

Sam R. Chew, for appellee.

1. It is the master's duty to provide the servant with a reasonably safe place in which to work, and to exercise ordinary care and caution to maintain it in a reasonably and ordinarily safe condition.

2. Though the master is not an insurer of the safety of his servant, he must exercise ordinary care, diligence and caution to see that the place where the servant is required to work is kept in an ordinarily and reasonably safe condition.

3. The servant is required to exercise ordinary care and

caution for his own safety; and if a failure therein proximately caused the injury, this is a contributory negligence on his part, and he can not recover.

4. If, through the negligence of the master, the servant is injured and dies, having suffered conscious mental and physical pain, the cause of action survives to his administrator. Bailey on Masters' Liability to Servants, 2 *et seq*; 1 Shear. & Red. on Neg. § 189; 53 Ark. 117; 35 Ark. 602; 44 Ark. 524; 48 Ark. 333; 46 Ark. 555; 18 S. W. 172; 48 Ark. 174; 68 Ark. 1.

5. Deceased, being where his work required him to be, had the right to proceed with his work and rely upon those in charge of approaching trains to give him timely warning. 2 Thompson on Neg. § 1756; 5 L. R. A. 786; 18 Am. & Eng. R. Cas. 56; 130 Ind. 170; 80 Iowa, 757; 64 S. W. 1.

McCULLOCH, J., (after stating the facts.) 1. It is urged by counsel, apparently with much confidence, that the charge of the court was too general, and failed to direct the attention of the jury specifically to the issues involved. We do not agree with him; but, conceding the correctness of this contention, still appellant is in no position to complain unless proper instructions were asked of a more specific nature. *McGee* v. *Smitherman*, 69 Ark. 632; *Fordyce* v. *Jackson*, 56 Ark. 594. As will be hereafter seen, the instructions asked by appellant were not correct declarations of the law. In *St. Louis & San Francisco R. Co.* v. *Crabtree*, 69 Ark. 134, this court said that "each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no ground for misapprehension or mistake;" but in that case a specific instruction was asked by the appellant, and this court held that it was error "for the trial judge to refuse to give a specific instruction correctly and clearly applying the law to the facts in the case, even though the law is in a general way covered by the charge given."

2. Error of the court is assigned in giving the fifth instruction, and also in refusing to give the following instructions asked by appellant:

"(1) If you find from the evidence in this case that the foreman of the 'track gang,' in which deceased was working, had instructed all his men to watch out for trains moving over the

tracks on which they were working, to the end that such track hands might not be injured by such movement of trains, that deceased at the moment when he was struck and injured was not paying any attention to the movement of the train, which was in plain view and approaching on the track on which he was working, if you find it was in plain view and approaching, you will find for the defendant.

"(2) If you find from the evidence that the deceased, by looking or listening for the approach of the train which struck and injured him, could have seen or heard such train and avoided being injured by it, you will find for the defendant."

The third instruction asked by appellant was in general terms on the subject of contributory negligence, and was fully covered by the instructions given by the court on that subject.

The fifth instruction given by the court must be considered in connection with the fourth, which was also given, wherein the jury was told that "plaintiff's intestate was required to use his own senses, and to take notice of those things which an ordinarily careful and prudent person situated as he was would have observed, by a proper use of his senses, in connection with his duties as an employee of defendant, pursuing his labor in defendant's behalf." Taking the two instructions together, they told the jury, in effect, that deceased was bound to exercise ordinary care to discover the peril and avoid injury, and in doing so he must make such use of his senses as was reasonably consistent with the performance of his duty to his employer. Is this a correct declaration of the law, or can it be said, as a matter of law, that deceased was guilty of contributory negligence because he failed to constantly look and listen for the approach of a train?

Mr. Labatt, in summing up the effect of the decisions on the subject of the degree of care for his own safety due by a servant in performing the master's work, says: "Where the servant failed to take such precautions as were appropriate for the purpose of protecting himself at the moment when the accident occurred, evidence that such failure was due to the fact that his attention was engrossed by his duties is always competent for the purpose of rebutting the inference of contributory negligence which might otherwise be drawn from his conduct; and if such evidence is offered, a court is very seldom justified in declaring

him to have been, as a matter of law, wanting in proper care. * * * Whenever the facts in evidence are such that the servant's temporary forgetfulness of the conditions may possibly be an excuse for conduct which would otherwise be culpable, the jury should receive appropriate instructions upon the subject." 1 Labatt on Master & Servant, § 350.

It is true the same author says that this doctrine applies only when "the circumstances were either such as to create a situation approaching to or constituting an emergency, or such as to exhibit the servant in the light of a person who was discharging a duty which demanded an unusual amount of attention," and not "where he was merely discharging, under normal conditions, some ordinary function incident to his employment." 1 Labatt, § 351. But in the last-noted statement the author refers to a class of cases where the servant, on account of forgetfulness or inadvertence, negligently places himself in a position of danger, and not where, by reason of his absorption in his work, he becomes oblivious of a dangerous condition created by the negligent act of the master or his servants whose duty it is to give notice of danger.

Mr. Thompson, in his treatise on Negligence (vol. 2, § 1756) in discussing the duty of track repairers, track walkers and like employees of railroad companies, says: "As a general rule, it is not contributory negligence, as a matter of law, for a person so employed not to be on a constant lookout for approaching trains. This must be so if we are to pay the slightest attention to the position of a man who is fastening a fish-plate, or who is oiling or repairing the wheel of a car in a passenger train which has stopped temporarily at a station for that purpose. Such a person can not keep his eyes on his work and at the same time keep them strained in both directions for approaching trains or for ocular signals. Such persons are, therefore, not blameworthy, as a matter of law, merely because they become so engrossed in their work as not to heed the approach of a train, or because they rely upon the reasonable expectation that the railway company will, through its trainmen, perform the duty of giving them the necessary and proper signals. But it does not follow from these considerations that contributory negligence will be wholly excused, even in persons so engaged." This statement of the law is well

supported by adjudged cases. *Goodfellow* v. *Boston, etc., R. Co.,* 106 Mass. 461; *Ferren* v. *Old Colony R. Co.,* 143 Mass. 197; *Austin* v. *Fitchburg R. Co.,* 172 Mass. 484; *Northern Pac. R. Co.* v. *Everett,* 152 U. S. 107; *Bluedorn* v. *Mo. Pac. Ry. Co.,* 108 Mo. 439; *Houston & T. C. R. Co.* v. *Smith* (Tex.), 51 S. W. 506; *Tobey* v. *Burlington, C. R. & N. R. Co.,* 94 Iowa, 256; *Shoner* v. *Penn. Ry. Co.,* 130 Ind. 170.

The doctrine stated is recognized by this court, in a somewhat different application, in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Higgins,* 53 Ark. 458, where the court said that, in determining whether an employee "has failed to exercise due care in exposing himself to danger, it is always necessary to take into consideration the exigencies and circumstances under which he acted. If the service which he undertook to perform was required by a repairer, and was such as to demand his exclusive attention, and that he should act with rapidity and promptness, it would be unreasonable to require of him that care, thought and scrutiny which might be exacted when there is time for observation and deliberation."

While the application of the doctrine is different in that case, it serves to illustrate the true rule that where the servant is engaged in performing service for the master under circumstances which justify him in assuming that ordinary care will be observed to warn him of approaching danger, he is required to exercise only such care and vigilance in discovering peril and avoiding injury as is consistent with the performance of the work in which he is engaged. Any other rule would place the servant while performing work for the master in the same category as a trespasser upon the premises of the master.

In *Bauer* v. *St. Louis, I. M. & So. Ry. Co.,* 46 Ark. 388, where a car inspector was injured while crossing from one track to another (not being engaged at the moment in the performance of a duty requiring his attention) was run over and killed by a passing train, this court held that he was guilty of contributory negligence, and in the opinion the court quoted with approval the language of Judge Shiras in *Holland* v. *C., M. & St. P. Ry. Co.,* 18 Fed. 243, that "the rule is still recognized by the courts that the employee is not relieved from exercising the care which he should exercise considering the work in which he is engaged."

Now, in the case at bar there was affirmative evidence to the effect that the work of tamping gravel under the ties required some care and attention, and that plaintiff's intestate was stooping over, engaged in this work with his back to the approaching train. It was also shown that it was customary for signals to be given by bell and whistle to laborers at work on the track, and to keep a flagman posted on the front end of moving trains. Under this state of the proof it was not proper for the court to instruct the jury that it was the duty of the servant to constantly look and listen for the approach of trains.

The two instructions given by the court properly, we think, submitted the question of due care of deceased. It was properly a question for the jury to say from all the circumstances whether or not deceased was guilty of contributory negligence. The court could not say as a matter of law that he was guilty of negligence because he failed to discover the approaching train in time to step off the track and avoid the injury.

The Supreme Court of Indiana, in *Shoner* v. *Penn. Ry. Co., supra,* the same being a suit for damages where a section hand was run over at a crossing, after speaking of the duty of the engineer to give signals of the approach of the train, said: "While this would not absolve him (the section hand who was injured) from the necessity of using reasonable care, proportioned to the dangers incident to his work and the place where he was working, it is, of course, apparent that the rule applicable to the traveler on the highway approaching a railroad crossing can not be applied to him. His duty requires him to give attention to his work. Can the court say, as a matter of law, how often he should turn from his work to look for approaching trains? He looked when he commenced work, and saw the track was clear. He then worked five or six minutes without looking, and was hurt. Can the court say, under such circumstances, that the inference of contributory negligence is conclusive and sufficient to overthrow the general verdict? We think not."

3. It is insisted that the cause should be reversed because of the refusal of the court to give the following instruction:

"4. If you find from the evidence in this case that at the time deceased was struck and injured the point on the tracks where he was injured was by the defendant thrown or created into

a working district which was under the regulations of the yards of the defendant where trains are shifted and made up, that, under the regulations applicable to such yards, it is not necessary to have a man on the front car of a train backing by the engine shoving from the rear, then it was not necessary to have a man on the rear car of the train which struck and injured the deceased, and negligence can not be predicated upon the absence of such person from such position."

This instruction was properly refused because it told the jury that, as a matter of law, the company owed no duty to its employees at work on the track to keep a flagman posted on the end of moving trains to warn them of approaching danger. The train of cars which ran over deceased was being pushed onto the track by the engine in order to put them into position to be filled with dirt from the steam shovel, and, even if it can be said that the engine was then engaged in "shifting and making up trains in yards," within the meaning of the exception to rule number 102, still this does not operate as an exemption from all duty to post a flagman on the end of moving trains in order to warn laborers on the track, if ordinary care requires that to be done. No rule of the company was proved exempting it from such duty, and, under the well-established doctrine that the master must exercise ordinary care to furnish the servant a safe place in which to work and to protect him from danger, it was for the jury to say whether this duty was performed when a train of cars was pushed on to the track where laborers were at work, without having a flagman on the front end to keep a lookout and give signals of danger.

4. Counsel contends that there was no proof of conscious suffering on the part of the deceased, and that, under the rule announced in *St. Louis, I. M. & S. Ry. Co.* v. *Dawson,* 68 Ark. 1, that the burden is upon the plaintiff to show affirmatively that such suffering was endured, the case must be reversed. Without setting out the evidence on this point, we deem it sufficient to say that we find ample proof of conscious suffering, and that the jury were justified in arriving at the conclusion recorded in their verdict.

We find no error, and the judgment is affirmed.

REEDER v. MEREDITH.

78 111
84 558

Opinion delivered March 3, 1906.

1. TRUST—ADMINISTRATION.—An administrator is a trustee for all who are interested in the estate which he has in charge to administer. (Page 114.)
2. SAME—WHEN PURCHASE BY TRUSTEE UPHELD.—To the general rule that a trustee can not buy from the beneficiary an exception exists where there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances, and where there is a fair compensation without fraud, concealment or advantage taken by the trustee of information acquired by him in the character of trustee. (Page 114.)
3. TRUST—RELATION OF CONFIDENCE.—In business dealings between a brother and sister, the dependence of the sister upon the brother and her confidence that he would do right made it imperative that he should use the utmost good faith. (Page 116.)
4. DEED—VALIDITY—APPORTIONMENT.—Where a deed of conveyance is entire, and is voidable in part on account of fraud, it is voidable as to all, there being no apportionment. (Page 116.)
5. TRUST—IMPROVEMENTS.—In an action by an heir to set aside a purchase by the administrator of lands of the estate, the defendant is not entitled to credit for improvements placed on the lands under contract with the widow and paid for by her. (Page 117.)
6. SAME—IMPROVEMENTS—GOOD FAITH.—Where a trust is enforced against a purchaser of land, he is not entitled to compensation for improvements placed by him thereon if his purchase was made in bad faith. (Page 117.)
7. SAME—TENDER OF CONSIDERATION RECEIVED.—Where the administrator bought the interest of an heir in the ancestral estate, and was sued by the latter to enforce a trust as to part of the property purchased, it was unnecessary for the heir to tender the consideration received if the administrator had realized from the residue of the property more than he paid for all of it. (Page 117.)
8. SAME—ACCOUNTING FOR PROFITS.—Where an administrator purchased from an heir of the estate (1) the heir's reversionary interest in the dower and homestead lands, and (2) such heir's interest in the residue of the lands, and the heir sued to enforce a trust as to the first class of lands only, the heir is not entitled to an accounting by the administrator of his profits upon the second class of lands. (Page 117.)

Appeal from Howard Chancery Court; *James D. Shaver*, Chancellor; affirmed.

Annie Meredith, one of the four daughters of Sam Reeder, who died intestate, sued her brother, W. S. Reeder, who was

administrator of the estate of their father, alleging that at his death her father owned the following land, towit: "The southeast quarter of the northeast quarter; the north half of the northwest quarter; the southeast quarter of the northwest quarter; the north half of the southwest quarter; the southeast quarter of the southwest quarter, all in section 19, and the northeast quarter of the southwest quarter of section 20, all in township 11 south, range 27 west. That of the lands belonging to her father the following, towit: The south half of the northeast quarter; the northeast quarter of the northeast quarter and the east half of the northwest quarter, of section 19, and the northeast quarter of the southwest quarter of section 20, all in township 11 south, range 27 west, were set apart and assigned to L. C. Reeder, wife to the said Sam Reeder, as her dower and homestead. That defendant approached plaintiff, being at the time administrator as aforesaid, to buy all her interest in the said estate except the dower and homestead, which had been assigned to the widow, and represented to her that a fair value of her interest therein, after paying the debts, would be $225, which amount he offered for her interest in said estate. That, defendant being brother of plaintiff and also administrator of said estate, she relied upon his representations and sold him, as she thought, all her interest in said estate except her interest in the dower and homestead for said sum, $225. That the deed, as plaintiff thought, was executed, not for her interest in her mother's dower and homestead, but she is advised now and alleges that said deed was prepared by the defendant himself and included all her interest in the Sam Reeder estate. That the representations to her by defendant as to the value and extent of her interest to be conveyed to defendant were false and untrue, and were known to be so by the defendant at the time, and that the value of her interest in said estate was largely in excess of the amount defendant paid her for it. That, since the sale of her interest in said lands, defendant has, as administrator aforesaid, sold all the lands belonging to the estate of said Sam Reeder except the dower and homestead, at public auction, for distribution, and that from her interest in the land thus sold appellant realized $285. That said sale is void because of the fiduciary relation of defendant at the time and his fraud practiced upon plaintiff.

Prayer that the deed executed to defendant be set aside, canceled and held for naught, and that she recover $60, the amount defendant received for her interest in said land in excess of the sum he paid therefor.

Defendant denied the various allegations of fraud, and alleged that his purchase was made in good faith.

The chancellor found in favor of plaintiff, and cancelled the deed as to the reversionary interest in the dower and homestead. Defendant has appealed.

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

1. Lands are assets in the hands of the administrator for the payment of debts. Kirby's Digest, § 79. The administrator has the right of possession of the lands so long only as there are unpaid debts owing by the estate. 46 Ark. 373. It was legitimate for the administrator to buy, as he was an heir, and the vendee of other heirs. 99 Mo. 585; 9 Am. & Eng. Enc. of Law (2 Ed.), 1067.

Assumption by appellant of debts owed by the estate entitled him to subrogation to the rights of creditors, notwithstanding he was the administrator. 49 Ark. 75; 56 Ark. 563. And he might lawfully have purchased at the sale. 54 N. J. Eq. 407. No question of trust could arise as to that part of the land set apart as dower and homestead. The probate court has never ordered it sold, nor could it have done so. 49 Ark. and 56 Ark., *supra;* 56 Ark. 574.

2. There is no evidence that appellee was overreached, or that any advantage was taken of her. The deed was in her possession, and ample opportunity was afforded to examine it before signing it. If she failed to read it, the fault was hers. 70 Ark. 512. She can not complain that she did not understand the deed as appellant did, unless he was guilty of such fraud as will avoid the transaction. There was no mutual mistake. 74 Ark. 336. If he had agreed that the deed was for the use of the mother, the deed would not be void. 73 Ark. 211. 57 Ark. 632.

Feazel & Bishop, for appellees.

1. An administrator is trustee, not only for the creditors of the estate, but also for the heirs and legatees. 27 Ark. 646; 98 Mo. 198. He can not purchase the estate for his own benefit.

Perry on Trusts (3 Ed.), § 205. Such purchase carries fraud on its face. 26 Ark. 445. And it matters not that the sale was *bona fide* and for a fair price. A court of equity, at the instance of the *cestui que trust,* if he applies in a reasonable time, will set the sale aside as of course. 23 Ark. 622; *Ib.* 44; 49 Ark. 242; 54 Ark. 633; 55 Ark. 85. The burden of proving the utmost good faith is on the trustee. 28 Am. & Eng. Enc. of Law (2 Ed.), 1020-1-2-3; Perry on Trusts (3 Ed.), § 195.

2. The deed is taken as an entirety, and, being void as to part of the land it conveys, it is void as to all. 63 Ark. 202; 52 Ark. 257; 10 Ark. 326; 22 Ark. 158; 53 Ark. 5.

3. All profits made by a trustee in dealing with trust property inures to the benefit of the *cestui que trust.* 40 Ark. 393.

WOOD, J. 1. At the time appellant purchased the land from his sisters, he was administrator of his father's estate, and as such had possession and control of the land for the payment of the debts of the estate for which it appears the lands were needed. Kirby's Digest, § 79. Appellant, therefore, was trustee for the creditors to see that their claims were paid. He was also trustee for the heirs to see that the lands were properly administered in the payment of the debts, and that the residue of the proceeds of the lands sold for the purpose of paying the debts should be distributed to them according to their respective interests. Appellant was a trustee for all who were interested in the estate which he had in charge to administer. *Wright* v. *Campbell,* 27 Ark. 646; 1 Woerner, Administration, § 10; 2 Woerner, Administration, § 489.

The general rule, says Mr. Perry, is "that the trustee shall not take beneficially by gift or purchase from the *cestui que trust;* * * * the question is not whether or not there is fraud in fact, the law stamps the purchase by the trustee as fraudulent *per se,* to remove all temptation to collusion and prevent the necessity of intricate inquiries, in which evil would often escape detection, and the cost of which would be great. The law looks only to the facts of the relation and the purchase. The trustee must not deal with the property for his own benefit." "But," he continues, "there are exceptions to the rule, and a trustee may buy from the *cestui que trust,* provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the

circumstances; that the *cestui que trust* intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the transaction of every shadow of suspicion. * * * Any withholding of information, or ignorance of the facts or of his rights on the part of the *cestui que trust,* or any inadequacy of price, will make such purchaser a constructive trustee." Perry on Trusts, § 195. This is the general doctrine announced by our own court and recognized by practically all the authorities. See *Thweatt* v. *Freeman,* 73 Ark. 575; *Cook* v. *Martin,* 75 Ark. 40; *Cornish* v. *Johns,* 74 Ark. 231. As to the purchase of trust property by the trustee, see also *Gibson* v. *Herriott,* 55 Ark. 85; *Hindman* v. *O'Connor,* 54 Ark. 627; *White* v. *Ward,* 26 Ark. 445; *Imboden* v. *Hunter,* 23 Ark. 622, where the general rule is declared. See also 28 Am. & Eng. Enc. Law (2 Ed.), pp. 1016, 1020, where the rule and exception thereto are stated, and the numerous authorities, English and American, are cited; 2 Woerner, Administration, § 487 *et seq.*

In *Handlin* v. *Davis,* 81 Ky. 34, it is said: "An administrator or executor is not allowed to purchase or speculate upon the estate confided to him for the purposes of administration."

In all cases the burden is on the trustee to establish all the requirements necessary to bring his title within the exception to the rule. 28 Am. & Eng. Enc. Law (2 Ed.), p. 1023.

In *Coles* v. *Trecothick,* 9 Ves., Jr., 234, Lord Eldon said: "Upon the question as to a purchase by a trustee from the *cestui que trust* I agree, the *cestui que trust* may deal with his trustee, so that the trustee may become the purchaser of the estate. But, though permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence, so much so that it is very hazardous for a trustee to engage in such a transaction." And further on in the opinion, after stating the requirements to bring a case within the exception upholding such transactions, he says: "I admit, it is a difficult case to make out, wherever it is contended the exception prevails."

The chancellor found: "That defendant, W. S. Reeder, was the acting administrator of the said estate; that prior to the purchase by him he submitted to the respective plaintiffs an offer, on

behalf of his mother, for $225 for the undivided one-eighth interest she had in her father's estate; that at the time of the submission of the said offer defendant stated to plaintiffs that after the debts of the estate had been paid that would be their respective shares, and that his mother requested him to purchase it in order to hold the estate together until her death, when it would go back to all the children; that defendant further represented to plaintiff that that part of the lands allotted as dower and homestead was not to be taken into consideration in arriving at the extent of plaintiff's interest, and that he was not purchasing that interest at all; that plaintiffs, relying on these declarations, executed the deeds in controversy; that the value of the homestead and dower land was $4,500, and that the value of the other lands was $3,500; that the $225 received by plaintiffs for their respective interests was not an adequate price therefor." It could serve no useful purpose to review at length the testimony upon which the chancellor's findings were based. It suffices to say that, eliminating all incompetent and irrelevant testimony, we are of the opinion that his conclusions of fact were not clearly against the weight of the evidence. Applying the principles of law announced, *supra,* to these facts, the conclusion reached by the lower court "that the defendant (appellant here) by reason of his relation of trustee for the creditors, the heirs and next of kin, was incapable of dealing with the trust property to his advantage" was clearly correct.

But, aside from any trust relationship, appellant was enjoined to the utmost good faith in dealing with his sisters. The dependence upon and confidence in him to do the right, engendered by the natural love and affection incident to such close blood kin, made *uberrimam fidem* imperative. *Million* v. *Taylor,* 38 Ark. 428.

2. The court did not err in canceling the deed from Annie Meredith to appellant, so far as it related to the S. ½ of the N. E. ¼, the N. E. ¼ of the N. E. ¼ and the E. ½ of the N. W. ¼ of sec. 19, and the N. E. ¼ of the S. W. ¼ of sec. 20, all in Tp. 11 S., R. 27 W. While this land had been assigned to the widow of Sam Reeder and the mother of appellant as homestead and dower, and was therefore not in the possession or under the control of the appellant as the administrator, still it was embraced in

the deed which conveyed the interest of appellee in the lands of the estate which were under the control of appellant as administrator, and which deed, as we have seen, was voidable. Now, the deed to all these lands was based upon one and the same consideration, and was an entire and indivisible transaction. The contract of conveyance was entire, and, being voidable in part, was voidable as to all. For there is no apportionment of such a contract. See *Phoenix Ins. Co.* v. *Public Parks Am. Co.,* 63 Ark. 202; *McQueeny* v. *Phoenix Ins. Co.,* 52 Ark. 257; *State* v. *Scoggin,* 10 Ark. 326; *Jackson* v. *Jones,* 22 Ark. 158; *Iron Mt. & Helena R. Co.* v. *Stansel,* 43 Ark. 275. And, as to entire contracts, *Higgins* v. *Gager,* 65 Ark. 604-609.

3. The court did not err in refusing to allow appellant for alleged improvements. The testimony of appellant tends to show that what improvements he put upon the lands were under contract with his mother, she having possession and control at the time appellant claims the improvements were made, and that she paid appellant for these improvements in allowing him the use of the land for two years. Moreover, if appellant's purchase was in bad faith, as the court's findings show and the proof warrants, he would not be entitled to any compensation for improvements.

4. It was not necessary under the facts of this record for appellee to offer to return the $225.00 which appellant paid her for her interest in the land, before she could maintain her suit for a rescission of the contract. For the proof shows that appellant had realized from appellee's interest in the estate which he bought, apart from the reversionary interest in the dower and homestead, the sum of $55.25 more than he paid. He is therefore *in statu quo,* with a clear profit of $55.25.

5. The claim of appellee that appellant should pay her the amount he received from the lands sold in excess of what he paid her for her interest is without equity, since the court annulled the sale of her reversionary interest in the dower and homestead. All the proof shows that she was willing to sell her interest in the estate, and would have sold it for the consideration paid her, had her dower and homestead not been included. There is nothing in the proof to impeach the good faith of the contract between appellant and appellee except the alleged misrepresentation on the part of appellant that the reversionary interest of appellee was

not to be included in the deed she should execute for her interest in the lands of the estate. But for this there would have been no cause for setting aside the deed.

The small profit realized would not show any inadequacy of consideration.

So our conclusion on the cross appeal is that the court did not err in refusing appellee's claim for the $55.25.

The decree was right. Affirm.

SCHMUTZ v. SPECIAL SCHOOL DISTRICT OF LITTLE ROCK.

Opinion delivered March 3, 1906.

1. SCHOOL DISTRICT—POWER TO ISSUE BONDS.—Under Acts 1905, c. 55, authorizing the Special School District of Little Rock to borrow money to erect a high school building, to issue evidences of debt therefor, and to mortgage the real property of the district as security for the loan, the district is authorized to issue negotiable bonds with interest coupons attached. (Page 121.)
2. CONSTITUTIONAL LAW—MUNICIPALITY.—Const. 1874, art. 16, § 1, declaring that no county, city, town or municipality shall "issue any interest-bearing evidences of indebtedness," does not apply to school districts. (Page 121.)
3. SCHOOL DISTRICT—POWER TO MORTGAGE LAND.—Acts 1905, c, 55, which authorizes the Special School District of Little Rock to borrow money and mortgage the real property of the district therefor, authorizes the district to mortgage all or part of the real property of the district as the school board may deem advisable. (Page 122.)
4. SAME—POWER TO PLEDGE REVENUES.—Acts 1905, c. 55, which authorizes the evidences of indebtedness to be issued by the school district to be "drawn upon the building fund and paid out of it in the order of their date, as the building fund is provided and collected by successive levies" empowers the district to pledge its building fund to pay such indebtedness. (Page 122.)
5. SAME—EFFECT OF UNAUTHORIZED ACT OF BOARD.—If the Special School District of Little Rock was not authorized in the bonds issued under Acts 1905, c. 55, to pledge the revenues of the district to pay such bonds, this would not justify the courts in enjoining the issuance of the bonds; for, if the directors exceeded their powers in that respect, this provision of the bond would not bind the district. (Page 122.)

Appeal from Pulaski Chancery Court; *Jesse C. Hart,* Chancellor; affirmed.

STATEMENT BY THE COURT.

In 1905 the Legislature of this State passed an act to authorize the Special School District of Little Rock to borrow money to erect, complete and equip a new high school building. Afterwards the board of directors of the district passed a resolution and undertook to issue 160 bonds of the district, of the denomination of $500 each, bearing interest at 6 per cent. each as set forth in the bonds. These bonds were to be secured by a mortgage upon block 20 of the City of Little Rock owned by the district, that block being the one upon which the high school building was located.

Thereupon F. J. Schmutz, a citizen of Little Rock and taxpayer of the district, brought this action to enjoin the school district from executing the mortgage and issuing the bonds, on the ground that the statute under which the bonds were about to be issued was invalid, and that the district had no authority to issue bonds, and for other reasons. The district filed an answer, denying that the statute under which the bonds were issued was invalid, and denying that the board of directors of the district had not properly authorized the issuance of the bonds.

On the hearing the chancellor entered a judgment in favor of the defendant which recites the following finding of facts by the court:

"It finds that the act in question, which became a law on the 24th day of February, 1905, was duly and lawfully passed; that the defendant has authority to issue the bonds with coupons attached, as set out in the resolution of its board of directors adopted on the 18th day of January, 1906, a copy of which is exhibited with the bill of complaint herein; that the defendant has authority to execute the mortgage provided for in said resolution, and that its execution and the execution of said bonds had been duly and properly authorized by the board of directors of said district; that the notice of the meeting of said board of directors at which said resolution was passed was duly given as required by law, and that the directors of said district had authority to pledge its revenue to secure the payment of said loan."

The complaint was dismissed for want of equity, and the plaintiff appealed.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The act was never lawfully passed.

2. No county, city, town or municipality in this State can issue interest-bearing evidences of debt. Const. 1874. The special school district is a component part of, and co-extensive with, the city. If the city as a whole can not issue interest-bearing evidences of debt, neither can the district. See 37 Iowa, 542; 62 Iowa, 102.

3. Defendant has no authority to issue negotiable bonds with coupons attached. 21 How. 547; 103 U. S. 102; 106 U. S. 185; 156 U. S. 709; Dillon, Mun. Corp. § 507, *et seq.*

4. Defendant has no power to mortgage its property. 2 Dill. Mun. Corp. § 579. Property needed for public uses can not be mortgaged without express legislative sanction. 24 Cal. 585.

5. Proceedings of a school board are void unless all the members have notice of the meeting.

6. The directors had no authority to pledge the revenue of the district to secure the loan.

Mehaffy & Armistead, and *Bradshaw, Rhoton & Helm,* for appellee; *Taylor & Jones* and *Bridges & Wooldridge,* of counsel.

1. The presumption is in favor of the validity of the act.

2. A school district is not a municipality within the meaning of the Constitution. Being a completely organized body within itself, it has power to issue interest-bearing evidences of debt. Kirby's Digest, § § 7668-70; 70 Ark. 451; 55 Ark. 148; 69 Ark. 284. See also 102 Iowa, 5; 19 Atl. 1038; 52 Mo. 309; 54 Mo. 458; 11 Kan. 23; 25 Am. & Eng. Enc. Law, 31. School districts are by statute *quasi* public corporations. 38 Ark. 452. See also 1 Dillon, § § 23, 24; 42 Ark. 54.

3. The express power to borrow money is held to include the power to issue negotiable bonds. 1 Dillon, Mun. Corp. § § 125, 127. The act of 1905 grants specific authority to issue notes and execute mortgage to secure the same. The acts of the Legislature will not be declared unconstitutional, unless clearly so. 32

Ark. 131. It is probable that under the general law the board would have this right. 1 Reed, Corp. Fin. § 257; Kirby's Digest, § 7684.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment of the chancery court of Pulaski County refusing to enjoin the Special School District of Little Rock from issuing certain bonds of the district. The question involves the validity of the act of the Legislature authorizing the district to borrow money for the purpose of erecting a high school building, and the further question whether the act, if valid, authorized the issuance of the bonds.

Now, the act expressly authorizes the district to borrow money for the purposes named in the act, to issue evidences of debt therefor, and to mortgage the real property of the district as security for the loan. Acts 1905, c. 55, p. 154. The express power to borrow money and to issue evidences of indebtedness therefor, we think, includes the power to issue negotiable bonds of the district with interest coupons attached. 1 Dillon, Municipal Corporations, § 127, and cases cited.

The power to issue these bonds having been granted by this act, if the act was valid, the district, in attempting to issue the bonds for the purpose of completing the high-school building, was acting under the authority of law, and should not be enjoined.

So far as we can see, the act was regularly passed, and the only objection urged against its validity is that it would be in violation of a provision in the State Constitution which declares that no "county, city, town or municipality" shall issue any interest-bearing evidences of indebtedness. Const. 1874, art. 16, § 1. But this court has recently held that a levee district, though it may possess corporate powers, is not a municipality within the meaning of this provision of the Constitution. *Memphis Trust Co.* v. *St. Francis Levee District,* 69 Ark. 284. We think that it is equally clear that the Special School District of Little Rock is not a municipality within the meaning of that provision. The school district is, it is true, a public corporation, but the mere fact that it is a public corporation does not make it a municipal corporation or, in other words, a municipality. In speaking of this question, Judge Dillon says: "All corporations intended as agencies in the administration of civil government are public, as distinguished

from private, corporations. Thus an incorporated school district or county, as well as a city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation." 1 Dillon's Municipal Corporations, § 22. A municipality, properly speaking, is a corporation that has the right to administer local government, as a city or incorporated town. But a school district is only an agency of the State with limited corporate powers belonging to a class of corporate bodies known as *quasi* corporations. These are not muncipalities, within the meaning of the constitutional provision referred to. It follows, therefore, that the act in question is not in conflict with the Constitution, and is a valid law.

It is said that the act does not authorize the district to mortgage a part only of the real property of the district. The language of the act is that the district is authorized "to borrow money and mortgage the real property of the district therefor." This, to our mind, obviously empowers the district to mortgage all or part of the real property of the district as the school board may deem advisable.

Again, it is contended that one of the directors was not notified of the meeting. But the clerk of the board who kept the records of the board testified on this point that all directors of the board were present except Mehaffy, and that he had been "notified by mail three days previous." This, we think, was sufficient to support the finding of the chancellor that all the directors were notified.

Lastly, it is contended that the recitals in the bond pledge the revenues of the district for their payment. The act under which the bonds were issued provides that the evidences of indebtedness issued by the district shall be "paid out of the building fund in the order of their date, as the building fund is provided and collected by successive levies." This, in effect, pledges the building fund of the district, whatever that may be, to the payment of the bonds. Besides, as the bonds are valid obligations, it was evidently the intention of the Legislature that they should be paid out of the revenues of the district, and they are therefore a charge against such revenues as any other valid debt would be. But, if we concede that the directors had no authority to pledge the revenues of the district in that way, this would not justify us

in enjoining the issuance of the bonds, for, if the directors exceeded their powers in that respect, this provision of the bond would not estop the district, or bind the successors in office of the directors who issued the bonds. For, the question of whether the district has power to pledge its revenues was not committed to those directors for ascertainment and decision. Their decision on that matter is no more binding than their opinion on any other question of law affecting these bonds. *Citizens Assoc.* v. *Perry,* 156 U. S. 709.

On the whole case, we are of the opinion that the judgment of the chancery court should be affirmed, and it is so ordered.

---

78 123
79 459
81 136

78 123
88 272

GOTTLIEB v. RINALDO.

Opinion delivered March 3, 1906.

1. BAILMENT—OPTION TO PURCHASE CHATTELS—LIABILITY FOR LOSS.—Where chattels were delivered to defendant with the understanding that if she was pleased with them she would keep them and account to the plaintiff for the price, and if not pleased would return them to plaintiff within a reasonable time, the title remained in the plaintiff until they were accepted, and any loss or damage sustained in the meantime from any cause except negligence of the defendant fell upon the plaintiff. (Page 126.)
2. SAME—EFFECT OF DELIVERY TO CARRIER.—Where chattels were delivered to defendant with the understanding that if satisfied with them she would purchase them, and, being dissatisfied, she delivered them to a responsible carrier, consigned to plaintiff, and they were subsequently lost, the delivery to the carrier was equivalent to a delivery to plaintiff, and absolved defendant from liability for their loss. (Page 126.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; reversed.

White & Altheimer, for appellant.

1. The rings were delivered to defendant with the agreement and understanding that if she was pleased with them she should keep them, and account to plaintiff at the value fixed, and, if not pleased, would within a reasonable time return them to

plaintiff. This was not a purchase by defendant under contract of "purchase or return." Defendant was only a bailee of the goods, and was not liable for the loss, unless she was negligent. Beach on Mod. Law of Cont. § 746; 150 U. S. 312; 100 Mass. 198. See also 21 Am. & Eng. Enc. Law (1 Ed.), 517 and note to § 3. Title remained in plaintiff till defendant expressed her satisfaction with the goods. Tiedeman on Sales, § 213.

2. Exercising the right to return the rings, by delivery of them to the express company, properly consigned, was delivery to the plaintiff. 44 Ark. 556; 50 Ark. 20; 51 Ark. 133.

Taylor & Jones, for appellee.

Defendant by the contract imposed upon herself the absolute duty to return the rings or make good their value, notwithstanding accident or unavoidable delay. 7 Am. & Eng. Enc. Law, 148 and authorities cited; 68 Am. Dec. 371, and citations; 61 Ill. 343; Bishop on Cont. § 590; 12 Ark. 664; 61 Ark. 312.

McCULLOCH, J. The plaintiff, David M. Rinaldo, brought this suit against the defendants, B. Gottlieb and the Pacific Express Company, to recover $372, the value of two diamond rings. It is alleged in the complaint that the plaintiff is a merchant doing business in the city of Hot Springs, dealing in watches, diamonds, jewelry, etc., that defendant Gottlieb is a merchant engaged in like business in the city of Pine Bluff, and defendant Pacific Express Company is a common carrier; that the plaintiff delivered said rings to defendant Gottlieb "with the agreement and understanding that, if she (defendant) was pleased with same, she should keep them and account to the plaintiff at the above value, and, if not pleased, would, within a reasonable time, return them to plaintiff at said city of Hot Springs." It is further alleged that the rings were never returned, and judgment is prayed in the sum of their aggregate value.

Defendant Pacific Express Company paid to plaintiff the sum of $300, and the action, as to that defendant, was dismissed.

The other defendant, Gottlieb, filed her separate answer as follows:

"It is true, as alleged in the complaint, that on or about the 20th day of December, 1902, the plaintiff delivered to her, through the Pacific Express Company, the two diamond rings of the billed

value as charged in the complaint, under the agreement that, if the same could be used by her, she would keep the rings and pay the plaintiff the price charged for the same; but, if not, she was to return the same to plaintiff. She charges that she is in the same business at Pine Bluff as the plaintiff is engaged in at Hot Springs, and, having customers who desired to purchase from her diamond rings of the kind charged in the complaint, and, she knowing that the said plaintiff had for sale diamond rings, she ordered the same from the plaintiff under this agreement: that if she was pleased with the same she would keep them and account with the plaintiff at the value fixed in the complaint, and if not pleased would within a reasonable time return them to the plaintiff at the city of Hot Springs, Arkansas; and the same were received by her at or about the time stated in the complaint, through the Pacific Express Company, at a valuation of $300. That, as soon as she could find her customers, she exhibited to them the rings, and, the diamonds being of off color, her customers refused to make the purchase, and on the 26th day of December, and within a reasonable time, she safely and securely sealed both the rings in a box, properly addressed to the plaintiff at Hot Springs, Arkansas, and on that day deposited said package containing said rings with the Pacific Express Company at Pine Bluff, consigned and to be delivered to the plaintiff at Hot Springs, Arkansas, fixing the same valuation upon said package as was fixed by the plaintiff when he sent said rings to her, towit: at the sum of $300. That the said Pacific Express Company, through which she sent the said rings consigned to the plaintiff, is a common carrier of goods and merchandise between Pine Bluff and Hot Springs, Arkansas, and the most reliable carrier between said cities, and responsible for any loss, and said company afforded the speediest and most accurate mode of transportation of said rings from herself to the plaintiff. That she has done all in her power to return said rings to the plaintiff, but she is informed and so charges that the said package has been lost by the said Express Company, without fault or negligence on her part."

The court sustained a demurrer to the answer, and, the defendant declining to plead further, judgment against her in the sum of $72 was rendered in favor of the plaintiff.

It is argued in support of the decision of the court below that the contract set forth in the pleadings amounted, in effect, to what is known in trade language as an agreement for "sale or return" of the articles named. Under such a contract the title passes to the purchaser, subject to the right to return the articles within the specified time, and if, before the expiration of such time, the property is destroyed, either by inevitable accident or by the negligent act or omission of the purchaser, he is responsible for the price. Such, however, is not the effect of the contract set forth in the pleadings. The complaint alleges that the rings were delivered to the defendant "with the agreement and understanding that if she was pleased with the same she should keep them and account to the plaintiff at the above value, and if not pleased would within a reasonable time return them to plaintiff at said city of Hot Springs." The answer states the contract in the same language, and the same does not constitute a contract of "sale or return." Under the contract stated, the title remained in the seller, and any loss or damage sustained from any cause except negligence of the purchaser fell upon the seller. Tiedeman on Sales, § 213; *Sturm* v. *Boker,* 150 U. S. 312; *Hunt* v. *Wyman,* 100 Mass. 198. The distinction between the two classes of contracts is concisely stated by the Supreme Court of Massachusetts in *Hunt* v. *Wyman, supra,* as follows: "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

But in whatever light the contract in this case may be viewed, whether as a contract for "sale or return," or as an agreement to purchase if satisfied with the article, we think that the defendant, in stating in her answer that she delivered the rings to the carrier for transportation, showed performance of her contract to return them to the plaintiff. The delivery to a responsible carrier properly consigned to the plaintiff was a delivery to the plaintiff. *State* v. *Carl,* 43 Ark. 353; *Burton* v. *Baird,* 44 Ark. 556; *Berger* v. *State,* 50 Ark. 20; *Herron* v. *State,* 51 Ark. 133; Benjamin on Sales, § 693; 1 Mechem on Sales, § § 736, 739; *Magruder* v. *Gage,* 33 Md. 344; *Wheelhouse* v. *Parr.* 141 Mass. 593.

We see no reason why the same rule applicable to delivery to carriers of goods sold should not apply to an agreement to return articles sent for inspection. Where the mode of transportation in return is agreed upon, or where no mode is agreed upon, and the party under obligation to return adopts a mode of transportation justified by the usages of trade, the delivery is complete when the goods are placed in the hands of the carrier properly consigned. Here the defendant delivered the rings to a responsible public carrier, the one employed in the first instance by plaintiff to transport the rings to defendant.

The learned circuit judge erred in holding that the answer of the defendant failed to state a defense.

The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer to the answer.

DRIVER v. PLANTERS' MUTUAL INSURANCE ASSOCIATION OF ARKANSAS.

Opinion delivered March 3, 1906.

FIRE INSURANCE—PAYMENT.—Where a policy of fire insurance provided that it should not be binding so long as the premium note remained unpaid, evidence that insured, on being notified by a bank that the premium note was held by it for collection, went to the bank, where he had funds sufficient to pay it, and notified the cashier to pay the note, but that he drew no check in payment, and that no entry was made on the bank's books, and no credit was given to the insurance company until after the fire occurred, was insufficient to prove payment.

Appeal from Mississippi Circuit Court; *Allen Hughes,* Judge; affirmed.

W. J. Lamb, for appellant.

If, having money on deposit in the bank sufficient for the purpose, plaintiff requested the cashier to apply the money on deposit to the payment of the note, which the cashier agreed to

do, this would constitute a payment, even though the cashier failed to remit it to the defendant. 52 Minn. 83; 38 Am. St. Rep. 526; 94 Am. Dec. 51.

J. W. & M. House, for appellee.

There was no payment. The money on deposit was under plaintiff's dominion, subject to his order at all times until after it was appropriated, which was not done until after the fire. 2 Jones' Law (N. C.), 199; 40 Kan. 744; 85 Mo. 173; 12 N. Y. Sup. 433; 15 Johns. 224; 120 Pa. 441; 57 Ala. 20; 2 Watts & Serg. (Pa.), 70. It was plaintiff's duty to see that his agent, the cashier, made the application of the money in payment of the note. 31 Mich. 230, 232; 7 Cal. 83; 120 Pa. St. 453; 22 Gratt. (Va.), 352; 17 Atl. 50.

BATTLE, J. Planters' Mutual Insurance Association of Arkansas insured certain property of Jettie Driver against fire, and received his note for $88 for the premium. The policy of insurance in reference to the note provided: "If paid on or before maturity, all interest waived, said amount being for cash premium on my insurance this day applied for; and it is further agreed that, if this note is not paid at maturity, the whole amount of assessment on said insurance shall be considered as earned, and the contract be null and void, so long as this note remains overdue and unpaid."

The property insured was destroyed by fire. The question is, was the note paid?

The note was sent to the bank at Osceola, Arkansas, about the latter part of October, 1903, for collection. The insurance company and the bank notified Driver that the note was sent there. The proof on the part of Driver was that he went to Osceola after he had been notified and before the fire; that he "went to the bank and found no one there, but he met the cashier some two hundred yards from the bank, and told him to pay the note, and he promised to do so; that Driver had money on deposit in the bank sufficient to cover the note; that no check was drawn, and no entries made on the books of the bank charging Driver with the amount of said note, and no credit given to the Insurance Company until after the fire occurred. Several days, and perhaps several weeks, according to the contention of Driver, had inter-

vened between the time he told the cashier to pay the note and the date of the fire, and he made no effort to see whether the note had really been paid or not until after the fire."

The money to the credit of Driver in the bank was never applied to the payment of the note. The bank gave no credit to the insurance company on its books for the note or charged Driver with the amount thereof until after the fire, but until then treated it as unpaid and uncollected. There was no payment. *Hatch* v. *Hutchinson,* 64 Ark. 119; *Sutherland* v. *First National Bank of Ypsilanti,* 31 Mich. 230; *Hecksher* v. *Shoemaker,* 47 Pa. St. 249; *Phillips* v. *Mayer,* 7 Cal. 81; *Cavanaugh* v. *Buehler,* 120 Pa. St. 441, 453; *Pease* v. *Dibble,* 57 Ga. 446; *Price* v. *White,* 70 Ga. 381; *Kenny* v. *Hazeltine,* 6 Humph. 62.

The effort to pay the note after the fire was too late to save the insurance.

Judgment affirmed.

LITTLE ROCK RAILWAY & ELECTRIC COMPANY *v.* GREEN.

Opinion delivered March 3, 1906.

1. STREET-RAILWAY COLLISION—NEGLIGENCE—EVIDENCE.—In an action against a street-railway company to recover damages for injuries received in a collision with one of defendant's cars, it was not error to permit a witness to testify that he had a general knowledge of the speed at which defendant's cars usually ran, that the car which collided with the plaintiff's wagon was at the time running at the usual rate of speed that cars ran along that street, that they usually ran at a pretty good rate of speed there as it was down grade; such evidence tending to show whether defendant used proper care to avoid the collision. (Page 131.)
2. INSTRUCTION—REPETITION.—It was not improper to refuse to give an instruction that was sufficiently covered by another that was given. (Page 131.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield,* Judge; affirmed.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. It was error to admit evidence of a witness to show his knowledge of the rate of speed of street cars on the various streets of the city. 187 Ill. 612; 63 App. Div. (N. Y.), 423; 36 Ore. 315; 58 Ark. 455; 6 Wash. 75; 19 Am. & Eng. R. Cas. 79; 93 Ill. App. 411; 96 Ill. App. 10; 78 Hun, 13; 75 S. W. 86. As a rule, it is for the witness to state the facts, and for the jury to draw the conclusions from the facts stated, and not from the opinion of the witness. 24 Ark. 255; 67 Ark. 375; 71 Ark. 304. Evidence that a car was moving at a "pretty good rate of speed," or "fast," is inadmissible because indefinite and uncertain. 103 N. W. 307.

2. It was error to modify the 4th instruction asked by appellant by striking out the first paragraph. 64 Ark. 423; Booth, Street Ry. Law, § 303.

Mehaffy & Armistead, and *Murphy & Lewis,* for appellee.

The testimony as to the rate of speed at which the cars were usually run was competent, as tending to show that defendant had fixed such rate as that its motorman was unable to avoid injuring plaintiff after discovering him on the track. 28 Minn. 103; 69 Ark. 289; 72 Ark. 572; 88 S. W. 1006. It was also competent to inquire of a witness, accustomed to observing the running and stopping of defendant's cars, how the car was running with reference to their usual rate, and within what distance they usually stopped them, and such testimony is not necessarily confined to experts. 59 Ark. 140; 62 Ark. 254; 17 Cyc. 105; 96 Ill. App. 10; 88 S. W. 648.

BATTLE J. Anderson Green sued the Little Rock Railway & Electric Company for $10,000 damages, alleging in his complaint "that on the fourth day of August, 1903, while traveling in a wagon drawn by two mules along North Cumberland Street and crossing East Markham Street, going south, he was negligently run into by one of the defendant's cars, said car striking the rear wheel of his wagon and breaking it and throwing plaintiff to the ground with such force as to break two ribs on his right side and bruise and injure him internally. That he was unable to do any work which required him to stoop over, had suffered great pain of body and mind, and was permanently injured, and was

put to expense in endeavoring to cure himself, towit: $55 doctor's bills and hospital fees, and other expenses for nursing to the amount of $45, and loss of business six weeks, $150.

"The answer denied the material allegations of the complaint, and alleged that, if the defendant had been injured in a collision with one of its cars, it was due to his own carelessness and negligence in driving his team across the track in front of an approaching car, without exercising reasonable care and prudence to protect himself."

Plaintiff recovered a judgment against the defendant for $500, the jury that tried the issues in the case having returned a verdict for that amount.

Plaintiff was injured, as alleged, while traveling in a wagon, drawn by two mules, along North Cumberland Street, and crossing East Markham Street, going south, in the city of Little Rock, by a collision with one of defendant's cars. Earnest Harper was allowed to testify, over the defendant's objections, "that he had seen the cars operated by the defendant on the various streets of the city of Little Rock, and that he had a general knowledge of the speed at which they usually ran; that the car which collided with the plaintiff's wagon was at the time running at the usual rate of speed that cars ran along East Markham Street; and that they ran at a pretty good rate of speed on East Markham between Scott and Cumberland streets, as it is down grade." We see no prejudicial error in allowing the witness to testify as he did. His knowledge of the speed at which cars of the defendant usually run on the streets of Little Rock could not have been of any effect, as he did not state the rate of speed. He stated that the car that struck plaintiff's wagon was running at the usual rate of speed cars travel along the street where the collision occurred, and that was a pretty good rate, as it is down grade there. The evidence was competent. It was admissible, in connection with other facts, for the purpose of showing whether the defendant used proper care to avoid the collision. It (the defendant) could have shown the rate of speed at which the car was moving, and did, by one witness, to be nine miles an hour.

The defendant asked the court to instruct the jury as follows:

"You are instructed that the street car has, and from the

necessities of the case must have, a right of way upon that portion of the street upon which alone it can travel, paramount to that of ordinary vehicles; but this superior right of way does not prevent others from driving along or across its tracks at any place or at any time when by so doing they will not interfere with the progress of the cars.

"If the employees of a street railway company in charge of its car see a person driving upon the street along by the side of the car track, and in the direction from which the car is approaching, they have a right to rely on human experience, and presume that he will act upon principles of common sense and the motive of self-preservation common to mankind in general, and will not attempt to cross the track in front of the approaching car, and may go on without checking the speed of the car until they see he is likely to go upon the track in front of the approaching car, when it would become their duty to give extra alarm by bell or gong, and, if that is not heeded, then, as a last resort, to check its speed, or stop the car, if possible, in time to avoid the accident."

The court struck out the first paragraph, and gave the second. No reversible error was committed by striking out the first paragraph. The second contained all the information in the instruction that was important for the jury to know.

The evidence was sufficient to sustain the verdict.

O'NEAL v. RICHARDSON.

Opinion delivered March 3, 1906.

1. INSTRUCTIONS—CONSTRUCTION AS A WHOLE.—In examining instructions for the purpose of ascertaining whether they be correct, they should be considered in connection with other instructions upon the same subject. (Page 136.)
2. INSTRUCTION—PROVINCE OF JURY—PREJUDICE.—While it was improper for the trial judge to say to the jury: "It is necessary for all of you, or some of you, to make concessions. I hope you will go out now with a view to getting a verdict"—such a charge was not preju-

dicial where the jury retired and remained out some time, and then returned into court and reported that they were unable to agree, and the court then gave them an additional instruction, whereupon they reached a conclusion. (Page 137.)

3. SAME—REDUCTION TO WRITING.—It is only at the request of a party that the judge is required to reduce his instructions to writing. (Page 137.)

Appeal from Lawrence Circuit Court; *Frederick D. Fulkerson,* Judge; affirmed.

S. D. Campbell, for appellant.

1. Instructions 3, 4, 5 and 6 were erroneous. Kirby's Digest, § § 529, 530; 64 Ark. 244.

2. The court erred in orally instructing the jury that they must make concessions. 58 Ark. 282; 60 Ark. 49.

3. The court erred in orally instructing the jury over appellant's objection. 71 Ark. 367.

H. L. Ponder and *Jno. W. & Jos. M. Stayton,* for appellee.

1. Instructions are to be construed together, and, when taken together, if the matter is fairly submitted to the jury, the verdict will not be disturbed, though one be inapplicable or misleading. 48 Ark. 396; 37 Ark. 238; 21 Ark. 357; 59 Ark. 422; 58 Ark. 353. Error that is not substantial and prejudicial is no ground for reversal. 8 Ark. 313; 27 Ark. 306; 43 Ark. 535; 51 Ark. 132; 59 Ark. 431. A judgment, right on the whole record, will not be reversed for error appearing in the record. 10 Ark. 9; 23 Ark. 115; 4 Ark. 525; 14 Ark. 114; 19 Ark. 96; 2 Ark. 115; 21 Ark. 469; 23 Ark. 121; 24 Ark. 326, 587; 26 Ark. 373; 44 Ark. 556; 43 Ark. 296; 46 Ark. 542, and numerous other citations.

2. It was proper for the trial judge to make plain the duty resting on the jury to agree, if possible, on a verdict. 60 Ark. 49.

3. Appellant can not now complain that an instruction was given orally which he did not ask to be reduced to writing.

BATTLE, J. L. E. O'Neal brought this action against V. G. Richardson and J. M. Jackson, partners doing business as Richardson & Jackson, to recover the possession of certain twenty-three bales of cotton. Richardson and Jackson answered, and denied that the cotton belonged to O'Neal, and alleged that the cotton was their property, and that they had sold the same to

Lesser-Goldman Cotton Company and the Planters Compress Company. These companies, purchasers, intervened and claimed to be the owners, and entitled to the possession of the cotton.

Richardson & Jackson were operating a round-bale cotton gin, and in order to operate the same it was necessary to buy seed cotton to furnish the gin. They were without sufficient means to continue the operation of the gin, and applied to O'Neal for assistance; and finally entered into an agreement with him, under and in pursuance of which O'Neal claims that all the cotton ginned by Richardson and Jackson was purchased by and belonged to him, and that when it was ready for shipment he sold it to them, and that under this agreement and arrangement the cotton in controversy was purchased by him, but never was sold to them, and still belongs to him.

Richardson & Jackson say that they had $350, and that, under the agreement with O'Neal, he signed a note for $350, as surety, and they borrowed on it $350, and this and the other $350, making $700, were placed in his hands for the purpose of paying for the cotton to be purchased by them; that he acted as their cashier, and in pursuance of said agreement, and for his protection against any losses on account of being their surety, paid with their money for the cotton purchased for the gin, and received the proceeds of the sale of the cotton sold by them, and with such proceeds paid for other seed cotton; and in this manner the gin was kept in operation. He was to receive compensation for his services. They further say that the cotton in controversy was purchased by them and sold to interveners, and that O'Neal "had nothing to do with it."

Each party adduced evidence in the trial in the action which tended to support his or their contention. Evidence was also adduced which tended to prove that the interveners were purchasers of the cotton in controversy for a valuable consideration without notice of any lien thereon.

Over the objections of the plaintiff the court instructed the jury as follows:

"3. If you find from a preponderance of the evidence herein [that], in order to secure the means to run their gin, the defendants, Richardson & Jackson, induced the plaintiff to go upon their notes to the bank for money and to make advances to them from

time to time, [that] they agreed [that] the plaintiff should hold all funds received by defendants, *and [that] all cotton shipped or sold by them was delivered to plaintiff by the delivery of the bills of lading therefor,* and [that] the plaintiff was to be repaid his advances and for the money borrowed on his name, and he was to receive a compensation therefor, such an arrangement would not confer the title of the cotton upon the plaintiff.

"4. If you find, from a preponderance of the evidence herein, [that] the defendant requested O'Neal to become their surety to the bank, and the defendants further gave him certain sums of money, and [that] it was further agreed [that] he should hold the money and disburse the same for seed cotton for them, and hold the bills of lading therefor and collect the proceeds of sale and repay his advances, and was later on to receive compensation for services rendered, such an arrangement would not be sufficient to give such a title to the plaintiff as would entitle him to recover in this suit, and you should find for the interveners.

"5. If you find from the evidence that the plaintiff was not the absolute owner of the cotton in controversy, but was to hold the same or proceeds thereof until he was made safe or repaid for advances made by him, such would not be sufficient, but the cotton must have been actually delivered to him; and if you find the cotton in controversy was bought and ginned in the ordinary course of business, and the same was never delivered to O'Neal, he can not sustain his action against the interveners, and you will find for the interveners.

"6. If you further find from the evidence that O'Neal became surety for Richardson & Jackson to the Bank of Newport for $350, and that he was to have a lien upon the cotton that was ginned by Richardson & Jackson, in case the said note became due and O'Neal had it to pay, this would not prevent a recovery of the cotton in controversy by the interveners and the Lesser Cotton Company, unless you further find that said Lesser Cotton Company bought said cotton with notice of said lien."

After the case was submitted to the jury, and they had been out sometime, and had returned into court, being unable to agree, the court stated to them: "Of course, it is necessary for all of you, or some of you, to make concessions. I hope you will go

out now with a view to getting a verdict." To this statement of the court the plaintiff at the time objected and excepted. They retired to their room, and after they had been out sometime they again returned into court, *being unable to agree,* and the court instructed them orally as follows: "Gentlemen, these instructions mean about this: If there was an agreement between Richardson & Jackson on one side and O'Neal on the other that O'Neal should buy cotton from the wagon, and own it for himself, and then to turn it over to them to gin, and then they would buy it from him, then the title was not to pass to Richardson & Jackson until after it was ginned and baled, then O'Neal would be the owner, and Richardson & Jackson would have no right under any circumstances, in such an event, to sell the cotton, either to innocent holders or any one else. On the other hand, it means about this: That if O'Neal was buying this cotton for Richardson & Jackson, and that he just had a lien on the cotton, and on the fund for what he had advanced and his security to the bank, if he was a security, then that would be Richardson & Jackson's cotton, and they have violated their agreement; the title would pass to Lesser Cotton Company, and be a better title than O'Neal's lien, unless they had notice of that kind of an agreement. That is all there is in it. The question is whether or not O'Neal absolutely owned it, or whether he had a lien, or such a lien as the Lesser Cotton Company had no notice of. I also instruct you that the fact that there had been no settlement as to the wages of O'Neal or a settlement, on the other hand, as to what he was to pay for ginning, that would not determine the issue in this case. It is only a question to be looked at. The mere fact that they had not settled the pay for ginning, if he was the owner, or the fact that they have not settled as to what he was worth as security—that doesn't necessarily settle it. In fact, there has been no settlement."

To the oral instructions the plaintiff objected and excepted. Thereupon the jury retired, and after being out sometime returned a verdict in favor of the interveners. Plaintiff appealed.

In examining instructions for the purpose of ascertaining whether they be correct, they should be considered in connection with other instructions upon the same subject. The instructions

numbered 3, 4, 5 and 6, to which appellant objected, were explained by the oral instruction. As explained, they contain no reversible error. See *Hauselt* v. *Harrison,* 105 U. S. 401, 405.

The statement of the court to the jury as to the necessity of making concessions was improper, but it does not seem that it was prejudicial. After it was made they retired and remained out some time, and then returned into court and reported that they were unable to agree, and did not agree until the oral instruction was given. Under the statement and instructions then given to them the jury were unable to agree. The statement yielded no results.

Appellant insists that the court erred in orally instructing the jury. He objected to it as he did to written instructions, but there was no request or demand that it be reduced to writing. It is only at the request of either party that a court is required to reduce instructions to writing. Constitution, art. 7, § 23.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

MAIN v. JARRETT.

Opinion delivered March 3, 1906.

SALE—SHIPMENT—DELIVERY OF BILL OF LADING.—Where, in an action to recover the purchase price of goods sold and delivered to a carrier to be transported to defendant, the defense was that only a part of the goods was delivered, it was error to instruct the jury that the plaintiffs could not recover unless they furnished defendants a bill of lading showing that the goods were delivered to the carrier, if the non-delivery of the bill of lading was not pleaded as a defense.

Appeal from Phillips Circuit Court; *Hance N. Hutton,* Judge; reversed.

W. F. Main & Company, a partnership doing business at Iowa City, Iowa, sued Jarrett and Womack, a partnership doing business at Cypert, Arkansas, alleging that defendants on or

about September 24, 1902, entered into a contract with appellants for the purchase of a certain amount of jewelry for the stipulated price of $191.60; that the contract was evidenced by a "contract order" which gave an itemized statement of every article purchased and the price of same; that, in addition to the goods mentioned in the regular form of the contract, there was added on the margin a list of "free goods," consisting of 100 drafts, $25 worth of free goods, one five-foot show case and table and ten catalogues; that, upon receipt of said contract appellants complied with all the conditions of same by delivering to the transportation company in Iowa City, Iowa, all the articles provided for in said contract; that the goods were delivered in due time, and were kept by defendants until November 19 following, when defendants delivered them to the express company, to be transported back to plaintiffs, who refused to receive them, and are now suing for the price.

Defendants in their answer admitted that they made a contract with W. F. Main & Company on September 24, 1902, for the purchase of certain articles described in said contract, and that said contract was in writing, the contract price of which said articles amounted in the aggregate to the sum of $191.60, but they denied that the said W. F. Main & Company performed all of their part of said contract. On the contrary, they claimed that the said W. F. Main & Company shipped to these defendants only a part of the articles mentioned in said contract, and, having failed and refused to forward all of said articles by delivering them to the transportation company for transmission to them, these defendants returned to said W. F. Main & Company prepaid all such articles as were shipped to them by said W. F. Main & Company, and therefore owe them nothing. They denied that they owed said W. F. Main & Company the sum of $191.60, or any other sum.

M. H. Taylor testified for plaintiffs: That he was general manager for plaintiffs; that as such general manager he personally supervised the packing of the goods mentioned in the contract, and delivered in person the jewelry to the express company and the "free goods" to the railroad company, f. o. b. cars, Iowa City. That plaintiffs, by their letter of October 17, 1902, advised defendants of the shipment of the goods on October 2, and

added this postcript: "We hand you herein duplicate bill of lading indicating that delivery has been made to you, the property becoming yours from date of delivery to transportation company." That subsequently the express company tendered back the jewelry package, which plaintiffs refused to accept; that plaintiffs had no knowledge of any further disposition of same, and claimed no interest in or control over same, and had never done so since the first delivery to the transportation companies.

W. B. Jarrett, one of the defendants, testified as follows:

That he was one of the defendants in this litigation; that he and his co-defendant were doing a mercantile business at Cypert, Arkansas; that his firm executed the contract of purchase filed as an exhibit in this cause; that all of the articles mentioned in said contract were delivered to him by the railroad company at Marvell, Arkansas, with the exception of the show case; that the show case was necessary for the display and sale of the goods; that on or about November, 1902, he shipped all the goods that he had received back to the plaintiffs, and has since neither seen nor heard anything of them; that the plaintiffs never delivered to his firm any bill of lading for the show case or other property claimed by them to have been shipped by rail; and that he had made demands of the plaintiffs that they should take the matter up with the railroad company and have them trace the show case, but did not know whether or not they did so. That he had received a letter from plaintiffs stating that a bill of lading was enclosed, but none was enclosed in said letter; that he never advised plaintiffs that he had not received same nor made request for duplicate.

Over the plaintiffs' objection, the court instructed the jury as follows:

"1. The jury are instructed that, under the contract in this case, the goods ordered became the property of the defendants as soon as delivered to the transportation company according to contract; but plaintiffs were required to furnish defendants with a proper bill of lading, showing that the goods had been delivered. The plaintiffs, to recover, must show full compliance with contract. This is a fact that the jury must determine from all the facts and circumstances in the case.

"2. That, unless you find that the plaintiffs in this cause delivered to the defendants a good and valid bill of lading for the goods mentioned in the contract, such a bill of lading as would enable them to maintain an action against the railroad company for the loss or injury of same, you will find for the defendants."

There was a verdict and a judgment for defendants, from which plaintiffs appealed.

W. G. Dinning, for appellants.

1. Delivery of the goods to the transportation company according to the terms of the contract was delivery to the defendants. 51 Ark. 133; 44 Ark. 556; 43 Ark. 353; Benjamin on Sales, § 181; 24 Am. & Eng. Enc. of Law, 1071.

2. The non-delivery of the bill of lading was not pleaded. The court's instructions were erroneous.

John I. Moore, for appellees.

1. The issue as to nondelivery of the bill of lading was sufficiently raised by the answer.

2. The jury having passed upon the facts, their verdict will not be disturbed, if the evidence is sufficient. 51 Ark. 467. If the judgment is right on the whole record, it will not be reversed. 44 Ark. 556.

BATTLE, J. The trial court erred in instructing the jury. The instructions made the right of plaintiffs to recover to depend upon the delivery by them to the defendants of a bill of lading, when the non-delivery of a bill of lading was not pleaded as a defense. No such issue was joined. The undisputed evidence shows that a bill of lading was sent by mail to the defendants. But they say they never received it, and that they did not inform plaintiffs that they had not received it and made no request for a duplicate. They received all the goods purchased, except a show case, and for that reason refused to pay for the goods. The instructions were, therefore, erroneous.

Reversed and remand for a new trial.

GREESON v. GERMAN NATIONAL BANK.

Opinion delivered March 10, 1906.

1. MORTGAGE—FUTURE INDEBTEDNESS.—Before an instrument intended as a mortgage will be construed to secure indebtedness for subsequent advances, it must appear that there was an unequivocal agreement to that effect. (Page 145.)
2. PLEDGE—WAIVER.—Where a bill of sale and note executed to a bank recited that certain chattels were deposited as collateral security for its payment, and that the surplus, if any, after payment of the note should, at the holder's election, be paid on any other obligation of the maker, if the note can be treated as creating a lien on the chattels themselves for future indebtedness, such lien was waived if the chattels were sold by a trustee in bankruptcy of the maker, and the note paid in full to the bank, which returned the bill of sale and note marked "Paid." (Page 146.)

Appeal from Pulaski Chancery Court; *Jesse C. Hart,* Chancellor; reversed.

STATEMENT BY THE COURT.

In August, 1902, the Longview Lumber Company of Prescott, Arkansas, made a contract for the purchase of certain steel rails which were located on a branch railway at Harlow, in Calhoun County, and which the company desired to use at Prescott, Arkansas. To carry out this contract, the company borrowed $3,000 from the German National Bank of Little Rock, and executed to the bank a note, in the form used by banks, in words and figures as follows:

"3,000. Little Rock, Ark., August 15, 1904.

"Ninety days after date we promise to pay to the order of the German National Bank, of Little Rock, three thousand dollars, for value received, negotiable and payable without defalcation or discount at the German National Bank, with interest after date at the rate of ten per cent. per annum until paid, having deposited or pledged with the said German National Bank, as collateral security for the payment of this note, about six miles of 20-pound and 30-pound relaying steel rails, as per bills of sale this day executed—said rails now being moved from Harlow, Arkansas, to Prescott, Arkansas. Now, in the event of the nonpayment of this note at maturity, the holder thereof is hereby invested with

full authority to use, transfer, hypothecate, sell or convey the said property, or any part thereof, or cause the same to be done at public or private sale, with or without notice or demand of any sort, at such place and on such terms as the said holder hereof may deem best, and the holder of this note is authorized to purchase said collateral when sold for its own protection, and the proceeds of such sale, transfer or hypothecation shall be applied to the payment of this note, together with all protests, damages, interests, costs and charges due upon the note, or incurred by reason of its non-payment when due, or in the execution of this power. The surplus, if any, after payment of this note, together with all charges above stated, shall be paid to the drawer of this note, or, at the election of the holder thereof, be paid on any other obligation of the drawer hereof; and if the proceeds of sale shall not be sufficient to pay this note, the drawer hereof agrees to make good any deficit. If at any time before the maturity of this note said collateral should depreciate below their present value, which it is estimated at $——, the holder thereof is hereby authorized to demand additional security. Upon refusal or inability to comply with said demand, the holder is authorized to sell said collateral at any time before maturity of this note.

"LONGVIEW LUMBER COMPANY.

"By Geo. W. Howell, Pt."

This note was indorsed by M. W. Greeson. Greeson had no connection with the lumber company, either as stockholder or officer, but had been employed by the company as attorney. To further secure the note, the lumber company executed an absolute bill of sale of the rails to the bank, in which bill of sale the consideration is set out as $3,000.

Afterwards the bank from time to time advanced other sums of money to the lumber company, and took other security therefor.

The company failed in business. A trustee in bankruptcy took charge of the property of the company, including the steel rails; and this property was afterwards sold by the trustee under order of the United States Court, and purchased by Greeson. Greeson took charge of the property, and paid the three thousand dollars collateral note executed by the Longview Lumber Com-

pany to the bank with interest, and the bank returned the bill of sale and note, the note marked "Paid."

Before or about the time this note was paid by Greeson the bank brought suit against him to recover the amount of the $3,000 note and interest, and subsequent indebtedness due from the lumber company to the bank, the bank claiming that the indebtedness contracted after the execution of the bill of sale to the rails was a lien on the rails, and that Greeson took them by his purchase at the receiver's sale charged with that lien.

Greeson filed an answer, in which he alleged that he had paid the note for $3,000, and denied that the bill of sale was executed for the purpose of securing the subsequent indebtedness as claimed by plaintiff. He further set up facts which he alleged estopped the bank from asserting a lien on the rails for the subsequent debts.

On the hearing the chancellor found that the subsequent debts were a lien on the rails; that the rails had been sold by Greeson for $4,009.06; that the note to the bank with interest was a first lien on the rails, amounting to $3,291.67, which sum had been paid by Greeson to the bank, and that the bank was entitled to a judgment against Greeson for the balance, and judgment was entered accordingly.

Greeson appealed.

McRae & Tompkins, for appellant.

For distinction between a pledge and a mortgage of personal property, see 4 L. R. A. 305; 18 Am. & Eng. Enc. Law (1 Ed.), 190, note. The filing of a mortgage is not legally equivalent to actual delivery and continued possession. 21 Minn. 91. Voluntary re-delivery of pledged articles to the pledgor forfeits all rights acquired in the security. 49 Am. Dec. 733, note, and cases cited. If it was a pledge, permitting the pledgor or assigns to take possession and sell the property avoided the pledge. *Ib.; 22* Am. & Eng. Enc. Law (2 Ed.), 853. But the bill of sale was only a mortgage, of which actual notice was not binding. 40 Ark. 536; 71 Ark. 517; 68 Ark. 168; Kirby's Digest, § 5396, note b. The bill of sale was not entitled to record. A surety on a note secured by a mortgage is disqualified from taking the mortgagor's acknowledgment. 68 Ark. 162. If a defeasance is not recorded,

it is postponed to a judgment creditor of subsequent date. 38 Me. 447. Appellant was not chargeable with notice of the "other indebtedness" clause in the note. 55 Ark. 569.

Ratcliffe & Fletcher, for appellee.

1. It is immaterial whether the bill of sale be treated as a pledge or a mortgage. If a mortgage, title vested without regard to possession. But in this case the bill of sale purports to convey absolutely. After the debt became due neither the lumber company nor trustee in bankruptcy had title. He could only assert a claim in equity, and could have asserted no claim in equity that was not superior to the equities of appellee. 14 Ark. 370.

2. In the absence of proof, the court will not presume that appellant was the signer of the acknowledgment. The question not having been raised by the pleadings or proof, it can not be raised here. 12 Ark. 190.

3. Appellant was put on notice that the bank claimed an additional amount, and that in order to redeem the trustee or purchaser would be required to pay the additional amount. 124 Fed. 968; 12 Ark. 581.

4. The bank is not estopped. Appellant knew the provisions of the note, that the bank was claiming an additional amount, that the cashier had no authority to waive its lien, and it was not sufficient for him to rely on the fact that the bank granted him a loan and took the same property as security. 49 Ark. 218; 63 Ark. 300; 55 Ark. 642; Bigelow on Est. (2 Ed.), 438, 439; 6 Allen (new), 423; 10 *Id.* 433. The bill of sale gave the bank such title that all persons must take notice thereof, precluded the assertion of any claim against that of the bank, and gave it a lien by operation of law. 1 Morse on Banking, § 324 *et seq.;* 62 Ark. 220; 124 Fed. 968.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment of the Pulaski Chancery Court, holding that the German National Bank had a lien on certain rails claimed by defendant Greeson. The rails were at one time the property of the Longview Lumber Company, and, while they were the property of that company, the company borrowed $3,000 from the bank, gave a note therefor, and executed a bill of sale for the rails to the bank to secure the note. Afterwards the company became

bankrupt, and the rails were sold by the trustee in bankruptcy, and purchased by Greeson. The $3,000 note to the bank has been paid, but the bank claims that, by virtue of the note and bill of sale above referred to, the bank had a lien on the rails, not only for the $3,000 and interest, but also for subsequent loans made by it to the lumber company.

Now, in the first place, there is no claim that there was any subsequent agreement by the lumber company with the bank that the bank should hold the rails for these subsequent advances. These subsequent advances were in each instance secured by transfer of bills of lading for shipments of lumber. When the cashier of the bank was asked whether at the time they were made anything was said about the rails standing as security for them also, he replied that he did not remember that anything was said about it at the time the loans were made, but he said that on several occasions when the bank refused to make such advances to the company, Howell, the president of the company, had said that the bank had the rails, which were greater in value than the specific obligation they were given to secure. This testimony, which is all the evidence on that point, shows clearly that there was no agreement, subsequent to the execution of the note for $3,000, that these rails should he held by the bank as security for subsequent advances. So, if the bank has any lien on these rails, it must rest on the note and bill of sale given at the time the loan for $3,000 was made to the company.

This bill of sale, though in the form of an absolute transfer of title, was executed to secure a debt, and was in equity only a mortgage. In the case of *Martin* v. *Halbrooks,* 55 Ark. 569, Chief Justice COCKRILL said that "an unequivocal agreement in a mortgage that the instrument shall secure all indebtedness of whatever nature that may be due from the mortgagor to the mortgagee at a future date named would not be invalid between the parties for want of certainty." Now, we agree with the contention of the bank that, as the bill of sale was absolute in form, there was no requirement that the note given at the same time should be recorded, for equity would not set aside such conveyance and permit a redemption without requiring the mortgagee or party holding under him to do equity by paying the debt secure by the absolute bill of sale. The bill of sale was recorded,

and that was sufficient to notify all persons dealing with the property conveyed that the bank claimed an interest in it. But, to create a lien on this property for subsequent debts, it should appear that there was, to quote the language of Judge COCKRILL, "an unequivocal agreement to that effect." Now, there does not appear to be an express stipulation in the note sued on that the bank should have a lien on these rails for subsequent debts. The note is, no doubt, in the usual form required by the bank of borrowers where collateral was deposited to secure the loan. It speaks of these rails as having been deposited with the bank as security for the payment of the note and interest, though as a fact the rails were never delivered to the bank.

The only reference to the subsequent debts in the note is found in that part of the note which deals with the disposition of the proceeds of the rails in the event they were sold to pay the debt. The language of the note clearly intimates that the debtor has the right to redeem the rails at any time before such sale by paying the amount of the three-thousand-dollar loan and interest. But the note provides, in the event that the debt is not paid, and the rails are sold by the bank, that "the surplus, if any, * * * shall be paid to the drawer of the note, or, at the election of the holder thereof, be paid on any other obligation of the drawer hereof." This language seems to give the bank a lien, not on the rails, but on any funds arising from the sale of the rails by the bank, in the event that the note was not paid. But, if we treat this rather equivocal language as creating a lien on the rails in favor of the bank for any subsequent debts due from the lumber company to the bank, it was a lien that the bank could waive. If the rails had been sold by the bank, and after payment of the note a surplus had remained, it could, perhaps, under this provision have applied it to other debts due it from the company. The note says that it could be done at "the election" of the bank. But if, instead of making such a disposition of the proceeds, it had elected to return such funds to the maker of the note, it is clear that afterwards the bank could not recall such action and demand the return of such funds. In this case the rails were never sold, for the party who purchased the rails at the sale by the trustee in bankruptcy, and who succeeded to the rights of the owner thereof, paid the note and interest in full. The bank thereupon

returned to him the bill of sale and the note marked "Paid." This was an election by the bank not to claim any lien on the rails for other indebtedness; and if it had any lien for such debts, it thereby waived it. But this action of the bank, together with the doubtful language of this note and the other circumstances under which the note was made, convinces us that this bill of sale was executed to the bank as security only for the loan of $3,000 and interest, and that the bank has now no right to hold these rails for loans made to the lumber company after the execution of the bill of sale in question. After consideration of the matter, we are of the opinion that there is no equity in the complaint.

The judgment is therefore reversed, and the action of plaintiff is dismissed for want of equity.

---

78 147
f79 393
82 561

78 147
f80 561

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. PLUMLEE.

Opinion delivered March 10, 1906.

1. EVIDENCE—COMPETENCY OF EXPERTS.—If a handcar is such a machine as requires expert testimony to determine what would be the effect of operating a defective car and what would be a defect in a car, a witness who had run a handcar for three years, and another who had had fifteen years' experience in operating such cars, were qualified to testify as experts. (Page 155.)
2. MASTER AND SERVANT—DUTY TO WARN SERVANT.—It was improper to charge the jury that a master should warn inexperienced servants of any danger incident to their service, in a case where there was no evidence that the master had notice of such inexperience. (Page 156.)
3. SAME—DANGERS OF WHICH SERVANT SHOULD BE WARNED.—While it is the duty of a master to warn its servants of certain kinds of defects in machinery and the danger likely to ensue from the operation thereof, it is not the duty of the master to warn its servants of all dangers that are incident to the business about which the servant may be employed, but only of those which are extraordinary or latent. (Page 156.)
4. INSTRUCTIONS—WHEN INCOMPLETENESS CURED.—Instructions which, standing alone, would be incomplete may be cured by others given by the court. (Page 156.)

5. DEFECTIVE INSTRUCTION—HOW OBJECTION RAISED.—An instruction to the effect that it is the duty of a railroad company to furnish its employees with safe tools and appliances with which to work is defective in form, but is not ground for reversal if appellant did not ask to have it corrected by suggesting the proper qualification. (Page 156.)

6. CONTRIBUTORY NEGLIGENCE—ABSTRACT INSTRUCTION.—In an action against a master to recover for the negligent killing of a servant caused by a defective handcar, it was not error to refuse to instruct the jury that there could be no recovery if the handcar was defective and was being run too fast, if there was no evidence that deceased knew of the defective condition of the car, nor any evidence that it was being run too fast. (Page 157.)

7. NEGLIGENCE—EVIDENCE.—Where it was a matter of dispute whether deceased was killed by the defective condition of the wheels of a handcar, it was prejudicial error to permit plaintiff to prove that some time after the accident defendant removed the wheels in question from the handcar. (Page 157.)

Appeal from Monroe Circuit Court; *George M. Chapline*, Judge; reversed.

STATEMENT BY THE COURT.

This was an action for damages for the alleged negligent killing of one Hopkins, who at the time of the killing was in the employ of appellant as a section hand, and working under the directions of its section foreman.

The complaint alleged that it was the duty of appellant to furnish "safe tools and appliances and a safe place to work; that under the direction of the foreman four men were sent on an errand with a handcar; that the appellee's intestate was inexperienced, having only worked on the line two months and ten days, and the handcar was unsafe and defective; that the flanges of the wheels were too short, and the wheels were not shaped in a manner to prevent them from jumping the track; that the section foreman was negligent in sending four men out with the handcar, and that by reason of the defect in the handcar it jumped the track, and injured appellee's intestate, which resulted in his death; that there was a low joint in one of the rails near where the handcar was derailed, and the handcar did not have safe brakes or attachments sufficient to prevent it from jumping the track, and it was not properly geared; that immediately after said accident appellant took off the two dangerous wheels, and replaced the same with safer and better wheels; that the plaintiff's

intestate was damaged by reason of the negligence of the appellant in the sum of $2,000."

The appellant, answering, "admitted plaintiff's intestate was in its employ as section hand at the time he was injured, but denied he was inexperienced in the use and operation of handcars, and alleged it was the custom to ride upon handcars while working on the section, and that the plaintiff's intestate and three other section men were by the foreman directed to take the car and go on a short errand, and bring some tools with which to remove a tree across the road. Appellant admitted, while returning, the car left the track and injured plaintiff's intestate, but alleged it was on account of the excessive speed; that the handcar was in good condition, and had been used for three months past; that the tracks were in good condition, and the rails were set the right distance apart, and were straight. The rapid speed of the handcar was dangerous on account of the light load, and the deceased was helping to propel the car at the time of the accident. It denied said car was not safe, or was defective in any way, or that the injury resulted from its negligence, or from the negligence of any of its employees. It denied the wheels of the handcar were removed after the accident, and denied the derailment was occasioned by a low joint, or that plaintiff's intestate was not furnished with safe tools or a safe track upon which to run said car, or that the handcar was defective in any way, and alleged that the accident occurred on account of the high rate of speed of the car."

There was evidence tending to show that appellant was negligent in failing to use ordinary care to furnish Hopkins and his fellow workmen with a safe handcar with which to do their work. There was no evidence tending to prove that Hopkins was guilty of contributory negligence in running the car at a high rate of speed, and this was the only particular in which contributory negligence was set up in the answer.

The only evidence introduced on the subject of the deceased's experience or inexperience in the work he undertook to perform was that he was 33 years of age, had worked as a section hand a few times as a substitute for regular men, and on the 13th of February, 1902, he became a regular hand and continued in that capacity until injured, April 28, 1902. There was no evidence

tending to show the appellant or any employee upon whom it devolved to either instruct or warn an inexperienced servant as to dangers incident to his employment knew anything about the experience or inexperience of the deceased.

Witness Orear testified that he had been a section hand about one and one-half years. When asked to state the defects in the car, he stated that he was no mechanic, but thought the flanges were rather small and low. Objection was made to this evidence, and it is made the second ground of the motion for a new trial.

Witness Thompson testified that he had worked as a section hand for fifteen or twenty years, had experience during this time with handcars, had taken them all to pieces and put them together again. The witness was asked this question: "If a handcar is not properly geared, and in pulling it the cogs slip or are jumped, what is liable to happen to that car in running it up and down the railroad track?" Over the objections of the defendant, witness was allowed to answer, and said: "Liable to jump the track." Witness was then asked: "Did you examine the axle?" Ans. "Yes, sir." "State whether or not it was sprung. State the condition you found the axle when you examined it." Witness answered: "My opinion is it was a little sprung; now, I would not be positive, because it is on account of my eyesight, I can not see as good as I would like, to testify to anything like that." Witness was permitted to make this statement over the objections of the appellant. Witness was then asked to state whether or not in his judgment from the operation of the car there was a sprung axle. Over the objections of the appellant, witness answered, "Yes, sir."

These objections were saved in the motion for new trial.

The court gave the jury the following instructions:

"1. The court instructs the jury that it is the duty of the master to instruct and warn his servants as to danger that is liable to occur in the carrying on of the master's business, and, further, the master should warn all inexperienced servants of any danger incident to their employment.

"2. The court also instructs the jury that as to whether a servant is inexperienced or not, or whether the master has knowledge of his servant's inexperience, is a question of fact for the jury to decide.

"3. The court instructs the jury that it is the duty of the defendant to furnish the plaintiff, who was a section hand on defendant's road, with safe tools and appliances with which to work, and to exercise care and prudence in maintaining said appliances and tools in good repair.

"4. The court instructs the jury that, while the servant assumes all ordinary risk incident to his employment when he enters the services of his master, yet this does not include any extraordinary risk, nor does it include latent defects in the appliances used by the servant.

"5. The court instructs the jury that the risk of danger arising from the master's failure to perform his duty is not assumed by his servant.

"6. The court instructs the jury that, if they find for the plaintiff, they will consider the pain and suffering of the deceased, A. J. Hopkins, his age at the time of his death, the wages he was earning and the probable duration of his life, as proper elements of damages in this case, and give plaintiff such damages as the jury think he is entitled to under the circumstances and proof in the case."

Exceptions were duly saved to the giving of these.

The appellant asked and the court granted the following requests for instructions, viz.:

"1. The jury are instructed that if they find from the evidence that the plaintiff's intestate, having the appearance of a man twenty-five or thirty years of age, applied to the defendant for employment as a section hand for its railway, and there was nothing said at the time about his experience or inexperience in performing such work, the defendant would have a right to assume that the plaintiff's intestate was familiar with such work, and he, the plaintiff's intestate, would assume all necessary and responsible risks of accident incident to such employment.

"2. The jury are instructed that if they find from the evidence that the handcar upon which the plaintiff's intestate was working was derailed or jumped the track on account of or by reason of said intestate and his companions pumping upon the rear lever with such force as to cause the same to jump the track or become derailed, then your verdict must be for the defendant.

"3. The jury are instructed that if they find from the evi-

dence that the handcar upon which the plaintiff's intestate was injured was defective, and such defects were known, or could have been known, to the plaintiff's intestate by the use of ordinary care, and he continued in the employment and the use of the handcar, he assumed the risk incident to such defects, and your verdict should be for the defendant.

"4. If the jury believe from the evidence that Hopkins was not in charge of the handcar, but the same was run by other section men, and they ran the car faster than in the exercise of ordinary care they should have run the car, and by reason of such fast running the car jumped the track, causing the death of Hopkins, then plaintiff can not recover, and your verdict must be for the defendant.

"5. If the jury believe from the evidence that Hopkins was not in charge of the handcar, but the same was run by other section men, and they ran the car faster than in the exercise of ordinary care they should have run the car, and by reason of such running the car jumped the track, causing the death of Hopkins, and at the same time the car would not have jumped the track but for the defects therein, which were known, or by the exercise of his powers of seeing and hearing could have been seen or noticed by Hopkins, plaintiff can not recover, and your verdict must be for the defendant.

"8. If the defect in the handcar spoken of by the witnesses were easily and readily seen or noticed by Hopkins, and Hopkins was accustomed to use the handcar in that condition, and with such knowledge of the defects, or if by the use of ordinary care he could have noticed such defects which were patent and not concealed under such circumstances, and in consequence of such defects Hopkins was injured and died from such injuries, plaintiff can not recover, and you will find for the defendant.

"9. If the jury find from the evidence that the defendant railroad was negligent in that it failed to exercise such care as the law requires of it in respect to furnishing the handcar with which A. J. Hopkins was required to work, as explained in other instructions, yet if the jury also find from the evidence that the handcar, while being operated by the deceased and other section men, was run so fast that it became more dangerous than if it had been run with ordinary care and speed, and such running

of the handcar was careless and negligent, and such fast, careless and negligent running of the handcar, co-operating with the defects in said car, caused the same to jump the track, whereby Hopkins was killed, then plaintiff can not recover, and the jury will find for the defendant.

"10. The court instructs the jury that it was the duty of Hopkins to notice all defects in the car which his eyesight would have discovered, and the court tells you that a flat wheel on a handcar is an obvious defect, such as he was bound to notice by the exercise of ordinary care, and the defect, if there was such a defect, was obvious, and Hopkins is presumed to have seen it and known of its existence, and, there being no evidence to show he did not know of its existence, you will treat this case as though he did know of it; and if, knowing such defect, he went on with his work and used such car in its defective condition, he is held in law to have assumed the risk of danger of so using it, and if you find that he sustained his injuries because of such defect, in connection with the fact that the car was run faster than with due regard for his safety it should have been run, then the plaintiff can not recover, and you will find for the defendant.

"11. The court instructs the jury that it was not the duty of the railroad to see that Hopkins actually knew of the alleged defect in the handcar, but it had a right to rest upon a probability that section men using the handcar would notice defects that were obvious and apparent to the eyes; and if Hopkins was injured because of such defect, his administrator can not recover for such an injury, and your verdict must be for the defendant.

"12. The court instructs the jury that if the jury find from the evidence that the handcar described by the witnesses was defective in respect to a flat wheel, or because there was such play in the wheels as to cause it to wobble on the track, and such defect caused the handcar to jump the track while running at a rapid rate of speed, whereby the deceased section hand, Hopkins, sustained such injuries as caused his death, yet if the defects in the wheel were open to his observation, or, as the law calls it, such defects were patent, and with such knowledge of the defects referred to Hopkins went on the handcar in discharge of his duties, and was injured by reason of such defects as already mentioned, then he assumed the risk of any accident that would naturally re-

sult from such defects, and plaintiff can not recover, and the jury will find for the defendant; and if you find from the evidence that the defects referred to were patent or open to Hopkins' observation, then it is the same as if Hopkins had seen the same, for he is held to have seen all that by the exercise of ordinary care he could have seen."

And the court refused the following prayers:

"6. If the jury find from the evidence that one of the wheels of the handcar was defective by being what the witness calls 'flat,' or because it wobbled on the track by reason of having too much play, and such a defect exposed Hopkins, using said car, to the possibility of injury, and, by running the car faster than same should have been run had they been exercising ordinary care or had not been careless or negligent, the car jumped the track, and Hopkins sustained the injuries resulting in his death, the plaintiff can not recover, and you will find for the defendant.

"7. The court instructs the jury upon the evidence to return a verdict for the defendant."

Exceptions were duly saved to the ruling of the court in refusing these.

Other facts will be stated in the opinion. The verdict and judgment were for $2,000.

S. H. West and *J. C. Hawthorne,* for appellant.

The law does not require the master to warn an inexperienced servant of danger attending the discharge of his duties, unless experience is necessary to enable him to discharge his duties with safety, and the servant was in fact inexperienced, and the master knew it or ought to have known it from his age and conduct. 58 Ark. 217; *Ib.,* 168; 71 Ark. 55; 71 Wis. 114; 33 Am. & Eng. R. Cas. and note, 274; 76 Ark. 69; 39 Ark. 17; 56 Ark. 206; 56 Ark. 238; 46 Ark. 388; 40 N. E. 180; 26 S. W. 590; 50 Fed. 725. Without evidence to show that deceased was inexperienced, or that the defendant knew, or ought to have known, that he was inexperienced, it was error to submit that question to the jury. 14 Ark. 530; 42 Ark. 57; 41 Ark. 282. The duty of the master is discharged if it exercises ordinary care, even though the machinery and appliances furnished be not in fact safe or free from defects. 46 Ark. 555; 48 Ark. 333;

35 Ark. 602; 44 Ark. 525; 49 Ark. 98; 4 Am. & Eng. R. Cas., new series, 273; 135 U. S. 554; 5 Am. & Eng. R. Cas. 474; 100 N. Y. 266. The servant assumes the risk of latent defects unknown to the master, unless the master was negligent. Whether they were discoverable is for the jury. 5 Am. & Eng. R. Cas. 480 and notes; 15 *Id.* 230; 39 N. Y. 468; 76 N. Y. 125; 56 Ark. 206; 117 Mass. 407. If deceased knew, or by use of ordinary care could have known of defects, plaintiff can not recover, notwithstanding the master's failure. 1 Am. & Eng. R. Cas. 107; 2 *Id.* 144; 2 *Id.* 159; 3 Dill. 317.

2. Witnesses Orear and Thompson not having qualified as experts, it was error to allow them to express opinions as to result of operating a handcar with defects. 56 Ark. 612; 36 Ark. 117; 49 L. R. A. 33.

3. It was error to admit testimony as to removal of wheels from the handcar after the accident. 70 Ark. 179; 8 Am. & Eng. R. Cas. 464; 11 *Id.* 168; 16 *Id.* 342.

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

1. If the servant is inexperienced in running a dangerous machine, it is the master's duty to warn him. Whether or not he was inexperienced is a question of fact for the jury. 71 Ark. 55; 39 Ark. 17; 56 Ark. 206; 18 S. E. 360.

2. Errors in instructions, if any, were cured by instructions given at the request of defendant.

3. If it was essential that witnesses Orear and Thompson testify as experts, there was no error in admitting their opinions. The record shows they were qualified.

4. Testimony as to removal of wheels after the accident was admissible as a circumstance to show whether or not there were any defects in the wheels.

WOOD, J., (after stating the facts.) 1. Appellant's counsel contend that witnesses Orear and Thompson were not competent to give an opinion that any particular condition of the handcar was a defect, nor as to what would be the result of operating a handcar with defects, until they had qualified themselves as experts.

Conceding, as this does, that a handcar is such a machine as requires expert testimony to determine what would be the effect

of operating a defective one and what would be a defect in any particular condition of the car, we must say that the witnesses, in our opinion, have sufficiently qualified themselves to give expert testimony. The record does not warrant the conclusion that a handcar was such a complicated machine that great length of time employed in the use and operation thereof was necessary in order to enable one to understand its various parts, whether they were defective or not, and what would be the consequences of the operation of a defective one. Orear had run a handcar "off and on" for about three years, and Thompson had about fifteen or twenty years' experience in operating cars. He could take one to pieces, and put it together again. We very much doubt whether any peculiar skill, or special habits of study, or any unusual knowledge was necessary in order to master the details of handcar machinery and its operation. But, if so, then Orear and Thompson showed sufficient familiarity and knowledge of the subject-matter to entitle them to testify as experts, and their testimony was properly admitted.

2. Instructions one and two given by the court were abstract, and moreover were not accurate statements of the law upon the subjects intended to be covered by them. If it was a question of fact as to whether or not Hopkins was inexperienced, there was no evidence whatever that appellant had notice or knowledge of such inexperience. And while it is the duty of the master to warn its servants of certain kinds of defects in machinery and the danger likely to ensue from the operation thereof, it is not the duty of the master to warn its servants of all dangers that are incident to the business about which the servant may be employed, as the first instruction might be construed to mean. But these instructions, when taken in connection with instruction number four and with instructions given at request of appellant, especially those numbered one, three, eight, ten, eleven and twelve, could not have been prejudicial, for the whole matter covered by instructions one and two given by the court and the particulars wherein they needed explanation were covered fully by other instructions given, and that too in a more favorable light in some respects than appellant had the right to demand.

Instruction number three given by the court was defective in form, but appellant did not ask to have it corrected by suggest-

ing the proper qualification. The exact point covered by this instruction is ruled by *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255.

The court did not err in refusing instruction number six asked by appellant. The instruction was abstract and misleading. Besides, it leaves out all knowledge on the part of Hopkins of the defects mentioned and the danger to be anticipated in the use of such defective machinery. There was no evidence that the handcar was run too fast.

The court properly refused to give an instruction directing a verdict for appellant. The case was one for the jury upon proper instructions, and there is nothing in the ruling of the court in giving or refusing instructions of which appellant can complain.

We need not again discuss the doctrines of assumed risks and contributory negligence presented by some of the charges, for the whole subject has been gone over exhaustively by us in the recent case of *C., O. & G. R. Co.* v. *Jones,* 77 Ark. 367. Nothing remains except to apply these principles to the facts of each case as they arise where these questions are involved. In addition to the authorities cited by Judge RIDDICK, I wish to refer, for the benefit of those who may be interested in investigating these subjects further, to the case of *Limberg* v. *Glenwood Lumber Co.,* 49 L. R. A. 33, and the elaborate notes thereto.

3. The twelfth ground of the motion for new trial is: The court erred in refusing to exclude from the consideration of the jury the evidence of Sam Thompson, R. J. McKay and R. L. Orear as to placing or replacing wheels on the handcar after the time of the accident. Over the objection of appellant, witness McKay was permitted to testify that the rear wheels of the handcar were taken off some time after the accident, but he could not tell how long, whether three weeks or a month. Witness Thompson was asked to state to the jury how came the change to be made, and over objection of appellant answered: "I suppose it to be for safety." He was then asked: "The other wheels were not considered safe by the men who ordered them off?" and over objection was allowed to answer, "No." Exceptions were properly saved. Motion was made to strike out this testimony, and the bill of exceptions shows that "the court overruled the

motion to strike out the testimony of Orear and Thompson in reference to change of the wheels made on the handcar, and permitted the testimony to go to the jury, but not for the purpose of establishing conclusively that the change was made on account of defects, but it might be considered by the jury, together with all other circumstances." Such testimony was incompetent, as was recently ruled by this court in *Prescott & Northern Ry. Co.* v. *Smith,* 70 Ark. 179. It was prejudicial, for it can not be said that the evidence, apart from this, conclusively established the negligence of appellant.

The question was for the jury. The evidence was conflicting as to whether or not there were defects in the handcar which appellant knew or by the exercise of ordinary care should have known.

For the error in admitting this testimony and refusing on motion afterwards to exclude it, the judgment is reversed, and cause remanded for new trial.

---

78 159
82 43

FIELDER v. WARNER.

Opinion delivered March 10, 1906.

1. SPECIFIC PERFORMANCE—ORAL CONTRACT.—Specific performance of an oral contract for the sale of land will not be decreed unless it is proved by a decided preponderance of the evidence, not only that the contract was made, but what were its precise terms. (Page 160.)
2. SAME—WHEN DENIED.—Equity will not enforce specific performance of a contract to sell land if, on account of great lapse of time, it would be impossible to frame a decree that would protect defendant's rights; or if the preponderance of the evidence shows that the contract has been by mutual agreement rescinded. (Page 161.)

Appeal from Craighead Chancery Court, Western District; *Edward D. Robertson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This is a suit to enforce the specific performance of an oral agreement to convey an interest in real estate.

Appellant alleges that in the year 1881 he entered into an agreement with appellee, whereby appellant undertook to clear 160 acres of land in north half of section 25, and put the same in cultivation. In consideration of the performance of the agreement by appellant, appellee agreed to convey to appellant one-half of the land cleared by him and an equal number of acres of timbered land in said half section. Appellant entered into possession under this contract, cleared 160 acres of said land, and put the same in cultivation, except about fifteen acres, which was wet and unfit for cultivation, and placed thereupon improvements of the aggregate value of $1,500.

Appellee answered, and denied the agreement set out in the complaint, alleged that he made no agreement in reference to the northeast quarter, section 25, but did agree to convey to appellant an undivided one-half interest of the northwest quarter of said section, provided appellant would place the whole of said 160 acres in cultivation. That during the time appellant was engaged in the performance of this contract he (appellant) was to pay one-half the taxes on the land. It is alleged in the answer that this agreement was afterwards rescinded by mutual consent, and it was thereafter agreed between appellant and appellee that appellee should cultivate the land on the shares and use one-third of the corn raised thereon for the purpose of keeping the place in repair.

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

In an action for specific performance the court will grant relief according to the circumstances of the case. 21 Ark. 110. Going into possession and making improvements upon the faith of the agreement is sufficient consideration upon which to base a claim for specific performance. 32 Ark. 97. Where either party has in good faith done anything in performance of his contract, and thereby placed himself in a situation such that refusal of the other party to perform would operate as a fraud for which the law affords no adequate remedy, equity will grant specific performance, or execute the contract as far as may be, and give compensatory judgment. 40 Ark. 382; 1 Ark. 391; 55 Ark. 587.

Hawthorne & Hawthorne, for appellee.

1. The evidence on the part of appellant is too indefinite to entitle him to a decree for specific performance.

2. After a lapse of twenty-one years, with no probability of appellant's complying with his part of the agreement, and no means of placing appellee *in statu quo,* the court could not decree a specific performance. 34 Ark. 663; 19 Ark. 51; 40 Ark. 382; 23 Ark. 421; 44 Ark. 334; 8 Wall. 557; 6 John. Chy. 222 and note; 54 Am. Dec. 492; 33 Am. Dec. 635; 2 Wheat. 336; 93 Pa. St. 443.

3. The proof discloses that the contract was rescinded, and that thereafter appellant continued to pay rent for the use of the land for a period of fifteen to seventeen years. His acts were inconsistent with his demand in this case, and he is estopped. 23 Ark. 653; 114 N. Y. 271; 21 Minn. 111; 57 Am. Dec. 668.

WOOD, J., (after stating the facts.) A court of equity can not make a contract for parties and then decree its specific performance, in order to carry out its notions of what the abstract justice and right of the case as disclosed by the proof demands. The court will only decree specific performance when the contract itself is clearly established by a preponderance of the evidence. We said in *Moore* v. *Gordon,* 44 Ark. 334, speaking of the contract: "Its terms must be definitely shown, * * * fairly made out, by decided preponderance, in a manner to be satisfactory to the chancellor, not only that the contract was made, but also as to the precise terms." The appellant testified concerning the terms of the contract as follows:

"About the 5th or 6th of January, 1881, near the gin lot of appellee, it was agreed between myself and appellee that I was to clear land, one-half for the other, and he put in a half section of which I was to clear 160 acres. He was to give me one-half of the cleared land, and as many more acres of timbered land. The reason I asked for one-half of the land in timber was because I would have to sell out unless I had timbered land to keep up the cleared part. I cleared on the half. He, Mr. Warner, said if I cleared 500 acres, he would deed me 500, and if I cleared 1000, he would give me 1000, and half I cleared."

A witness for appellant who heard the agreement between appellant and appellee testified:

"I heard Mr. Fielder propose to buy the tract from Mr. War-

ner. Warner replied: 'Thad, you are not able to buy it. You need a home, and I would like for you to have it. Go over there, and clear the land deadening, and I will give you half you clear,' or a certain division of the land. I don't recollect now what that was, but he was to have timber in proportion to that piece of land. I think it was a half section. It was to be cleared across the east side of it, and back as far as possible. As well as I remember, Fielder said: 'If I clear so much I will have no timber,' but I do not recollect that Warner said that he was to have half of the land that was not cleared. Mr. Fielder agreed to the proposal."

The appellee testified that he had the northwest quarter of 25 deadened, fenced, and 62 acres had been cultivated. He told appellant "to move in the houses, clear up the 160 acres under fence and they would farm in co-partnership," and added, "when we get this in cultivation, we will clear some more." The contract was not intended to cover the northeast quarter.

Who can tell from this evidence what the precise terms of the contract were which appellant is seeking to have performed? His own evidence leaves it uncertain whether he was to clear the land, and get half of what he cleared, or whether he was to clear the land and receive the same number of acres as he had cleared in consideration for the clearing, or whether he should receive half of what he had cleared and an additional number of acres in the woods to make area equal to what he had cleared? Certainly, if appellant and his witnesses could not be definite and certain as to what the contract was, the court could not be. But even if there had been a contract definite in terms established, there are other insuperable barriers to the relief which appellant asks; namely, a preponderance of the evidence shows that, even if the contract were as appellant claims in his complaint and brief, still it would be impossible to frame a decree that would put appellee *in statu quo*, or approximate it. It would be impossible after this great lapse of time to have appellant comply with his part of the agreement, even as he contends it should be. Then, too, a finding that if there was an original agreement as set up in the complaint, such agreement had been, long years before rescinded would be sustained, we think, by the clear preponderance of the evidence.

So the decree of the chancellor was right, and it is affirmed.

COFFIN v. BRUTON.

Opinion delivered March 10, 1906.

NOTARY PUBLIC—NEGLIGENCE—PROXIMATE CAUSE.—A complaint against a notary public which alleges that defendant negligently affixed his official signature and seal to the affidavit of a soldier that he was entitled to an additional homestead entry under the United States laws, and to an assignment thereof, when in truth such affidavit and assignment were not signed by the alleged soldier, and that, relying upon the truth of defendant's certificate, plaintiff purchased such right, and thus lost the consideration paid therefor, was properly dismissed where it was neither alleged nor proved that the alleged soldier had in fact a right of additional homestead entry.

Appeal from Pope Circuit Court; *William L. Moose*, Judge; affirmed.

Coffin brought suit upon the official bond of Bruton, a notary public, alleging that Bruton, as such notary, affixed his seal and official signature to a document and affidavit purporting to have been executed before him by David Mayberry, Jr., late of Company G, Second Regiment Arkansas Infantry Volunteers. That said document was headed "Assignment," and in which said Mayberry purported to have made statements as to his service in the United States army, and to the fact that he, prior to 1874, made a certain homestead entry under the United States homestead laws of less than 160 acres; also purporting to have assigned by said document, headed "Assignment," his right to a soldier's additional homestead right; that said notary in his official capacity also affixed his signature and seal of office to a certain other affidavit purporting to have been executed by said Mayberry, in which said Mayberry purported to have sworn, among other things, to his army service, and to the fact that he, prior to 1874, made a homestead entry under the laws of the United States of less than 160 acres, as well as to the fact that he had not previously assigned his right to a soldier's additional homestead right and the assignment thereof; also to a certain other affidavit which purported to have been signed and sworn to by J. W. Hodge and Lizzie Hodge, which affidavit was in corroboration of the affidavit of said Mayberry; that these affidavits were in proof of and to establish the right of the said Mayberry to a soldier's additional home-

stead right; that the said notary on the 22d day of March, 1905, affixed his official signature and seal of office to the said assignment, certifying that the said David Mayberry, Jr., was personally well known to him, and that he had on the 22d day of March, 1900, personally appeared before him as such notary and signed and acknowledged said assignment before him; that said notary on the said 22d day of March affixed his official signature and seal of office to a jurat, certifying that said parties signed and swore to said affidavits before him on said date; that said certificates and jurats were in fact false; that said Mayberry or J. W. Hodge, or Lizzie Hodge never appeared before said Bruton as such notary and did not execute said assignments and affidavits before him as therein stated. That said assignment and affidavits, if true, would have established the right of said Mayberry to a soldier's additional homestead right under the laws of the United States. That, relying on the truth of the said certificate and the proper execution of the said document, he purchased the said soldier's additional homestead right of said Mayberry from R. D. Hamm on the 5th day of April, 1900, and paid him therefor the sum of two hundred and seventy-seven dollars ($277.00). That, by reason of the falsity of the said certificate and negligence of the said notary in negligently certifying the proper execution of the said papers before him, he was imposed upon by the said R. D. Hamm, and paid him the sum of two hundred and seventy dollars ($270.00) for the said soldier's additional right of the said Mayberry. That, owing to the said negligence of the said notary, and the fact that the said Mayberry, Hodge and Hodge did not appear before him as certified and execute the said papers and affidavits, he acquired no right by reason of said purchase, and that the consideration paid by him for said right was wholly lost.

Wherefore plaintiff prays judgment for two hundred and seventy-seven dollars and interest.

Defendant Bruton demurred to the complaint, and, on the overruling of the demurrer, answered, denying the allegations of negligence.

It was agreed that Coffin purchased the soldier's additional homestead right of David Mayberry, Jr., late of Company G, Second Arkansas Infantry Volunteers, on the — day of April, 1900, paying $277 for said claim; that the assignment was in

blank, and that the papers in proof of said right, as well as the assignment, were executed before J. H. Bruton, who was at the time a regularly appointed and duly qualified and commissioned notary public; that he as such notary public affixed his signature and seal of office to a certificate attached to said assignment and affidavit of said Mayberry, certifying that said Mayberry appeared before him and signed and acknowledged said assignment and affidavit as therein stated, and also attached his signature and seal of office to a certificate to the affidavits purporting to have been signed by J. W. and Lizzie Hodge, certifying that they appeared before him and subscribed and swore to the said affidavits as therein stated; that a copy of said assignment and affidavits were attached as part of the evidence; that said assignment and affidavits purporting to have been executed before said Bruton, if true, would have established the right of said plaintiff, as assignee, to the soldier's additional right of the said Mayberry; that said Mayberry did not appear before said Bruton, having died in 1879; that R. D. Hamm, one of the defendants, was the seller of said claim; that he came to said Bruton with three parties on said date, one of whom he introduced as said Mayberry, and the others as J. W. and Lizzie Hodge; that said Bruton had no knowledge of the said Mayberry or parties brought before him, but had known said Hamm, in whom he had confidence, for many years; that said parties signed and acknowledged said assignment and affidavits, and that said Bruton did not take the sworn identification of said parties by any person whom he as such notary was personally acquainted with, but relied upon and was satisfied with the introduction of the said Hamm and the statement of the said parties themselves; that said Coffin used all proper efforts to secure the rights purported to have been sold and transferred by said assignment and papers, but failed in his efforts by reason of the facts that said Mayberry never signed and executed said assignment and affidavits as certified by said notary public; that said Bruton had never seen or known said parties, and that said Hamm was not acquainted with and had never known either of said parties, but this fact was not known to said Bruton. The court, sitting as a jury, found the facts as set forth in the agreed statement of facts, and declared the law both upon the demurrer and the facts to be for the defendant, and that the

plaintiff's complaint and cause of action be dismissed, and rendered judgment for the defendant for costs.

Plaintiff has appealed.

Myers & Bratton, for appellant.

If the acknowledging party is not personally known to the officer, his identity must be proved by witnesses known to the officer, which proof or affidavit must be indorsed on the deed or instrument of writing. Kirby's Digest, § 747. The law imposes the duty on a notary public to know or to inform himself that a party acknowledging an instrument before him is the person he represents himself to be, and he is liable on his bond for negligence in this respect. 10 Cal. 239; 9 Pac. 843; 63 S. W. 819; Shear. & Red. on Neg. (5 Ed.), § 602; 2 Mo. App. 413; 45 Ill. App. 311; 9 Pac. 843; 31 Pac. 1132; 39 Mich. 456; 97 Cal. 208; 61 Iowa, 35; 94 N. Y. 302; 15 How. 179; 74 Mich. 643. Where a notary, through negligence or fraud, makes a false certificate, he and his sureties on his bond are liable for resulting damages to an injured party. Authorities, *supra.* The injury would not have occurred but for the negligence of the notary. It was therefore the proximate cause. 48 Minn. 433; 59 S. W. 925, and cases cited; 36 S. W. 1111; 26 Hun, 608; 50 Am. Rep. 568; 14 Minn. 62; 8 Am. & Eng. Enc. Law 861.

The doctrine of estoppel applies, and Bruton should not be heard to offer any explanation in the face of his cetrificate, and plaintiff, on showing its falsity, should have judgment. 8 Ark. 345; 25 Mass. 386; 87 Ind. 126; 22 Ark. 308; 45 Ark. 59; 11 Am. & Eng. Enc. Law (2 Ed.), 421. The one whose negligence or lack of foresight makes the loss possible must bear the burden. 6 Mackey, 428; 74 Ala. 604.

J. A. Gillette and *Dan B. Granger,* for appellees.

1. The case of *Smith* v. *McGinnis,* 75 Ark. 472, controls this.

2. The certificate of a notary is presumed to be correct, and can not be attacked collaterally. 16 Am. & Eng. Enc. Law (1 Ed.), 753 and note 4; *Ib.* 767, and note 3; 40 Am. Rep. 193. The notary in determining the identity of the person making the assignment acted judicially, and can not be held liable unless in the dereliction complained of he acted willfully, maliciously or

corruptly, and this is not charged. 16 Am. & Eng. Enc. Law (1 Ed.), 754 and note 2; *Ib.* 782 and note 3; *Ib.* 783 and note 1; 1 Rice on Ev. 315; 97 Pa. St. 228; 38 Am. Req. 623; 39 Am. Rep. 805; 40 Am. Rep. 193; Rapalje & Lawrence's Law Dict. 689.

3. The statute relied on is not applicable. Additional homestead rights are personal property, subject to assignment and transfer as such. Until the right is exercised, title to land which might be entered is perfect in the Government, and not affected by any transfer of the right. 19 Ark. 86; 20 Ark. 359; 26 Ark. 168; 163 U. S. Sup. Ct. 331; 39 Land Dec. 510.

4. There is no privity between the plaintiff and the notary. The cause is too remote.

WOOD, J. The cause was tried by the court sitting as a jury, and was heard upon "the complaint, the answer of the defendants, and their demurrers reserved therein to the said complaint, together with an agreed statement of the facts." The court found the facts as set forth in the agreed statement, and declared the law generally both upon the demurrer and the facts to be for the defendants.

In *Smith* v. *Maginnis,* 75 Ark. 472, in considering whether "the fact that the notary public falsely certified that the parties had made affidavits to their ownership was the proximate cause of the injury," we said: "Though the plaintiff may have relied upon the affidavit and the certificate of the notary public in making his purchase, still such certificate was not in law the proximate cause of his injury. The proximate cause of his injury was the act of the party who sold him homestead rights which he did not own; not the negligence of the notary in certifying that such party had sworn that he was the owner of the right. *Oakland Savings Bank* v. *Murfey,* 68 Cal. 459; *Wyllis* v. *Haun,* 47 Iowa, 614; *Doran* v. *Butler,* 74 Mich. 643; *Hatton* v. *Holmes,* 97 Cal. 208; *Henderson* v. *Smith,* 26 W. Va. 829; 53 Am. Rep. 139." That case rules this. There is no such difference in the facts as will warrant the application of a different principle.

The whole case below was tried upon the theory that the notary and his bondsmen were liable to appellant because the notary falsely certified that one Mayberry personally appeared before him (the notary) to him known to be the person who executed the assignment and affidavit, and that certain other parties

had made affidavit before him which were in corroboration of the affidavit of Mayberry. In other words, that appellees were liable because the notary had certified falsely as to the identity of the parties named in his certificates. It was alleged in the complaint that the affidavits were in proof of and to establish the right of the said Mayberry to a soldier's additional homestead right, and also that "said assignment and affidavits, if true, would have established the right of the said Mayberry to a soldier's additional homestead right under the laws of the United States." It is set forth in the agreed statement that said assignment and affidavits purporting to have been executed before said Bruton, if true, would have established the right of said plaintiff as assignee to the soldier's additional right of the said Mayberry. And that said Coffin used all proper efforts to secure the rights purported to have been sold and transferred by said assignment and papers, but failed in his efforts by reason of the facts that said Mayberry, Jr., never signed and executed said assignment and affidavits as certified by said notary public. But all this falls short of alleging and proving that Mayberry had in fact a right of additional homestead entry. The utmost that these allegations and the agreed facts show is that Mayberry and his assignee could, if the facts so falsely certified to had been true, have established "a soldier's additional homestead claim." The very statement shows that the right had not in fact been established, but could be only upon condition that the affidavits were true. Well, unless Mayberry had additional homestead rights to transfer, it is certain that a false certificate of acknowledgment that he had executed an assignment of such right to another, and a false certificate that certain affidavits were made that would establish his right, if true, would not be the proximate cause of injury and the basis of liability. So the complaint is defective in not alleging that Mayberry had a right of additional entry which he could assign, and the demurrer should have been sustained.

Again, as to the facts, the trial court may have concluded that the agreed statement failed to show that Mayberry had a right of additional homestead entry. Giving to appellees the benefit of every deduction, the trial court may have drawn from the evidence in their favor, who can say that it was not warranted

in such a conclusion? There is no affirmative statement that Mayberry had a right to additional homestead entry, and taking the whole agreed statement together, the intention and effect of it was to show that appellant purchased for a valuable consideration from one Hamm the claim of Mayberry to have a soldier's right of additional homestead established, which had been assigned in blank, and appellant purchased this claim of Hamm upon the certificate of the notary that Mayberry had appeared before him and acknowledged the execution of the assignment of the claim, and made affidavit in proof of his right to have his claim approved or established, which affidavit, if true, would establish his right; and that certain other parties had made affidavits also in proof of Mayberry's right to have his homestead claim established, which, if true, would establish such right; and that such certificate of the notary that the persons appeared and made the acknowledgment and affidavits was in fact false, but that appellant believed it to be true, and acted upon the faith of it. This comes short of showing that Mayberry had a right of additional homestead already established, but only showed that he had assigned such right if it should be established or approved.

The question of whether or not the right of additional homestead could be established depended upon the truth of the facts set up in the affidavits. There is no statement in the complaint or the agreed statement that the facts set forth in the affidavits were in fact true. So the complaint and the proof failed to show a cause of action. We conclude that what we said in *Smith* v. *Maginnis, supra,* is applicable to the pleadings and facts of this record, and the judgment is therefore affirmed.

ALEXANDER v. BEEKMAN LUMBER COMPANY.

Opinion delivered March 10, 1906.

1. APPEAL—QUESTION RAISED BY RECORD.—It is immaterial that proper exceptions were not saved to instructions given by the court in construing a certain contract if the same questions were raised on the record by the ruling of the court in upholding the sufficiency of the complaint. (Page 171.)
2. DEED—CONVEYANCE OF SAWMILL—EFFECT.—By a deed conveying timber, a sawmill and all the machinery connected therewith, and stipulating that "nothing else is sold, and that the party of the first part retains the ownership of the land and all other property thereon," a shed which covers the sawmill does not pass. (Page 172.)

Appeal from Greene Circuit Court; *Allen N. Hughes,* Judge; reversed.

Alexander, Amberg & Company, a partnership, as parties of the first part, made a written contract with Smeltzly and Stametts, parties of the second part, whereby they sold to the latter all the mill timber on certain described lands. The contract provided that "the party of the first part hereby sells to the party of the second part their sawmill and all the machinery connected therewith located on said land near St. Francis River and the Paragould & Southwestern Railroad."

After providing for the mode of payment and giving the purchasers six years to remove the timber, the contract provided further that "nothing is sold to the party of the second part but timber, sawmill and machinery mentioned herein, and the party of the first part retains the ownership of the land and all other property thereon. * * * It is expressly agreed and understood that if the party of the second part does not pay the notes given for said sawmill and timber promptly when they fall due, then all of said notes are to become due and payable at once, and the said sawmill and timber may be sold to pay whatever may be unpaid of the purchase price by the party of the first part. * * * It is further agreed by the party of the first part to give the party of the second part the use of all the houses on said property, except one occupied by S. Virgilio."

The Beekman Lumber Company, a corporation, succeeded

to the rights of Smeltzly & Stametts, and R. L. Alexander to those of Alexander, Amberg & Company.

The Beekman Lumber Company, while in possession of the sawmill under the above contract, attempted to sell the mill shed in which the sawmill was located, whereupon Alexander served notice upon the Beekman Lumber Company and the prospective buyer that he would sue them for damages if they removed or attempted to remove the mill shed, and thereby prevented the consummation of the sale. The lumber company then brought this suit to recover damages for the unlawful interference with its rights.

Under the instructions of the court a verdict was found in favor of the plaintiff, and judgment was rendered accordingly.

Defendant filed a motion for new trial, relying upon the following grounds:

"First, the verdict of the jury is contrary to the evidence.

"Second, the verdict of the jury is contrary to law.

"Third, the verdict of the jury is contrary to the law and evidence.

"Fourth, the declarations of law given by the court, Nos. 1, 2, 3, 4, 5 and 6, are contrary to law."

The motion was overruled, and defendant has appealed.

Johnson & Huddleston and *W. S. Luna,* for appellant.

The court erred in holding that title to the mill shed passed to appellee. For definition of the word "mill," see 71 Wis. 33. Sawmill: a mill used for sawing, especially used for sawing timber or lumber.—Web. Unabridged Dict. A mill for sawing timber.—Univ. Dict. Eng. Lang. Vol. 4, Ed. 1899. See 44 N. H. 386.

J. D. Block, for appellee.

Appellant's objections to the court's declarations of law are general, and fail to set out the specific grounds of objection. This court will not consider them if any of the declarations are correct. 60 Ark. 250; 59 Ark. 312; *Ib.* 370. A mill is defined as "the building, with its machinery, where grinding or some process is carried on." 71 Wis. 33, second definition. "Mill, mill-dam, mill-privilege, mill-site, and like expressions, are construed to include land, buildings and machinery, or other fixtures

necessary or useful to attain the object proposed in the erection." Anderson's Law Dict. (1891 Ed.) See also Webster's Dict.; Bouvier's Law Dict.

Johnson & Huddleston and *W. S. Luna,* for appellant, in reply.

The declarations of law by the lower court being based upon the construction of the language and terms of a written contract set out in the bill of exceptions, and which was the only evidence considered in construing the contract, it was not necessary to except at all in order to secure a review by this court. 125 Mo. 418; 28 S. W. 656; 101 Ill. 446; 48 Kan. 428; 20 U. S. 530; 15 S. W. 987; 5 Ark. 700. See also 65 Ark. 525; 39 Ark. 41.

WOOD, J. The bill of exceptions shows that the court of its own motion gave the following instructions and declarations of law, towit:

"'1. The words of description of the property sold in the contract included the mill shed.

"'2. If the shed was a fixture real when built, it has by agreement of the parties ceased to be such.

"'3. The form of the writing is sufficient.

"'4. The plaintiff was the owner of the shed when it was torn down.'

"To which instructions and declarations of law the defendant at the time excepted, and asked that his exceptions be noted of record, which was accordingly done."

The exception to the instructions was in gross. *Atkins* v. *Swoope,* 38 Ark. 528.

But, inasmuch as the contract itself was the basis of the complaint, and as the question of law in the case depends upon the sufficiency of the complaint, we are of the opinion that if there was any error in the construction of the contract, such error appears upon the face of the record.

So the only question here is, do Alexander, Amberg & Company (represented here by appellant) own the sawmill shed involved in this litigation?

Reverting to the contract, its language is: "The party of the first part hereby sells to the party of the second part their sawmill and all the machinery connected therewith located on said

land near St. Francis River and the Paragould & Southwestern Railroad. * * * Nothing is sold to the party of the second part but timber, sawmill and machinery mentioned herein, and the party of the first part retains the ownership of the land and all other property thereon. It is expressly agreed and understood that if the party of the second part does not pay the notes given for said sawmill and timber promptly when they fall due, then all of said notes are to become due and payable at once, and the said sawmill and timber may be sold to pay whatever may be unpaid of the purchase price by the party of the first part. In testimony whereof we have signed our names hereto this the 13th day of July, 1895. It is further agreed by the party of the first part to give the party of the second part the use of all the houses on said property, except one occupied by S. Virgilio."

We do not agree with the learned trial court that the word "sawmill," as used in the contract, includes the mill shed that covers the sawmill. A mill is not a shed, and a shed is not a mill. They are not synonymous nor convertible terms, nor does one include the other. A sawmill is a sawmill, whether it has a shed over it or not. In the factory where it is made or the store where it is sold, it is still a sawmill, and the sheds covering the sawmill in such cases are not parts of the sawmill, but parts of the real estate to which they are attached.

What is a sawmill? A "saw" is "a tool for cutting," and a "mill" is "a machine for grinding." March's Dictionary.

The standard lexicographers all give the first meaning of mill as a machine or device for grinding, cutting, etc. The mill is the machine constructed for various purposes of grinding, cutting, etc. The particular purpose for which it is designed is usually designated by a prefix indicating the purpose, as "sawmill," "gristmill," etc. The term "mill" necessarily carries with it the idea of a machine, device, tool, but it does not necessarily carry with it the idea of a shed or house. True, the term "mill" is frequently used to designate, not only the machine used for grinding, cutting, etc., but also, in a general and comprehensive sense, the house or shed where such machinery may be in operation, if there be a house or shed where the mill is located. Many lexicographers give this as the second meaning of the word. See Worcester, Century and Webster's Dictiona-

ries. So not much aid can be derived from the definition of the word by the lexicographers, except when it is used in its strictly technical sense.

If the makers of the contract had used the word in the broad sense of designating the plant as a whole, including house, machinery and all appointments in connection with such manufacturing establishment, they would hardly have added the words, "and machinery," "and machinery thereto attached," after the word "sawmill," for it would have been unnecessary. The word "mill" would have been sufficient.

Now, the parties to the contract were by their contract converting fixtures into personalty, if the contention of appellee be correct. They were changing the legal and natural status of the property, and the intention to do this should be made most manifest before the instrument could be construed to have such effect. We think it clear from the words used, and from the other reservations made by the owners of the real estate, that they did not intend to sell the mill shed with the sawmill and machinery. This shed would have to be torn down and detached from the soil in order to be removed, and it is not probable, we think, that the parties had this in contemplation. Only the "sawmill and machinery" were sold. "The land and all other property thereon" were reserved. It follows that the mill shed or house was not sold, and the court erred in rendering judgment in favor of appellee.

The judgment is reversed, and the cause is remanded for new trial.

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

Opinion delivered March 10, 1906.

RAILROAD—LIABILITY FOR WORK DONE—ACCEPTANCE.—Where the work of a subcontractor in clearing the right of way of a railroad company has been accepted by the engineers of the railroad company, the subcontractor is entitled to recover of the contractor and the railroad com-

pany, and it is too late to object that the plans and specifications which the company furnished to the contractor were not complied with.

Appeal from Phillips Circuit Court; *Hance N. Hutton,* Judge; affirmed.

B. S. Johnson, for appellant.

Where a contract has reference to another paper for its terms, the effect is the same as if the words of the paper referred to were inserted in the contract. 1 Beach on Mod. Law of Cont. § 713; 9 Cyc. 582.

P. D. McCulloch, for appellee.

BATTLE, J. The Memphis, Helena & Louisiana Railway Company is a corporation organized under the laws of the State of Arkansas to construct a railroad from the city of Memphis, in the State of Tennessee, through the counties of Crittenden, St. Francis, Lee, Phillips, Desha and Chicot, in the State of Arkansas, and through the State of Louisiana to the City of New Orleans. C. J. Johnson was employed by this company to clear the right of way and to construct the road of the company from Marianna, Arkansas, to Memphis, Tennessee. G. W. Bogan was employed by Johnson to clear a portion of the right of way of the company by a contract in writing as follows:

"Pinckney, Ark., Aug. 22, 1903.

"Have this day let to G. W. Bogan the clearing on the M., H. & L. Ry. from station 1320 to station 1640, at the price of ($40) forty dollars per acre, it being understood that said Bogan has all the timber he wants on the same, and that he has an option on further four miles, provided he can get a force on same, quick work to commence at once, and be prosecuted as fast as possible. Work to be done according to the plans and specifications of the railway engineers in charge.

[Signed] "C. J. JOHNSON."

Upon this contract Bogan brought this action against Johnson and said railway company, alleging in his complaint that he had cleared fifty-six acres of said right of way; that thereafter the clearing of the right of way was discontinued, and he was not permitted to complete the performance of his contract; that there was due him for this work the sum of $2,240; that he had

been paid thereon the sum of $575, leaving a balance due him of $1,665, for which amount he asked judgment, and that the judgment be declared to be a lien upon the right of way, roadbed and the franchises of the railroad company.

The St. Louis, Iron Mountain & Southern Railway Company having purchased and become the owner of the franchises, right of way, roadbed and all other property owned by the Memphis, Helena and Louisiana Railway Company, was made a defendant in this action.

Johnson answered and admitted that he entered into the contract sued on, but denied that Bogan had cleared fifty-six acres of the right of way, and that he was indebted to him in any amount whatever. The other defendant answered, and denied that plaintiff had cleared any of the right of way as alleged.

The only question in the case is: How much of the work Bogan contracted to do was done by him? According to his testimony in the case, he cleared fifty-six acres. C. J. Onion, a civil engineer and surveyor, and experienced in the construction of railroads, testified that 51.35 acres were cleared. According to the testimony in behalf of the defendants, 24.60 acres were cleared. The defendants offered and the court refused to permit them to introduce in evidence the plans and specifications in accordance with which the right of way of the railroad company was to be cleared. The jury found that plaintiff was entitled to $1,520, less $576 which the evidence showed had been paid to him, leaving $944 unpaid, and also found that there was $23 interest due on this balance. Judgment was rendered accordingly, and the defendants appealed.

Appellants contend that the plans and specifications should have been admitted as evidence and considered in estimating what proportion of the work Bogan undertook to perform had been done and the amount due therefor. But no copy of the plans and specifications were delivered to Bogan. The contract was made with Johnson, and not with the railroad companies. He instructed Bogan as to what he should do in performance of the contract, and Bogan complied with his directions. The engineers of the railroad companies, employed for the purpose, inspected his work from time to time and approved it. He was doubtless induced by the directions of Johnson and the approval

of the engineers to perform his contract as he did, believing that he would be compensated therefor according to his contract. It is too late now to hold appellee responsible for the observance of plans and specifications after the right of way had been abandoned and he had been released from his contract, and thereby deprive him of compensation for labor performed by him and approved by all parties concerned.

Judgment affirmed.

McCULLOCH, J., being disqualified, did not participate.

KAUFMAN v. KELLEY.

Opinion delivered March 10, 1906.

JUSTICE OF THE PEACE—JURISDICTION.—Where, in replevin before a justice of the peace, the affidavit of the plaintiff showed that the property was worth $300, the constitutional limit of a justice's jurisdiction, and the evidence shows that it was of value exceeding that amount, the justice of the peace had no jurisdiction, and the circuit court acquired none on appeal.

Appeal from Yell Circuit Court, Danville District; *Edward W. Winfield,* Judge, on exchange; reversed.

H. M. Jacoway, Jr., and *Walter D. Jacoway,* for appellants.

Appellee, *pro se.*

BATTLE, J. This action was instituted by Kaufman & Wilson against Lem Briggs, constable, and Kelley & Clement, before a justice of the peace, to recover possession of certain personal property, alleged in the affidavit filed by plaintiffs to be of the value of $300. It was dismissed as to Kelley & Clement, and J. L. Kelley was made a defendant. On a trial before the justice of the peace, plaintiffs recovered judgment, and the defendants appealed to the circuit court. In the circuit court the defendants moved to dismiss the action because the justice of the peace had no jurisdiction, the property in controversy being worth more

than $300. The motion was overruled. In the trial which followed the evidence adduced proved that the property was of a value exceeding $300. Thereupon the defendants again moved to dismiss the action because the justice of the peace did not have jurisdiction, and the motion was overruled. The jury returned a verdict in favor of the defendants, and found the value of the property to be $325.

The Constitution of this State provides that justices of the peace shall have "concurrent jurisdiction in suits for the recovery of personal property where the value of the property does not exceed the sum of three hundred dollars." Art. 7. § 40. The value which determines the jurisdiction is the real value, and not the alleged value of the property. That having been shown in this case to exceed $300, the justice of the peace had no jurisdiction, and the circuit court acquired none by appeal. The motion should have been sustained. *Davenport* v. *Burke,* 91 Mass. 116, and cases cited: *Sackett* v. *Kellogg,* 2 Cush. 91; *Corbell* v. *Childers,* 17 Oreg. 528; *Vogel* v. *People,* 37 Ill. App. 388; *Darling* v. *Conklin,* 42 Wis. 478; *Chilson* v. *Jennison,* 60 Mich. 235; *Sandford* v. *Scott,* 3 Conn. 244; *Small* v. *Swain,* 1 Me. 133.

The judgment of the circuit court is reversed, and the action is dismissed for want of jurisdiction.

PRATT v. METZGER.

78 177
88 458

Opinion delivered March 10, 1906.

1. SALE—WARRANTY—WAIVER.—Where goods were sold by sample, with warranty as to quality, and it was stipulated that the vendee should examine them promptly upon their delivery, and that if they failed to comply with the warranty he should, within five days from the date of delivery, give notice of such failure to the vendors, the failure to give the notice was an acceptance of the goods and a waiver of the warranty, and the sale became absolute. (Page 181.)

2. CONTRACT—MISTAKE.—In the absence of fraud, a party who had opportunity to examine a written contract before signing it can not sub-

sequently be heard to say that when he signed it he did not know what it contained. (Page 181.)

3. CONTRACT OF SALE—SEVERABILITY.—Where a contract for the sale of goods embraced numerous items, sold by samples and warranted to be the same in quality as the samples, 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 181.)

4. INSTRUCTION—ABSTRACTNESS.—An instruction that is not based upon the evidence should not be given. (Page 181.)

5. SALE—WARRANTY OF SUITABILITY.—Where there was no express or implied warranty that goods sold were suitable for the uses for which they were bought, it was improper to instruct the jury that the purchaser was not bound to accept them unless they were suitable for the purposes for which they were purchased. (Page 182.)

Appeal from Conway Circuit Court; *William L. Moose,* Judge; reversed.

W. P. Strait, for appellant.

1. Where a warranty is upon condition, or when some duty is devolved upon the purchaser by the terms of the warranty, such condition must be fulfilled upon his part before he can interpose the breach as a defense. 28 Am. & Eng. Enc. Law, 830; 75 Ark. 206; 76 Ark. 74; 71 Iowa, 101; 36 Kan. 439; 18 S. W. 789; 3 Wash. 603. The vendee must show that the conditions have been complied with. 14 Pa. St. 211; 21 Barb. 236; 1 Iowa, 531; 11 N. E. 206; 12 N. E. 495; 55 N. W. 580; 11 Neb. 116. Where the vendee refuses to comply with his part of the contract, he puts it out of his power to rescind. 88 Iowa, 607.

2. If a party signs a contract without reading it, or relying upon the representations of a stranger, he is nevertheless bound by it, and can not testify to an understanding of it contrary to its written terms. 71 Ark. 185; 46 Ind. 116; 43 Iowa, 561; 106 Ind. 406; 14 Ind. 499; 50 Cal. 558; 67 Iowa, 547; 59 Iowa, 416; 71 Ill. 456. See also 12 Neb. 438; N. Y. 640; 11 Utah, 29; 130 U. S. 643.

3. The court erred in refusing instruction 3 asked for by appellant. A contract having several distinct items, and founded upon a consideration apportioned to each, is severable, 76 Ark. 74; Beach, Contracts, § 731; 40 Cal. 251; 66 Pa. St. 351.

4. The court erred in giving its instructions "A," "C" and "D." 30 Am. & Eng. Enc. Law (2 Ed.), 203, 204 and notes; 35 Mo. 229; 55 Am. St. Rep. 837; 79 Mo. 264; 116 Wis. 130; 68 Iowa, 94. See also 15 Am. & Eng. Enc. Law, 1227; Benj. on Sales (6 Ed.), § 667; 2 East, 314; 72 Ala. 288; 67 Minn. 329.

Sellers & Sellers, for appellee.

BATTLE, J. This case is very much like *Pratt* v. *Meyer,* 75 Ark. 206. Walter Pratt & Company brought an action against M. A. Metzger, before a justice of the peace of Conway County, for $198.88, upon a written contract by which the plaintiffs agreed to sell and deliver to the defendant a bill of perfumes, soaps and toilet articles. In the justice's court the defendant recovered judgment, and the plaintiffs appealed to the circuit court, where the defendant was again successful, and plaintiffs appealed to this court.

The same order for the goods was given in this case as was given in *Pratt* v. *Meyer, supra,* and the same warranty was made and on the same conditions. The same evidence, substantially, was adduced by the plaintiffs in the two cases.

Appellee testified over the objections of appellants as follows: "And in the contract I never noticed about notes at all until that night I sat down and read it, and I noticed it said 'notes.' * * * I wrote that I didn't notice that the contract called for notes, and that I didn't make any notes at all," and that the goods purchased were not suitable for his trade.

The court refused to instruct the jury, at the request of appellants, as follows:

"1. The failure to comply with reasonable conditions imposed by the contract of sale is fatal to the vendee's remedy for a breach of the warranty, whether he attempts to exercise it by action on the warranty or by setting up a breach of the warranty in defense of an action for the price by the seller. The law is well settled that where an express warranty is upon condition, or where duty is devolved upon the purchaser by the terms of warranty, such condition must be fulfilled or such duty performed before an advantage can be taken of a breach of such warranty.

"2. A party is bound to know the contents of a writing signed by him; and if he signs it without reading it, or relying

upon the representations of a stranger, he is nevertheless bound by the contract, and can not testify as to his understanding of the contract, different from the plain, written terms of the contract.

"3. A contract, having several distinct items and founded upon a consideration apportioned to each, is severable. If you find that a part of the articles covered by the contract is in grade, kind and quality as therein provided, and they have a value or price apportioned to them, separate from the price of other goods not up to contract price and grade, then you will find for the plaintiff for the price of goods which are equal in grade to that provided by the contract."

And instructed them, over the objections of the appellants, as follows:

"A. If you find from the testimony that the goods were inferior in quality to the samples by which they were sold, and that the defendant, on receipt of the goods, notified the plaintiff, or the plaintiff's attorney, that he declined to accept the goods because of the fact that they were not equal to the samples by which they were sold, and if the defendant has not yet accepted the goods, your verdict should be for the defendant.

"C. If the original contract was induced by fraudulent representations made by the representative of the plaintiff, then, when Mr. Metzger discovered that he had been imposed upon, if the fact was true, he would have a right to repudiate the whole contract. I doubt if he would be required to give anybody notice. If that is true, the original contract was fraudulent. If he notified the attorney of plaintiff that he declined to accept the goods, in my opinion the notice was sufficient, although the contract may have required a written notice to be sent to the Chicago office, Then, if you find the contract binding, on the other hand, the notice would not be sufficient.

"D. If the proof shows the plaintiffs were manufacturers of the goods sold to the defendant, that the use for which the defendant bought or contracted for the goods was known by the plaintiffs, or the agent making the sale, then the law would imply an agreement and warranty upon the part of the plaintiffs that the goods were suitable for the uses bought for, and the defendant would be under no obligation to accept them; provided,

also, that it appears that the goods were inferior to the samples by which they were sold."

The first instruction asked for by the appellants was based upon the contract sued on, and should have been given. Appellee agreed, as a part of the contract, "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 & Company, Chicago, Ill.; otherwise all warranty of said goods is waived." This was held to be a valid contract in *Pratt* v. *Meyer, supra,* "and it was also held that the failure to give the notice within the five days was an acceptance of the goods and a waiver of the warranty, and the sale became absolute."

As to the second instruction asked for by the appellants, it is sufficient to say that there was no evidence that the execution of the contract sued on was obtained by fraud, such as misreading, surreptitious substitution of one paper for another, or by some other trick or device; and that the evidence proved that he had the opportunity to examine it before signing it; and that he can not now be heard to say that when he signed it he did not know what it contained. *Colonial & United States Mortgage Co.* v. *Jeter,* 71 Ark. 185.

The testimony of the appellee as to his failure to notice what is said in the contract about the giving of notes, admitted over objections of appellants, should have been excluded.

The third instruction asked for by appellants should have been given. *Duffie* v. *Pratt,* 76 Ark. 74.

The instruction given by the court on its own motion, and numbered "A," ignores the contract sued on. The goods were sold by samples, and the appellants warranted them to be the same in quality, material and in all other respects as samples. The contract provided that the appellee should "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; otherwise, all warranty of said goods is waived." A detailed, written notice was to be given within five days from date of arrival of goods at destination. Under the in-

struction of the court such notice was not necessary, notwithstanding it was a condition of the warranty and sale. Instruction "A" was erroneous.

We fail to find any evidence in the record upon which to base the instruction of the court numbered "C," and it should not have been given.

Instruction numbered "D" should not have been given. The only warranty, express or implied, made by appellants as to the quality, material or otherwise, of the goods sold was that they were the same as the samples. There was no warranty that they were suitable for the uses for which they were bought. The evidence admitted to show that the goods purchased were not suitable for appellee's trade was incompetent.

Reverse and remand for new trial.

---

78 182
80 541

78 182
84 236

PORTER v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered March 17, 1906.

INTERSTATE COMMERCE—EVASION OF THROUGH RATE.—Although the through rate on freight from a point outside the State to a point within the State is greater than the rate to an intermediate point plus the local rate to the destination of the freight, a shipper can not take advantage of this fact in regard to a consignment which is in fact intended to be a continuous interstate shipment, but which is interrupted inside the State for the sole purpose of evading the interstate rate.

Appeal from Arkansas Circuit Court; *George M. Chapline,* Judge; affirmed.

John L. Ingram and *Geo. C. Lewis,* for appellant.

It was not an interstate transaction. There was no arrangement for continuous shipment, no through bill of lading, and on arrival at Brinkley freight charges were paid, and the car delivered to appellant. 162 U. S. 184; 1 Int. St. Com. Rep. 30; 2 *Ib.* 142; 63 Iowa, 732; 26 S. W. 172; 81 Fed. 783; 77 Fed. 942; Judson on Interstate Com. § 114.

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

The plan of shipment adopted by appellant was a mere subterfuge to avoid the interstate rate, and apply the local rate fixed by the State Commission, and is in violation of the Interstate Commerce Act, § 7. Appellant could not break up the shipment in order to evade the interstate rate. 44 S. W. 542; 46 Fed. 641; 45 S. W. 814; 184 U. S. 47. A shipment originating at a point in the State, and consigned to another point in the State where the carrier, in order to deliver the same, passes through another State or Territory is an interstate shipment. 187 U. S. 617. An article of interstate commerce ceases to be such, not at the instant when it enters the State, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the State. 30 Fed. Rep. 867; 82 *Ib.* 422. Where the shipper has selected an unusual method of shipment, differing from the ordinary way, his intent may be shown. 196 U. S. 271-2; Prentice & Egan, on Com. Cl. Fed. Const. 90-93. Being an interstate transaction, appellee could not have charged the rate fixed by the State Railroad Commission without violating the Interstate Commerce Act and subjecting itself to a severe penalty. 46 S. W. 609; 54 Kan. 232; 94 Ga. 775; 63 Mo. App. 145.

McCULLOCH, J. Appellant purchased at Erin, Tennessee, on the Louisville & Nashville Railroad, a carload of lime to be transported to Stuttgart, Arkansas, on the railroad of appellee. He inquired of appellee's agent at Stuttgart as to the freight rate, and was advised that the through rate from Erin to Stuttgart, *via* appellee's road and connecting carriers, would be 22 cents per hundredweight. He also ascertained that the through rate from Erin to Brinkley, Arkansas, was 14 cents, and the local rate from Brinkley to Stuttgart fixed by the Arkansas Railroad Commission over appellee's road was 5 cents, so he caused the carload of lime to be consigned to himself at Brinkley. It was shipped over the Louisville & Nashville Railroad (which extends from Erin to Memphis, Tennessee), and the Choctaw, Oklahoma & Gulf Railroad, which extends westward from Memphis and crosses appellee's road at Brinkley.

Upon arrival of the car of lime at Brinkley, appellant, with-

out unloading or opening the car, paid the freight from Erin to that point and reshipped it over appellee's road to himself at Stuttgart. When the car arrived at Stuttgart, appellant tendered to the agent of appellee 5 cents per hundredweight upon the consignment, which the latter refused to accept and demanded payment of 12½ cents per hundredweight, which would have been its *pro rata* of a through rate.

The question presented to us now is whether appellant had the right, under the circumstances detailed above, to take advantage of the local freight rate from Brinkley to Stuttgart fixed by the Arkansas Railroad Commission, or whether the consignment must be deemed continuous from Erin to Stuttgart, and therefore an interstate commerce transaction. The lower court held that it was interstate commerce, and rendered judgment against appellant at the rate of 8 cents per hundredweight, which, with the rate of 14 cents paid from Erin to Brinkley, made up the through rate of 22 cents from Erin to Stuttgart.

We are not concerned about the correctness of the judgment, inasmuch as appellee does not question it, further than to inquire whether or not it imposed upon appellant a more burdensome freight rate than he was entitled to. There is no dispute about the facts, or that appellant intended to procure continuous transportation of the lime from Erin to Stuttgart, the only question being whether he had the right to take advantage of the situation presented; viz., the interstate rate from Erin to Brinkley and the Railroad Commission rate from Brinkley to Stuttgart, in order to secure a rate through to the latter place at less than the interstate rate fixed between the two points.

In other words, as Erin, Tennessee, was the initial point of consignment, and Stuttgart, Arkansas, was intended as the final destination, did the character of the consignment as an interstate transaction continue until the latter point was reached? The question is by no means free from doubt, and there are few decisions of the courts bearing upon it, but those to which our attention has been directed sustain the ruling of the circuit judge. In *Augusta S. R. Co.* v. *W. & T. R. Co.*, 74 Fed. 522, it was held (quoting from the syllabus) that "the fact that a railroad lies wholly within one State does not exempt it from obligations imposed by the interstate commerce act, if the transportation over

it is part of a shipment from one State to another, or to or from a foreign country." In *Interstate Commerce Com.* v. *Bellaire, Z. & C. Ry. Co.,* 77 Fed. 942, and *United States* v. *Chicago, K. & S. R. Co.,* 81 Fed. 783, it was held that railroads operating wholly within a State, and not participants in a common arrangement for interstate shipments, were not within the terms of the interstate commerce act. There are decisions of the Interstate Commerce Commission to the same effect. *Mo. & Ill. R. T. & L. Co.* v. *Cape Girardeau & S. W. Ry. Co.,* 1 Int. Com. Com. Rep. 30; *New Jersey Fruit Exch.* v. *Central R. Co.,* 2 Int. Com. Com. Rep. 142.

The case of *Cin., N. O. & Tex. Pac. Ry. Co.* v. *Int. Com. Com.,* 162 U. S. 184, is relied on to some extent by both sides here, but we do not find it conclusive of the particular question. There the railroad was operated wholly within the State of Georgia, but carried freight in that instance under a through bill of lading, and under an arrangement with other carriers for continuous shipment from other States. Mr. Justice SHIRAS, speaking for the court, said: "All we wish to be understood to hold is that when the goods shipped under a through bill of lading from a point in one State to a point in another are received in transit by a State common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading, we are referring to the usual methods in use by connecting companies, and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested."

In the two cases, *State* v. *Gulf, C. & S. F. Ry. Co.* (Court of Civ. App. Texas), 44 S. W. 542, and *Cutting* v. *Florida Ry. & Nav. Co.,* 46 Fed. 641, the same principle was involved as in the case at bar, and was decided contrary to the contention of the appellant. The only difference between these cases and the case at bar is that in the former the shipper intended to ship freight out of the State, but, in order to take advantage of a lower interstate rate from another point in the State, attempted to ship to that point, and enforce the local rate thereto, and then reship to the intended final destination. The courts, in both the cases

cited, held that it was an interstate transaction from the initial point of shipment, and that the State commission rates could not be enforced. The Texas court, referring to the case of *Houston Direct Nav. Co.* v. *Ins. Co. of North America,* 89 Tex, 1, 32 S. W. 889, said: "We regard that decision as directly in point, and therefore hold that the shipment Long & Company desired to make over appellee's road would have been interstate commerce, and consequently not subject to regulation by the State or its railroad commission." Those two cases are decisive of the question presented in this case, and are supported by sound reason.

A section of the Federal Interstate Commerce act is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act." 24 Stat. L. 382.

This section clearly prohibits the carrier from doing, either directly or indirectly, what the shipper has attempted to do in this case, and we see no reason why it should not be a protection to the carrier as well as a limitation upon its acts. As we understand them, the Federal statutes providing for the regulation of interstate commerce, as well as the statutes of this State providing for the regulation of intrastate railroad traffic rates, are designed for the protection of shippers, each covering a separate field of operation, the latter yielding to the former where there is possible conflict. The rate fixed under State legislation can not be used to affect or frustrate the rate fixed under the superior power. To permit that would be a regulation of interstate com-

merce by State laws, a power conferred solely by the Constitution upon Congress. *Louisville & N. R. Co.* v. *Eubank,* 184 U. S. 47.

The decisions of the Interstate Commerce Commission hereinbefore cited are not in conflict with the views here stated. In those cases the question presented was one of jurisdiction of the commission to regulate an interstate rate. The question we are dealing with here is whether the State commission rate can be demanded and enforced in favor of the shipper on a consignment which was in fact intended to be a continuous interstate shipment but which has been interrupted inside the State for the sole purpose of evading the interstate rate. We say that it can not be done. The consignment is an interstate transaction, and continues to be such until the final destination is reached.

Affirmed.

RIDDICK, J., not participating.

HARRIS LUMBER COMPANY *v.* GRANDSTAFF.

Opinion delivered March 17, 1906.

1. CORPORATION—DOUBLE TAXATION.—Under Kirby's Digest, § 6936, providing that the corporations therein mentioned should make a sworn statement to the assessor, showing the amount and value of their capital stock, and the value of all their tangible property, their capital stock is subject to taxation, but the personal property acquired with such capital stock is exempt. (Page 191.)
2. SAME—PLACE OF ASSESSMENT.—To comply with Kirby's Digest, § 6396, by listing the capital stock of corporations, and to avoid complications arising from the purchase of personal property with their capital stock, all of the personal property of a domestic corporation should be assessed in the county of its domicil. (Page 192.)

Appeal from Scott Chancery Court; *J. Virgil Bourland,* Chancellor; reversed.

Brizzolara & Fitzhugh, for appellant.

Appellant, being a domestic corporation, is required to assess

its personal property for taxation only in the county of its domicil. Kirby's Digest, § § 6903-4-10-16-18-36 and 6937; Cooley on Taxation (3 Ed.), 398 and cases cited; 10 Mass. 504; 37 Mo. 266; 156 Pa. St. 488; 2 Ark. 291; 5 Ark. 204; 46 Ark. 312; 84 S. W. 715; 1 Cooley, Tax. 394; *Ib.* 673; 1 Desty on Tax. 341; 21 Ohio St. 555.

H. N. Smith, for appellee.

BATTLE, J. This is a suit brought by the Harris Lumber Company, a corporation organized under the laws of the State of Arkansas, domiciled in Polk County in the State of Arkansas, against the collector of Scott County, to restrain him from collecting taxes upon the personal property of the appellant situated in Scott County.

The complaint is as follows:

"Comes Harris Lumber Company, and complains of the defendant, George M. Grandstaff, as collector of Scott County, and for its cause of action says: That it is a corporation duly created and existing under and by authority of the laws of the State of Arkansas, and domiciled in the county of Polk, in the State of Arkansas, having its principal place of business in the said county of Polk; that the county of Polk is designated in its articles of incorporation as its place of business; that its articles of incorporation are duly filed in the office of the county clerk of Polk County, and that it is carrying on its business of buying, selling and manufacturing lumber in said county of Polk. That it owns real and personal property in Scott County, Arkansas, and has paid its taxes upon all real property owned by it in Scott County, Arkansas. That it has personal property, consisting of merchandise, sawmill and various and divers other articles of personal property, situated in Scott County, which constitute a part of its corporate assets, and the same are managed and controlled by the corporation from its office in Polk County, Arkansas. That, being duly advised in the premises, the said corporation made its return for the purpose of taxation in Polk County, Arkansas, and made out and delivered to the assessor of Polk County, Arkansas, a statement as required by section 6462 of Sandel & Hill's Digest, and included in that statement all of its property in Polk County, Arkansas, and also all of its property in Scott County, Arkansas,

as well as all other personal property belonging to the corporation wheresoever situate. That the assessor of Scott County called upon the plaintiff for a statement of its property subject to taxation in Scott County, and the plaintiff gave the assessor a list of its real property, and notified the assessor that it was a Polk County corporation, and was advised to pay its taxes on its personal property situated in Scott County. That the plaintiff had no further information in regard to the taxation of its personal property in Scott County until it went to pay its taxes in the year 1903 for the year 1902, when it found that the assessor of Scott County had assessed the following articles of personal property against the plaintiff, towit:

"Value of goods and merchandise.....$ 3,000
"Value of material and manufactured articles.. 12,000
"Total value of all other property required to be listed..... 8,000

"Total value of personal property.....$23,000

"That the same was described as situated in School District No. 26, and there was charged against the plaintiff an assessor's penalty of 50 cents and school fund penalty of 50 cents, and a total tax, including said penalties, against the plaintiff of $316. That the county clerk of Scott County has extended said tax against the plaintiff, and delivered the same to the defendant, as collector of Scott County, with a warrant authorizing a levy by the collector on any property of the plaintiff, in default of the payment of said $316. That the board of equalization took no action upon said action of the assessor, and the plaintiff did not know of said assessment until after the board had adjourned, and the plaintiff then, and before the collector closed his books, filed a petition in the Scott County Court setting forth that it was not subject to said taxation, and praying that the same be adjusted and the taxation corrected by causing the same to be stricken from the taxes extended against the plaintiff. That the county court of Scott County refused the prayer of the petition, and the plaintiff has taken an appeal therefrom to the Scott Circuit Court. That the next term of the Scott County Court is the first Monday in August, 1903. That it will be the duty of the collector before the convening of said Scott Circuit Court, and before said appeal

can be heard, to levy upon the property of the plaintiff in Scott County to satisfy said tax extended against it. That the plaintiff's remedy by law is wholly inadequate and insufficient to afford the plaintiff relief from said illegal assessment and attempted taxation of its property in Scott County; that, unless restrained, the collector will proceed to collect by distraint said amount of taxes together with a penalty of twenty-five per cent. thereupon. That there is no other adequate remedy for plaintiff than by the interposition of a court of chancery restraining and preventing the defendant from levying or attempting to levy upon the property of the plaintiff and adding a penalty against it for nonpayment of said illegal taxes; that the illegality of said assessment does not appear upon its face, and can not be corrected by certiorari.

"Wherefore, petitioner prays that the defendant be restrained from collecting or attempting to collect said taxes assessed against the aforesaid personal property of the plaintiff, and until the hearing herein, or until the hearing of the appeal in the Scott Circuit Court, that a temporary injunction issue restraining the defendant from proceeding in the collection of said taxes, and for all other equitable and proper relief which the plaintiff may be entitled to receive."

The answer admits that appellant is a corporation organized under the laws of Arkansas, and that it has paid taxes upon its real property situated in Scott County, but denies that it is domiciled in Polk County. The answer alleges that appellant is a manufacturing establishment, and as such is doing business in Scott County, and is engaged in buying, selling and manufacturing lumber, and that it is the owner of sawmills and planers, which are used in the manufacture of lumber in Scott County, and that said tangible property is subject to taxation in said county.

By agreement the appeal case from the county court was consolidated with this suit, and both tried together.

Upon the hearing the court rendered the following judgment:

"Comes plaintiff by Hill & Brizzolara, and comes the defendant by H. N. Smith, his attorney, and by agreement the answer in the case at law is treated as the answer herein. The court heard the testimony and agreement of counsel, and doth find:

"1. The personal property of the plaintiff is subject to taxation in Scott County.

"2. The property of plaintiff is assessed for 25 per cent. more than it should be.

"3. It is therefore ordered, considered, adjudged and decreed that the temporary order be and is hereby dissolved to the extent of preventing the collection of taxes upon $15,000 of personal property without any penalty thereupon by non-payment prior to the 10th of April. To the extent of collecting taxes upon more than $15,000, and extending the penalties against plaintiff, the injunction is made perpetual. The costs are adjudged against the plaintiff, and defendant may have and recover of plaintiff all the costs and its taxes upon said $15,000 of personal property."

The evidence adduced at the hearing of this cause sustained the allegations of the complaint.

The only question in the case is:

"Was the plaintiff required to assess and pay taxes on its personal property situated in Scott County to the collector of said county, or was it required to pay taxes on all its personal property, wherever situated, to the collector of Polk County, the domicil of said corporation?"

A statute governing corporations of the class to which plaintiff belongs is as follows:

"Gas, telephone, bridge, street railroad, savings banks, mutual loan, building, transportation, construction, and *all other* companies, *corporations* or associations, *incorporated under* the laws of this State, or under the laws of any other State, and doing business in this State, other than insurance companies and the companies and corporations whose taxation is in this act specifically provided for, in addition to the other property required by this act to be listed, shall, through their president, secretary, principal accounting officer or agent, annually, during the month of July, make out and deliver to the assessor of the county where said company or corporation is located or doing business a sworn statement of the capital stock, setting forth particularly:

"First. The name and location of the company or association.

"Second. The amount of capital stock authorized, and the

number of shares into which such capital stock is divided.

"Third. The amount of capital stock paid up, its market value, and, if no market value, then the actual value of the shares of stock.

"Fourth. The total amount of all the indebtedness, except indebtedness for current expenses, excluding from such indebtedness the amount paid for the purchase or improvement of the property.

"Fifth. True valuation of all tangible property belonging to such company or corporation. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of State." Kirby's Digest, § 6936.

The object of this statute is to secure a list of the personal property of the corporation for assessment. Other statutes make it the duty of the assessor receiving it to return it to the county clerk for taxation. The statute first mentioned obviously intends that a domestic corporation shall list its personal property in only one county. It makes the capital stock a subject of taxation, and makes it the duty of the corporation to give the assessor a statement showing the amount and value of it. Ordinarily, the capital stock is the only means a corporation has of acquiring property. Both the property thereby acquired and the capital stock used in purchasing it, under the Constitution of this State, are not subject to taxation. *Hempstead County Bank* v. *Hempstead County,* 74 Ark. 37. This would be double taxation. To comply with the statute by listing its capital stock, and to avoid complications arising from the purchase of personal property with capital stock, all of the personal property of the corporation should be assessed in the same county. Under the statute the domicil of the corporation is the *situs* of the capital stock, and, all of its other personal property being required by the statute to be given in at the same time and by the same statement, it follows that all of the personal property should be assessed for taxation in the same county.

Polk County being the principal place of business, the plaintiff is, in respect to its personalty, the proper place of taxation. The assessment and taxation of its personal property in Scott County are illegal. 1 Cooley on Taxation (3 Ed.), p. 673; 1 Desty on Taxation, p. 341.

The decree of the trial court is reversed, and the cause is remanded, with instructions to the court to enter a decree herein in accordance with this opinion.

---

78 193
80 289
80 291
182 467

78 193
89 503

COULTER v. SYPERT.

Opinion delivered March 17, 1906.

1. INFANTS—CUSTODY.—While the custody of an infant is generally awarded to the father, as being its natural protector, the courts are not bound to deliver the infant into the custody of the father or of any other person, but will investigate all the circumstances, and act according to sound discretion, as the welfare of the child appears to require. (Page 195.)
2. SAME—WHEN FATHER NOT ENTITLED TO CUSTODY.—A child of ten will not be removed from the custody of its grandparents to that of its father if he has shown no attachment for it, contributed nothing to its maintenance and support, and displayed no disposition or ability to discharge the duties of a father, while they have taken care of, maintained and supported it, and given evidence that they will continue to do so, and it is apparent that it is for the child's benefit to remain with them. (Page 198.)

Appeal from Howard Chancery Court; *James D. Shaver,* Chancellor; reversed.

Feazel & Bishop, for appellant.

The welfare of the child is of paramount importance. The courts are not bound to deliver the custody of the child into the hands of any particular claimant, but will exercise a sound discretion, and leave the child in such custody as may appear best for it. Hurd on Hab. Corp. 528; Tyler on Infancy and Coverture, § 187 and cases cited; 37 Ark. 31; 50 Ark. 351; 32 Ark. 92.

W. D. Lee, for appellee.

BATTLE, J. This is a contest between a father and grandfather for the custody of a boy, about ten years old, named Richmond Sypert.

Henry Sypert married Caroline Coulter, the daughter of

Joe Coulter. The issue of this marriage was Richmond Sypert. Caroline, being in bad health and her husband failing or refusing to secure for her needed medical attention, returned to her parents in the fall of one year, and lingered there until the spring of the next year, and died. He did nothing for her in her last illness, and visited her only once. Richmond, his son, at this time was about one year old. His father permitted him to remain with his grandparents until he was ten or eleven years old, when this proceeding was instituted to gain his custody. During all this time he contributed nothing to the support of his son. He visited him about twice. The grandparents cared for, clothed and fed the boy, and sent him to school. After he was four years old the father says he asked the grandfather for him, and repeated this request several times thereafter. But no earnest effort was made to recover his custody until he had reached the age of ten or eleven years, and was old enough to be of some service. While he manifested such utter indifference to his child, the grandparents were much attached to him, and treated him with the care and consideration due from parents to children, and in their devotion to him are unwilling to give him up.

In the ten years that have expired since his wife's death Henry Sypert accomplished the following: He married again; in the first year of the second marriage he separated from his wife and remained apart for about one year and a half; had three children by the last marriage; indulged sometimes, though not frequently, in shooting craps, for which he was indicted three times; and accumulated one cow and seven hogs and household furniture, worth, he says, about fifty dollars. His second wife owned an interest in about forty acres of land, of which eighteen acres were cleared. Henry purchased an interest in it, but never paid a cent of the purchase money. At the commencement of this proceeding he was earning twenty dollars a month; and he and his wife own one horse, two cows and a calf and about seven hogs and household furniture. Joe Coulter owns one hundred and seventeen acres of land, upon which is a farm of 80 acres in cultivation; he has two mules, one pony mare, ten hogs, six cattle, and farming implements; and he is a carpenter, and has no young children. He paid $800 for his land, and does not owe a cent for it.

The chancellor who tried this case awarded the custody of the child to Henry Sypert, and Joe Coulter appealed.

The father has no proprietary right or interest in or to the custody of his infant child. As said by Senator Paige in *Mercein* v. *People,* 25 Wend. 64, 103, decided in the Court of Errors of New York in 1840: "There is no parental authority independent of the supreme power of the State, but the former is derived altogether from the latter. * * * The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated, by its duty of protection, to consult the welfare, comfort and interests of such child in regulating its custody during the period of its minority." In the case of *U. S.* v. *Green,* 3 Mason, 482, which arose upon an application by habeas corpus of a father for his infant daughter, aged about ten years, alleged to be detained in the custody of her maternal grandfather, Judge Story said: "As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and, if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavor, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose that the court is, at all events, bound to deliver over the infant to his father, or that the latter has an absolute, vested right in the custody."

In the Matter of Waldron, 13 Johns. 418, is something like this case. In that case a habeas corpus was issued to Andrew McGowan to bring up the body of Margaret Eliza Waldron, an infant, alleged to be detained in his custody. John P. Waldron had married the daughter of Andrew McGowan, and, becoming embarrassed and insolvent, McGowan took his daughter to his house. She lived with him until her death; and during her resi-

dence with her father Margaret Eliza Waldron was born, who was always supported by her grandfather. Waldron used to visit his wife shortly after her removal to her father's, but had discontinued his visits for a long time previous to her death, and had not visited his child. McGowan was a man of very affluent circumstances, and abundantly able to educate and maintain his granddaughter; and it appeared that Waldron was insolvent, and unable to pay certain trifling debts which he had contracted, although it was alleged that his mother, with whom he lived, was competent and willing to support him and his daughter. It also appeared that the infant's mother was the only daughter of McGowan, and the infant the only remaining grandchild in the family. It appearing that it would be more for the benefit of the infant to remain with its grandfather than to be put under the care of the father, the court refused to direct it to be delivered to the father.

In *McShan* v. *McShan,* 56 Miss. 413, the court held: "While, as a matter of abstract law, the father, as head of the family bound to provide therefor, is entitled to the custody of his children, yet such right is modified by the circumstances of each case; and where the mother, whom her husband has deserted without means among strangers, has found with her father a pleasant and permanent home, where her two infant girls are excellently cared for, her husband can not, repenting of having broken up the family, by habeas corpus take the little girls, although the mother refuses his proposals to again cohabit, and declares that the separation shall be perpetual. While the children, if of age of discretion, could be consulted, yet when very young the court must be guided by their best interests, in view of all the circumstances."

Mr, Hochheimer, in his work on the "Custody of Infants," says: "The following statement very nearly expresses the general result of authorities: 'The courts are, in no case, bound to deliver a child into custody of the claimant or any other person, but will investigate all the circumstances, and act according to sound discretion in the exercise of a conscientious parental duty, as the welfare of the child at the time appears to require, without regard to any technical right of custody, when such custody is not proper and beneficial, and without regard to mere technicalities of procedure.'" Page 96, and cases cited.

In *Verser* v. *Flood,* 37 Ark. 30, this court said: "As between the father, too, and the mother, or any other relation of the infant, where sympathies on either side of the tenderest nature may be relied on with confidence, the father is generally to be preferred. In the great majority of cases, his greater ability and knowledge of the world renders him the fittest protector, although that is not the test. The preference is conceded to the ties of duty and affection, and attends the primary obligation of the father to maintain, educate and promote the happiness of the child, according to his own best judgment and the means within his power. * * * Nevertheless, keeping these leading principles always in view, there are exceptional cases, depending on their own circumstances, in which the sovereign power of the State as *parens patriae,* acting through the chancellor, has interfered so far as may be necessary to afford the child reasonable protection. It is impossible to define them, further than to say that they should be of such urgency as to overcome all considerations based upon the natural affections and moral obligations of the father; and it may be added that this delicate discretion will be more freely exercised in behalf of one whose ties of affection are next to those of the father himself, upon whom the accompanying moral obligations would devolve in case of the father's death.

"In this case the motherless infant, two days old, was taken by the maternal grandmother, with the father's assent, and tenderly guarded through all the perils of infancy. There has been all of a mother's care, and scarcely less than a mother's affection. The child is yet scarcely three years of age, delicate in health; she is in a safe asylum, surrounded by those who may be trusted to guard her anxiously against pernicious influences, and to do their best to instill into her mind such principles as will promote her future usefulness and happiness. They, too, plead the full strength of natural affections. * * * * The father has shown himself to be a moral man, with the means of discharging his parental obligations. Certainly, under the circumstances, if he had been in possession of the child, no chancellor could have found warrant in equity for taking her away to be placed under the grandmother's care. But it can not be ignored that the case does not present that attitude. The child was placed where she is by the father's assent. By his assent ties have been woven between

the grandmother and granddaughter which he is under strong obligations to respect, and which he ought not wantonly and suddenly to tear asunder. He has shown no urgent necessity for present action, and his appeal to the circuit court for aid was not such as to enlist in most hearts any very strong sympathy."

The case before us is one of the exceptional cases. On the part of Henry Sypert, the ties of duty and affection for the son, to which preference is as a rule conceded to the father, are lacking. He has not shown as much concern and attachment for his son Richmond as some brutes manifest for their young. For ten years he has manifested an utter indifference for his son and contributed nothing to his maintenance and support. He has shown no evidence of a disposition or ability to discharge the duties of a father to the son. No ties of affection of the father for the son exist to be torn asunder. But ties have been woven between grandparents and grandson. They have taken care of, maintained and supported him nearly all of his life, and they give evidence that they will continue, if permitted, to care for, maintain and support him as their own child. No doubt can be entertained that it will be more for the benefit of the son to remain with his grandparents than to be put under the care and custody of his father.

The decree of the chancery court is reversed; and it is ordered that Richmond Sypert remain in the custody of Joe Coulter until the further order of a court of competent jurisdiction, with leave to the father, on all suitable occasions, to see him.

SWING v. BRINKLEY CAR WORKS & MANUFACTURING COMPANY.

Opinion delivered March 17, 1906.

APPEAL—PRESUMPTION.—In the absence of a bill of exceptions, it will be presumed that the court's findings of fact were based on the evidence, where there is nothing in the record to rebut that presumption.

Appeal from Monroe Circuit Court; *George M. Chapline*, Judge; affirmed.

Thomas & Lee and *J. W. & M. House,* for appellant.

The judgment of the court below discloses error on its face. It was not necessary that the defendant be made a party to the action in which the decree of assessment was made. It was error to hold that, by the terms of the policy and the by-laws indorsed thereon, the defendant was not liable beyond the cash premiums paid; and it was also error to hold that the judgment of the Supreme Court of Ohio was of no force and effect as against the defendant. 131 U. S. 319-36; 135 U. S. 533-49; 162 U. S. 329; 91 U. S. 45; 146 U. S. 705; art. 4, § 1 Const. U. S. Where error appears upon the face of the record, neither a bill of exceptions nor a motion for new trial is necessary. 36 Ark. 461; 26 Ark. 536; *Ib.* 662; 43 Ark. 398; 34 Ark. 684; 32 Ark. 154; 37 Ark. 544; 39 Ark. 258; 47 Ark. 230; 46 Ark. 17; 57 Ark. 370; 61 Ark. 33; 62 Ark. 338.

C. F. Greenlee, for appellee.

This cause should be affirmed for failure to file the bill of exceptions in time. A note being a prerequisite to membership in the company, appellee never became a member thereof. The contract, if made, was with a foreign insurance company attempting to transact business in this State in violation of its laws, and the action can not be maintained. 58 L. R. A. 223, and cases cited; 63 N. W. 408; 59 N. W. 290; 55 Ill. 86; 68 N. W. 1065; 77 Fed. 42; 37 N. E. 834.

BATTLE, J. "The appellant, James B. Swing, a trustee, etc., brought this suit in the Monroe Circuit Court on April 9, 1902, against the Brinkley Car Works & Manufacturing Company, and alleged in substance that he is the trustee for the creditors of the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, and that said Brinkley Car Works & Manufacturing Company was a corporation organized under the laws of the State of Arkansas; that said insurance company had been duly incorporated under the laws of Ohio, and that the Supreme Court of Ohio had disincorporated said insurance company and appointed the plaintiff-appellant trustee for the creditors of said insurance company; that he accepted the trust, and brought this suit by order of the court appointing him. That said insurance company was a mutual one, organized under the laws of Ohio, and that section 3650 of the Revised Statutes of Ohio provided:

'Every person who effects insurance in a mutual company and continues to be insured, and his heirs, executors, administrators and assigns, shall hereby become members of the company during the period of insurance, shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability.'

"That said insurance company was doing business in the years 1889 and 1890, and that said defendant accepted from said insurance company two policies of insurance, No. 1745 for $2,000, held in force from February 1, 1889, to February 1, 1890, and policy No. 3914 for $2,000, held in force from February 1, 1890, to December 19, 1890. That the contingent liability to assessment of said defendant on said policies under the by-laws of said company, and under the statutes of Ohio and under the decree of the Supreme Court of Ohio, was and is five times the agreed annual premium, viz.: $700. That, by accepting and holding said policies, said defendant effected insurance in said insurance company during the time and in the amount aforesaid, and that by reason thereof said defendant became a member of said insurance company, and became legally and equitably liable for defendant's just proportion of all unpaid losses and expenses incurred by said insurance company during the time said defendant held its said policies, and to pay such percentage on the amount of said contingent liability to assessment of said defendant's said policies, as should be required by law. That the Supreme Court of Ohio, on June 11, 1901, rendered a decree, in which it fixed and determined the rate of liability of each member of the insurance company for losses and expenses in various periods of time. That said defendant, on or about December 9, 1901, was duly notified according to law by said trustee to pay said assessment, but that it refused to do so and has paid no part thereof, and alleges that there is due said trustee from said defendant on said assessment, the sum of $651.47, with interest thereon from January 9, 1902, and prays judgment for said sum. And afterwards, on May 13, 1902, the defendant filed its answer, admitting that defendant is a corporation organized under the laws of Arkansas, and denying that it accepted said policies, and that its contingent liability was $700; and saying that, if such policies were issued to defendant,

they were not taken or accepted by authority or consent of defendant; and that defendant was not organized for the purpose of engaging in the insurance business; and that, if defendant did accept said policies, it did it in violation of the laws of the State of Arkansas set forth in section 1328 of Sandels & Hill's Digest."

The following judgment was rendered in this action:

"On this day, this cause coming on to be heard, the plaintiff appeared by Messrs. Thomas & Lee and P. A. Reece, Esq., and defendant by C. F. Greenlee, Esq., and, both parties announcing themselves ready for trial, this cause is submitted to the court sitting as a jury, upon the complaint, answer and exhibits, reply, agreed statement of facts and testimony adduced before the court, from which the court finds that the defendant is a member of the corporation, the Union Mutual Fire Insurance Company, of Cincinnati, Ohio. That, by the terms of the policy issued and the by-laws indorsed on the said policy, the defendant was not liable beyond the cash premium paid, and, having paid said premium in full on a policy issued for one year, and never having given a premium note, the judgment against said corporation is of no force and effect against the defendant; and the court finds that the defendant is not indebted to the plaintiff in any sum. It is therefore ordered and adjudged that the plaintiff take nothing, and that the defendant have judgment for all its costs herein expended."

Plaintiff appealed.

No bill of exceptions was filed in this case within the time prescribed by law or allowed by the court. We are left to determine from the findings of fact by the court whether the court committed any reversible error. It found that the appellee was not affected by the assessments made by the Supreme Court of Ohio against the Union Mutual Fire Insurance Company of Cincinnati, Ohio, because by the terms of the policy issued, and the by-laws indorsed thereon, the defendant was not liable beyond the cash premium paid, and because it paid the premium in full and never gave a premium note. The policy and by-laws are in no way made a part of the record, and we can not tell whether the court erred in its conclusions as to their effect. The presumption is in favor of the judgment of the trial court, and there is nothing in the record to remove that presumption.

Judgment affirmed.

SINGER MANUFACTURING COMPANY v. BREWER.

Opinion delivered March 17, 1906.

1. FORFEITURES—CONSTRUCTION OF CONTRACTS.—As forfeitures are not favored in the law, they must, in order to be enforced, be plainly and unambiguously provided in the contract; and it is the duty of the courts, when contracts are fairly susceptible of more than one construction, to adopt such as will not work a forfeiture of the acquired rights of either party. (Page 205.)
2. CONTRACTS—CONSTRUCTION.—While the cardinal rule for construction of contracts is to arrive at the real intention of the parties, if possible, yet where that intention is doubtful or obscure, a construction should be adopted which is most fair and reasonable, and which will impose the least hardship upon either of the contracting parties. (Page 205.)
3. SAME.—Under a contract between a sewing machine company and its managing salesman which provided for three methods of compensation for his services, viz.: (1) a fixed salary per week, (2) a commission of 15 per cent. on all sales or leases of machines, the same to be payable as payments on the sales or leases made, and (3) a remitting commission of 5 per cent. on the net amounts collected and remitted to the company; and stipulated that "the foregoing compensation shall be full payment and satisfaction for all services of every kind and nature" rendered by such salesman, and "that all his claims therefor shall cease immediately upon the termination of this agreement," *held* that the commission of 15 per cent. on sales and leases already earned but not collected would not be forfeited by a termination of the contract, though the remitting commission of 5 per cent. would be forfeited in such case. (Page 205.)
4. SAME—CUSTOM IN AID OF CONSTRUCTION.—From a custom in the dealings between a sewing machine company and its managing salesman that the salesman should lose his selling commission on the removal of a purchaser of a machine from his territory, it does not follow that upon the discharge of the salesman he should forfeit his already earned commissions on uncollected sales. (Page 205.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

Austin & Danaher, for appellant.

The fourth clause of the contract precludes a recovery by the plaintiff. The contract was reasonable, and plaintiff is bound by its terms. Inasmuch as the contract provided that the agreement could be terminated at the pleasure of either, appellant committed no wrong in terminating appellee's agency.

Taylor & Jones, for appellee.

A reasonable construction of the contract will not defeat the plaintiff of pay already earned at the time the agreement is terminated. 3 Ark. 222; *Ib.* 258. The law does not favor forfeitures. 67 Ark. 553.

McCULLOCH, J. Appellee, W. F. Brewer, was employed by appellant as its agent, and brought this action to recover the sum of $308.57 alleged to be due him, according to contract, for commissions on sales of sewing machines made by him in the course of his employment. There was a written contract between the parties prescribing the duties of appellee as "managing salesman for the company at its sub-office in the city of Pine Bluff, Arkansas, and that part of the contract fixing the compensation to be paid to him for his services is as follows:

"Third. The company agrees to pay the said party of the second part for all his services the following compensation with the restrictions and limitations hereinafter expressed:

"A. A salary at the rate of twelve dollars per week, lost time to be deducted, which shall include the use and keeping of horse and wagon.

"B. A commission of fifteen per cent. of the value of all sales or leases of family machines at retail list prices made by said company, said commission to be computed on the net value after all deductions for old machines or discounts shall have been made. This commission shall be payable only as payments in cash are made on said sales and leases, and paid over to said company, and shall be at the rate of fifty per cent. of such cash payments until the full amount of commission shall have been paid, except on leases where the payment is less than $5, then commission shall be payable from the second and subsequent payments.

"C. A remitting commission of five per cent. on the actual amount of money remitted by him from said sub-office, and said remittances are to be made only from money remaining on hand after payment of the running expenses of said sub-office and any advances from division or department headquarters for expenses are to be deducted from such remittance in computing this percentage.

"Fourth. It is expressly understood and agreed between the parties hereto that the foregoing compensation shall be full

payment and satisfaction for all services of every kind and nature rendered by said party of the second part, and that all his claims therefor shall cease immediately upon the termination of this agreement.

* * * * * * * * * * * * *

"Tenth. This agreement may be terminated at the pleasure of either party."

Appellant discharged appellee from its service on January 15, 1903, and paid the amount of all commissions collected up to that time on sales. The commissions sued for were on sales made upon installment plan prior to his discharge, but the amounts were not collected until after he was discharged from service.

The sole question presented by the appeal is whether, under the contract, appellee was entitled to commission on sales made during his period of service where the collections were made after his discharge.

It is the contention of appellant that appellee was entitled only to commission on collections made while he was in service, and that he was precluded from recovering commissions on collections made after his discharge by the fourth clause of the contract which provides that "all his claims therefor shall cease immediately upon the termination of this agreement." We do not think that the proper interpretation of the contract supports that contention. It will be observed that the contract provides three methods of compensation for the services of the agent, viz.: (1) A fixed salary of $12 per week, which included pay for the use of his horse and wagon; (2) a commission of fifteen per cent. on all sales or leases of machines, the same to be payable as payments on the sales or leases which were made, and (3) a remitting commission of five per cent. on the net amounts collected and remitted to the company.

It is evident that the commission of fifteen per cent. was intended as compensation for the sales and leases, and was earned when the sales or leases were consummated, though payment of the commission was to be postponed until the collections were made. Not so, however, as to the remitting commission of five per cent. That commission was not earned until the money was collected and actually remitted to the company. The selling com-

mission having been earned by the agent while in service, he could not by discharge be deprived of it, even though the payment was, under the contract, postponed until the money should be collected. His right to it depended upon the prices or rentals of the machines which he had sold or leased being finally collected, but it was not essential that the collections should be made during his period of service.

We do not think that the language of the contract quoted above was meant to work a forfeiture, upon termination of the period of service, of compensation already earned. Forfeitures are not favored in the law, and in order to be enforced they must be plainly and unambiguously provided in the contract. It is the duty of courts, when contracts are fairly susceptible of more than one construction, to adopt such as will not work a forfeiture of the acquired rights of either party. *Arkansas Fire Ins. Co.* v. *Wilson,* 67 Ark. 553; *Letchworth* v. *Vaughan,* 77 Ark. 305; *Little Rock Granite Co.* v. *Shall,* 59 Ark. 408.

The language referred to must be construed to mean, not that compensation already earned should be forfeited, but that either party should have the right to terminate the contract at any time and stop the earning of further compensation, and that upon such termination no further compensation should be claimed, except that stipulated in the contract and already earned at that time.

The construction contended for by appellant would cut off the right of appellee, upon discharge, to claim unpaid salary which he had earned while in service, but this is too unreasonable to find support in any fair rule of interpretation. While the cardinal rule for construction of contracts is to arrive at the real intention of the parties, if possible, yet where that intention is doubtful or obscure, a construction should be adopted by the courts which is most fair and reasonable, and which will impose the least hardship upon either of the contracting parties. 1 Beach, Contracts, § 708; *Little* v. *Banks,* 77 Hun, 511; *Wright* v. *Reusens,* 133 N. Y. 298.

Applying this salutary rule of construction, we think the trial court properly interpreted the contract and allowed a recovery for commissions.

Evidence was introduced to the effect that during the pend-

ency of the contract between appellant and appellee, where the person to whom the agent had sold a machine moved out of his agency territory before paying for the machine in full, the selling agent would, according to custom, forfeit his commission and the account would be transferred to the agency to whose territory the purchaser moved, and all future collections made there. This custom is urged as an interpretation of the contract by the parties themselves which the court must follow. It has been said that the best guide obtainable for the interpretation of an ambiguous contract is what the parties themselves have done in execution of it. *Robbins* v. *Kimball,* 55 Ark. 414. "Tell me what you have done under a deed, and I will tell you what that deed means." Lord Chancellor Sugden in *Attorney General* v. *Drummond,* 1 Dr. & W., Irish Ch., 353.

There may, however, have been much reason consistent with the terms of the contract for occasionally transferring the account of a person moving out of the territory, so that the selling agent lost his commission; but that, in the nature of the business, could not occur frequently, and the settling agent was relieved of the burden of looking after the collection. The parties doubtless had in mind the fact that the removals from one territory to another would be equalized, and an agent who lost the remitting commission on one purchaser who moved out of his territory would gain it back in another who moved in from another territory. But the business of selling sewing machines is shown to be conducted largely on the installment plan, the selling commission of the agent is the largest part of his compensation for services, and we can not assume, from the custom with reference to transfer of unpaid accounts of removing purchasers, that the parties intended that the agent should, upon discharge, forfeit his selling commissions on uncollected sales.

We think the circuit judge was right in his conclusion, and his judgment is affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. LANGLEY.

Opinion delivered March 17, 1906.

1. APPEAL—JUDGMENT OF JUSTICE OF THE PEACE.—Appeals from all judgments of justices of the peace to the circuit court are allowed as a matter of absolute right, regardless of the amount involved. (Page 208.)
2. SAME—FROM PART OF JUDGMENT.—One against whom a judgment has been obtained has the right to pay or to offer to pay so much thereof as he concedes to be just and to appeal from the residue of the judgment. (Page 208.)

Appeal from Hot Spring Circuit Court; *Alexander M. Duffie,* Judge; reversed.

E. B. Peirce and *T. S. Buzbee,* for appellant.

The Constitution and statute law confer unconditional right of appeal. Art. 7, sec. 42, Const. Ark.; Kirby's Digest, § 4665. See also Kirby's Digest, § § 1223, 1234, 1235 and 1236. An action for recovery of penalty for nonpayment of wages is a separate action, and may be maintained separately from an action to recover wages. 70 Ark. 226. Defendant clearly had the right to pay off that part of the judgment which it deemed to be just, and appeal from that part at which it was aggrieved. 53 Ark. 514; Baylies on New Tr. & App. § 7; 2 Enc. Pl. & Pr. 96.

H. B. Means, for appellee.

McCULLOCH, J. The plaintiff, J. T. Langley, sued the defendant, Chicago, Rock Island & Pacific Railway Company before a justice of the peace of Hot Spring County to recover a debt of $41.60 for labor performed, and the further sum of $1.83 per day as statutory penalty for nonpayment of wages; and on the return day of the summons the justice of the peace rendered judgment in favor of the plaintiff for the amount of wages sued for and the accrued penalty, aggregating the sum of $131.40.

On the same day defendant presented to the justice of the peace an affidavit and prayer for appeal to the circuit court, in which it tendered to plaintiff the full amount claimed by him as wages, interest and cost of suit, and prayed an appeal from the judgment for the penalty. Defendant also tendered a supersedeas bond in proper form. The justice of the peace refused to allow

the appeal, whereupon the defendant filed in the circuit court a petition for a rule on the justice requiring him to grant the appeal. The court denied the prayer of the petition, and defendant appealed to this court.

The appeal was refused on the ground that it was sought to be taken from only a part of the judgment.

The court erred in refusing to order the allowance of the appeal. Appeals from all judgments of justices of the peace to the circuit court are allowed as a matter of absolute right, regardless of the amount involved. Art 7, § 42, Const. 1874; Kirby's Digest, § 4665.

The defendant had the right to pay, or offer to pay, the amount of the judgment which it conceded to be just, so as to stop further cost of litigation, if that amount should be finally adjudged to be all that was due, and appeal from the remainder. To the extent of the amount conceded to be just, it was not aggrieved by the judgment. The plaintiff could not, by refusing to accept the undisputed amount tendered, cut off the right of appeal from that part of the judgment at which the defendant was aggrieved.

The penalty for nonpayment of wages was a separate cause of action (*St. Louis, I. M. & S. Ry. Co.* v. *Pickett,* 70 Ark. 226), and defendant had the right to appeal from that part of the judgment without subjecting itself to further cost by litigating the amount of wages which it conceded to be justly due to plaintiff. It is the policy of the reformed procedure to encourage the speedy termination of litigation by permitting a defendant to offer to pay or confess judgment for an amount conceded to be due at any stage of the action, and thereby stop the accrual of further cost against him.

The question of the right of a party to accept a benefit under one part of a judgment and appeal from another is not involved in this case. The defendant accepted no benefit under the judgment of the justice of the peace. It simply offered to pay the undisputed amount of wages due plaintiff.

The cause is reversed and remanded with directions to enter a judgment in accordance with the prayer of the petition, requiring the justice of the peace to grant the appeal and certify a transcript of the procedings as provided by the statute.

78 209
f80 182

STRAYHORN v. MCCALL.

Opinion delivered March 17, 1906.

1. STATUTE OF LIMITATIONS—PLEADING.—When relied on as a defense, the statute of limitations must be pleaded in equity as well as at law. (Page 210.)
2. SAME—SUFFICIENCY OF PLEA.—In a suit to foreclose a mortgage an answer alleging that "no credits were entered on the margin of the mortgage" is not sufficient as a plea of the statute bar. (Page 211.)
3. MORTGAGE—ASSIGNMENT BY AGENT—PRESUMPTION.—Where an assignment of a mortgage was executed by an agent for the benefit of the holder of the mortgage, it will be presumed that the agent had authority to execute the assignment until the contrary is made to appear. (Page 212.)
4. EVIDENCE—TRANSACTIONS WITH AND STATEMENTS OF DECEASED.—It is only as to transactions with or statements of the deceased that the opposite party is rendered incompetent to testify, under Const. 1874, Sched., § 2. (Page 212.)
5. APPEAL IN CHANCERY CASE—PRESUMPTION AS TO EVIDENCE.—On appeal a chancellor is presumed to have reached his conclusion upon competent testimony only, and to have disregarded any incompetent testimony. (Page 212.)

Appeal from Yell Chancery Court; *Jeremiah G. Wallace,* Chancellor; affirmed.

STATEMENT BY THE COURT.

J. E. McCall was the owner of a quarter section of land in Yell County, which he occupied as his homestead, and on January 20, 1888, he borrowed $300 from Mattie L. Freeman, and execu ed to her a note for that sum, payable two years after date with interest, and a mortgage on said land to secure the payment of said note. He died in 1896, and the land was sold by appellee, Strayhorn, as the administrator of his estate, under order of the probate court, for the purpose of raising funds to pay debts, and M. C. Perry, the wife of a judgment creditor, became the purchaser. P. J. McCall, a son of J. E. McCall, commenced this suit in equity against Perry, and the administrator, Strayhorn, alleging in his complaint that he purchased said land from his father, and in consideration paid off said mortgage debt, and that the note and mortgage were duly assigned to him by the holder, Mattie L. Freeman, and that no part of said debt had ever been repaid to him. The prayer of the complaint was that the plaintiff's title to the land be quieted, or that the mortgage be foreclosed. The

mortgage and note were referred to in the complaint and exhibited therewith. They each have indorsed thereon the assignment of said Mattie L. Freeman by agent, W. H. Gee.

Defendant Perry filed a separate answer, in which she alleged that J. E. McCall paid a great part, if not all, of said mortgage debt to Mattie L. Freeman. She also denied that the plaintiff ever purchased the land from J. E. McCall, or held possession thereof before the death of J. E. McCall, or that the note and mortgage were ever assigned to plaintiff. The answer also contains an allegation "that no credits were entered on the margin of the mortgage executed by said J. E. McCall to M. L. Freeman," and that plaintiff held the mortgage for the purpose of defrauding the creditors of J. E. McCall. Mrs. Perry brought an ejectment suit at law to recover possession of the land, and by consent the two causes were consolidated. The chancellor found that there had not been sufficient change of possession to take the alleged purchase of plaintiff from J. E. McCall out of the operation of the statute of frauds, but found that the mortgage and note executed to Mattie L. Freeman had never been paid, and had been duly assigned to plaintiff, and entered a decree foreclosing same.

The defendants appealed.

John M. Parker, for appellant.

1. If P. J. McCall purchased from his father, the agreement being verbal, the sale was void. Kirby's Digest, § 3654. Being a homestead, the sale was invalid unless joined in by the wife. *Ib.* 3901; 57 Ark. 242.

2. The mortgage debt was barred, as against the estate of J. E. McCall. Kirby's Digest, § § 5069, 5070, 5399. The claim of P. J. McCall, if not barred, was fifth class, and subsequent to claims of Perry, etc. Kirby's Digest, § 110, fifth clause, and § 130.

3. The evidence of P. J. McCall was inadmissible. Sec. 2, Schedule, Const. Ark.

Priddy & Chambers, for appellee.

McCULLOCH, J., (after stating the facts.) It is urged here that the chancellor erred in decreeing a foreclosure, because the debt was barred by limitation, but an examination of the plead-

ings fails to disclose a plea of the statute bar. The statute of limitations, when relied upon as a defense in suits in equity, as well as in actions at law, must be specially pleaded. *Wilson* v. *Anthony,* 19 Ark. 16. Chief Justice English in delivering the opinion of the court in the case just cited said: "The statute of limitation cannot be insisted on as a bar in equity without being pleaded or in some form relied on as a defense in the pleadings. (Citing *Hickman* v. *Stout,* 2 Leigh, 6; *Hudson* v. *Hudson,* 6 Munf. 356; *Dey* v. *Dunham,* 2 Johns. Ch. Rep. 191; *Crutcher* v. *Trabue,* 5 Dana, 82; *Whitney* v. *Whitney, Id.* 331; *Van Hook* v. *Whitlock,* 2 Edward. Ch. 307; *Prince* v. *Heylin,* 1 Atk. 494; *Colvert* v. *Millstead,* 5 Leigh, 88; *Maury* v. *Lewis,* 10 Yerger, 118; *Jones* v. *Chiles,* 4 J. J. Marsh. 610.) The reason of the rule is that the complainant should have notice of the defense, in order that he may have an opportunity of bringing his case within the exceptions of the statute by special replication, or, according to the modern practice, by an amendment of his bill, and not to be taken by surprise at the hearing." This view is sustained by more recent decisions. 13 Enc. Pl. & Pr., p. 183; *Thompson* v. *Parker,* 68 Ala. 388; *Lux* v. *Haggin,* 69 Cal. 255; *Brush* v. *Peterson,* 54 Iowa, 243; *Lawrence* v. *Rokes,* 61 Me. 38; *Wilkinson* v. *Flowers,* 37 Miss., 579; *Bruce* v. *Baxter,* 7 Lea (Tenn.), 477; *Gibson* v. *Green,* 89 Va. 524.

The language used by Judge Eakin in *Riley* v. *Norman,* 39 Ark., 158, appears to be against this view, but the learned judge seems to have been discussing the equitable doctrine of laches, rather than the statute of limitation, as the former doctrine was applied in that case in denying the relief sought. None of the elements upon which courts of equity apply the doctrine of laches are found in the case at bar. The defendant purchased the land from the administrator of J. E. McCall with full knowledge of the asserted claim of the plaintiff. If the defendants intended to rely as a defense upon the fact that the debt secured by the mortgage was barred by limitation, the rules of good pleading, as well as fairness to the plaintiff, demanded that such intention should have been plainly manifested by an appropriate plea. Instead of doing so in this case, the defendants based their defense upon other grounds and said nothing about the statute of limitations or the facts upon which the court could apply the statute. Noth-

ing appears in the answer from which the court could infer an intention to plead the statute bar except, possibly, the bare statement that "no credits were entered on the margin of the mortgage." This is not sufficient as a plea of the statute bar. The facts constituting the bar should have been set forth.

It is contended that the mortgage was not properly assigned to the plaintiff because the authority of the agent who made the assignment is not shown. The assignment was made for the benefit of the principal; she has not questioned it, and the authority will be presumed until the contrary is made to appear.

The defendant objected to the testimony of the plaintiff on the ground that it was a suit against the administrator, and that his testimony related, in part, to transactions with the deceased. For several reasons the testimony was not incompetent. The suit was against the purchaser of the land, and as to him the testimony was competent. *Nolen* v. *Harden,* 43 Ark. 307; *Lawrence* v. *LaCade,* 46 Ark. 378. The testimony, so far as it tended to sustain the relief granted by the court, did not relate to a transaction with the deceased, but to an independent transaction, *i. e.,* the assignment to him of the note and mortgage by the holder. It is only as to "transactions with or statements of" the deceased that the opposite party is rendered incompetent to testify. Const. 1874, sec. 2, Schedule.

Moreover, there was testimony of other witnesses bearing upon the issue sufficient to sustain the decree of the chancellor, and he is presumed to have reached his conclusion only upon competent evidence, and disregarded that part which was incompetent. *Niagara Fire Ins. Co.* v. *Boon,* 76 Ark. 153.

Decree affirmed.

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

Opinion delivered March 17, 1906.

1. EVIDENCE—RES GESTÆ.—Where a brakeman was injured while in the discharge of his duties, so that he lived only a short while, his statement as to how he received the injury was admissible as part of the *res gestae.* (Page 216.)
2. RAILROAD—DUTY AS TO DISABLED CARS.—A railway company is bound only to exercise due care, through its vice-principals and through a proper system of timely inspection, to discover the disabled cars and notify the trainmen of such condition; and when this is done, the risk of handling such cars and carrying them to the repair shop becomes one of the risks ordinarily incident to the employment, and is assumed by the employee. (Page 216.)
3. SAME—RISKS ASSUMED BY BRAKEMAN.—Where a car is reported to a brakeman as being in bad order, the burden of ascertaining the defect and source of danger is cast upon and assumed by him. (Page 218.)
4. SAME—DUTY TO BRAKEMAN.—While a brakeman, engaged in handling disabled cars, is deemed to have assumed the ordinary risks incident to the performance of that duty, yet the same duty rests upon the company and its vice-principals to commit no act of negligence whereby he may suffer injury, and to exercise ordinary care to protect him from danger, as would rest upon them while he is in the discharge of less hazardous work. (Page 219.)

Appeal from Lonoke Circuit Court; *George M. Chapline,* Judge; affirmed.

Marshall & Coffman, for appellant; *Trimble & Robinson,* of counsel.

The court erred in directing a verdict for the defendant. It was a question for the jury. 130 U. S. 652; 152 U. S. 107; 149 U. S. 44; 2 Labatt, M. & S. 2377-80; 1 *Ib.* 814; 39 Ark. 491; 62 Ark. 69; 63 Ark. 94; 66 Ark. 363; 70 Ark. 230; 71 Ark. 305; *Ib.* 445. Failure to use due care to inspect the cars or to give notice of their defects, and also permitting cinders and clinkers to accumulate on the track, was actionable negligence. 71 Ark. 159; 70 Ark. 295; 57 Ark. 377; 1 Labatt, M. & S. 337, 340; *Ib.* 537-8. Notice must be sufficient to enable the servant to protect himself. Am. Dig. 1903 A, 2802 (Y); *Ib.* 2803 (Y Y); 21 So. 120; 76 Fed. 443. Risks arising from the master's negligence are not assumed

by the servant. 67 Ark. 209; 54 Ark. 389; 1 Labatt, M. & S. 620; 129 Fed. 347; 71 Ark. 446; 25 S. C. 158. Defendant could not shift the duty of inspection on to its employees by a rule. 48 Ark. 333, 347. The dangerous condition of the track was not of the obvious character to impute knowledge, as a matter of law, to a man engrossed in his work. 73 Pac. 880; 86 N. W. 838; Am. Dec. 720; 111 Ill. App. 473; 84 S. W. 679; 152 U. S. 107; 196 U. S. 51; 1 Labatt, M. & S. 1104-5; 1149-50; 1156-8, 1135, 1024-7. Whether the defective couplers and roadbed contributed proximately to the injury should have gone to the jury. 2 Labatt, M. & S. 2379; 4 Am. Rep. 181. See also 116 Fed. 867. Where there is evidence showing the master's actual knowledge of a defect, the case must go to the jury. 23 Atl. 843; 37 Atl. 619. It was not negligence *per se* for deceased to go between the cars, though they were equipped with automatic couplers. 56 N. W. 519; 103 N. W. 77; 87 N. W. 136; 119 Fed. 288; 4 Am. & Eng. Enc. Law (1 Ed.), 427-8; 1 Labatt, M. & S. 855-6; 35 So. 547; 131 N. E. 476. There was no rule forbidding employees from going between cars to couple them, and if there had been its customary nonobservance would relieve deceased of the charge of negligence in doing the work in that way. 74 S. W. 357; 1 Labatt, M. & S. 515; 69 S. W. 430; 77 N. W. 541; 51 N. W. 645; 92 N. W. 462; 84 S. W. 679; 100 Ala. 451; 1 Labatt, M. & S. 905-9.

Oscar L. Miles, for appellee.

1. The handling of "bad order" cars is a necessary incident of the service of trainmen. Deceased was charged with notice that the car was unfit for use, and that there was more than ordinary danger in attempting to handle it. Having an opportunity to know the danger and risk, he is presumed to know of such danger, and, if he failed to inform himself of it, he can not recover. 58 Ark. 125; 41 Ark. 542; 48 Ark. 333. He will be held to have assumed the greater risk attending the handling of disabled cars. 11 Am. & Eng. R. Cas., New Series, 410; 61 Ill. 130; 53 Tex. 434; 125 N. Y. 15; 16 Am. & Eng. R. Cas., New Series, 515.

2. By remaining between the cars at a time when it was unnecessary to do so, deceased was guilty of contributory negligence. "Safety Appliance Act," sec. 2; 63 S. W. 695; 70 S. W.

626; 18 Am. & Eng. R. Cas., N. S., 551; 70 Ark. 606; 24 Penn. St. 469; 62 Ark. 245.

McCULLOCH, J. Appellant, as administratrix of the estate of her deceased husband, C. R. Marshall, brought this action against appellee to recover damages by reason of his death, alleged to have been caused by the negligence of appellee. Deceased was a brakeman employed by appellee, and was killed by a train at Russellville, Ark., while he was coupling cars. Negligence of appellee was alleged in allowing the roadbed to become covered with piles of clinkers and cinders, and in allowing a drawhead and coupler on one of the cars which deceased was attempting to couple to become defective, and in allowing a hinge of an apron attached to the car to become broken, none of which defects, it is alleged, deceased had notice of. The answer denied all the allegations of negligence, and alleged contributory negligence on the part of deceased, and that his death resulted from an accident which was a part of the risk he assumed in his employment.

When the introduction of testimony was completed, the court instructed the jury to return a verdict for the defendant, which was done, and the plaintiff appealed. The only question, therefore, presented is whether there was sufficient testimony, giving it the strongest probative force in support of plaintiff's alleged cause of action, to justify a verdict in her favor.

It is shown that deceased made three or four attempts to couple the cars, which were ineffectual on account of the failure of the coupler to work automatically. He was killed in the last attempt. No defect in the coupler is shown to have existed, except that it was perhaps rusty, and the knuckle failed to open and close from the impact of the cars coming together. Immediately after the accident it worked all right after being greased. The car which he was attempting to couple onto the train was a disabled dirt car which had been in use in the work of re-constructing the roadbed. On the end of the car was an iron apron about three feet wide, extending the full width of the car, which was attached to the car by large iron hinges. The apron was arranged so that, when turned down in a horizontal position, it covered the space between that car and the next one, and enabled the plow to pass along unobstructed from car to car to expel the

loads of dirt. One of the hinges on the apron was broken, and, when the apron was turned back, it protruded twelve inches, so one of the witnesses stated, over the end of the car. Deceased, in attempting the last time to couple the cars, stepped out from between them, gave the signal to the engineer to back up, and walked back between the cars to adjust the knuckle of the coupler. He had his hand on the knuckle when the cars came together, and he attempted to jump out from between them, and was caught by the hinge, and fell between the ends of the couplings, and was hurt. The hinge either pierced his body or his clothing. He lived only a very short while, and, when asked, after he partially revived from the shock, concerning the manner in which he received the injury, merely said, "The hinge." There was sufficient evidence to have justified the jury in finding that the company was guilty of negligence in allowing piles of clinkers and cinders to accumulate along the track which might hinder the trainmen in handling and coupling cars, but there was no testimony tending to show that this contributed to the injury of appellant's intestate. One witness stated that he was either "caught by something or stumbled," he did not pretend to know definitely which it was. Two eyewitnesses introduced by plaintiff stated that he was caught by something and was thrown over between the ends of the couplings. There can be no doubt, under the evidence, that he was caught by the hinge as he attempted to pass out from between the cars. This was his own brief account of the accident, which was stated under circumstances which rendered it admissible as part of the *res gestae.* So there was nothing to go to the jury on this charge of negligence.

The evidence was undisputed that the coupler was not in perfect working order, and that the hinge on the apron of the car was broken, either of which defects the jury might have found from the evidence contributed to the injury. There was also sufficient evidence to warrant a finding that the car had not been inspected and notice given in the usual way of the defects. But it does not follow from this that the servants of the company were negligent in this regard, or that the accident was not due to one of the risks which appellant's intestate assumed by virtue of his employment. On the contrary, it is clear from the evidence that he had notice that the car was

disabled in some way, and that it was being coupled into the train for the purpose of carrying it to Van Buren for repairs. This train was made up at Russellville for a trip to Van Buren, and the conductor had orders from the office of the trainmaster to take up all bad-order dirt cars and all empty box-cars on the road between Russellville and Van Buren, and convey them to Van Buren for repairs. Deceased knew of this order, and assisted in locating the bad-order dirt cars (there being two of them) on the side track at Russellville. The conductor and one of the brakemen testified that deceased had the switch list containing the numbers of those cars, and that all three of them hunted up the cars and looked at them. In this way he received notice that they were disabled cars to be carried to the shop for repairs. It may be that he did not know of the projecting broken hinge before he was caught by it, though it is highly probable from the evidence that he did observe it. It was a defect easily discernible on casual observation of that end of the car, and the conductor testified that he and deceased examined the car together, and that the latter was bound to have seen it. But the company was not bound to give him specific notice of the defects. It was not customary to do so, and under the facts of this case it was not required in the exercise of due care. It was customary for the inspector merely to mark with chalk on the disabled car the letters "B. O.," meaning bad order. This was not done in this instance, and the jury would have been warranted in so finding, and that the inspector was guilty of negligence in failing so to do; but, as deceased received information of the same fact from another source, it can not be said that the negligence of the inspector contributed to the injury. In the operation of railroad trains, cars will necessarily become disabled, sometimes from ordinary wear of use and sometimes from unavoidable accident. They must then be conveyed to the shop for repairs, and it is the duty of the trainmen to do this. It is necessarily and unavoidably a part of the duties arising from their employment as train operatives, because the company obviously can not provide a repair shop wherever a car may become disabled, nor send out a special train and corps of men to bring in or repair every disabled car. It is only bound to exercise due care, through its vice-principals,

and through a proper system of timely inspection, to discover the disabled cars and notify the trainmen of such condition. When this is done, the risk of handling the cars and carrying them to the shop becomes one of the risks ordinarily incident to the employment, and is assumed by the employee. 1 Labatt, Master & Servant, § 268; Dresser on Employers' Liability, p. 409; 4 Thompson on Neg. § 4729; *Chesapeake & O. R. Co.* v. *Hennessy,* 96 Fed. 713; *Yeaton* v. *B. & L. Railroad,* 135 Mass. 418; *Judkins* v. *Railroad Co.,* 80 Me. 417; *Arnold* v. *D. & H. C. Co.,* 125 N. Y. 15; *Chicago & N. Ry. Co.* v. *Ward,* 61 Ill. 130; *Fraker* v. *St. P., M. & M. Ry. Co.,* 32 Minn. 54; *Kelly* v. *Chicago, St. P. M. & O. Ry. Co.,* 35 Minn. 490; *Flannagin* v. *Chicago & N. W. R. Co.* 50 Wis. 462; *Watson* v. *H. & T. C. Ry. Co.,* 58 Tex. 434; *Brown* v. *Chicago, etc., R. Co.,* 59 Kan. 70.

The doctrine applicable to the facts of this case is fully stated by the Supreme Court of Minnesota in *Kelly* v. *Chicago, St. P. M. & M. R. Co. supra,* as follows:

"The aspect of the case is, then, this: The plaintiff's intestate is notified generally that the car is in bad order, so that it has been necessary to withdraw it from ordinary service and lay it up for repairs. When he comes to handle it, he does so knowing that, for some reason not disclosed to him, it is not suitable for use in the ordinary way. Not knowing what, in particular, those reasons are, if he handles the car at all, he handles it as a car which is unsuitable for use, and at his own risk, not only for its defects—at least for such as are apparent to or would be fairly suggested by ordinarily diligent and careful observation, like those of the brake on this car. * * * The plaintiff's intestate must be taken to have assumed the risk of handling this car as one in bad order, which it therefore might be dangerous to handle in the ordinary way, and as to which, in the absence of any definite information as to the respect in which it was defective, the burden of ascertaining the defects and source of danger was cast upon and assumed by him. As he took this risk and burden upon himself, he can not hold the defendant responsible for it."

In *Chesapeake & O. R. Co.* v. *Hennessy, supra,* Judge Lurton, speaking for the court, said: "The rule is well settled that if the work of the employee consists, in whole or in part, in dealing with damaged or defective cars, and which, by the very

nature of his occupation, he must know, or have some reason to know, are unsafe and dangerous, he voluntarily assumes the risk and hazards which are incident to the duty he was engaged to perform. It is not a case where dangerous or defective instrumentalities are supplied by the master to be used in his work, and where notice of such danger should be given, but a case where the instrumentalities to be handled and worked with or upon are understood to involve peril and to demand unusual care. In such cases, the risk is assumed by the servant as within the terms of his contract, and compensated by his wages."

We do not mean to hold that because the servant is engaged in the hazardous work of handling disabled cars he is deemed to have assumed risks created by the negligence of the company or its vice-principals, or that the company is absolved from the exercise of due care to protect him. On the contrary, we say that whilst he is engaged in that work, though he is deemed to have assumed all the ordinary risks incident to the performance of that particular duty, yet the same duty rests upon the company and its vice-principals to commit no act of negligence whereby he may suffer injury, and to exercise ordinary care to protect him from danger, as while he is in the discharge of other and less hazardous work. The case of *St. Louis, I. M. & S. Ry. Co.* v. *Touhey,* 67 Ark. 209, is illustrative of the doctrine. In that case the servant was a member of a wrecking crew engaged in removing wrecked cars to the repair shops, and was injured by reason of the negligent acts of other employees of the company in moving the train to which the cars were attached at too rapid a speed. The court held that the company was liable for the negligence—that it was a risk which the servant had not assumed. But in the case at bar the servant knew that the car was disabled. It was a part of his duties to handle such cars, and, according to all the authorities on the subject, he must be deemed to have assumed, as one of the ordinary risks of his employment, the risk resulting from the disabled condition of the car.

This being true, the evidence did not justify a verdict in favor of the plaintiff, and the court properly instructed the jury to return a verdict for the defendant.

Affirmed.

RIDDICK, J., not participating.

LITTLE ROCK & HOT SPRINGS WESTERN RAILROAD COMPANY v. CROSS.

Opinion delivered March 24, 1906.

1. EVIDENCE—COMPETENCY.—In a suit in which plaintiff sought to recover for injuries alleged to have been received by him by reason of defendant's negligence in driving another car against the one which he was unloading, where defendant attempted to prove that its employees notified a boy who was assisting plaintiff outside that they were going to couple on to the car, it is competent to prove that the boy who was assisting plaintiff was inside the car with him at the time plaintiff was injured. (Page 224.)
2. SAME—HEARSAY.—The testimony of a witness as to how another was injured was hearsay and incompetent where his knowledge was derived from the injured person three days after the injury was received. (Page 225.)
3. SAME—WAIVER OF OBJECTION.—Where the incompetency of evidence introduced by plaintiff was first disclosed on cross-examination by defendant, and defendant failed to move to exclude the evidence, the objection was waived. (Page 225.)
4. RAILROAD—NEGLIGENCE—INSTRUCTION.—Where plaintiff, while unloading a car into a wagon, was injured by reason of another car being driven against such car, it was not error to refuse to instruct that defendant's employees were justified in assuming that, if there was a boy on the wagon, it was his duty to notify plaintiff, who was in the car, of the approach of the other car. (Page 225.)
5. SAME—NEGLIGENCE.—It was not error to refuse to instruct the jury that if there was a boy in plaintiff's wagon, and defendant's employees did not know there was any person in the car, they had a right to presume that the person in the wagon was in charge thereof, and the law would not require them to look in the car to see if there was some one in there. (Page 225.)
6. DAMAGES FOR PERSONAL INJURY—EXCESSIVENESS.—A verdict for $3,000 as damages for personal injuries will not be set aside as excessive where the evidence shows that before the injuries plaintiff was earning $75 per month while afterwards he was earning $1.50 per day; that before the injury he was a vigorous man, but since has been helpless; that his injuries were serious, causing intense suffering, and were probably permanent. (Page 226.)

Appeal from Garland Circuit Court; *Alexander M. Duffie*, Judge; affirmed.

STATEMENT BY THE COURT.

This was a suit for personal injury. Plaintiff charged that

on December 4, 1903, while he was in a box car in the railway company's yards at Hot Springs, Arkansas, unloading brick into his wagon, the employees of the railway company negligently and carelessly, with great force, caused another car to be driven against the car which he was in with such force as to injure him for life, and asked for damages in the sum of $5,000.

The defendant answered, denying each and every allegation of the complaint, and then charged contributory negligence on the part of plaintiff.

The proof on behalf of appellee tended to show that on December 8, 1903, appellee, who was working for the Merchants Transfer Company at Hot Springs, went to the yards of appellant to unload a car of brick. It was the usual thing for freight to be handled from the cars on the track where appellee was at work. He placed his wagon alongside the car, and began unloading brick therefrom. While in the car at work, standing in a stooping position, another car was backed against the car he was in with such great force as to send it about forty or fifty feet from the position it occupied when appellee began unloading it. Appellee's head struck against the car, and he was rendered unconscious. He was thrown prone upon his back six or eight feet from where he stood when the crash came. He was unconscious for about two days, and remained in semi-conscious condition for about a week after the accident.

On behalf of appellant, the proof tended to show that when the coupling was made to the car appellee was in, a negro was in the wagon by the side of the car, and the brakeman making the coupling said to him: "We are going to couple on the car." That appellant's employees having the work in hand did not know that any one was in the car at the time the coupling was made. None of the train crew could see or know that the appellee was in the car. They had looked in the car that morning, and no one was in it. The man in the wagon, when notified that they were going to couple on to the car, made no response. He could see the cars coming back. The coupling was made in the usual way. In rebuttal, appellee testified that at the time the coupling was made a boy nearly as light as he was in the car with him; that they walked back and forth, throwing brick into the wagon from the car; that they did not step out into the wagon, but threw

brick in it from the car; that the boy was in the car with him when it was struck. The boy whom appellant's witnesses say they saw on the wagon was described by them as being a young "black-looking negro," "pretty dark, and not very light" "eighteen or nineteen years old." Other testimony corroborative of this was introduced. Then one Page was introduced, who testified as follows:

"Q. You know this boy that was working down there with plaintiff at the time of the accident? A. Yes, sir; his name was George; don't remember his last name."

The above question and answer were objected to by defendant; and, upon the objection being overruled, defendant saved its exceptions.

"Q. What color boy is he? A. He was a light boy, about as light as that girl sitting there (indicating).

"Q. How soon after the accident did you see him? A. That evening.

"Q. You know whether or not he was hurt? A. Yes, sir.

"Q. What did you see? A. He was bruised upon the legs and then his arms. I took him to Dr. Hebron to treat him.

"Q. When you carried him to Dr. Hebron, how long was that after the accident? A. Two or three days.

"Q. He did have bruises on his limbs? A. Yes, sir; and on his arms; he was complaining about it."

Defendant at the time separately objected to each of the above six questions and answers, and, the objections being overruled, defendant at the time saved its separate exceptions.

On cross-examination witness testified:

"Q. Page, you are one of the attorneys in this suit? A. Yes, sir.

"Q. You don't know anything about where he was injured, except what he told you? A. Well, I could see the abrasion of the skin.

"Q. You don't know anything about how he received his injuries, except what he told you? A. Oh, no, sir.

"Q. And when you saw it was when you took him to a doctor? A. Yes, sir.

"Q. And that was two or three days after the injury? A. Yes, sir; before I took him down there.

"Q. Was the negro lighter or darker than Charley? A. Darker than he is.

"Q. His name is George is all you know? A. I have his name on my book.

"Q. Do you know where he is? A. I heard he went to Memphis.

"Q. How recently? A. I think just before this trial.

"Q. You didn't have him subpœnaed? A. No, sir; when I heard he was gone, I thought I could get along without him."

Among the prayers refused are the following asked by appellant:

"8. If you find from the evidence that defendant's employees saw the wagon and some person in it, and saw that the wagon was not so near the train as to be in danger, and if you further find that they were not aware that any one was within the car, they had the right to presume that there was no one in the car, that the negro in the wagon had charge of the wagon, and they were not guilty of negligence in going on and coupling on to the brick car; and if you believe and find from the evidence that the trainmen saw a man in the wagon, and told him they were going to couple onto the car, and the wagon was far enough from the train to be out of danger, and they were not aware that any one was in the car, your verdict must be for the defendant."

"11. If you find from the evidence that the negro who was working with plaintiff knew that the train was coming down on the same track that the car that plaintiff was in was on, and negligently failed to notify plaintiff when, if he had notified plaintiff, he would have avoided the injury, then the negligence of the negro who was working with plaintiff will be imputed to the plaintiff, and bar his recovery in this case."

"15. You are instructed that if defendant's servants saw a person apparently in charge of the wagon, and did not know there was any person in the car, they had a right to presume that the person in the wagon was in charge of the wagon, and the law would not require them to go and look in the car to see if there was some one in there."

The verdict and judgment were for $3,000.

B. S. Johnson, for appellant.

1. The court erred in permitting inadmissible evidence to go to the jury.

2. It was error to refuse the 8th, 11th and 15th instructions asked by defendant. When defendant's employees, seeing the negro in charge of the wagon, and not knowing that any one was in the car, warned the one in the wagon, they did all that was required of them in the exercise of ordinary prudence. They had the right, having once visited the car and found no one in it, to presume that the wagon was in charge of the negro whom they saw in it. See 65 Ark. 275.

3. The verdict, under the evidence, was excessive.

Wood & Henderson, for appellee.

The court did not err in permitting witness Page to testify as he did. The 8th, 11th and 15th instructions asked by defendant were properly refused, and the verdict was not excessive.

WOOD, J., (after stating the facts.) 1. The facts sought to be established by the witness Page by the examination in chief were competent. Witnesses for appellant had testified that there was a negro boy on the wagon at the time appellee was hurt, and they gave the description of the negro as a "black-looking negro." This was in contradiction of the testimony of appellee, which tended to show that the boy was in the car with him at the time he was hurt, and that the boy that was with him was a mulatto. The testimony of Page tended to corroborate the testimony of appellee. The fact that the boy was seen by him that evening after the accident with bruises upon his arms and limbs, and that he was a mulatto instead of a black-looking negro, tended to corroborate and strengthen the testimony of appellee that the boy was with him in the car at the time of the accident. This testimony tended, therefore, necessarily to disprove the testimony of appellant's witnesses that the boy was upon the wagon at the time of the injury to appellee. There is no contention that the witnesses for appellee and appellant were testifying about a different boy. It is assumed that they were talking about the same boy, and there is no contention that there were two boys there besides appellee. Page was asked about "the boy that was working down there with plaintiff at the time of the accident," and his answers show that this was the boy he was

describing. The testimony was competent, relevant and material.

But it was discovered on cross-examination that Page only found out that the boy was injured when he took him to the doctor, two or three days after the accident, and he only knew about how it was done from what the boy told him. This rendered that part of his testimony incompetent, and too remote. It was hearsay evidence, and prejudicial. But appellant, after thus bringing out these facts, did not ask the court to exclude the evidence. It elicited the evidence itself on cross-examination, and it waived all objection to its incompetency by not moving the court to exclude it after such incompetency was discovered.

2. The court's ruling was correct. Instructions numbered eight and fifteen assume, as matter of law, that the appellant had exercised ordinary care to prevent the injury to appellee if it notified the boy on the wagon that it was about to couple on to the car. This proposition assumes the existence of too many facts which should be left to the jury to ascertain. And then, after ascertaining the facts, it was still a question for the jury to determine whether appellant, under the facts proved, was negligent. For instance, these instructions assume that, if appellant's servants saw a boy on the wagon, they had a right to presume that no one was in the car. *Non sequitur.* The facts were, as the proof showed, that there were two boys there. The evidence conflicts as to whether or not they were both in the car at the time of the accident. It was a question for the jury to determine whether the boys were in the car, or whether one was in the car and the other on the wagon at the time of the injury; and if there were two, what was their status to each other and the company; and it did not follow at all that, if one boy was on the wagon, there was no one in the car. And the company had no right to assume, as the instructions indicate, that if there was a boy on the wagon he would communicate the notice to the boy in the car. There was no proof that the boy in the car and the one on the wagon, if there was one also on the wagon, held such status to each other as to warrant the assumption that the boy in the car was responsible for the conduct of the boy on the wagon, and *vice versa,* or that the conduct of the boy on the wagon was imputable to the boy in the car. This instruction No. 15 assumes.

We see nothing in the evidence to warrant the conclusion, as matter of law to be told the jury, that if there was a boy on the wagon it was his duty to warn the appellee, who was in the car, and that, if he failed to do so, he was guilty of negligence which should be imputed to appellee, and that the railway company had the right to assume that the boy on the wagon would notify the boy in the car, and to act accordingly. The whole tenor and legal effect of the instructions were to take from the jury the very question which it should determine, namely, as to whether or not the appellant, under all the facts which the jury might find from the evidence, was guilty of negligence.

The questions involved in these instructions were elaborately presented to the jury in general terms, in proper form, in other instructions. We find no error in the court's charge.

3. The verdict was not excessive. Appellee in his regular calling, for which the accident unfitted him, had earned as much as $75 per month. At the time of the accident he was earning $1.50 per day. He was before the injury a vigorous young man. Since, most of the time, he has been helpless as a child. His injuries were serious, painful and probably permanent. The suffering was intense.

Considering all the elements for which damage should be allowed, we do not feel authorized to disturb the verdict as to the amount.

Affirm.

GODDARD v. STATE.

Opinion delivered March 24, 1906.

1. JUDGMENT—AMENDMENT.—The rule that a court has authority, upon any competent and legal evidence, to amend its records so as to speak the truth is applied in criminal as well as civil cases. (Page 227.)
2. CONTINUANCE—DISCRETION OF TRIAL COURT.—Where the transcript in a murder case shows that a physician made an affidavit, in support of a motion for continuance, to the effect that defendant had sustained

a buckshot wound, from which he suffered great bodily pain, and that he was in no fit condition for a trial, the discretion of the trial court in refusing a continuance will not be interfered with where the court found that "defendant walked some 14 miles after receiving the buckshot wound; that after he was put in jail he walked to the doctor's office, some two blocks, until after the special term of court was called, and that he had no fever at the time his case was called." (Page 228.)

Appeal from Sevier Circuit Court; *James S. Steel,* Judge; affirmed.

W. F. Nichols and *B. E. Isbell,* for appellant.

1. The court erred in refusing to postpone the trial until the defendant was in physical condition to prepare for it. Where the defendant is too ill for trial, he is entitled to a continuance. Clark's Crim. Proc. 412. Likewise if his counsel becomes ill and can not attend the trial. 26 S. W. 60.

2. The record does not disclose that the jurors selected and impaneled to try the case were sworn as required by law. Kirby's Digest, § 2373; 25 Ark. 106; 37 Ark. 61; 34 Ark. 257; 45 Ark. 146. Such error appearing on the face of the record, it was not necessary to set it out as one of the grounds in motion for new trial. 26 Ark. 536; 25 Ark. 662; 46 Ark. 21; 61 Ark. 35.

Robert L. Rogers, Attorney General, for appellee.

1. Since continuances are addressed to the sound discretion of the trial judge, and since in this instance he had the prisoner before him and was familiar with all the circumstances, his action ought not to be disturbed.

2. The record, corrected by certiorari, shows that the jury were properly sworn.

RIDDICK, J. The defendant, D. T. Goddard, was indicted, tried and convicted of murder in the first degree for killing one Ed Ward by shooting him with a gun, on the 17th day of May, 1905, in Sevier County, Arkansas.

The brief filed for defendant presents only two questions: One of these was based on the fact that the record failed to show that the jury before which defendant was tried was sworn as the law requires. But the record has since been amended so as to show that the jury were properly sworn. The circuit court at a subsequent term heard the testimony of the jurors who tried the case and of other parties at the trial, and found from this testimony that the jury had been duly sworn as the law requires,

and amended its record accordingly so as to speak the truth. Counsel for defendant contend with much force that it was improper to amend the record in that way on oral evidence alone. But, while there is conflict in the decisions of the different States on that point, the rule is established in this State that a court has authority to amend its records so as to make them speak the truth as to what was done, and may do so upon any competent and legal evidence. There is no difference between criminal and civil cases in the power of courts to amend their records so as to reflect the facts. *Freel* v. *State,* 21 Ark. 213; *Binns* v. *State,* 35 Ark. 118; *Sweeny* v. *State,* 35 Ark. 586; *Ward* v. *Magness,* 75 Ark. 12; *Liddell* v. *Bodenheimer. post,* p. 364; In re *Black,* 52 Kansas, 64, s. c. 39 Am. St. Rep. 331; In re *Wight,* 134 U. S. 136.

The other question is whether the court erred in refusing to grant a continuance on account of the physical condition of the defendant. The affidavit of the physician tended to show that defendant had sustained a buckshot wound, from which he suffered great bodily pain, and that he was in no fit condition for a trial. So far as the record shows, this affidavit was all the evidence introduced at the trial of the motion for continuance. But the court found that "defendant walked some 14 miles after receiving the buckshot wound; that after he was put in jail he walked to the doctor's office, some two blocks, until after the special term of court was called; that he had no fever at the time his case was called." The court therefore found that defendant was physically and mentally able to undergo the ordeal of the trial, and he overruled the motion for continuance. Continuances, especially those based on the physical condition of the defendant at the time of the application therefor, are addressed largely to the discretion of the trial court. This must necessarily be so, for that court has the defendant before it in person, and can to some extent judge from his personal appearance whether his physical condition is such as to enable him to stand the ordeal of a trial. But this means which the trial court has of determining the defendant's physical condition can not be preserved in the record except in a very imperfect way. No attempt is made in this record to state what the appearance of the defendant was at that time.

further than it is shown by the affidavit of the physician and the finding of the court. If the condition of the defendant was such as described by the physician, we think the case should have been continued, for it would have been unnecessary, and more or less cruel, to put a defendant on trial for his life while he was suffering great pain from a dangerous wound, and when his chance of recovery would be jeopardized by the trial. But his testimony, as it appears from the record, seems very full and clear, and it does not appear that his condition was unfavorably affected by the trial. The findings of the court show that the court was of the opinion that he had no fever, and was able to undergo the trial without prejudice to his legal right to a fair trial and without jeopardizing his health.

While the affidavit made by the physician raises some doubt in our minds of the propriety of overruling this motion for continuance, we do not feel sufficiently convinced to overturn the judgment of the trial court on that point.

The State made out a strong case against the defendant. On the day of the tragedy Ward was engaged in hauling lumber, and the road along which he had to travel led by the field where the defendant was at work. There had been some ill feeling between them by reason of the fact that Ward, so defendant testified, had accused defendant's son, a small boy, of taking an axe belonging to Ward.

Defendant, on the day of the killing, took his gun with him to the field near which he knew that Ward would pass. No one was present at the time of the shooting except these two. According to defendant's own statement, he stood inside of his field and shot Ward, who was on the outside of the fence, because Ward used an abusive epithet and started to throw a rock at him. He shot Ward twice, and the trail of blood showed that Ward staggered a few steps, fell and died. Defendant ran off, and remained in hiding until captured.

We think the evidence shows clearly that he was guilty of some degree of unlawful homicide, and is sufficient to sustain the verdict for the highest degree.

While, as before stated, we are not fully convinced that the court should not have granted the continuance, we do not think that we would be justified in setting this conviction aside and

granting a new trial on that account, for we do not see that any prejudice resulted to the defendant from being tried at that time.

Judgment affirmed.

---

78 230
e82 212

WHETSTONE v. HUNT.

Opinion delivered March 24, 1906.

1. DEED—REPUGNANCY BETWEEN GRANTING AND HABENDUM CLAUSES.—While it is a rule of law that, if there is a clear repugnance between the granting and habendum clauses in a deed, the latter must give way, upon the theory that the deed should be construed most strongly against the grantor, yet it is only where these clauses are irreconcilably repugnant that such a disposition of the question is required to be made. (Page 232.)
2. SAME—CONSTRUCTION.—Where the granting clause in a deed conveyed the entire interest of the grantor to the grantee and his heirs, and the habendum clause limited the estate to one for life, without stipulating whose life, the words of limitation will be construed to be for the life of the grantor. (Page 232.)

Appeal from Miller Circuit Court; *Joel D. Conway,* Judge; affirmed.

Byrne & Lewis and *E. F. Friedell,* for appellant.

The estate intended to be conveyed must be determined by the intent of the parties to be ascertained by the contents of the deed. 53 Ark. 185; 28 Ark. 285. The whole deed should stand, as under that construction there might be an estate for the heirs of the grantee to take after her death if practical, and every part of it be made to take effect. 6 Ark. 109; 15 Ark. 286; 18 Ark. 65; 2 Devlin on Deeds, § 837. General language in a deed, or language which is formal, is controlled by special language. 23 Ark. 1-4; 97 N. Y. 545. See also 2 Devlin on Deeds, § § 858, 859.

Scott & Head, for appellee.

If there is a clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields

to the former; but if they can be construed so as to stand together without contradicting the grant, that construction will be given so as to give effect to both. The habendum can not frustrate a grant complete before, nor abridge or lessen the estate granted. 3 Wash. on Real Prop. (5 Ed.), 469; 4 Kent, 50; 1 Cooley's Blackst., book 2, 297. If the habendum is in conflict with the granting clause, the habendum must give way upon the theory that the deed shall be construed most strongly against the grantor. 74 N. E. 1012; 3 Gill, 198. If a grant is to one of his heirs, habendum for life, the habendum is void because it gives a lesser estate. Elph. Interp. Deeds, 219. Habendum may be rejected entirely when repugnant to or inconsistent with other clauses in the deed. 44 S. W. 250.

McCULLOCH, J. This is an action of ejectment which involves the construction of the following deed (omitting caption):

"That the said Eliza Whetstone and her husband, Evans L. Whetstone, for and in consideration of the sum of $500, lawful money of the United States, in hand, the receipt of which is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell and convey, unto Samuel W. Mays, party of the second part, his heirs and assigns, the entire interest of the said Eliza Whetstone and her husband, Evans L. Whetstone, in and to the property belonging to the estate of John C. Blanton, deceased, late of the county and State aforesaid, and consisting of a one-third interest of the following described property belonging to the estate of the said John C. Blanton, deceased, towit: (Here follows the description). To have and to hold the above bargained and granted land for life, together with all the interest that the said party of the first part has or may have in or to any and all property, real or personal, belonging to the estate of the said John C. Blanton, deceased. And, for and in consideration of the foregoing payment of five hundred dollars by the party of the second part to the party of the first part, the party of the first part hereby sells, bargains and conveys, gives, grants and releases all their claim, interest or demands as heirs of Richard Blanton, deceased, in and to any or all property, real or personal, belonging to said estate of the said Richard Blanton, deceased, unto the party of the second part, his heirs and assigns forever, and the party of the first part do further agree

with the party of the second part that they are the lawful heirs of the said John C. Blanton, deceased, and Richard Blanton, deceased, and that they have a good and lawful right to sell their interests in the aforesaid lands and their whole interest in all property belonging to said estate, that their interest is free from all incumbrances suffered or made through them, and that they will, and that their estate, covenant and defend the said party of the second part, his heirs and assigns, [against] the lawful claims and demands of all persons whatsoever."

The interest claimed is that inherited from John C. Blanton, it being conceded that appellant's interest in the Richard Blanton lands was conveyed in fee simple by the deed.

It is contended by appellant that an estate for and during the life of the grantee was conveyed by the deed, whilst appellees contend that an estate in fee simple was conveyed. The circuit court held that an estate for and during the life of the grantor was conveyed. Both parties have appealed to this court.

"If," says Mr. Washburn, "there is a clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields to the former; but if they can be construed so as to stand together by limiting the estate without contradicting the grant, the court always gives that construction, in order to give effect to both. If, therefore, a grant be to A. and his heirs, habendum to him for years or for life, the restrictive clause is void, because it contradicts and defeats the grant." 3 Wash. Real Prop. (6 Ed.), § 2360; Elphinstone's Interp. Deeds, 219; 1 Cooley's Blackstone, book 2, p. 297; *Tyler* v. *Moore,* 42 Pa. St. 376; *Hunter* v. *Patterson,* 142 Mo. 310; *Lamb* v. *Medsker,* 74 N. E. (Ind.) 1012; *Ratliffe* v. *Marrs,* 87 Ky. 26; *Smith* v. *Smith,* 71 Mich. 633. "As to the habendum, it is a rule of law that every part of the deed should be examined and construed as a whole. But if the habendum be found to be in conflict with the granting clause, the habendum must give way, upon the theory that the deed shall be construed most strongly against the grantor, in order to prevent a contradiction or retraction by a subsequent part of the deed, or a limitation being placed upon a right which had been granted and given in the premises." *Lamb* v. *Medsker, supra.*

It will be observed that the habendum clause in this deed does not specify the party to whose life the grant is limited. whether to the life of the grantor or of the grantee. It reads merely, "to have and to hold the above-bargained and granted land for life, together with," etc. This language would ordinarily mean for the life of the grantee, but it is ambiguous, and to give it that construction would be to bring it in direct conflict with the granting clause of the deed, for if the word "heirs" of the grantee is to be given any effect whatever, there must be some estate left after his death for his heirs to take. On the other hand, if we construe the words of limitation to be for the life of the grantor, they are not necessarily in conflict with the granting clause, for under that construction there might be an estate for the heirs of the grantee to take after his death. Giving it that construction, the two clauses of the deed are consistent and not conflicting, and, according to the authorities just quoted, it is our duty to give all parts of the deed such construction, if possible, as that they will stand together. See also *Carson* v. *McCaslin,* 60 Ind. 334; *Caldwell* v. *Hammons,* 40 Ga. 342; *Coleman* v. *Beach,* 97 N. Y. 545; *Henderson* v. *Mack,* 82 Ky. 379; *Bodine* v. *Arthur,* 91 Ky. 53; 2 Tiff. Real Prop. § 382.

"In the case of repugnant dispositions of property contained in the same instrument, the courts are from necessity compelled to choose between them; but it is only when they are irreconcilably repugnant that such a disposition of the question is required to be made." *Coleman* v. *Beach, supra.*

The judgment of the circuit court is therefore correct, and must be affirmed. It is so ordered.

LANE v. KANSAS CITY SOUTHERN RAILWAY COMPANY.

Opinion delivered March 24, 1906.

RAILROAD—STOCK CASE—REBUTTAL OF PRESUMPTION.—The *prima facie* case of negligence, made by proof of the killing of an animal by a railroad train, may be overcome by rebutting evidence of the engineer which is consistent, reasonable and uncontradicted.

Appeal from Polk Circuit Court; *James S. Steel,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant sued the appellee for damages growing out of the alleged negligent killing by appellee of two mules, the property of appellant.

The testimony on behalf of appellant by a witness to the accident was as follows: "From the point where I was sitting, the track looking in the direction of Mena was very nearly straight for as much as one and one-half miles or more. I noticed the train when it first came in sight. When I stopped, I noticed the mules in question just below me in the direction of Rust Station. They were on the right of way, grazing, and about 25 or 30 feet from the track with their heads from the track, and continued to feed from the track when the train came and passed between us on the same side of the track the mules were on. At the outer boundary of the right of way was a fence. This fence was a part of the inclosure of a field on that side of the track. This fence extended north in the direction of Mena, running along the outer limit of the right of way 100 yards or more, and the same fence extended south in the direction of Rust about 100 yards. The whole continuous line of fence was 200 yards or more; was just outside of and parallel with the right of way. The track at the point near where the mules were grazing is slightly higher than the right of way on which it is located. On the right of the track going south there is no fence. The point where I was resting was about 100 yards from where the mules were grazing, as well as I could estimate. There were two telegraph poles between where I was sitting and the space occupied by the mules, and I was half way between the

second pole and the pole beyond in the direction of Mena. Apparently the train was running at its regular speed; and, when it reached a point about 100 yards beyond and in the direction of Mena from where I was sitting, the engineer whistled, and then there were no more whistles until they got right up on the mules. After the train passed where I was sitting, it came between me and the mules, and I saw the mules no more until the train struck and knocked them off the track."

There was proof of the value of the animals. Appellant testified: "That at the place where the mules were killed was a fence on the edge of the right of way, and a deep ditch in front on the same side they were on, and there was no way for them to run except across the track; and that no obstruction was on the right of way."

The testimony of one Hager on behalf of the appellee was as follows: "I am an engineer on the Kansas City Southern Railroad. I was engineer on the train that killed the mules in question. I saw the mules about one mile before we reached the place where they were. They seemed to be feeding, and on the right of way some thirty or forty feet from the track with their heads turned from the track. The train was running about 25 miles per hour. I blew the whistle at a road crossing about the time I came in sight of the point where the mules were feeding on the right of way. The mules were some thirty or forty feet from the rails, and were feeding with their heads turned away from the tracks as long as they were in my line of vision. As engineer I was on the right side of the engine. Immediately after the animals passed out of my line of vision on the left side, my view being cut off by the front of the engine, my fireman told me that the mules were attempting to cross the track in front of the engine. I immediately sounded the whistle, and at that instant saw the mules as they came in my line of vision approaching the track, and they were only about 20 or 30 feet ahead of the engine at that time and in a dead run. The mules had time after my line of vision had passed them to turn and run towards the track, but it was impossible to stop the train so as to prevent the killing of the mules after they started toward the track. I did not see them start towards the track, but they

did not start toward the track until my line of vision had passed them. If brakes had been put on at the instant that my vision passed them, and every other means had been used to stop the train, it could not have been stopped in time so as to have prevented killing the mules. At the same time the mules passed out of my line of vision, they were not more than 50 yards ahead of the engine. I mean that a straight line drawn from where the mules were would have struck the track not more than 50 yards ahead of where my engine was at the time my line of vision passed the mules. It would have done no good to put on the brakes or to have reversed the engine, because it would not have been possible to have stopped the train in time to prevent the killing of the mules. The only thing that could have been done was to sound the whistle, and I did that fully so as to scare the mules away after they had started towards the track."

The court instructed the jury to return a verdict for the appellee.

J. I. Alley and *R. G. Shaver,* for appellant.

The burden was upon the appellee to show that the lookout statute had been complied with. Kirby's Digest, § 6607. This was a question of fact for the jury to determine from the evidence. The mules being on the right of way, near the track, and close enough to indicate danger, it was the duty of those in charge of the train to use all available means to prevent injury. 68 Ark. 32; 75 Ark. 560.

S. W. Moore and *Read & McDonough,* for appellee.

The evidence completely rebuts the presumption of negligence on the part of appellee. 69 Ark. 619; 66 Ark. 441; 53 Ark. 96; 67 Ark. 516. The engineer's testimony was fair and reasonable, and he is shown to have exercised every precaution at his command. There was nothing to submit to the jury.

WOOD, J., (after stating the facts.) There was no error in the court's ruling. The cases of *St. Louis S. W. Ry. Co.* v. *Costello,* 68 Ark. 32, and *St. Louis & S. F. Rd. Co.* v. *Carlisle,* 75 Ark. 560, are not applicable. In those cases the statutory presumption of negligence arising from the killing was not overcome by the proof. On the contrary, the evidence in the latter case tended affirmatively to show negligence on the part of the

railway company. The case at bar is ruled by the principle announced in *St. Louis, I. M. & S. Ry. Co.* v. *Landers,* 67 Ark. 514.

Here the statutory presumption of negligence is fully overcome by the testimony of the engineer, which is consistent, reasonable and uncontradicted in essential points. Indeed, it is corroborated by the testimony of appellant's witness. The engineer and fireman did not fail to keep a lookout. They saw the animals feeding on the right of way thirty or forty feet from the track. But the animals had their heads turned away from the track, and seemed to be going from it, as long as they were in the line of vision of the engineer, who continued to observe them, and not until they had passed out of his line of vision did they become confused and suddenly turned toward the railway track. Whereupon the fireman notified the engineer. Then he did everything in his power that could be done to avoid injuring them. Unless the testimony of appellee's witness could be arbitrarily disregarded, which can not be done, we do not see how the court could have ruled otherwise. *St. Louis, I. M. & S. Ry. Co.* v. *Landers, supra,* and cases cited. It was not the duty of the engineer to slow down or take other precautionary measures for the protection of the animals until their presence upon the track or in proximity thereto indicated that they were in danger.

Affirm.

---

78 237
f82 411

DILLARD v. NELSON.

Opinion delivered March 24, 1906.

REPLEVIN—RETAINING BOND—SUMMARY JUDGMENT.—A bond executed by the defendant in a replevin suit either to pay the judgment or that the property shall be forthcoming is not in the form prescribed by the statute (Kirby's Digest, § 6863), and a summary judgment thereon is unauthorized.

Appeal from Clark Circuit Court; *Joel D. Conway,* Judge; reversed.

Hardage & Wilson and *John H. Crawford,* for appellants.

The bond was not such as is required by the statute. Kirby's Digest, § 6863. It was in the alternative, and the delivery of the mule was a complete satisfaction of the bond. Not being in the statutory form, it was error to render a summary judgment upon it. 54 Ark. 13; 56 Ark. 291. The judgment for costs against appellants was void. Kirby's Digest, § 4424. See also 59 Ark. 483; 60 Ark. 369; 62 Ark. 439; 64 Ark. 108; 64 Ark. 556. The judgment should have been quashed in circuit court by writ of certiorari, because the justice of the peace was without jurisdiction to render it. Kirby's Digest, § 1315; 68 Ark. 205; 39 Ark. 348; 30 Ark. 17.

McCULLOCH, J. Appellants, in an action of replevin brought by J. A. Frizzell against John Luzader, before a justice of the peace of Clark County, to recover possession of a mule, executed a bond to the plaintiff in the following form (omitting the caption):

"We undertake to pay to the plaintiff such sums, not exceeding $200, as may be adjudged to him in the action, or that the property attached, towit: one mule attached herein, shall be forthcoming and subject to the order of the court for the satisfaction of such judgment as may be rendered in the action, whichever shall be directed by the court."

A trial of said case before another justice of the peace on change of venue resulted in a verdict for the plaintiff for the recovery of the mule sued for, or its value, fixed at $75, and cost of the action, and judgment was rendered accordingly against the defendant Luzader and appellants as sureties on said bond. Luzader delivered the mule to the plaintiff, and the justice of the peace issued execution upon the judgment for costs, which were taxed in the sum of $52.35.

Appellants thereupon presented to the circuit court their petition, setting forth the foregoing facts, for writ of certiorari to quash the judgment against them as sureties on said bond, which being refused they appealed to this court.

The basis of their contention is that the bond is not in form prescribed by the statute as a delivery bond in replevin, that it was enforcible only as a common-law obligation, and that a summary judgment thereon was not authorized. They assert also

that all liability as a common-law obligation has been discharged by a return of the property as adjudged.

The statute provides that in replevin the officer holding the writ may return the property to the defendant upon his giving bond, with security, "to the effect that the defendant shall perform the judgment of the court in the action." Kirby's Digest, § 6863. The bond executed by appellants was not an obligation to "perform the judgment of the court in the action." The undertaking was to "pay to the plaintiff such sums not exceeding $200 as may be adjudged to him in the action, or that the property attached * * * shall be forthcoming and subject to the order of the court for satisfaction of such judgment as may be rendered in the action, whichever shall be directed by the court." It is in the alternative, either to pay a sum of money not exceeding $200, or to return the property, as the court should direct, but not to do both. It can not be construed to be an undertaking to perform such judgment as the court was authorized to render in an action of replevin.

The statute regulating judgments in replevin is as follows:

"In all actions for the recovery of personal property where the defendant has given a delivery bond as now provided for by section 6863, the court or jury trying the case may not only render judgment against the defendant for the recovery of the property, or its value, together with all damages sustained by the detention thereof, but also, upon motion of the plaintiff, render judgment against the sureties upon his said delivery bond for the value of the property, and also damages as aforesaid, as the same may be found and determined by the court or jury trying said cause." Kirby's Digest, § 6870.

The bond not being in form prescribed by the statute, a summary judgment thereon was unauthorized. *Lowenstein* v. *McCadden,* 54 Ark. 13; *Martin* v. *Tennison,* 56 Ark. 291.

The judgment against appellants as sureties on the bond was void, and should be quashed on certiorari.

The judgment of the circuit court denying the writ is reversed for further proceeding in accordance with this opinion.

EQUITABLE MANUFACTURING COMPANY v. THOMASSON.

Opinion delivered March 24, 1906.

1. SALE OF CHATTEL—CONDITION—DEFENSE AT LAW.—In a suit upon a written order for merchandise it is a good defense at law that the order was given by one of the members of defendant's firm upon the express verbal condition that it should be subsequently approved by the other member of the firm who, upon his return, disapproved the order, whereupon defendants immediately notified plaintiff to cancel the order. (Page 241.)
2. ACTION—TRANSFER FROM LAW TO EQUITY.—It is error to transfer an action at law to equity upon an answer which sets up a legal defense. (Page 241.)

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; reversed.

A. T. Whitelaw, for appellant.

The court erred in transferring the cause to the chancery court, thereby depriving appellant of a trial by jury upon the facts. Kirby's Digest, § 5984; *Ib.* § 5985. Suits involving purely questions of law should not be transferred to a court of equity. 71 Ark. 222; 46 Ark. 272; 71 Ark. 484; 56 Ark. 391; 56 Ark. 398; 52 Ark. 411; 40 Ark. 155; Const. Ark. art 2, § 7; 32 Ark. 553; 47 Ark. 205; 11 S. W. 953; 6 S. W. 362.

Taylor & Jones, for appellee.

The answer presented an equitable defense, if proved. 39 Ark. 568.

McCULLOCH, J. Appellant commenced this action in the circuit court of Jefferson County to recover the sum of $185 alleged to be due for merchandise sold upon a written order or contract and shipped by appellant from its place of business at Iowa City, Iowa, to appellees at Wabbaseka in Jefferson County. Appellees filed their answer, alleging that the order for the goods was delivered by one of the members of their firm to the traveling salesman of appellant upon condition that the same should be subsequently approved by the other member of the firm, who was then absent, and under an express verbal agreement with said agent that he would not forward the same to appellant until they notified him of such approval. They further allege that immediately upon the return of the member of the firm

the next day he disapproved said order, and they immediately notified said agent by mail to cancel it. They asked that the cause be transferred to equity, and that the contract be canceled.

The circuit court ordered the transfer to equity over the objection of appellant (to which exceptions were duly saved), and the chancellor rendered a decree in favor of the defendants.

The answer presented a complete defense at law. *Graham* v. *Remmel,* 76 Ark. 140; *State* v. *Wallis,* 57 Ark. 64; *Ware* v. *Allen,* 128 U. S. 590; *Burke* v. *Dulaney,* 153 U. S. 228.

This being true, it was error to transfer the cause to equity. *Weaver* v. *Arkansas Nat. Bank,* 73 Ark. 462.

Reversed and remanded with directions to transfer the cause to the circuit court for trial.

FRAZIER v. POINDEXTER.

Opinion delivered March 24, 1906.

1. AGENCY—UNDISCLOSED PRINCIPAL—SETOFF.—Where an undisclosed principal sues on a contract made by his agent in his own name with some person who had no knowledge of the agency, but supposed that the agent dealt for himself, such suit is subject to any defense or setoff acquired by the defendant against the agent before he had notice of the principal's rights; and this rule applies not only to sales of goods, but also to other contracts where the agent is authorized to collect money for an undisclosed principal. (Page 244.)
2. SAME—DISCLOSED PRINCIPAL—SETOFF.—If a party who deals with an agent, acting in his own name, knows or has reason to believe that he is dealing with an agent, though he does not know who the principal is, he can not plead against the principal a defense or setoff acquired by him against the agent. (Page 245.)
3. SAME—WAIVER OF SETOFF.—Where an agent accepted notes for collection under an agreement that he would pay the money, when collected, over to a third party, he has no right to use it as a setoff against a demand due him from his principal. (Page 245.)

Appeal from Ouachita Circuit Court; *Charles W. Smith,* Judge; reversed.

STATEMENT BY THE COURT.

This is an action brought by N. F. Frazier, appellant, against E. S. Poindexter, appellee, on account to recover money alleged to have been collected by the defendant upon certain promissory notes delivered to him by one J. W. Ferguson as agent of plaintiff.

Frazier lived at El Dorado, Kansas, and owned a lot of horses which he placed for sale in the hands of Ferguson, who was engaged in the business of buying and selling horses in Arkansas. Ferguson sold the horses for Frazier in Miller County, this State, taking notes for the purchase price in his own name. He delivered these notes to Frazier, who subsequently returned them to him (Ferguson) for collection. There is a conflict in the testimony concerning the indorsements on the notes. Frazier and Ferguson both testified that they were assigned to the former by written indorsements on the back of each note, whilst Poindexter testified that Ferguson indorsed them in blank.

Ferguson sent the notes for collection by mail to Poindexter, who was at the time an employee of Ferguson's on a stated salary, assisting him in buying and selling horses and cattle, making collections, etc. Ferguson testified that he directed Poindexter to remit the money when collected to Frazier. Poindexter testified that Ferguson instructed him to remit to Frazier any amount left in his hands after making expenditures directed by him (Ferguson). He collected $552.75 on the notes and remitted $325 to Frazier, promising to remit the balance soon, but subsequently he refused to pay the balance of $227.75 to Frazier, upon the alleged ground that Ferguson owed him more than that amount on account, and claimed that he had collected the money for Ferguson under the belief that the notes belonged to the latter and without any information that Frazier owned the notes. He claimed in his testimony at the trial that he knew Frazier to be a banker at El Dorado, Kansas, and supposed that Ferguson directed the remittance to be made to him because he (Ferguson) was indebted to Frazier.

In his answer, Poindexter set forth the above as a defense and pleaded his account against Ferguson as a setoff. He also alleged that, under the belief that Ferguson owned the horses and notes, he expended large sums, by direction of Ferguson,

in feeding and taking care of the horses, and that he was directed to pay therefor out of the said funds collected.

A trial before a jury upon the issues thus presented resulted in a verdict for the defendant, and the plaintiff appealed.

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

1. Where one deals with an agent, knowing the agency, he can not set off a claim due him from the agent as against a debt due the principal. 3 Branch, 193, 204; 3 Ill. App. 144; 1 La. Ann. 220; 2 John. Cas. 327; 51 Barb. 339; 114 E. C. L. 467. If appellee had the means of knowing, though he had not been expressly told, that he was dealing with an agent, he can not set off a debt due him from the agent, as against the principal. 2 Am. Lead. Cas. (5 Ed.), 108; 51 Barb. 344; 50 Ark. 380.

2. The court erred in modifying the first, third, fourth and fifth instructions asked for by plaintiff and in giving same as modified.

3. The court erred in refusing the fourth and fifth instructions asked for by plaintiff.

McCULLOCH, J., (after stating the facts.) Appellant asked the court to give the following instructions:

"1. The court instructs the jury that if you find from the evidence in this case that the notes from which the money was collected were made payable to J. W. Ferguson or order, and that the said J. W. Ferguson, for value, before they were due, transferred said notes to Frazier, and that said notes were received from Frazier for collection by Ferguson, and delivered to defendant, and he collected same, and failed to remit said money, then your verdict must be for plaintiff, for the amount he has received for Frazier and has not remitted."

But the court, over the objection of appellant, added to said instruction the following: "if the defendant knew Frazier was the owner of the notes, or was in possession of facts that would place a reasonable person on inquiry as to the ownership."

Appellant also asked the court to give the following instruction, which the court, over his objection, modified by inserting the words in italics:

"3. The court instructs the jury that if you find from the evidence in this case that the notes were the property of the

plaintiff, and the defendant collected the same agreeing to remit the amount so collected to plaintiff, *and knowing the plaintiff to be the owner of the notes,* then your verdict should be for the plaintiff the amount collected less the amount remitted, though you may further find that the said Ferguson is or is not indebted to the said Poindexter."

The court refused to give the following instruction asked by appellant:

"4. The court instructs the jury that J. W. Ferguson is not a party to this suit; and if you find from the evidence in this case that these notes were taken in the name of J. W. Ferguson, and by Ferguson transferred to the plaintiff by writing his name on the back of said notes for value, and by Frazier were delivered to Ferguson, and by him delivered to defendant for collection for account of Frazier, and the defendant accepted said notes for collection for plaintiff and collected same, then your verdict should be for the plaintiff in the amount collected, less amount remitted, though you may further find that the witness Ferguson is or is not indebted to the defendant."

The court erred in refusing the fourth instruction asked by appellant. That instruction contained a recital of facts which, if they were found to be true, were sufficient to put appellee upon notice that the notes belonged to appellant, and he could not under those circumstances claim a set-off against the money collected thereon. It was undisputed, under the testimony, that the notes belonged to appellant. If, therefore, they were taken in the name of Ferguson, but transferred to appellant by written indorsement, and appellee accepted them for collection for appellant, he was bound to take notice of the latter's ownership, and account for the money collected. He could not apply it on a debt due him by Ferguson. This instruction was not covered by the first instruction asked by appellant and modified by the court. The latter did not embrace the facts stated in the former that the assignment of the notes was in writing, so that appellee was bound to take notice of it, nor that he accepted the notes for collection for appellant.

It is undoubtedly the law that where an undisclosed principal sues on a contract made by his agent in his own name with some person who had no knowledge of an agency, but supposed

that the agent dealt for himself, such suit is subject to any defense or set-off acquired by the third party against the agent before he had notice of the principal's rights. 2 Clark & Skyles on Agency, § 537; Tiffany on Agency, p. 311; *George* v. *Clagett,* 7 Term R. 359; *Rabone* v. *Williams, Id.* 360; *Belfield* v. *National Supply Co.,* 189 Pa. 189; *Sullivan* v. *Shailor,* 70 Conn. 733; *Buchanan* v. *Cleveland Linseed Oil Co.,* 91 Fed. 88.

And this rule applies not only to sale of goods, but as well to other contracts where the agent is authorized to collect money for his undisclosed principal. Tiffany on Agency, p. 311; *Montague* v. *Forward,* 2 Q. B. (1893), 351.

But if the party who dealt with the agent, acting in his own name, knew or had reason to believe that he was dealing with one who was an agent for some third person, he can not successfully plead such defense or set-off. He must, in order to be protected, be innocent of any knowledge or of facts and circumstances which would put a reasonably prudent person on inquiry that he was dealing with an agent. Where he knows that the party he is dealing with is an agent, although he does not know who the principal is, he is not protected. *Quinn* v. *Sewell,* 50 Ark. 380; *Baxter* v. *Sherman,* 73 Minn. 434; *Semenza* v. *Brinsley,* 114 E. C. L. 467; *George* v. *Clagett, supra; Bliss* v. *Bliss,* 7 Bosw. 344.

The third instruction asked by appellant should have been given, and the court erred in modifying it. If the defendant accepted the notes for collection under an agreement that he would pay the money when collected over to plaintiff, he had no right to apply it to his own debt, and to refuse to pay it to plaintiff, even though he had no information of Ferguson's agency and believed that the notes belonged to Ferguson.

"The right of setoff, recoupment and counterclaim in actions at law between principal and agent is," says Mr. Mechem, "governed ordinarily by the same rules that apply in other cases. This right, however, may be waived by contract, express or implied, and it can not be insisted upon where its enforcement would result in a violation of the agent's duty to his principal. The receipt of money by an agent to be applied to a specific purpose imposes upon him the duty not to apply it to another and different purpose. He can not, therefore, apply it to his own use by using as a setoff against it a demand due him from his principal."

Mechem on Agency, § 535; 1 Clark & Skyles on Agency, § 427; *Tagg* v. *Bowman,* 108 Pa. St. 273.

The same rule would undoubtedly apply where suit is brought by an undisclosed principal; for, if the defendant could not have claimed the right of set-off against his own principal, he could not do so against the undisclosed principal of an agent with whom he dealt as principal.

There was abundant evidence to base the instruction upon as asked by appellant. Ferguson testified that when he sent the notes to Poindexter for collection he instructed him to remit the amount collected to Frazier, and he was corroborated by Frazier, who testified that Poindexter, when he made the remittance of $325, promised to send the balance in a short time. If the jury found these facts to be true, and that Ferguson did not recall that direction for the application of the funds, then the verdict should have been for the plaintiff.

The first instruction given at the request of appellee is objectionable because it imposed upon appellant the burden of showing that he had given notice to appellee of his rights, even though the jury found that there were circumstances sufficient to put him upon notice as to appellant's ownership of or interest in the notes, but this objection should have been specifically pointed out. A general objection to the instruction as a whole was not sufficient.

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

---

78 246
90 200
e90 396
f90 398

SWING v. ST. LOUIS REFRIGERATOR & WOODEN GUTTER COMPANY.

Opinion delivered March 24, 1906.

1. FOREIGN JUDGMENT—PROOF.—In a suit by one claiming authority to sue as trustee under a foreign judgment, his authority, if questioned by the defendant, can not be proved merely by a copy of the judgment, but he must also prove such pleadings and proceedings as authorized or empowered that court to render the judgment. (Page 250.)

2. STATUTE OF LIMITATIONS—BURDEN OF PROOF.—Where the statute of limitations is pleaded, the burden devolves upon the plaintiff to prove that the action was brought within time. (Page 251.)

Appeal from Clark Circuit Court; *Joel D. Conway,* Judge; affirmed.

Hardage & Wilson, J. W. & M. House and *Patterson A. Reece,* for appellant.

The statute of limitation does not begin to run in favor of a policy holder of an insolvent mutual insurance company until notice of an assessment has been given. 135 U. S. 533; 105 U. S. 143; 122 Ill. 630; 4 Blackf. 77; 107 Pa. St. 352; 60 Md. 93; 81 Ga. 383; 80 Ala. 159; 87 Ala. 619; 62 Vt. 148; 13 Va. L. J. 91; 68 Cal. 353; 2 S. C. 51; 19 Nev. 171.

John H. Crawford, for appellee.

1. No complete transcript of the record of the Ohio case was offered in evidence in this case. To show jurisdiction in that court, a certified copy of the judgment alone is not sufficient, but the pleadings and proceedings on which the judgment is founded, and to which, as matter of record, it refers, must be produced. 47 Ark. 120; 70 Ark. 343.

2. This action is barred by the statute of limitation. 68 Ark. 433. Where the liability of the shareholder is immediate and primary, and not contingent on the obtaining of a judgment against the corporation, the statute begins to run in favor of the shareholder when the debt matures against the corporation. Cook on Stock and Stockholders (1 Ed.), § 227 (g); Kirby's Digest, § 5064; 74 Cal. 167; 82 Cal. 653; 92 U. S. 509; *Ib.* 156; 103 U. S. 442; 97 U. S. 171; 95 U. S. 628.

Appellant's counsel in reply.

Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. Const. U. S. art. 4, § 1. See also U. S. Rev. Stat., § 905. The judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world. 28 U. S. 207. The jurisdiction will be presumed if the record is silent on the subject; and, when a transcript shows clearly that there has been a judicial determination, the record is absolute verity. 43 U. S. 319, 340; 5 McLean, 167; 7 Col.

562; 31 Conn. 427; 5 Houst. (Del.) 519; 18 Ill. 133; 119 Ind. 103 *et seq.*; 5 Iowa, 301; 37 Kan. 33; 18 La. Ann. 682; 60 Md. 11; 62 Md. 198. A record does not need to set forth all the proceedings in detail. 92 Mass. 488. See also 100 Mass. 411. A complaint on a foreign judgment need not allege jurisdictional facts. 36 Minn. 177; 34 Miss. 330. See also 15 N. H. 15; 83 N. Y. 313; 19 Ohio C. C. R. 687; 27 Pa. St. 479; 36 S. W. 970; 20 Wash. 450.

BATTLE, J. James B. Swing, as trustee for the creditors and policy holders of the Union Mutual Insurance Company, of Cincinnati, Ohio, in a complaint in an action against the St. Louis Refrigerator & Wooden Gutter Company alleged that the Supreme Court of Ohio, on December 18, 1890, disincorporated said insurance company, and afterwards appointed plaintiff the trustee for the creditors and policy holders of the insurance company, and he accepted the trust and qualified, and is acting as such trustee; that said insurance company was a mutual company, and was incorporated under the laws of Ohio on May 27, 1887; that section 3650 of the Revised Statutes of Ohio provides that "every person who effects insurance in a mutual company, and continues to be insured, and his heirs, executors, administrators and assigns, shall thereby become members of the company during the period of insurance, and shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note." Said Mutual Insurance Company was doing business during the years 1889 and 1890. That the defendant accepted from the insurance company a policy of insurance on its property against loss by fire; that said policy was for $4,000, and was in force from May 1, 1889, to May 1, 1890, the annual premium on it being $96; that the contingent liability to assessment of the defendant, under the by-laws of the company and the statutes of Ohio and the decree hereinafter mentioned, was and is five times the annual premium, towit, $480; that by accepting and holding the policy the defendant effected insurance in the insurance company during the time and in the amount aforesaid, and became a member of the same, and is legally and equitably liable for its just proportion of all unpaid losses and expenses incurred by the insurance company

during the life of the policy and to pay such percentage on the amount of the contingent liability to assessment on the policy. That the Supreme Court of Ohio, on the 11th day of June, 1901, assessed the rate of liability of the members and stockholders of the insurance company for the unpaid losses and expenses of the company; that plaintiff, on or about the 6th day of September, 1901, notified the defendant to pay said assessment, but it refused to do so, and is indebted to him as such trustee, on the assessment, in the sum of $116.77, with six per cent. per annum interest thereon from 6th of September, 1901.

The defendant, the St. Louis Refrigerator & Wooden Gutter Company, answered and denied that the Supreme Court of Ohio disincorporated the insurance company and appointed plaintiff trustee as alleged, and made and entered a decree of assessment; and alleged that the Supreme Court of Ohio was without jurisdiction to appoint plaintiff trustee for the purposes alleged in the complaint; and pleaded the statute of limitation in bar of plaintiff's right to maintain this action.

In the trial of this action the following was shown to be a statute of Ohio: "Every person who effects insurance in a mutual company, and continues to be insured, and his heirs, executors, administrators and assigns, shall thereby become members of the company during the period of insurance, shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability; and the directors shall, as often as they deem necessary, settle and determine the sum to be paid by the several members thereof, and publish the same in such manner as they may choose, or as the by-laws prescribe, and the sum to be paid by each member shall always be in proportion to the original amount of such liability, and shall be paid to the officers of the company within thirty days next after the publication of such notice," etc.

The issuance of the policy, the date, the amount, the premium and the time it was in force were shown to be as alleged in the complaint.

What was said to be the judgment of the Supreme Court of Ohio, without any pleadings or other proceedings, was read as evidence.

The defendant recovered judgment, and plaintiff appealed.

The appellee having denied that the Supreme Court of Ohio had jurisdiction to appoint appellant trustee, the duty and the burden devolved upon him to show jurisdiction. He failed to do so. He produced what he called the judgment of the court appointing him trustee, but did not prove such pleadings and proceedings as authorized or empowered the court to render the judgment. "It is essential," says Mr. Freeman, "that the jurisdiction of a court over a subject-matter be called into action by some party and in some mode recognized by law. A court does not have power to render judgment in favor of one as plaintiff if he has never commenced any action or proceeding calling for any action, nor has it, as a general rule, power to give judgment respecting a matter not submitted to it for decision, though such judgment is pronounced in an action involving other matters which have been submitted to it for decision, and over which it has jurisdiction. A petition or complaint must be filed in the court whose action is sought, or otherwise presented for its consideration in some mode sanctioned by law." 1 Freeman on Judgments, § 120, and cases cited.

Many illustrations might be given of this rule. A few will suffice. "The circuit courts of this State have jurisdiction to enforce the collection of debts according to an established procedure. A holds the bond of B for one thousand dollars, due and unpaid. He goes into a circuit court with the bond in his hand, and without writ issued or any pleadings, asks the court to award a rule against B to show cause why judgment should not be rendered against him for the debt and interest. The rule is accordingly awarded, executed, and returned, and judgment thereupon rendered for the debt, interest and costs. Such a judgment would be void, notwithstanding the court has jurisdiction of the subject and of the parties. Why void? Because, in the language of Mr. Justice FIELD, 'the court is not authorized to exert its power in that way.' The same would be true if A should sue B on one bond, and in the same action decline to take judgment on the bond sued on, and take judgment on another bond of B, on which no suit had been instituted, without the consent of B." *Anthony* v. *Casey,* 5 Am. State Rep. 279; *Seamster* v. *Blackstock,* 83 Va. 232; *Munday* v. *Vail,* 34 N. J. L. 422.

Appellant was therefore without authority to bring or maintain this action.

Appellee having pleaded the statute of limitation, the burden devolved upon the appellant to prove that this action was brought within the time prescribed by the statute. *Taylor* v. *Spear,* 6 Ark. 382; *McNeil* v. *Garland,* 27 Ark. 343; *Carroll* v. *Clark,* 21 Ark. 500; *Railway* v. *Shoecraft,* 53 Ark. 96; *Leigh* v. *Evans,* 64 Ark. 26. The policy and membership of appellee in the insurance company expired on the first of May, 1890. The insurance company was disincorporated on the 18th day of December, 1890, by the Supreme Court of Ohio. Its directors, during its life, were authorized by the laws of Ohio to apportion its losses and expenses among its members, and to give notice of such apportionment; and thirty days were allowed in which to pay the amount so apportioned. This could have been done and the statute set in motion before the company was disincorporated. It was therefore necessary for appellant to prove that it was not done, in order to show that his action was not barred. The proceedings of the Supreme Court of Ohio alone were not sufficient to show that the action was brought within the time prescribed by the statute, because the statute of limitation might in the manner indicated have been set in motion before such proceedings were instituted.

The evidence fails to show that this action was brought within the time prescribed by the statute of limitation.

Judgment affirmed.

---

78 251
f 83 70

78 251
78 361
f78 524

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* TOMLINSON.

Opinion delivered March 24, 1906.

1. RAILROAD—DUTY TO SIGNAL AT CROSSING.—Where a road which crossed a railway track, though not a county road, had been used by the public for many years, and the railway company had built a crossing over

its track, it was such a road as the company was required, by Kirby's Digest, § 6595, to give signals at its crossing. (Page 260.)

2. SAME—DUTY TO KEEP LOOKOUT ON BOTH SIDES OF TRACK.—Where, on acount of a curve in the track, it was necessary for a lookout to be kept on both sides of the track, negligence on the part of the railway company is not disproved by showing that a lookout was kept on one side. (Page 260.)

3. INFANT—CONTRIBUTORY NEGLIGENCE.—A child of tender years, traveling in a wagon with his father and elder brother, is required to exercise only such care and caution as is according to his maturity and capacity; and whether he does so in any particular instance is a question for the jury. (Page 260.)

4. RAILROAD CROSSING—DUTY OF TRAVELER TO KEEP LOOKOUT.—It was not improper to instruct the jury that it is the duty of a person about to cross a railway to look both up and down the track, and to listen for trains from each direction, and that, if it appears to him, as a reasonably prudent person, that the greater danger is to be apprehended from one of the track than the other, he may give greater attention to that end. (Page 261.)

5. SAME—LOOKOUT IN CASE OF APPREHENDED DANGER.—While it is the duty of a person about to cross a railroad track to look both up and down the track, and to listen for trains from each direction, yet if it appears to him, as a reasonably prudent person, that the greater danger is to be apprehended from one direction than from the other, he may give more attention to that end of the track from which the greater danger is apprehended. (Page 261.)

6. DAMAGES—PHYSICAL AND MENTAL SUFFERING.—In an action against a railroad company for injuries to an infant received in collision at a crossing, evidence that, by reason of defendant's negligence, plaintiff received serious injuries which had permanently affected his health, including his eyesight, and which might destroy his mind, was sufficient to sustain a verdict for $15,000 damages. (Page 261.)

Appeal from Independence Circuit Court; *Frederick D. Pulkerson,* Judge; affirmed.

B. S. Johnson, for appellant.

1. The injury resulted, not from any negligence on the part of the defendant, but from the contributory negligence of the plaintiff.

2. The 4th and 5th instructions, given at request of plaintiff, were erroneous. Where plaintiff's own evidence shows negligence on his part contributing to his injury, the burden is not on defendant to show it. 48 Ark. 130; 61 Ark. 556; 46 Ark. 193.

The 7th instruction was erroneous. 54 Ark. 431; 61 Ark. 549; 62 Ark. 156; 65 Ark. 235; 69 Ark. 135.

3. The court erred in refusing to declare the law as asked by defendant. As to the sixth instruction asked for, see 56 Ark. 433; 69 Ark. *supra; Ib.*, 489. Negligence of the company's employees as to rate of speed, or in failing to sound the whistle or ring the bell, does not relieve the traveler from the necessity of taking ordinary precautions for his safety. 54 Ark. 431; 59 U. S. 697; 114 U. S. 615; 12 L. R. Q. B. Div., 70-73; 3 App. Cas. 1155. The Magness Spur road crossing was not a public highway, within the meaning of the statute. Kirby's Digest, § 7223. See, also, 45 N. E. 675; 80 Ky. 138.

W. A. Oldfield, S. D. Campbell and *W. S. Wright,* for appellee.

1. The defendant was negligent in this: In failing to sound the whistle or ring the bell at any time for either of the three crossings, and in failing to keep the lookout required by Kirby's Digest, § 6607. Under the circumstances the duty was on the fireman to keep the lookout. 57 Ark. 194; 62 Ark. 186; 63 Ark. 184. Defendant was also negligent in having in charge of the locomotive an engineer and fireman rendered incompetent and unskillful for want of necessary rest. Kirby's Digest, § § 6652, 6654; 13 Pet. 181.

There was no such negligence on the part of plaintiff as would bar his recovery. The train that caused the injury was a special, coming at an unusual hour, and of which plaintiff had no warning, and under the circumstances the driver had the right to give greater attention to that end of the track from which, as a reasonably prudent person, he might expect the greater danger. 55 Ark. 248; 57 Ark. 306; 10 Am. Rep. 330; 25 Am. Rep. 162 and notes. The negligence of the driver, if any, should not be imputed to plaintiff. 58 Ark. 454; 59 Ark. 180; 43 Ohio St. 91; 84 Fed. Rep. 586. The care and caution of a child is according to his maturity and capacity, and whether he exercised the care required of him under these circumstances was for the jury. 33 Ark. 372; 53 Ark. 128; 60 Ark. 549; 71 Ark. 55; 41 Am. St. Rep. 786; 17 Wall. 657; 53 Am. St. Rep. 641; 84 Fed. 586.

2. When plaintiff made out a *prima facie* case by proving his injury to have been caused by operation of the train, and

without disclosing negligence on his part, contributory negligence was an affirmative defense, and the burden was on the defendant to show it by a preponderance of evidence. 125 Fed. 187; 48 Ark. 348; 46 Ark. 193.

3. Appellant was not prejudiced by the court's refusal to give instructions as asked by it. Nos. 6 and 11 were fully covered by other instructions given. No. 13 was properly refused, because the duty to whistle or ring the bell is not limited to public county roads (Kirby's Digest, § 6595), and because the Magness Spur road had been continuously in use by the public over twenty years, and defendant had constructed and maintained the crossing. 47 Ark. 436; 50 Ark. 57.

BATTLE, J. This action was instituted by Enos J. Tomlinson, by his next friend, W. H. Tomlinson, against the St. Louis, Iron Mountain & Southern Railway Company. Plaintiff alleged in his complaint that "he was a minor, eleven years of age; that while he was being driven across the railroad at Magness Station in a wagon, the defendant negligently, wantonly and recklessly ran its engine against the wagon; that the defendant negligently failed to ring the bell or sound the whistle of its engine for the crossing; that its employees negligently failed to keep a lookout for persons and property at the crossing; that the engineer and fireman were unskillful and incompetent, and at said time were in a state of intoxication; that, though able to avert the danger of plaintiff after discovering same, said employees failed and neglected to do so; that, as a result of the engine being run against the wagon, the plaintiff was thrown out of the same, and his brain, eyes and vision were injured, to his damage in the sum of $20,000."

The defendant answered, and specifically denied all the material allegations in plaintiff's complaint, and alleged that his injuries were caused by his own contributory negligence.

The jury in the case returned a verdict in favor of the plaintiff for $15,000, and the defendant appealed.

The jury might have found from the evidence adduced at the trial in this action the following facts: "A special train, called a pay train, was run out of Poplar Bluff, Mo., and from Newport up the White River Branch, a considerable distance above Batesville, Ark., and on its return, at or about Batesville,

the locomotive engine broke down and became what is called a dead engine. * * * Upon the disabling of the engine, another engine and crew were wired for, and the same were sent from Newport to the relief of the special train. * * * This relief engine was attached to the special pay train at Batesville, early on the morning of October 17, 1902, and proceeded towards Newport, and about seven o'clock in the morning, much earlier than any regular train was due at Magness Station, struck the wagon in which plaintiff was riding.

"A train going from Batesville towards Newport, before reaching Magness Station, would pass the 'Oak Grove Crossing,' about a mile and a half before reaching Magness, then after a considerable distance would pass the 'Military Road Crossing' (a county road), then after going 370 yards would pass the 'Newark and Batesville Road Crossing' (a county road), and then, after going through a cut 75 yards long, would pass over a trestle and then over the Magness Public Crossing, where the collision occurred. (This road, although it had not been established by the county court, was used by the public more than the other two roads, and had been so used by the public for about twenty years, and defendant railroad company had put the crossing in there.) * * * Neither the whistle was sounded, nor the bell rung, nor other warning was given for either of these three crossings at or about the time of the collision. * * * In going out of the cut and approaching Magness Crossing, there was a slight curve toward the left, on account of which the engineer, on the right-hand side, while keeping a lookout ahead, could not see the wagon in which plaintiff was riding, while it was on or approaching the track from the left-hand side. The fireman, being on the left-hand side, the best position to make the lookout effective, was not keeping a lookout. * * *

"If the statutory signals had been given for either of the three crossings named, such warning could have been heard, and the collision and injury might have been averted. If the fireman, being on the inside of the curve and in position to make the lookout most effective, had been keeping such lookout, he would necessarily have seen the wagon approaching, not only in time to have given effective statutory warning, but also in time to have caused the train to come to a full stop before reaching the

Magness Crossing, where the collision occurred. * * *

"Plaintiff was a boy about eleven years of age, riding in the wagon, which was driven by his brother, Ed Tomlinson, and his father, W. H. Tomlinson, was standing in the rear end of the wagon, and he was standing between the two. The driver, Ed Tomlinson, when about twenty feet from the track, looked up the track toward Batesville, and, seeing no train and hearing no bell or whistle sounded, drove on, and attempted to cross the track, at the same time looking down the track towards Newport, from which direction a gravel train was expected about that time. Just as the driver was driving his wagon across the track, the special train at an unusual hour for trains from that direction, and at an unusual speed for trains upon that road, and without any warning or statutory signal, and without any lookout on the left side, where, on account of the construction of the track, a lookout would be most effective, struck the wagon, knocking the plaintiff out and injuring him.

"The plaintiff, by the collision and fall, had his skull broken, the fracture being about one inch to the right of the middle line of the skull, on the posterior part of the frontal bone, and being about one inch by its shortest diameter, and about an inch and a quarter by its longest diameter. He was rendered unconscious by the fall, and remained so for about 18 hours. Doctors operated upon him. By the fall a piece of bone was driven upon his brain, lacerating and puncturing the dura mater, a membrane forming the outer covering of the brain. This piece of bone, together with other pieces, was removed by the operation called trephining, and the hole in the skull, remaining after the operation, was described by the doctors who operated upon him as being about the size of a silver half-dollar. After the operation the boy remained semi-unconscious for five or six days. Upon the healing of the wound, an adherent, depressed scar remained, and the aperture was partially closed with a cartilaginous substance, and from the edges of the old bone and below the natural level, there appears to be a very slight and slow growth of a harder material which may perhaps in time become bone, and make progress towards closing the aperture with bony substance, which, if it does take place, will be below the level of the old bone, and produce

permanent pressure upon the brain. Before the injury the boy was subject to headache about once a month, and since the injury he has been subject to headache twice a month, and the spells are of longer duration. Before the injury he was fairly intelligent for a child of his age, learned with average rapidity, was good-natured and even-tempered, obedient to his parents and industrious; whereas since the injury he has been dull and slow of perception, disobedient, hard to control, quick-tempered, easily irritated and forgetful. Before the injury the boy's eyes and vision seemed to be normal, but since he at times appears to see two objects when looking at only one object.

"According to expert testimony adduced in the case, 'the future mental development of the boy will necessarily be one-sided, and the injury may produce epilepsy, insanity, or even idiocy; and the injury has caused a periodical double vision, which doctors call diplopia.' "

The court instructed the jury at the request of plaintiff, over the objection of the defendant, as follows:

"4. If the plaintiff shows by a preponderance of the evidence that he was injured by the operation of defendant's train, it is presumed that the injury was negligent, unless shown not to be negligent, and the burden in such cases is upon the defendant to show that the injury was not the result of such negligence upon its part.

"5. You are instructed that the burden of proof is upon the defendant to show by a preponderance of evidence in the whole case that the plaintiff was guilty of contributory negligence.

"7. You are instructed that while it is the duty of a person about to cross a railway track to look both up and down the track, and to listen for trains from each direction, yet if it appears to him before crossing, as a reasonably prudent person under the surrounding circumstances, that greater danger is to be apprehended from one end of the track than the other, he may give more attention to that end of the track from which he as a reasonably prudent person under all the circumstances apprehends the greater danger."

And the court refused to give the following instructions at the request of the defendant:

"6. Where the view of a railroad track is obstructed, and the danger of a road crossing is thus increased, a greater degree of care is required of one about to cross the railroad track than would be his duty to exercise at a crossing not particularly dangerous; but a traveler upon a railroad is bound to exercise ordinary care and diligence at the intersection of a railroad by looking and listening in both directions in order to ascertain whether or not a train is approaching, and so avoid a collision; and if he fails to do so, and for that reason is injured, he is not entitled to recover.

"11. Even if you find that the employees in charge of defendant's train failed to give the signals for crossings by blowing the whistle or ringing the bell as required by law, or were otherwise negligent, your verdict will be for the defendant, if you find from the evidence that the plaintiff on approaching the crossing was himself guilty of negligence by failing to look and to listen in both directions for approaching trains, provided you also find from the evidence that by doing so he could have seen or heard the approaching train in time to have avoided the injury."

And modified and gave the sixth as modified as follows:

"6. Where the view of a railroad track is obstructed, and the danger of a road crossing is thus increased, a greater degree of care is required of one about to cross a railroad track than would be his duty to exercise at a crossing not particularly dangerous."

And gave the following at the request of the defendant:

"2. You are instructed that an ordinarily prudent person, before attempting to cross a railroad, will use his eyes and ears in order to determine whether or not he can safely do so; and if the circumstances require it, as where the view of a railroad is obstructed, he will stop in order to see and hear more clearly. If a traveler neglects to do what an ordinarily prudent person would do under the circumstances, such traveler is guilty of negligence and can not recover.

"3. You are instructed that the rule of law that requires a traveler on a road, on approaching a railway crossing, to listen and to look in both directions for an approaching train is not relaxed in favor of one being carried by a vehicle driven by another. It is the duty of a person riding in a wagon driven by

another to use his eyes and ears to discover danger, so that he may avoid it. In this case you are instructed that the plaintiff had no right, because his brother was driving the wagon, to omit taking reasonable and prudent precaution to learn for himself that the crossing was safe. He was bound to listen and look in both directions for approaching trains, and to continue to do so as he approached; and if you find from the evidence that he failed to listen and look in both directions for the train, your verdict will be for the defendant.

"4 The jury are instructed that the want of care on the part of a traveler in failing to look and listen for the approach of a train is not excused by the neglect of the employees in charge of the train either to keep a careful lookout on the track for persons and property, or to give the usual signals on approaching a crossing. If, therefore, you find from the evidence in this case that the plaintiff went upon the railroad track before listening and looking in both directions for an approaching train, and was for that reason injured, your verdict will be for the defendant, even though you should further find that the men in charge of the train failed to keep a careful lookout or to blow the whistle or to ring the bell on approaching the crossing.

"5. If the facts and circumstances in evidence in this case show that the plaintiff, at the time of the injury of which he complains, was in a dangerous position, and was where a prudent person would not have been under the circumstances, and that this fact directly contributed to his injury, then plaintiff will not be entitled to recover, unless the evidence shows that the employees in charge of the engine saw the danger the plaintiff was in in time to have prevented the accident by the exercise of ordinary care, and failed to exercise such care."

And modified the 8th and 10th instructions asked for by the defendant, and gave them modified as follows:

"8. The jury are instructed that if they find from the evidence in this case that the defendant was guilty of negligence, and that the plaintiff was guilty of negligence, your verdict will be for the defendant—and this covers every kind of negligence by plaintiff or defendant contributing to the injury—unless the evidence further shows that defendant's employees in charge of the engine became aware of the negligence of the plaintiff in time to

have avoided injuring him by the use of ordinary care and failed to exercise such care.

"10. If the plaintiff saw or heard, or by the exercise of reasonable care could have seen or heard, the approaching train in time to have avoided the injury by the exercise of reasonable care, and failed to exercise such care, then he can not recover."

It is contended that the appellant was guilty of no negligence at the time of the accident. But this is not true. There was evidence to show that it failed to sound the bell or whistle at any time before reaching any of the public crossings near the place of appellee's injury, and at the same time failed to keep a proper lookout. It is true that the Magness Crossing was not a place where a road, laid out, constructed, repaired and maintained at the expense of the county, crossed the railroad, but a road crossed there which had been used by the public for about twenty years, and appellant had made the crossing; and it is such a crossing as the statute refers to when it requires railroad companies to ring the bell or to sound a whistle at the distance of at least eighty rods from the place where the railroad shall cross any other road or street, and to keep ringing the bell or sounding the whistle "until it shall have crossed said road or street." Persons traveling over same belong to the class intended to be protected by the statute. It may be true that the engineer on the train was keeping a lookout on the right-hand side of his engine when the accident complained of in this action occurred, but this was not sufficient. It was also necessary to keep a lookout at that time on the left-hand side on account of the curve in the road to protect persons traveling over the Magness Crossing. *Railroad Company* v. *Chriscoe,* 57 Ark. 194; *St. Louis Southwestern Railway Company* v. *Russell,* 62 Ark. 186; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Denty,* 63 Ark. 184.

The injury to appellee might have been avoided by complying with the statutes requiring signals to be given and a lookout to be kept.

But it is said that appellee was guilty of contributory negligence. At the time he was injured he was about eleven years old, and was traveling in a wagon with his father and an elder brother. It was natural for him, on account of their age and experience, to rely upon them for protection. He was required to

exercise only such care and caution as is according to his maturity and capacity. Whether he did so was a question for the jury to decide. *Little Rock & F. S. Ry. Co.* v. *Barker,* 33 Ark. 372; *Davis* v. *Railway Co.,* 53 Ark. 128; *Brinkley Car Co.* v. *Cooper,* 60 Ark. 549; *King-Ryder Lumber Company* v. *Cochran,* 71 Ark. 55.

Appellant insists that the court erred in giving to the jury the instructions numbered 4 and 5 at the request of appellee, because, he says, they took from the jury the consideration of all evidence on the part of appellee showing contributory negligence. But this defect was covered by the instructions numbered 2, 3, 4, 5 and 12, given at the request of appellant, and modified instructions numbered 8 and 10. In every case in which they could have been prejudicial, so far as we can see, the jury were properly instructed as to what they should do. Prejudice was further guarded against by the instructions of the court to the jury to consider all the instructions given to them together and as a whole.

We see no reasonable objection to the instruction numbered 7 given at the request of the appellee. In that instruction the jury were told that it is the duty of a person about to cross a railway to look both up and down the track, and to listen for trains from each direction, and that, if it appears to him, as a reasonably prudent person, that the greater danger is to be apprehended from one end of the track than the other, he may give more attention to that end of the track from which he apprehends the greater danger. The instruction does not relieve such person of the duty to look and listen in both directions, but says that he may give more attention to the end of the track from which the greater danger is apprehended. This is reasonable, and in accordance with that prudence and care an ordinarily prudent person would exercise.

So much of instruction numbered 6, asked for by appellant, as was not given was supplied by instruction numbered 7, given at the request of appellee, and instructions numbered 2, 3 and 4, given at the request of appellant.

The instruction numbered 11, asked for by appellant and refused by the court, was, so far as it is correct, covered by other instructions which were given.

The evidence is sufficient to sustain the verdict.

Judgment affirmed.

Ex parte BUTT.

Opinion delivered March 31, 1906.

1. CONTEMPT—REVIEW.—The rule that proceedings for contempt of court are reviewable on certiorari, and not upon appeal or writ of error, has not been changed by the act of May 6, 1899, which does not extend the right of appeal, but regulates the manner in which it shall be granted and gives the right to bail during pendency of the appeal. (Page 265.)
2. SAME—REFUSAL OF WITNESS TO ANSWER IRRELEVANT QUESTIONS.—If a court or officer examining a witness has jurisdiction of the subject-matter involved, a witness should not be permitted to refuse to answer a question on the ground that it is irrelevant, and the fact that the questions asked a witness are irrelevant or improper furnishes no reason for impeaching the commitment of the witness for refusing to answer them. (Page 266.)
3. CONSTITUTIONAL LAW—SELF-INCRIMINATION.—Kirby's Digest, § 3087, providing that "in all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor, but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense," is a valid statute. (Page 266.)
4. WITNESS—PROTECTION AGAINST SELF-INCRIMINATION.—It is only to the extent that protection is offered by the statute (Kirby's Digest, § 3087) that one jointly concerned with another in the commission of an offense is not privileged to refuse to testify as to facts criminating himself; and as he is not protected against the use of his testimony in other prosecutions, he can not be compelled to testify as to them. (Page 267.)
5. SAME—PRIVILEGE OF SILENCE.—To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence, that there is reasonable ground to apprehend danger of self-incrimination; but when such ground appears, as the witness alone knows what answers he will give, he alone can decide whether it will criminate him. (Page 267.)
6. EXAMINATION BEFORE GRAND JURY—QUESTIONS WHICH MAY BE ASKED.—In an examination before the grand jury of charges of bribery against members of the Legislature and others, a witness may be asked questions which tended to show that he kept a key to a room which was used during the sitting of the Legislature as a meeting place for persons offering and receiving bribes. (Page 269.)
7. SAME—WITNESS—SELF-INCRIMINATION.—A witness before the grand jury can not be compelled to testify whether, while a member of the Legislature, he accepted and used a free pass over the line of a railroad company. (Page 269.)

8. SAME—FORM OF QUESTIONS.—Where a witness was asked before the grand jury whether he wrote certain letters, and declined to answer upon the ground that his answers would incriminate himself, it was error for the circuit court to compel him to answer such questions if the letters were not submitted to the court, nor their contents otherwise made known to it. (Page 270.)

9. SAME—PROTECTION OF WITNESS.—A witness before the grand jury may be compelled to answer whether he wrote to an official of a street railway company during the last Legislature and stated that it would be necessary for the company to put up $1,000 or some amount to defeat a certain bill which affected street railways. (Page 270.)

10. SAME—WHEN WITNESS REQUIRED TO ANSWER.—A witness before the grand jury may be compelled to testify as to whether railway mileage or mileage books were delivered to him while a member of the Legislature, since if the mileage was delivered to him for a lawful purpose his answer would not incriminate him, and if it was delivered for an unlawful purpose his answer would tend to criminate another, and he could be required to testify, under Kirby's Digest, § 3087. (Page 271.)

Certiorari to Pulaski Circuit Court; *Robert J. Lea,* Judge; affirmed with modification.

Murphy, Coleman & Lewis, for petitioner.

If the questions which petitioner declined to answer were illegal and improper, whether from impertinence, immateriality or other cause, the court exceeded its authority in adjudging him guilty of contempt for refusing to answer them. Kirby's Digest, § 720, subdiv. 5; 9 Cyc. 18; 71 Cal. 238; 131 Cal. 280; 38 Kan. 408; 28 Am. St. 451 and note; 3 Blatchf. 113; *Ib.,* 148; 34 Tex. 666; 46 Neb. 402. Our constitutional provision securing witnesses against self-accusation is identical with the Federal Constitution on the same subject. If the lower court's decision violated one of these provisions, it violated both. 35 U. S. (Law Ed.), 1110; L. Ed. 860; *Id.* 1122.

Robert L. Rogers, Attorney General, and *Lewis Rhoton,* for respondent.

Conviction for contempt is a conviction in a criminal case. 194 U. S. 326. Hence, under the provisions of the Acts of 1899, p. 292, petitioner has the right of appeal, and certiorari does not lie. 37 Ark. 318; 52 Ark. 213; 40 Pac. 66; 34 Ark. 847; 42 Pac. 480; 9 Cyc. 64; 199 U. S. 73.

The statute, Kirby's Digest, § 3087, has been upheld by the

decisions of this court. 13 Ark. 307; 67 Ark. 163. It is not for the witness to determine the materiality of the questions. 43 Minn. 253; 1 Best & S., 311; 24 N. Y. 74; 107 N. Y. 427; 106 Mo. 602; 104 Cal. 529; 135 N. C. 118; 83 N. C. 132; 3 Wigmore on Ev., 3181 *et seq.*

BATTLE, J. In March, 1906, F. O. Butt appeared before the grand jury of Pulaski County in obedience to a summons to testify. Among many questions propounded to him by that body he refused to answer the following:

"1. Do you know where room 215 in the Fulk Building in the city of Little Rock is?

"2. Did you not, during the last session of the last Legislature, have a key similar to the one which I now show you, for the purpose of getting in and out of room 215, Fulk Building?

"16. Did you not use free transportation during the last term of the Legislature?

"17. Have you during your term as senator accepted or used, or both accepted and used, free transportation from the St. Louis, Iron Mountain & Southern Railway Company, or what is commonly known as the Frisco Railway, or the Choctaw, Ok. & Gulf Ry. Co., or the Rock Island Ry. Co.?

"20. Please examine the letter dated May 9, 1903, which is addressed to T. L. Cox and signed F. O. Butt, and state whether you wrote the letter.

"21. Please examine the letter written June 9, 1903, addressed to Thomas L. Cox and signed F. O. B., and state whether you wrote that letter.

"22. Please examine the letter of October 7, 1904, and signed Butt, and state whether you wrote that letter.

"23. Please examine the letter dated May 25, 1903, and the slip which is pinned to it, dated August 6, and state whether or not the letter dated May 25, 1903, is not the reply of T. L. Cox to you, answering your letter of May 19, 1903, and whether or not you wrote the slip dated August 6, and attached it to Cox's letter of May 25, and returned Cox's letter to him with the slip of August 6 attached to it.

"25. Did you write to the president of the street-railway company of Eureka Springs, during the last Legislature, and state to him that it would be necessary for the company to put

up $1,000, or some amount, to defeat the Holland bill which affected street railways, stating in your letter that you did not want any for yourself, but the other boys would have to have some; did you write such a letter in substance and effect?

"31. Did Representative Fuller deliver to you any mileage or mileage books during this last General Assembly of this State?

"32. Did you not tell Mr. James, Fuller's partner, that Fuller had delivered to you a mileage book?"

Thereupon the foreman of the grand jury proceeded with the witness, F. O. Butt, into the presence of the Pulaski Circuit Court, First Division, and there stated to the court that the grand jury had propounded to the witness the foregoing questions, and that he had refused to answer them; and the court, having heard the witness, decided that he was bound to answer the questions, and inquired of him if he persisted in his refusal, and, he having answered that he did, committed him to the jail of Pulaski County until he expressed a willingness to answer them, or until the further order of the court. Witness now seeks by certiorari to have such proceedings set aside.

It is argued that petitioner has mistaken his remedy, and that appeal is his mode of relief. In *Cossart* v. *State*, 14 Ark. 538, this court held that "whatever may be the remedy, where the inferior court, in punishing for contempt, shall exceed its lawful authority or jurisdiction, there is none according to existing law, by writ of error or appeal." Among the reasons given for such ruling, the court said: "If a contumacious witness, juror, party litigant, or counsel be entitled to an appeal or writ of error, he could also claim the full benefit of a supersedeas or stay of execution of the sentence by complying with the statute in such cases, and thereby effectually check the machinery of the court in its operation, and frustrate the wholesome administration of the law." But it is said that this rule has been changed by an act entitled "An act to permit defendants in felony cases to give bond after conviction in the circuit court," approved May 6, 1899. But an examination of that act will show that it does not extend the right of appeal, but regulates the manner in which it shall be granted, and gives to appellant the right to bail during the pendency of the appeal, and regulates the proceedings upon forfeiture of bail.

Petitioner, Butt, contends that a witness can not be punished for contempt for refusal to answer irrelevant questions. If a witness is interrogated before a court or officer about a matter entirely outside of its jurisdiction, he may refuse to testify. This, of course, does not authorize him to refuse to answer questions propounded in a legitimate cross-examination. But, if the court or officer has jurisdiction of the subject-matter involved, a witness should not be permitted to refuse to answer a question on the ground that it is irrelevant. To permit him to do so against the opinion of the court or officer taking his testimony would "be subversive of all order in judicial proceedings. The fact that such questions are irrelevant or improper" furnishes no reason for impeaching the commitment of the witness for refusing to answer them. Ex parte *McKee,* 18 Mo. 600; *People* v. *Cassels,* 5 Hill (N. Y.), 165; *Bradley* v. *Veazie,* 47 Me. 85; Rapalje on Contempt, § 66, and cases cited.

A statute of this State, section 3087 of Kirby's Digest, provides: "In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense." This has been held to be a valid statute by this court. *State* v. *Quarles,* 13 Ark. 307; *Cossart* v. *State,* 14 Ark. 539; *Pleasant* v. *State,* 15 Ark. 649; *State* v. *Bach Liquor Co.,* 67 Ark. 163.

In *State* v. *Bach Liquor Company, supra,* the court held that the word "concerned" in this statute is used in the sense of the word *participants.* It is said: "In relation to what crime shall he be sworn? Manifestly, the crime in the commission of which he participated with the defendant in whose trial for which he is sworn. In what criminal prosecution is he protected against his testimony? Obviously, criminal prosecution for the offense of which he was sworn to testify—'the same offense.' His protection is limited. He is not protected against the use of his testimony in other prosecutions. To the extent of the protection offered by the statute, he can be compelled to testify as to facts incriminating himself; but beyond this he can not be required to go in that direction, without violating the Constitution." Ac-

cordingly the court held that "an infant over the age of eighteen years, called to testify against a saloonkeeper indicted for selling liquor to him without the written consent of his parents or guardian, is privileged to refuse to answer where his answer would tend to establish his guilt of another crime, namely, procuring liquor without informing the saloonkeeper that he was a minor."

In cases in which the statute does not provide for protection, a witness can not be compelled to criminate himself. He may refuse to answer all questions the answers to which may criminate him. But who shall be the judge as to the crimination—the court or witness? If the court, how can he decide? The witness can not be required to show how an answer can criminate him.

In *Regina* v. *Boyes,* 1 B. & S. 311, 321, Chief Justice COCKBURN said: "To entitle a party, called as a witness, to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer, * * * * [although] if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. * * * Further than this, we are of the opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios,* protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

In the Burr trial Chief Justice MARSHALL said that the

rule which, it is conceived, courts have generally observed, is this: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege whch is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court can not participate with him in this judgment, because they can not decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims." *United States* v. *Burr,* 25 Fed. Cas. p. 38.

Mr. Justice MITCHELL, in *State* v. *Thaden,* 43 Minn. 253, 255, said: "All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give. * * * It would be difficult to conceive of an instance where the circumstances of the case, and the nature of the evidence called for, would be entirely neutral in their probative force upon the question whether or not there was a reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some of the English cases, and adopted and followed by Chief Justice COCKBURN, in *Regina* v. *Boyes.* * * * To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice MARSHALL meant by his statement of the rule in the Burr trial."

We think that the conclusion of Mr. Justice MITCHELL as to the rule is correct. See 3 Wigmore on Evidence, § 2271, and cases cited.

According to the test stated, should witness Butt have been required to answer the questions propounded to him by the grand jury which he refused to answer?

Questions numbered 1 and 2 in reference to room 215 in the Fulk Building should have been answered. They were preliminary to other questions propounded to the witness at the same time, which he refused to answer, but offered to do so in the circuit court, and has not yet answered. The object of these questions 1 and 2, included, it seems, was to ascertain whether the room referred to was not a place where persons offering and receiving bribes met, and where he received a bribe or bribes. We can not see how any information acquired by answers to questions 1 and 2 could have been used for any purpose except to show that the room 215 was used as a place of meeting of two or more persons. If he knew that such persons committed bribery there, although jointly concerned, he could be compelled under the statutes of this State, to testify and tell what he knows in relation to the same. There is no reasonable ground to apprehend that any answer to the questions will criminate witness beyond what he can be required to do under the statute.

He should not have been required to answer questions numbered 16 and 17, as to the acceptance and use of free transportation by the railroads. A direct answer to these questions may criminate him.

The statutes of this State provide:

"No railroad or transportation company organized or doing business in this State under any act of incorporation or general law of the State now in force or which may be hereafter enacted shall grant any free pass in the cars or other modes of conveyance over the line of any such railroad or transportation company, for any length of time, or for any distance, to any officer of this State, legislative, executive or judicial, whereby any such officer may be transported for any length of time or for any distance over the line of any such railroad or transportation company, either free of charge therefor or for less compensation than that demanded or received from the general public."

"Any such railroad or transportation company that shall grant any free pass to any such officer in violation of this act shall forfeit and pay for every such offense not less than two hundred dollars, nor exceeding two thousand dollars, to be recovered in an action at law brought in the name of the State by the prosecuting attorney, etc.

"Any such officer, legislative, executive or judicial, of this State, who shall accept and use any such free pass to be transported for any distance over the line of any such railroad or transportation company, either free of charge or for less compensation than that received therefor from the general public, shall, for every case where such pass is used, be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not less than twenty dollars nor more than two hundred dollars, and shall be removed from office," etc. Kirby's Digest, § § 6694, 6695 and 6697.

By the violation of these statutes only one crime or misdemeanor is committed, and that is committed by the officer accepting and using the free pass. In this case the witness, Butt, being a member of the General Assembly of the State of Arkansas, by accepting and using a free pass issued by a railroad company in this State, committed a misdemeanor for the prosecution of which he only is liable, and in relation to which he can not, against his consent, be sworn or required to testify under section 3087 of Kirby's Digest. *State* v. *Bach Liquor Company,* 67 Ark. 163.

In the form questions numbered 20, 21, 22 and 23 were propounded to witness it can not properly be held that he ought to have been required to answer. The letters referred to were a part of the questions, and do not appear in the record before this court, and it does not appear that they were submitted to or examined by the circuit court. Without knowing their contents, we can have no conception as to the information sought by the questions. Question numbered 23 is objectionable for the further reason that it does not submit the letter of May 19, 1903, referred to therein, to witness for examination before answering. These questions may yet be propounded by the grand jury to the witness in an amended form.

Question numbered 25, in which reference is made to a suggestion to the president of the street-railway company of Eureka Springs as to the necessity of "putting up" money to defeat the Holland bill in the Legislature, ought to have been answered. The grand jury had the right to propound it for the purpose of acquiring information as to indictable offenses. Its object, obviously, was to obtain information as to bribery, if any, of the members of the General Assembly. If witness Butt was con-

cerned in such bribery, it must have been jointly with others. In that event he could have been required to testify under the statute.

Questions numbered 31 and 32, as to mileage or mileage books delivered to witness, should have been answered. No sufficient reason is shown for the refusal to answer them, except that the answers to the same by the witness might criminate him. If the mileage was delivered to him for a lawful purpose, his answer could not do so. If, however, it was delivered to him by another person as an inducement to commit a crime, and he committed the crime, such person would be jointly concerned with him in the commission of the crime, and he could be required to testify under section 3087 of Kirby's Digest. Of course, if no crime was committed in consequence of the delivery of the mileage, he could not criminate himself by answering the questions.

The judgment of the circuit court is affirmed except in so far as it is inconsistent with this opinion.

RIDDICK, J., did not participate.

BURKS v. STATE.

78 271
188 453

Opinion delivered March 31, 1906.

WITNESS—IMPEACHMENT—PROOF OF CONSISTENT STATEMENTS.—Where a witness has denied having made statements contradictory of those made by him upon the witness stand, and proof is introduced tending to prove such contradictory statements, former statements of the witness consistent with those made by him upon the stand are inadmissible in support of his testimony.

Appeal from Hot Spring Circuit Court; *Alexander M. Duffie,* Judge; reversed.

M. S. Cobb, for appellant.

The court erred in permitting the State, in rebuttal, to introduce testimony to prove that the prosecuting witness had made, shortly after the assault, a statement consistent with his testimony

on the witness stand, to the effect that he recognized appellant as one of his assailants. 63 Ark. 470; 62 Ark. 494; 66 Ark. 110; 72 Ark. 412; 16 Ark. 628; 56 Ark. 345; 42 L. R. A. 432; 49 C. J. L. 440; 51 S. W. 930; 70 S. W. 215; 85 S. W. 1179; 1 Ark. Law Rep. 290; *Ib.* 406; 30 Am. & Eng. Enc. Law (2 Ed.), 1140; 4 L. R. A. 296; 11 *Ib.* 75; 48 S. W. 986.

Robert L. Rogers, Attorney General, for appellee.

McCULLOCH, J. Appellant, Al Burks, was convicted of the crime of assault with intent to kill. The facts of the case are sufficiently stated in the opinion of this court on a former appeal. 72 Ark. 461. The prosecuting witness, W. W. Reiblin, who was the party upon whom the felonious assault is alleged to have been committed, testified that he identified appellant as one of his assailants, and appellant's counsel, after laying the proper foundation by asking Reiblin if he had not on other occasions stated that he did not recognize the persons who assaulted him, to which questions he replied in the negative, introduced witnesses who testified that Reiblin had made such contradictory statements. The court permitted the State in rebuttal, over the objection of appellant, to prove that Reiblin stated to witness, a few hours after the assault, that he recognized appellant as one of the assaulting parties.

The question is therefore presented whether or not, where a witness has denied having made a statement contradictory of those made upon the witness stand, and proof is introduced tending to establish such contradictory statements, former statements of the witness consistent with those made by him upon the stand are admissible in support of his testimony. Authorities are not wanting sustaining the rule as to admissibility of such testimony Prof. Wigmore, after reviewing the decisions on the subject, casts the weight of his opinion in favor of its admissibility. 2 Wigmore on Ev., § 1126. There are some courts which hold to the rule that the evidence is admissible for the purpose of corroborating or re-establishing the testimony of the witness on the main question, on the ground that the jury should be permitted to hear the previous consistent, as well as contradictory, statements and decide which are true, but that rule finds scant support in the adjudged cases, and is generally discredited. The

courts which have adopted the rule of admissibility of the testimony put it on the ground stated by Prof. Wigmore, that it is for the purpose of supporting the witness in his denial of the contradictions. This view is stated by Judge COOLEY in delivering the opinion in *Stewart* v. *People,* 23 Mich. 74. "The rule is," says Reade, J., in *State* v. *Parish,* 79 N. C. 610, "that when the witness is impeached—observe, when the *witness* is impeached—it is competent to support the witness by proving consistent statements at other times, just as a witness is supported by proving his character; but must not be considered as substantive evidence of the truth of facts, any more than any other hearsay evidence."

This view, while not without reason and authority to support it, is, we think, clearly against the weight of authority. The courts of the following States adhere to that rule: Indiana, North Carolina, Pennsylvania, South Carolina, Tennessee and Texas. *Perkins* v. *State,* 4 Ind. 222; *Hinshaw* v. *State,* 147 Ind. 334; *State* v. *Parish, supra; McKee* v. *Jones,* 6 Pa. 425; *Tyler* v. *Tyler,* 1 Hill. Eq. 77; *Graham* v. *McReynolds,* 90 Tenn. 673; *Red* v. *State,* 40 S. W. 408.

The courts of the following States are found arrayed against the admissibility of such evidence: Alabama, California, Georgia, Iowa, Louisiana, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New York and Vermont. *Jones* v. *State,* 107 Ala. 93; *People* v. *Doyell,* 48 Cal. 90; *Mason* v. *Vestal,* 88 Cal. 396; *McCord* v. *State,* 83 Ga. 521; *State* v. *Vincent,* 24 Iowa, 570; *State* v. *Cady,* 46 La. Ann. 1346, 16 So. 195; *Commonwealth* v. *Jenkins,* 10 Gray, 485; *Hewitt* v. *Cory,* 150 Mass. 445; *Head* v. *State,* 44 Miss. 731; *State* v. *Taylor,* 134 Mo. 109; *Kipp* v. *Silverman,* 25 Mont. 296; *Reed* v. *Spaulding,* 42 N. H. 114; *Dudley* v. *Bolles,* 24 Wend. 465; *Lavigne* v. *Lee,* 71 Vt. 167.

The courts of Missouri, New Hampshire and New York first admitted such testimony, but in later decisions excluded it. So the earlier English decisions held it admissible, but later repudiated the doctrine.

Greenleaf lays down the rule in accord with the majority of the courts as before cited, but states an exception, which is found in many decisions, "where a design to misrepresent is charged upon the witness in consequence of his relation to the party, or to the cause; in which case, it seems, it may be proper to show

that he made a similar statement before that relation existed." Wharton, Cr. Ev., § 492; Greenleaf, Ev. (15 Ed.), § 469; 2 Phillips, Ev. 445, 446; *Nichols* v. *Stewart,* 20 Ala. 358; *People* v. *Doyell, supra; State* v. *Vincent, supra; State* v. *Cady, supra; State* v. *Reed,* 62 Me. 129; *Red* v. *State, supra; State* v. *Flint,* 60 Vt. 304; *Ellicott* v. *Pearl,* 10 Pet. (U. S.) 412; *Conrad* v. *Griffey,* 11 How. (U. S.) 480.

The facts of the case at bar do not, however, fall within any of the exceptions noted in the cases cited. It is true that appellant introduced testimony tending to establish contradictory statements of the prosecuting witness, Reiblin, and that the latter entertained feelings of animosity toward him which prompted a design to misrepresent the facts and connect him with the assault as the assailant, but there was no testimony tending to show that the relations between the parties were in anywise changed between the dates of any of the alleged statements and the date of the trial at which the testimony of Reiblin was given which was sought to be contradicted. The proof of ill feeling and personal animosity all showed that it existed before the assault, and that there was no change in this respect after the assault. The state of feeling was precisely the same at the various times all the alleged statements were made, and the only purpose which the previous consistent statements could serve would be to corroborate the statement given under oath at the trial. This, we think, is clearly improper. We can see no distinction whatever in admitting the testimony for the purpose of corroborating the witness as to his statement on the main fact, and in admitting it for the purpose of corroborating his denial of the contradiction, unless, as in some of the cases just cited, there has been some change in the circumstances or relations between the parties which might have prompted a recent fabrication or design to misrepresent the facts. After all, the effect of proof of previous consistent statements could only be to corroborate the statement of the witness under oath by his own words uttered on another occasion. It would add nothing to his statement upon the witness stand, either as to his testimony on the main issue, or as to his denial of the contradiction. We are of the opinion that the admission of the testimony by the court was improper and prejudicial, and should not have been allowed.

Numerous other rulings of the court are assigned as error, but, after consideration of the whole record, we find nothing prejudicial to appellant.

But, for the error indicated in admission of evidence, the judgment is reversed, and the case remanded for a new trial.

RIDDICK, J., not participating.

ARNOLD v. MCBRIDE.

Opinion delivered March 31, 1906.

1. APPEAL—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings of fact will not be disturbed unless against the clear preponderance of the evidence. (Page 277.)
2. MARRIED WOMEN—POWER TO BORROW MONEY.—A married woman, under the law, may borrow money for her separate use, and her agreement to repay same is binding upon her, whether the money was used for her benefit or not. (Page 277.)
3. MORTGAGE—ENFORCEMENT OF LIEN.—An indorsement upon a mortgage that "this deed is not to be foreclosed until the seventh or last payment is due" does not prevent the bringing, before the date mentioned, of a suit to declare the debt a lien on the land. (Page 278.)
4. APPEAL—HARMLESS ERROR.—Appellant can not complain that the relief granted to appellee stopped short of what the pleadings and proof would have justified. (Page 278.)

Appeal from Searcy Chancery Court; *T. H. Humphreys*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Plaintiff, N. J. McBride, brought this suit in equity against the defendant, Mary Arnold, a married woman, alleging that defendant was the owner, as her separate estate, of certain land described, which was under mortgage, and that on October 11, 1897, she borrowed from said plaintiff $4,418.27, and executed to him therefor seven notes with interest, one falling due each year thereafter, the first five of said notes being for $735 each, and the last two for $369.76 each, and to secure said notes executed on

said day a deed of trust with power of sale to Smith (who is joined as plaintiff) as trustee, which said trust deed was indorsed with these words: "It is hereby expressly understood and agreed and made a part of this deed that this deed is not to be foreclosed until the seventh or last payment is due;" that defendant's husband, E. D. Arnold, joined in said deed; that the notes were executed by defendant in a transaction relating to her separate property; that the first two of said notes were about to be barred by limitation, and that the lien would be lost thereby before the time fixed for foreclosure by the trustee of said trust deed, viz.: the maturity of the last note. The prayer of the complaint is that the two notes first falling due be declared a lien on said land, and that, if the same be not paid before the maturity of the last note, then that the land be decreed to be sold to pay said notes.

The defendant answered, pleading coverture and alleging that said notes were not given in relation to or for the benefit of her separate property, or for her personal benefit. She denied that she was ever engaged in any separate business, or that plaintiff McBride had ever loaned her any money, or that the conditions of said trust deed had been broken.

Plaintiff, McBride, testified, in substance, that defendant in person applied to him to borrow said sum of $4,418, and that he made the loan to her and paid the money to various persons in accordance with her verbal directions, including $1,100 to one Reese in satisfaction of said prior mortgage, and $1,500 to defendant's husband, and $718 applied in satisfaction of a debt owing by defendant to him (plaintiff).

The defendant gave her deposition in her own behalf, denying that she borowed any money from McBride, or that she received any of the funds, or the benefit thereof, except the sum of $100 paid over to her and the sum of $1,100 applied in satisfaction of the Reese mortgage debt, which she testified was her husband's debt. She also testified that her husband had entire control of her lands, and used the rents and profits thereof in his business. This was all the evidence in the case except that a son of plaintiff and a son of defendant each testified as to collateral matters.

The court rendered a decree in favor of plaintiff, declaring a lien upon said lands for the amount of said two notes and accrued interest, but did not order the lands sold.

The defendant appealed.

Pace & Pace and *W. S. McCain,* for appellant.

1. In this State a married woman can not become surety or give her note for a consideration moving to another. 32 Ark. 776; 39 Ark. 361; 70 Ark. 5. The presumption is that a married woman's note is void, and this presumption must be overcome by proof that it was given for a consideration that passed to her. 66 Ark. 117; 58 Ark. 484.

2. Where a mortgage is given to secure a particular debt, any plea that defeats the debt defeats the mortgage. 1 Jones on Mort., § 110. A mortgage can not be extended beyond its express terms. 35 Ark. 217.

3. It having been expressly agreed that the mortgage was not to be foreclosed until the last note was due, this suit was prematurely brought. 1 Jones, Mort., § § 1184, 1186, 1189, 1190; Wiltsie, Mort. Foreclosures, § § 51-54.

4. The chancellor should have declined to proceed until the holders of the other notes were before the court. Kirby's Digest, § 6011; 33 Ark. 240; 44 Ark. 314.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1. A married woman can mortgage her property to raise money to pay her husband's debts or for any other purpose. The burden is not upon the lender to see that the money is appropriated to her use. 34 Ark. 17; 35 Ark. 480; 45 Ark. 117; 47 Ark. 485; 56 Ark. 220; 70 Ark. 516.

2. Two of the notes were about to be barred by limitations. Action was necessary and not premature. 13 Am. & Eng. Enc. Law, 779. Where a debt is payable in installments, there may be a foreclosure on default in payment of any installment. 2 Jones, Mort. § § 1459, 1577, 1591.

MCCULLOCH, J., (after stating the facts.) There is sufficient evidence to sustain the findings of the chancellor that the money was borrowed by the defendant for her own use, and the findings, not being against the clear preponderance of the evidence, will not be disturbed. *Du Hadaway* v. *Driver,* 75 Ark. 9; *Sulek* v. *McWilliams,* 72 Ark. 67; *Greer* v. *Fontaine,* 71 Ark. 605.

This court, in *Sidway* v. *Nichols,* 62 Ark. 154, said: "Our conclusion is that a married woman has, under the law, the right

to purchase personal property, or borrow money for her separate use, and that the property purchased or money borrowed becomes her separate property. Her contract to pay for the same is a contract in reference to her separate property, and creates a personal obligation, valid in law and in equity, and this without regard to whether she owned any additional property or not." It is unimportant what use she made of the money after she received it, as the lender was not bound to see that she actually used it for her own purposes and benefit. All that is necessary is that the money shall have passed to her as her own property to do with it as she pleased. The evidence shows that this was done in this case.

It is contended that the suit was prematurely brought because it was agreed, by indorsement upon the mortgage that "this deed is not to be foreclosed until the seventh or last payment is due." It was not agreed, however, that payment should not be enforced until the last note became due. Only the date of foreclosure was postponed. The plaintiff could have brought suit on either of the notes any time after the respective dates of maturity, and the running of the statute of limitations would have been arrested by commencement of such suit. The only purpose of this suit was to have a lien declared on the land, and we are not called upon to determine whether the statute of limitations had begun against a foreclosure of the mortgage as to these notes, or whether this suit arrested the statute, as this question was not raised by the pleadings, and the court did not decree a foreclosure. For the same reason appellant was not prejudiced by the decree merely declaring the debt to be a lien on the lands. The court might, under the allegations of the complaint and general prayer for relief, have gone further and rendered a personal decree against the defendant for the amount of the debt, but it did not do that. The appellant can not complain that the relief granted to appellee stopped short of that which the pleadings and proof justified. If appellee is content to accept that relief only, no prejudicial wrong is done to appellant.

The suit is somewhat novel on account of the peculiarity of the contract in relation to postponement of foreclosure of the mortgage, but we find nothing in the decree of which appellant may justly complain, and the same is affirmed.

FT. SMITH LIGHT & TRACTION COMPANY v. CARR.

Opinion delivered March 31, 1906.

1. TRIAL—INSTRUCTION—SUFFICIENCY OF OBJECTION.—Where, as one of several elements of damage in a personal injury case, the jury were told to award "the pecuniary loss, if any is shown by the testimony, sustained by reason of plaintiff's inability to attend his business or profession," a general objection was insufficient to call attention to the fact that there was no proof of such pecuniary loss. (Page 283.)
2. APPEAL—HARMLESS ERROR.—Error of the court, in an action against a street-railway company for injuries received in collision with a car, in submitting to the jury the issue as to the incompetency of the motorman, there being no evidence on that question, was not prejudicial if the jury were instructed that such incompetency should not be considered unless it contributed to plaintiff's injury. (Page 283.)

Appeal from Sebastian Circuit Court; *Styles T. Rowe,* Judge; affirmed.

STATEMENT BY THE COURT.

The plaintiff, Andy Carr, sues to recover damages caused by being knocked down and injured by one of the street cars of the defendant, Fort Smith Light & Traction Company, operated along the streets of the city of Fort Smith.

The injury occurred about eleven o'clock at night. The plaintiff boarded a crowded street car at a park where a public entertainment was in progress, for return to his home in the city. He stood on the rear platform of the car, and when it approached the street crossing near his home the lights on the car became extinguished for some cause. Without signaling for the car to be stopped, he swung himself off the rear steps on the left side next to the parallel or return track. After alighting he went upon the other track, and was struck by a rapidly moving car going in the direction opposite from that which he had alighted. The lights on that car had also become extinguished, and the testimony is conflicting as to whether or not the gong was sounded.

The complaint sets forth the following charges of negligence on the part of the defendant in the operation of the car by which plaintiff was injured, viz.:

"1. That the car which ran over plaintiff was being oper-

ated by an incompetent motorman, known to be such by defendant, or such incompetency might have been known by the exercise of ordinary prudence upon its part.

"2. That said car was not in proper condition for being run and moved in the night, because it had no headlight or other light upon it so that plaintiff could see its approach, or so its motorman could see persons on the street who might be about the track or attempting to cross same in time to stop the car from running upon them.

"3. That said car was running at a dangerous speed, and the motorman did not have same under control.

4. That the motorman did not, when approaching the street crossing where plaintiff was injured, give any alarm or signal of its approach, either by sounding a whistle or bell.

"5. That the motorman was not on the lookout for or watching for pedestrians who might be on or near the track and about to cross the street.

"6. That he ran car upon plaintiff without giving him notice or warning of its approach, and without observing the presence of plaintiff near the track and about to cross same, when he could have observed the presence of plaintiff by the exercise of ordinary care on his part, if the headlight on the said car had been lighted.

"7. That the motorman did not, when the lights went out on the said car, stop the car until the lights were restored, but continued to run same at a high rate of speed, and that it was unsafe and dangerous to pedestrians on the street to run the cars without lights.

"8. That the motorman did not, when the lights went out, slacken the speed or apply the brakes to the car so as to have same under control."

The defendant in its answer specifically denied all the charges of negligence, and alleged that by alighting from the wrong side and wrong end of the moving car in violation of the rules of the company, of which, it is alleged, plaintiff had notice, and by going upon the parallel track without looking and listening for an approaching car, the plaintiff was himself guilty of negligence which caused or contributed to his own injury.

There was evidence introduced by the defendant tending to

establish the fact that the rear gates of cars were required to be kept closed, and that they were closed on this occasion, and that there was a rule of the company requiring passengers to signal the motorman and to depart from the front end of the car, so that the motorman could stop the car and control the departure of passengers. Other evidence tended to show that the rear gates were open on this occasion, and that the observance of this rule was not required on occasions such as this when the car was crowded, or when a conductor was in charge of the car.

The plaintiff testified that, when he approached the crossing where he was accustomed to alight, the lights of the car went out, he got down on the steps, and, facing the direction in which the car was going, looked for an approaching car on the parallel track, and, seeing none and hearing no sound of one, swung himself down upon the ground, and walked a few steps in the same direction, and, still not seeing or hearing an approaching car, he attempted to cross the track, when he was suddenly and unexpectedly struck by the car and knocked down. He further testified that the car was not lighted, and that the gong was not sounded nor the alarm given.

The evidence was conflicting as to whether or not the rear gates of the car were closed, and plaintiff testified that they were open.

The contention of the defendant was that plaintiff was guilty of negligence in getting off the rear end of the moving car on the side next to the parallel track without looking and listening for a car approaching on the other track and under circumstances that he could not hear the noise of a car, and that the momentum of his jump or step from the moving car carried him on the other track when he was immediately struck—that the car was so close when he went upon the track that his presence could not be discovered in time to avoid the collision. Evidence was introduced tending to support that contention, but those points were all disputed, and the evidence was conflicting.

There was evidence from which the jury might have found that the car on the other track was from 100 to 150 feet distant when plaintiff alighted from the car and went onto the parallel track. The evidence warranted a finding that there was no light upon the car, that the gong was not sounded, that the speed of

the car was excessive, and that the motorman did not have the car under control of the brakes.

The jury returned a verdict in favor of the plaintiff, fixing an amount not claimed to be excessive.

Mechem & Mechem, for appellant.

1. Because of plaintiff's contributory negligence, shown by the evidence, the court erred in refusing to direct a verdict for the defendant. 62 Ark. 163; *Ib.* 245; 70 Pac. 345; 47 Atl. 872; 39 Atl. 294; 95 N. W. 161; 33 So. 577; 46 Pac. 136; 27 Atl. 1067.

2. The court erred in instructing the jury as to negligence which there was either no evidence or insufficient evidence to support. 71 Ark. 351; 70 Ark. 441; 9 Wall. 557; Thompson, Trials, § 2315; 66 N. W. 667.

Ira D. Oglesby, for appellee.

1. Appellant failed to properly save exceptions to the instructions. No specific objections were interposed. At night it is the duty of the company to maintain headlights on their cars. 90 Mich. 413. While it is the duty of pedestrians to use ordinary care for their own safety, it is also the duty of the company to use proper diligence in approaching and crossing streets to prevent injury to such pedestrians. 26 Am. St. Rep. 512; 62 *Id.* 421. If plaintiff did not look before attempting to cross, whether or not it was negligence on his part was properly submitted to the jury by the court's instructions; while those given at request of defendant declared it to be negligence *per se* not to look—an erroneous statement of the law. 75 S. W. 699; 78 S. W. 681; *Ib.* 1080; 66 N. E. 615; 58 S. W. 337; 11 Am. St. Rep. 87; 55 *Ib.* 623; 62 *Ib.* 421.

McCULLOCH, J., (after stating the facts.) It is earnestly insisted by learned counsel for appellant that the court should have taken the case from the jury by a peremptory instruction to return a verdict in favor of the defendant, on the ground that the plaintiff was guilty of contributory negligence. We do not, however, think that, under the evidence presented, it was a case for the court to say as a matter of law that the plaintiff was guilty of negligence. If it be conceded that it was negligent for plaintiff to alight from the moving car under

the circumstances shown, that was not the proximate cause of the injury. He was not injured in alighting from the car or by reason of having done so in the manner shown. If he was guilty of negligence at all which contributed to the injury, it was by going upon the railway track without observing the proper precautions of looking and listening for the approach of cars. This question was fully submitted to the jury on instructions asked by both parties, and there was evidence to justify the verdict of the jury. The plaintiff testified that when he was about to alight he got on the steps of the car and stood facing the direction the car was moving, and that he looked and listened for an approaching car on the other track, and that after he alighted and before attempting to cross the track he faced the only direction from which a car might be expected and looked and listened, and that, neither seeing nor hearing the approach of a car, he attempted to cross. The evidence did not present a case of a man emerging from behind a moving car or other obstruction on to a railway track without awaiting an opportunity to look or listen for the approach of a car.

The court also properly instructed the jury upon all the other questions of contributory negligence. Taking the instructions as a whole, they were fair to the defendant, and put the case to the jury in as favorable an aspect as the law of the case warranted.

It is urged that the court erred in submitting to the jury as an element of damage the "pecuniary loss" sustained by plaintiff, when the evidence established no injury of that character. The instruction given at plaintiff's request on the measure of damages concluded with the words "and the pecuniary loss, if any is shown by the testimony, sustained by reason of inability to attend to his business or profession." There was no evidence of any such damage, but this part of the instruction should have been specifically objected to. A general objection to the instruction as a whole was not sufficient.

Counsel for appellant also contend that the court erred in submitting to the jury instructions upon all the charges of negligence in the complaint. They argue that the instructions were abstract, as there was no evidence upon which they could be based. We find that there was evidence sufficient to base instructions

upon each of the charges of negligence except the first involving the question whether the motorman who operated the car which struck plaintiff was incompetent and known to be such by the defendant. There was no evidence of that fact, and the court should not have submitted that question to the jury. But the error was not prejudicial. for the reason that the jury, by the verdict returned, necessarily convicted the motorman of negligence. A finding of incompetency of the motorman could not have resulted in a verdict for the plaintiff, if the jury obeyed the instructions of the court, unless they found that it contributed to plaintiff's injury, and it could not have so contributed unless the motorman was guilty of negligence in one of the particulars charged. The error was therefore harmless.

Finding no prejudicial error in the record, the judgment must be affirmed. It is so ordered.

---

78 284
79 603
f80 498
f81 31
82 27

BENTON v. STATE.

Opinion delivered March 31, 1906.

1. EVIDENCE—CONSPIRACY—SUBSEQUENT DECLARATIONS.—The acts and declarations of co-conspirators done and made in the absence of the defendant after the consummation of the criminal enterprise can not be admitted in evidence. (Page 290.)

2. APPEAL—HARMLESS ERROR.—Where a witness in a murder case was permitted, without objection, to testify that, after the commission of the crime, the accused burned the clothes of the man whom he was alleged to have murdered, it was not prejudicial to permit the witness to testify that he communicated such fact to some one else. (Page 291.)

3. SAME—SUFFICIENCY OF EXCEPTION.—An exception to testimony in the following form, towit: "And the defendant here states that, in order to save the time of the court, he objects to all evidence of actions, conversations, etc., transpiring after the commission of the offense, related by this witness and accomplice," was not an objection to evidence that might be thereafter admitted, and was too general and indefinite. (Page 291.)

4. SAME—SUFFICIENCY OF EXCEPTION TO EVIDENCE.—In the absence of an agreement between the parties that exceptions to all decisions made

during the trial are saved without being specially mentioned at the time the decision is made (Kirby's Digest, § 6222), an objection to the introduction of testimony must be made when the testimony is offered, and the exception be reserved at the time the ruling is made. (Page 291.)

5. WITNESS—IMPEACHMENT.—A witness may be impeached by proof that he has made statements contradictory of his present testimony. (Page 292.)

6. TRIAL—EXCLUSION OF ONE'S OWN TESTIMONY.—The court properly refused to direct the jury not to consider evidence of the acts and declarations of a fellow conspirator, done and made after the commission of the offense and in defendant's absence, and tending to connect defendant with the crime, where part of such evidence was elicited by defendant on cross-examination. (Page 293.)

7. WITNESS—IMPEACHMENT—PAST ANTECEDENTS.—It was not error to permit the prosecuting attorney to ask the accused, who was a white man, whether he did not marry a negro woman. (Page 293.)

8. SAME—IMPEACHMENT BY PROOF OF INDICTMENT.—While it was error to ask the accused, a white man, whether he had been indicted for marrying a negro woman, the error was not prejudicial if he answered in the negative. (Page 294.)

9. INSTRUCTION—OBJECTION.—Where the record in a prosecution for murder in the first degree recites that after the jurors had deliberated for a time they returned into court and one of them handed the judge a written note, asking him whether they had a right under the law to find the defendant guilty of murder in the second degree, to which he replied in the affirmative, that the contents of the note were not publicly announced, and were unknown to defendant's counsel, and that defendant "objected and excepted," but fails to show that defendant asked that the contents of the note be disclosed, the objection is unavailing. (Page 294.)

10. SAME—PROVINCE OF JURY.—An instruction in a prosecution for murder in the first degree that the jury had the right under the law to find the defendant guilty of murder in the second degree was not objectionable as expressing an opinion as to defendant's guilt. (Page 296.)

Appeal from White Circuit Court; *Hance N. Hutton,* Judge; affirmed.

STATEMENT BY THE COURT.

On June 10, 1905, the body of a man was found floating in the St. Francis river, and taken out at Madison. It was temporarily buried in the sand. It was identified as that of Walter Gray, a young man who had a store on the bank of the St. Francis River, about ten or twelve miles above Madison.

The body bore unmistakable evidence of violence. There was "a terrible wound on the body, and the head was split open." Around the neck was a barbed wire, to which was attached a piece of iron weighing about sixty pounds.

The appellant and Bob Martin, Berry Minor and John Davis were arrested, and afterwards indicted for murder in the first degree, the offense charged being the murder of Walter Gray. Appellant, on change of venue to White County, was tried and convicted of murder in the second degree, and sentenced to ten years in the penitentiary. It appears that appellant assisted Gray in his store. Neither appellant nor Gray were married, and they were constant companions, often eating and sleeping together. Customers of Gray saw him and the appellant in the store as late as nine or ten o'clock on the evening of June 6th, when Gray mysteriously disappeared. Gray was last seen in company with appellant.

Circumstantial facts were detailed in evidence which it is unnecessary for the purposes of this opinion to recite, tending to show that Gray was murdered in his room at the store, and his body taken to and cast into the river where it was afterwards found.

There was ample evidence, of a circumstantial character, aside from the testimony of the alleged accomplice, tending to connect the appellant with the commission of the crime. The testimony of John Davis shows that he and one Bob Martin were accomplices in the alleged murder of Gray. Davis, after having testified to all the details of the horrible crime, further testified that he went with appellant when he took the clothes of Walter Gray to a certain deadening (Norfleet) and burned them.

The record then shows the following:

"Q. Who did you first tell about the burning of these clothes? A. I told Mr. Sweet about it. Q. He is a white man, is he? A. Yes, sir. Q. When did you tell him about it? A. I told him about it after that."

(The defendant here interposed objection to the questions propounded to the witness by counsel for the State, for the reason that the statements the witness and accomplice is called on to answer did not take place in a conversation with or in

the presence of the defendant. That the proof shows, heretofore, that the crime had been committed, and that these acts and declarations took place after the consummation and completion of the offense. And. secondly, that Davis was an accomplice and a conspirator in the killing; that the court has not passed upon the question as to whether or not it is a conspiracy; and for these reasons defendant objects. Said objection is by the court overruled, and defendant excepts. And the defendant here states that, in order to save the time of the court, he objects to all evidence of actions, conversations, etc., transpiring after the commission of the offense related by this witness and accomplice. Objection overruled, and exceptions saved by defendant.)

The witness Davis, after having testified that Lucy Witherspoon washed for him and for Walter Gray, and that he carried her some clothes to wash, was asked the following questions:

"Q. Well, did you carry anything over there? A. Yes, sir; Mr. Benton's and Mr. Gray's clothes. Q. Who gave you Mr. Benton's clothes? A. Mr. Benton did." Here the record recites: "Objected to, as what the witness is now testifying to occurred subsequent to the alleged killing; overruled, to which the defendant excepts, and asks that his exception be noted of record, which is accordingly done." Upon the objections thus made and the exceptions thus saved to the ruling of the court, appellant based assignments of error as follows:

"6. Because the court permitted the witness, accomplice and co-conspirator, John Davis, to testify to facts with reference to the defendant Benton touching the alleged offense not within the presence of Benton, and after the consummation and completion of the offense charged in the indictment.

"7. Because the court allowed the witness, co-conspirator and co-defendant, John Davis, to testify as to conversation he had with the defendant, Gus Benton, about the clothes of Walter Gray [which] were burned after the completion and consummation of the offense charged in the indictment.

"10. Because the court erred in permitting the witness John Davis to testify about a conversation he had with the witnesses Sweet, Swan, Lucy Witherspoon, Potts and others, regarding the declarations, acts, and conversations made or had, not within the presence of the defendant Gus Benton, and after consumma-

tion and the completion of the charge and offense alleged in the indictment.

"11. Because the court erred in allowing the witness Swan to testify in regard to conversation had with the witness John Davis with reference to the clothes of Walter Gray being burned, said conversation having taken place in the absence of the defendant, and after the consummation and completion of the act charged in the indictment.

"12. Because the court erred in allowing Lucy Witherspoon to show conversations had with the coconspirator and defendant and accomplice, John Davis, about the washing of clothes and to whom the clothes belonged, said Davis saying to Lucy Witherspoon that the clothes were the clothes of Gus Benton, that they were sent to her by him to be washed for the said Benton; the conversation taking place between witness Davis and Lucy Witherspoon, not within the presence of the defendant, Gus Benton, and after the completion and consummation of the offense charged in the indictment.

"13. Because the court erred in permitting the witness Sweet to testify to any conversation that he had with John Davis, the witness, accomplice and coconspirator, about the defendant, Gus Benton, or any act or declaration of the said defendant, touching the alleged offense, not made in the presence of the said defendant and [made] after the completion and consummation of the offense alleged in the indictment; that the conversation of the witness John Davis had with the witness Sweet about the killing, or how it was brought about, or the act or declaration of the defendant, Gus Benton, not made within the presence of the said defendant, Gus Benton, and in his absence, and after a completion and consummation of the offense, was not competent.

"14. Because the court erred in permitting Francis Williams, Polk Simms and Lucy Witherspoon to testify to conversations of John Davis, the accomplice and codefendant, as to acts and declarations of the defendant Benton, not made within his presence, and in his absence, after the consummation and completion of the crime alleged in the indictment

"15. Because the court erred in permitting the witness Polk Simms to detail a conversation had with the codefendant and

coconspirator John Davis, the said Davis relating in the conversation that the defendant, Gus Benton, told him that he was going to Madison to find out whether the body found was that of Walter Gray, and that he would return Monday evening to the Gray store and tell him, the witness John Davis, and coconspirator, whether it was Walter Gray or not, said conversation having taken place between the codefendant and coconspirator and accomplice Davis and the witness Simms, not within the presence of Gus Benton, and after the consummation and completion of the crime alleged in the indictment.

"16. Because the court erred in permitting the witness Swan to testify that the witness Davis and codefendant stated to him that a piece of iron that had laid about the store known as "the Gray store," on the night of the 6th of June, at the time alleged in the indictment that the crime was committed, that the co-defendant saw thrown into the St. Francis River by the codefendants Minor and Martin and the defendant Gus Benton, and that he said if the said Swan would go to the place where the co-defendant threw the iron, which was near the willow tree, he would find the same; that he, the said Swan, stated that he did go and hunt for the iron, and found it as directed by the co-defendant and witness Davis. All of this conversation took place between the witness Swan, and which was testified to by the co-conspirator and accomplice Davis, was not had within the presence of the defendant, and after the consummation and completion of the offense."

Other facts deemed necessary are stated in the opinion.

M. B. Norfleet, Chas. T. Coleman and *Campbell & Stevenson,* for appellant.

1. The court erred in admitting evidence of declarations and acts of alleged co-conspirators, made and done after the killing and in the absence of the defendant. 45 Ark. 165, 328, 332; 67 Ark. 234.

2. It was error to permit the prosecuting attorney to ask defendant if he had not been married to a negro woman and indicted for same. 2 Ark. 229, *et seq.;* 34 Ark. 649; 37 Ark. 261; 38 Ark. 221; 45 Ark. 165; 39 Ark. 278; 52 Ark. 33; 73 Ark. 152; 62 Ark. 126; 68 Ark. 577.

3. After deliberating for a time, the jury returned into court and asked for additional instructions, which the court gave them. Then a juror handed the judge a note which in substance asked the judge whether or not under the law the jury had the right to find the defendant guilty of murder in the second degree. The judge read it, and, without making known to defendant or his counsel its contents, answered "Yes." This action of the court was error, (1) because the contents of the note were not made known to the defendant or his counsel, and no opportunity to object was allowed to him. His mere physical presence in the court room did not satisfy the requirement of the law that he be present at each substantive step in the case. 44 Ark. 332; 11 Tex. App. 454; 5 Ark. 431; 19 Ark. 205; 24 Ark. 629; *Ib.* 620, *et seq.;* (2) because the question and answer amounted to an expression of opinion on the evidence by the court, and a direction to find a verdict for murder in the second degree.

4. The court erred in refusing to instruct the jury on the question of *alibi.* 41 Ark. 173; 55 Ark. 244; 59 Ark. 379. If there is any evidence, however slight, to sustain a particular theory of a case, the court should properly instruct the jury as to that theory. * * * If there is any evidence to sustain his theory, it must be submitted to the jury under proper instructions. 50 Ark. 549; 52 Ark. 47. Where the defendant's evidence tends to prove an *alibi,* a refusal of the court to instruct specially thereon is ground for reversal. 12 Cyc. 319; 2 Am. & Eng. Enc. Law (2 Ed.), 54; 11 Tex. App. 381. See also 17 Tex. App. 131; 18 Tex. App. 498; 30 Tex. App. 345; 5 Baxt. 662.

Robert L. Rogers, Attorney General, for appellee.

WOOD, J., (after stating the facts.) Learned counsel for appellant urge:

1. That the court erred in admitting evidence of the declarations and acts of John Davis and Bob Martin, two of the alleged co-conspirators of the defendant, made and done after the killing and in the absence of the defendant.

The law is well settled that the acts and declarations of co-conspirators in the absence of the defendant after the consummation of the criminal enterprise can not be admitted in evidence. *Polk* v. *State,* 45 Ark. 165; *Foster* v. *State,* 45 Ark. 328; *Bennett* v. *State,* 62 Ark. 516; *Willis* v. *State,* 67 Ark. 234.

There is nothing in the bill of exceptions upon which to base appellant's sixth, seventh, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth assignments of error in his motion for new trial. The only objection saved was to the following questions and answers:

"Q. Who did you first tell about the burning of these clothes? A. I told Mr. Sweet about it. Q. He is a white man, is he? A. Yes, sir. Q. When did you tell him about it? A. I told him about it after that."

The witness John Davis had testified without objection to the burning of the clothes. The fact sought to be established by the accomplice, Davis, that appellant, after the commission of the crime, had burned the clothes of the man whom he was alleged to have murdered, was highly prejudicial to appellant because it tended to show guilty consciousness, in an effort to suppress evidences of his crime. But this evidence went to the jury without objection, and, having been thus admitted, there could have been no prejudice in the mere fact that he had told some one about it, especially since the one to whom he said he communicated the fact was not questioned concerning this, and had nothing whatever to say about it.

The language in the bill of exceptions in the objection, towit: "And the defendant here states that, in order to save the time of the court, he objects to all evidence of actions, conversations, etc., transpiring after the commission of the offense, related by this witness and accomplice," was not an objection to testimony that might thereafter be admitted, and was not an exception to the ruling of the court thereon. The objection was too general and indefinite. Besides, there is nothing in the record to show that the parties agreed that all exceptions to the rulings of the court on the admission or rejection of testimony were saved without being especially mentioned at the time the decision was made. In the absence of an understanding of that kind, the objection to the introduction of testimony must be made when the testimony is offered, and the exception reserved at the time the ruling is made. Sec. 6222, Sandels & Hill's Digest. It is but fair to the court that any objection to testimony should be made at the time it is offered. *Burris* v. *State,* 38 Ark. 221.

There was no prejudicial error in the witness John Davis

being permitted to testify that appellant gave him his clothes to carry to Lucy Witherspoon to be washed. This is the extent to which the objection to the testimony reached, and as an independent fact it could throw no light upon the question of the guilt or innocence of the accused. It could not have injured his cause.

The court permitted Sam Martin, a negro witness for the State, after he had stated that on the Sunday night following June 6, 1905, while he was engaged in a crap game at Gray's store with Bob Martin (the alleged co-conspirator and accomplice of appellant), some one came up, and said that the body found in the river had been identified as that of Walter Gray, to testify as follows: "While the game was going on, Frank McClelland came running down the hill, and said that that body they found was Walter Gray's, and Bob Martin had up fifty cents, and he lost thirty cents, and he left the money, and would not have it, and walked off, and said, 'I have to see Mr. Benton,' as he walked off. (Defendant objected to this testimony; objection overruled; exception saved.) Q. You say he said something about going and seeing Mr. Benton? A. Yes, sir. Q. Now, you say that Bob Martin was there at the time—that night? A. Yes, sir. Q. And when a man came up and said that was Walter Gray's body he got up and left twenty cents he still had in the half dollar? A. Yes, sir. Q. And walked off, and said he must see Mr. Benton? A. Yes, sir."

Bob Martin was a witness for appellant, and was asked, on cross-examination, this question:

"Q. I will ask you if it is not a fact that while you were engaged in this negro crap game right at the end of Walter Gray's store, if some one did not come up there and announce publicly in the game that the dead body found in the river the day before at Madison was Walter Gray, and did you not then get up and give a negro a half dollar that you owed five cents to, and quit, and say you had to go and see Mr. Benton? A. No, sir; I did not."

The testimony of Sam Martin was proper, in impeachment of the testimony of Bob Martin. The defendant, by introducing him, subjected him to the same rule of impeachment as applicable to all other witnesses. Section 3138, Kirby's Digest.

2. It is contended that the court erred in refusing to direct the jury, as prayed by appellant, not to consider the evidence of the acts and declarations of John Davis, after the killing and in the absence of Benton, and tending to connect Benton with the crime." The instruction was properly refused. Appellant, on the cross-examination of one Sweet, a witness for the State, had gone beyond the examination in chief of this witness, and had made Sweet his witness, and elicited from him the entire confession of the accomplice, John Davis, and had brought out acts and declarations of Davis which, under this instruction, would be taken from the jury. The appellant, having elicited the testimony, presumably because he thought it would be advantageous for him to do so, could not afterwards repudiate it because he conceived that it might be detrimental. A party can not, even in a criminal case, take inconsistent positions and play fast and loose with the court. If he sees proper to waive rules of evidence that are made for his protection, he may do so. If he, by affirmative acts, ignores these rules because he thinks it will advance his interest, he can not afterwards undo his work, because he did not reap the anticipated benefit. Such conduct would destroy orderly procedure of trials, and would be unfair to the commonwealth. If appellant desired to have other declarations and acts of John Davis than those elicited by him removed from the jury, he should have specifically called attention to these in the instruction he asked. A general instruction to disregard the acts and declarations of accomplice John Davis, where some of his acts and declarations were properly before the jury, would not suffice. *Western Coal & Mining Co.* v. *Jones,* 75 Ark. 76; *Vaughan* v. *State,* 58 Ark. 353.

3. The next contention is that the court erred in permitting the prosecuting attorney to ask the defendant if he had not been married to a negro woman and indicted for same.

The record shows that, on cross-examination of the defendant by the prosecuting attorney, the following questions and answers were made: "Q. Did you not marry a negro woman in the State of Ohio, and live with her on Cat Island? A. No, sir; I never was married—to a white woman, negro or Indian. Q. Were you not married to a negro woman, and prosecuted in the Lee Circuit Court for living with a negro woman?" (Objected

to by defendant; objection overruled, the court saying as ground therefor: "I don't know what proof the State may have." Exception saved by defendant.) Q. You deny these things, do you? A. Yes, sir. I have never been married in my life, and no record will ever show that I got a license for any woman. Q. Nowhere? A. No. Q. And you lived in Missouri and Mississippi and on Cat Island, and you deny that you have ever been married? A. I told you so. I have never been married. Q. And you were never prosecuted on this charge? A. No, sir."

In *Hollingsworth* v. *State,* 53 Ark. 387, this court, quoting from *Wilbur* v. *Flood,* 16 Mich. 40, said: "It has always been held that within reasonable limits a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. The court has a discretion as to how far propriety will allow this to be done in a given case, and will or should prevent any needless or wanton abuse of the power. But, within this discretion, we think a witness may be asked concerning all antecedents which are really significant, and which explain his credibility." See also *Little Rock Vehicle & Implement Co.* v. *Robinson,* 75 Ark. 548.

Such of the questions as were directed to the past association of appellant with a negro woman were proper, but those that sought to show his prosecution therefor were improper. *Stanley* v. *Aetna Insurance Company,* 70 Ark. 107. However, the witness answered all in the negative, and there was no prejudicial misconduct on the part of the prosecuting attorney in persisting in asking the witness improper questions seemingly for the purpose of making the impression on the jury that appellant had lived with a negro woman and had been prosecuted for same, notwithstanding his denial thereof. The record on this point hardly brings the case within the rule announced in *Burks* v. *State,* 72 Ark. 461. We do not see how the jury could have reached the conclusion, in view of appellant's negative answers, that appellant had married and lived with a negro woman, and had been prosecuted for same. Unless they did reach such conclusion, there could not have been any prejudice to appellant's cause by reason of the improper questions.

4. Learned counsel urge that the court erred in giving ad-

ditional instructions to the jury, in the absence of the defendant, by answering the note of inquiry addressed to the court by the juror Cowen, and by telling the jury, in response thereto, that they might find the defendant guilty of murder in the second degree. The record discloses that, after "the jury had deliberated for a time, they returned into open court, and asked the judge of the court to give them additional instructions as to the law in the case; and the court proceeded to do so. One of the jurors then handed the judge a written note, the judge read it, and then turned to the jury and said 'Yes.' This note asked the judge whether or not the jury had the right, under the law, to find the defendant guilty of murder in the second degree. The contents were not publicly announced, and were known to the prosecuting attorney alone besides the judge. After the judge had read it and laid it down, the prosecuting attorney then read it himself. Counsel for the defendant had no knowledge of its contents. To this the defendant at the time objected and excepted."

It appears that the defendant was present during this proceeding, else how could he have "objected and excepted?" It is conceded that the defendant was present in person in the court room when the inquiry was made by the juror of the judge, and his answer given thereto. But it is now insisted that, inasmuch as the contents of the note were known only to the judge and prosecuting attorney, the proceeding was tantamount to a ruling of the court upon a substantive matter in the absence of appellant or his counsel. Not so. The appellant was present in person and by counsel. It does not appear that he asked that the contents of the note be disclosed, and that the court refused to reveal to him the contents of the note. If he had made the request of the court to discover the contents of the note, no doubt such request would have been granted. The record does not warrant the conclusion that the trial court, intentionally or otherwise, concealed from appellant or his counsel the contents of the note. The most it shows is that they had no knowledge of its contents. But, for aught that appears to the contrary, they might have had such knowledge upon the asking. For aught that appears to the contrary, they might not have desired such knowledge. For aught that appears to the contrary, it was their own fault that they did not obtain knowledge of the contents of the

note. Appellant can not complain here that the contents of the note were unknown to him, or kept secret from him, when it does not appear that he asked to have such information imparted to him at the time the note was presented to the trial judge. He contented himself with a mere general objection and exception, and he must be held to have waived the information which a specific request would doubtless have brought him. The record does not show that the ground of objection to this proceeding before the trial court was that the contents of the note were unknown to appellant. Such objection can not avail here for the first time.

The inquiry by the juror of the court was "whether or not the jury *had the right, under the law,* to find the defendant guilty of murder in the second degree." It will be observed that the question did not call for an expression of opinion by the judge on the facts in evidence. Giving the jury credit for average intelligence, they must have understood that the court meant to tell them that under the charge laid in the indictment they had the right to find appellant guilty of murder in the second degree if the facts warranted such finding. The inquiry and answer were equivalent to an instruction to that effect. The jury wanted to know, not what the facts were, but what the law gave them the right to do under the facts as they might find them. This, we think, is the only reasonable conclusion deducible from the inquiry, when it is considered in connection with the charge that the court had given them declaring that they were to find the facts in the case from the *testimony.* In instruction number twelve, given at the request of appellant, the court told the jury that the defendant was presumed to be innocent until there was *testimony proving his guilt beyond a reasonable doubt;* "That the law requires proof by legal *and credible evidence* of such a nature that, when it is all considered by the jury, giving to it its natural effect, they feel, when they have weighed and considered it all, a clear and entirely satisfactory conviction of the defendant's guilt." In the first paragraph of the oral instructions given by the court the jury were told that the instructions were to cover each and every phase of the testimony, that the jury were to "take the instructions together after *they have first found the facts;*" that, "*when they have found what the facts are in the*

case, then they are to take all the instructions together, and see what instructions *are applicable to the facts as they find them.*" In view of these instructions, we do not see how the jury could have reached the conclusion, from the question of the juror and the answer of the court, that the court intended to express the opinion that the defendant was guilty of murder in the second degree as contended by counsel for appellant. Their argument is plausible, but their conclusion is unsound. It is at least exceedingly strained and technical.

5. The last proposition is that "the court erred in refusing to instruct the jury on the question of *alibi.*" On this subject the appellant asked the following:

"No. 7. You are instructed that the evidence must support and be in conformity to the allegations made in the indictment, and must show that the accused was present, standing by, aiding, abetting and assisting at the time of the alleged killing; and if you believe that the defendant was absent at the time of the alleged killing, you can not convict under the indictment in the cause."

The court refused this request, but gave the following:

"No. 7. You are instructed that the evidence must support and be in conformity to the allegations made in the indictment, and must show, beyond a reasonable doubt, that the accused was standing by, aiding, abetting and assisting at the time of the alleged killing; otherwise you can not convict under the indictment in this cause."

Appellant also asked the following:

"10. The court charges the jury that the defendant need not prove an alibi by a preponderance of evidence; but if, by reason of the evidence in relation thereto, the jury doubt his guilt, he is entitled to an acquittal."

"11. And the court further charges the jury that where the defense is an alibi, the jury must acquit if, from a consideration of all the evidence, they have a reasonable doubt of the presence of the accused at the place and time of the alleged crime, whether such doubt be from lack of proof on the part of the State or from evidence adduced on behalf of the defendant."

These requests the court refused. But the court gave at the request of appellant the following:

"No. 2. If you find from the testimony, beyond a reasonable doubt, that Walter Gray has been killed, and also find that he was killed by some one or more of several persons, but there is a reasonable doubt as to which person committed the offense, that reasonable doubt must prevail and result in the acquittal of the defendant, unless you find that the defendant was present, aiding, abetting or assisting in the commission of the offense."

"No. 3. The jury are instructed, as a matter of law, that when a conviction for a criminal offense is sought upon circumstantial evidence alone, the prosecution must not only show, by a preponderance of evidence, that the alleged facts and circumstances are true, but they must show by such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the defendant, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant.

The defendant testified that, from shortly after nine o'clock on the night of the alleged murder until the next morning he was asleep in the Lacefield house, about seventy-five or a hundred yards away from the place where it is alleged the killing occurred at about ten o'clock in the night. Conceding that this testimony of appellant tended to prove an alibi, and warranted him in asking an instruction on that subject, and conceding that the requests were proper, the court did not err to the prejudice of appellant in refusing them. For instructions numbered two and three given at the request of appellant, and instruction number seven given by the court, covered the ground embraced in the refused requests. The instructions given required the jury to find beyond a reasonable doubt that the defendant was *standing by, aiding, abetting and assisting* at the time of the alleged killing; otherwise, they should acquit. Such is the purport of the seventh instruction, and the second, *supra,* declares *"unless you find that the defendant was present,* aiding, abetting, and assisting," etc. It necessarily followed, as the converse of the proposition presented by these instructions, that if the jury found that appellant was absent when the killing was done he was not guilty, and the jury should so find. We can not agree with the zealous counsel that it was as "great travesty of justice to convict Benton of murder in the second degree as it would have

been to have convicted him of the higher degree." The proof tends to show a most atrocious murder, and is ample to have sustained a verdict against appellant for the higher instead of the lower degree. Since the record is otherwise free from error, that the jury were lenient is a matter to appellant for congratulation rather than for complaint.

Affirm.

BATTLE, J., dissenting.

---

78 299
180 378

GALLAHER v. STATE.

Opinion delivered April 7, 1906.

1. CONTINUANCE—DISCRETION OF COURT.—The refusal of a postponement in a case on account of the absence of a witness is a matter in the sound judicial discretion of the trial court, for which a reversal can only be had when it appears that there is an arbitrary abuse of discretion. (Page 301.)
2. SAME—ABSENCE OF WITNESS.—No abuse of discretion is shown in refusing a continuance on account of the absence of a witness where the testimony of such witness would have been cumulative, and would have tended to prove an immaterial issue. (Page 301.)
3. INSTRUCTION—APPLICABILITY TO EVIDENCE.—Refusal of an instruction to the effect that certain evidence might be considered as tending to disprove an admitted fact was not error. (Page 301.)

Appeal from Benton Circuit Court; *James A. Rice*, Special Judge; affirmed.

Walker & Walker, for appellant.

1. It was prejudicial to defendant to require him to testify to having, 18 months before the alleged offense for which he was on trial, bought a sack of sugar from the same Reed, there being no evidence that it was stolen sugar.

2. Whether or not defendant was a partner in the firm of Gallaher & Cunningham and financially interested therein was a proper circumstance to go to the jury, along with all other facts and circumstances in evidence, as tending to prove whether or not

he received the property knowing it to be stolen. It was therefore error on the part of the court in its 4th instruction to charge the jury that it was immaterial whether or not defendant was such partner, and that the fact that he was not a partner was no defense; and it was error to refuse the 12th instruction prayed for by defendant.

3. Being surprised by testimony introduced by the State to the effect that defendant's father had stated to witnesses that he (defendant) was a member of the firm of Gallaher & Cunningham, defendant at the time asked for a subpoena for the father, and asked the court to hold the case open until 6 o'clock of the same day, when the father could reach the scene of trial and testify, and stated that the father would testify that he had had no such conversation with the witnesses.

Defendant acted promptly, made known the surprise, and asked for the postponement (55 Ark. 567), and the court should have granted it. The testimony of the father was not merely cumulative. 103 Ind. 142; 5 Am. Crim. Rep. 469.

Robert L. Rogers, Attorney General, for appellee.

1. The evidence is sufficient to sustain the verdict. That defendant bought the sugar for an inadequate price late at night from one not a dealer therein, with wholesale grocery stores near his establishment; that it was delivered at night, and defendant came to his store on Sunday morning and moved it inside the store—are circumstances inconsistent with innocence.

2. The gist of the offense is receiving the property, knowing it to be stolen, and it is no defense that defendant did not receive or expect a benefit. 117 Mass. 141; 69 N. C. 29.

HILL, C. J. Gallaher was convicted of knowingly receiving stolen property. Without going into the evidence, it is sufficient to say that it was ample to sustain the verdict. Errors are assigned in the instructions, but the court fails to find any departure from established precedents.

Gallaher purchased the property at night for a greatly reduced price of one Reed, who has pleaded guilty to stealing it. The property (ten sacks of sugar) was placed in stock in the store of Cunningham & Gallaher. Two witnesses for the State testified that Samuel Gallaher, father of the appellant, stated that

the appellant was a member of the firm of Cunningham & Gallaher. Cunningham, the other member of the firm, also a State's witness, testified that Samuel Gallaher, and not the appellant, was the member of the firm. The appellant claims that he was surprised at the evidence to the effect that he was a member of the firm, and asked a postponement of the cause to enable him to get his father from an adjoining county as a witness to contradict these statements. The court refused the postponement. This is a matter in the sound judicial discretion of the trial judge, and for which a reversal can only be had when it appears that there is an arbitrary abuse of discretion. Such is not the case here. The appellant had the benefit of his own testimony and the other member of the firm, and the latter accredited by the State as her own witness, and his father's testimony would have been merely cumulative. The testimony did not go to the gist of the case; the appellant, according to his own statement, managed and controlled the business for his father; and as his interest in the store, and consequently the purchase of goods therefor, only went to furnish a possible motive, it can not be said that his interest as manager and representative of his father was much less than as partner. The issue of fact was an unimportant one, and the action of the court was not arbitrary in refusing a continuance to enable appellant to fortify his other evidence.

Error is assigned to the court refusing this (the 12th) instruction: "I charge you that if you find from the evidence that the defendant, Hugh Gallaher, was not a partner in the firm of Gallaher & Cunningham, and had no financial interest in their business, then the jury would be authorized to consider this fact, together with all the other evidence and circumstances testified to and before you in evidence, as tending to prove whether or not the defendant received the sugar alleged to have been received, if you find he received it, knowing it to be stolen property at the time it was received." This instruction was properly refused. Appellant admitted receiving and purchasing the goods, and the inquiry was as to his guilty knowledge, whereas this instruction sought to have considered his interest in the business as evidence tending to prove whether he had received it. If it had been drawn to have pointed out this lack of interest indicating a dearth of motive for purchasing with guilty knowledge, it

might well have been given, and probably would have been; still the point was not important, as before stated, and could have had little, if any, bearing upon the question of appellant's guilt, which was fairly submitted to the jury on abundant evidence.

Questions as to the admissibility of evidence are discussed; but, as they were not raised in the motion for new trial, they were waived.

The judgment is affirmed.

WOOD, J., (dissenting.) The twelfth instruction should have been given. In view of the other instructions given by the court, the giving of this was necessary to insure appellant a fair trial. It submitted a vital issue presented by the evidence that would have tended to show a lack of guilty motive without which this offense, like the offense of larceny, was not complete. Certainly appellant had the right to have the jury consider any fact that the evidence tended to prove, which went to the question of his intent. The *lucri causa* was as essential here as in larceny. And the question of whether or not appellant was a partner and had a financial interest in the firm was most pertinent. I also think that the request of appellant to have the cause postponed for the short time indicated under the circumstances was a reasonable and proper request, and should have been granted. The appellant should have been given another trial.

MYERS v. STATE.

Opinion delivered April 7, 1906.

WITNESS—IMPEACHMENT.—It was proper to ask a witness for the defendant in a murder case whether he had any contract with defendant's father in regard to testifying.

Appeal from Lawrence Circuit Court, Western District; *Frederick D. Fulkerson,* Judge; affirmed.

J. B. Judkins, for appellant.

Robert L. Rogers, Attorney General, for appellee.

WOOD, J. On a good indictment charging appellant with the crime of murder in the first degree in the killing of one Will Payne, appellant was convicted of voluntary manslaughter, and sentenced to three years in the pentitentiary. Two grounds are urged for reversal.

1. That the court erred in permitting the prosecuting attorney to ask the witness, Thomas East, who testified for appellant, this question: "Did you ever have any contract with Dr. Myers in regard to testifying?" and in permitting the witness to answer. Appellant contends that the question was improper and prejudicial. He says "that it had a tendency to prejudice the minds of the jury against appellant, and injure his cause, by attempting to show that his father, Dr. Myers, was using his influence and means to secure false testimony in behalf of the appellant, without showing that appellant was present and consenting thereto, or that he had authorized his father to do so. The question was not prejudicial, because the witness answered it in the negative. Had it been shown that appellant's father had made an attempt to influence improperly a witness to testify falsely in behalf of his son, and had failed, such testimony would be prejudicial; but such is not the effect of the question and answer here. On the contrary, it shows that there was no attempt by appellant's father to bribe the witness. If the question, as asked, had been answered in the affirmative, showing that the witness was testifying under contract with Dr. Myers, it would have been proper testimony going to the credibility of the witness East.

2. It is contended that the verdict was contrary to the evidence, but, after carefully reviewing the evidence in the record, we are of the opinion that it amply sustains the verdict. Appellant and deceased at the time of the killing were bitter enemies, the result of a previous quarrel and fight in which appellant had been "badly beaten up" by Payne, who was the larger and stronger man. Appellant had not seen Payne after the previous fight "until the day of the shooting." He had been heard to say "shortly after the fight" that he "would get him yet," meaning Payne. On the day of the shooting witnesses for the State testified that they saw Payne and appellant in front of the drug store

of the father of appellant; that the first thing that attracted their attention was the first shot; then they saw Payne running, and appellant firing at him. Appellant fired several shots at Payne while he was running. One witness testified for the State that the party shooting "seemed to be in the door of the drug store." Other witnesses for State say that Payne did not turn toward the appellant "at any time," "or attempt to do anything." Witnesses also say that after the shooting appellant came into the drug store, and said: "I got the son of a bitch; I fixed him." Deceased was shown to have been shot in the back and on the right side. True, testimony for appellant tended to show threats on part of Payne to kill Dr. Myers and his son, which threats were communicated to appellant on the day of the killing, and the appellant's own testimony tends to prove that Payne was the aggressor at the time of the killing. But the weight of the evidence was for the jury.

From the viewpoint of the State, the evidence certainly warranted a verdict for even a higher degree than the jury found.

Affirm.

HILL, C. J., not participating.

---

78 304
88 476

GRIMMETT v. OUSLEY.

Opinion delivered April 7, 1906.

ACCORD AND SATISFACTION—EFFECT OF ACCORD UNEXECUTED.—Under the rule that an accord without satisfaction does not constitute a bar to the original cause of action, it is no defense to a suit to enforce a mortgage that the mortgagee agreed to accept land in satisfaction if the agreement was never carried into effect by execution of the deed and release of the mortgage.

Appeal from Columbia Chancery Court; *Emon O. Mahoney*, Chancellor; affirmed.

J. M. Kelso, A. S. Killgore and *Oliphint & Miles*, for appellants.

Smead & Powell, for appellees.

HILL, C. J. Grimmett was short in his accounts as collector of Columbia County, and, in order to secure funds, executed a note, secured by real estate mortgage, for $2,100, to Brewer and Shannon. Brewer assumed Shannon's share, and afterwards assigned the note, and this is a suit by the representative of the assignee to recover a balance on the note, and to foreclose the mortgage. Grimmett pleaded payment. Two questions are presented on appeal. The first are two items claimed as credits by Grimmett and rejected by the chancellor.

Various notes and accounts of Grimmett's were turned over to Brewer, and those which were paid were credited in the judgment, but these two were not shown to have been paid, and Grimmett insists that he should have credit because he says that they were accepted as payment *pro tanto.* But there was no definite evidence of a novation. A mere statement that he so understood it is not sufficient to overcome the finding of the chancellor treating them as collateral, which the circumstances justified the court in doing. Practically all the credits contended for, amounting to nearly $1,000, were allowed. Grimmett has no ground of complaint on this score.

The second question is as to an accord and satisfaction. Grimmett testifies, and he is corroborated by others, that he offered Brewer four lots in the town of Buckner in settlement of the balance of the mortgage debt, and that, after viewing them, Brewer agreed to accept two of them in satisfaction of the residue of the debt. There are circumstances tending to prove that this particular debt was not settled when Brewer died; but, accepting Grimmett's version of the facts, still he can not recover. There is no evidence of the execution of this agreement, no deed is shown, no release of the mortgage, no surrender of the note. Grimmett continued to pay taxes on the property. The burden was upon Grimmett to prove, not only the agreement to accept these lots in satisfaction of the mortgage debt, but an execution of the agreement. Judge Thompson in a recent article on accord and satisfaction thus states the law: "To constitute a bar to an action on the original claim or demand, the accord must be fully executed unless the agreement or promise, instead of the per-

formance thereof, is accepted in satisfaction." 1 Cyc. 313-314. This principle has had frequent application in this State. *Ballard* v. *Noaks,* 2 Ark. 45; *Pope* v. *Tunstall,* 2 Ark. 209; *Crary* v. *Ashley,* 4 Ark. 203; *Levy* v. *Very,* 12 Ark. 148.

The judgment is affirmed.

---

78 306
c82 581

BONANZA MINING & SMELTER COMPANY *v.* WARE.

Opinion delivered April 7, 1906.

1. PLEADING—INCONSISTENT DEFENSES.—In a suit against a corporation upon a contract, a subsequent answer denying that defendant executed the contract is inconsistent with the original answer which admitted that it executed the same. (Page 312.)
2. APPEAL—OBJECTION NOT RAISED BELOW.—Objection that a supplemental answer is inconsistent with the original answer may be waived. (Page 313.)
3. SALE OF LAND—DISTINCTION BETWEEN SALE AND OPTION.—Where a vendee executed his notes for the purchase money of land, and the vendor executed a deed which was placed in escrow to be delivered when the notes were paid, and nothing remained to complete the sale except the payment of the purchase money and delivery of the deed, the transaction amounted to a sale, and not to an option to purchase. (Page 314.)

Appeal from Marion Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The Bonanza Mining & Smelter Company is a corporation of Virginia, authorized to do business in this State. Appellee sues it on two promissory notes for $6,000 each, dated March 23, 1901. One of the notes was payable on or before September 16, 1901, the other on or before March 16, 1902. The notes bore interest from March 16, 1901, at the rate of 8 per cent. per annum, and the interest was payable semi-annually. Each note recited that it was given "for part of the purchase money of the S. W. ¼ of the N. W. ¼ of section 14, and the S. E. ¼ of the N.

E ¼ of section 15, township 17 north, range 15 west." The notes were signed, "F. S. Coburn, Pres., George Johnson, Secy." The notes in one corner contain a recital showing that "deed was in escrow in Bank of Yellville, at Yellville, Ark., to be delivered upon payment of note, due September 16, 1902."

The appellee attaches as an exhibit to his complaint a deed from himself and wife purporting to convey the above-described lands, in consideration of the aforesaid notes which are accurately described therein, "unto the said F. S. Coburn, president, the Bonanza Mining & Smelter Company, of Arkansas, and unto its successors and assigns forever."

There was a prayer for judgment for the amount of the notes and interest, and for a vendor's lien to be declared on the lands described, and for other and proper relief. The summons was served upon J. C. Floyd, the agent for appellant, January 24, 1902.

The caption to the complaint was as follows: "In the Marion Circuit Court, February term, 1901, J. C. Ware, plaintiff, *v.* The Bonanza Mining & Smelting Company, defendant." The record shows that the first answer was filed February 19, 1902. In this answer the case was styled as in the complaint towit: "J. C. Ware, plaintiff, *v.* The Bonanza Mining & Smelter Company, defendant." This answer contained substantially the following allegations: That the defendant became desirous of acquiring title to a certain ledge or outcropping of zinc, supposed to be on the lands described in plaintiff's complaint; that John H. Dickerson, agent and partner of plaintiff, informed defendant that said ledge was on said land, and asserted that same was the property of the plaintiff, who could convey the same in fee simple to the defendant; that, acting upon the representations of said Dickerson and believing that said lands containing said outcropping of zinc were the property of the plaintiff, J. C. Ware, it agreed to give to the said J. C. Ware the two notes set forth in the complaint, upon his placing in the Bank of Yellville a deed in escrow conveying to it the eighty acres of land containing the said outcroppings of zinc as aforesaid, the said sale of land to become complete upon the payment by defendant of said notes and the delivery of said deed; that the defendant had no such title or interest as to authorize the plaintiff to foreclose a vendor's

lien on same, the plaintiff reserving title in himself; that plaintiff well knew that defendant desired to purchase the lands containing said outcropping of zinc, and did not desire to purchase any other, and that the plaintiff and said Dickerson knew that the plaintiff did not own and could not convey the same; and that, relying on such fraudulent representations of said Dickerson, it agreed and contracted with said Ware to purchase said lands for the consideration of $12,000, and executed the notes described in the plaintiff's complaint to secure the payment of said sum; and that, by reason of the fraud or mistake of the said Dickerson, said notes should be held to be void.

This answer was signed by J. C. Floyd, attorney for defendant. On August 19, 1902, an amended answer was filed. In this the case was styled, J. C. Ware, plaintiff, *v.* Bonanza Mining & Smelter Company of Arkansas, defendant. The amended answer was the same in substance as the original, and in addition contained allegations denying that plaintiff had sold it the land described in his complaint, and denying that it ever took possession of the land, and denying that plaintiff had ever executed a good and sufficient deed to said lands, and denying that he had placed such deed in the Bank of Yellville by agreement with defendant, to be delivered on payment of the notes described and set forth in the complaint, and alleging in substance that the contract made with Ware was in the nature of an option contract, and was intended as such, and that, on account of the fraud and misrepresentations of one J. H. Dickerson, agent of said J. C. Ware, defendant has declined to take the property under said option.

At the February term, 1903, appellant filed what is designated in the record its "separate answer," which is, in substance, as follows: That the Bonanza Mining & Smelter Company is a corporation duly organized in the State of Virginia, is a distinct, separate and independent corporation from the Bonanza Mining & Smelter Company of Arkansas, which was organized under the laws of South Dakota as the Bonanza Gold Mining Company of Boston, and its charter afterwards amended, changing its name to the Bonanza Mining & Smelter Company of Arkansas, which will appear more fully from copies of articles of incorporation of said companies marked exhibits A and B, and

made part of said answer. That the contract and notes relied on by plaintiff herein were made with and by F. S. Coburn, for the Bonanza Mining & Smelter Company of Arkansas, of South Dakota, and not by or for the Bonanza Mining & Smelter Company, organized in Virginia, defendant herein. That, on the date of the execution of said contract and notes sued on, defendant company had no corporate existence, and it denies that the two notes sued on for $6,000 each with 8 per cent. interest from date, executed March 23, 1901, purporting to bind the Bonanza Mining & Smelter Company to pay said sum, and signed by F. S. Coburn, president, and George Johnson, secretary, were executed by the defendant company to the said J. C. Ware, and further deny that F. S. Coburn, president, and George Johnson, secretary, had any authority to act for it at said time in the execution of said notes, and deny that defendant company at any time thereafter ratified their acts in the execution of said notes and contract for the purchase of said lands as the act and deed of said corporation, and deny that it ever at any time assumed payment of said notes, or contracted with F. S. Coburn or J. C. Ware for the payment of the same, and deny that said George Johnson, who signed said notes as secretary, was ever secretary of their said company, or even a stockholder therein. It alleges that the Bonanza Mining & Smelter Company, defendant, was organized in Virginia, July 17, 1901, with Fred S. Coburn as president and Frank K. Raymond as secretary, and had no existence at the date of the alleged contract and notes relied on by plaintiff in this action.

The answer concludes with prayer for judgment and for all proper relief.

To this answer were attached exhibits A and B, showing the incorporation of "the Bonanza Mining & Smelter Company," of Virginia, on the 18th day of July, 1901, and the incorporation of the "Bonanza Gold Mining Company of Boston" on the 11th day of September 1899, in South Dakota, and an amendment to the articles of incorporation of the "Bonanza Gold Mining Company of Boston," made November 1, 1900, changing the name of said corporation to that of "the Bonanza Mining & Smelter Company of Arkansas," and reciting "with a branch office at Washington, D. C." Also a certificate of the amendments signed by F. S.

Coburn, president, and George Johnson, secretary, dated April 6, 1901.

The decree of the court recites: "On this day comes the plaintiff by attorney, and defendants Bonanza Mining & Smelter Company, organized in Virginia, by attorney, and Bonanza Mining & Smelter Company of Arkansas by attorney, and, all parties announcing ready for trial, this cause is submitted to the court upon the complaint of plaintiff with exhibits thereto attached, the answer of Bonanza Mining & Smelter Company of Arkansas, and the separate answer of the Bonanza Mining & Smelter Company organized in Virginia with exhibits thereto attached, the depositions of certain witnesses for plaintiff and the original answers offered by way of evidence for plaintiff, and the depositions of certain witnesses (naming them) for the defendants."

"Whereupon the court finds from the evidence that on the 23d day of March, 1901, F. S. Coburn, for the Bonanza Mining & Smelter Company afterwards organized, made and entered into a contract with the plaintiff, J. C. Ware, for the purchase of the lands" described "for the sum and price of $12,000, evidenced by two promissory notes of $6,000 each" (describing them); "that on the 23d day of March, 1901, F. S. Coburn and George Johnson, secretary for Bonanza Mining & Smelter Company, executed their promissory notes for said sum of money aforesaid, and that each of said notes is past due and unpaid; that on the 21st day of March, 1901, J. C. Ware and wife, Mary M. Ware, made and executed their warranty deed conveying said lands to the defendant, the grantee therein being F. S. Coburn, president of Bonanza Mining & Smelter Company, by mistake, when it should have been Bonanza Mining & Smelter Company; that on the 11th day of May, 1901, the plaintiff J. C. Ware, and Mary M. Ware made and executed a warranty deed conveying said lands to F. S. Coburn, president of the Bonanza Mining & Smelter Company of Arkansas, at the request of the attorney of defendant Bonanza Mining & Smelter Company." "The court further finds that the Bonanza Mining & Smelter Company is a corporation duly organized under the laws of Virginia, and that the plaintiff is entitled to a specific performance of said contract and for judgment on said notes." The court thereupon rendered judgment against "the defendant Bonanza Mining & Smelter

Company of Virginia" in the sum of $12,000 principal, and $2,986.66 interest, and declared same a lien on the lands, and ordered same sold to pay the judgment, and decreed all costs against defendants. The Bonanza Mining & Smelter Company of Virginia appealed.

Other facts stated in the opinion.

J. C. Floyd, for appellant.

1. The contract relied on by appellee was only an option. When the notes were not paid when due, and thereafter the deed was withdrawn by appellee from escrow, the contract was at an end. 57 L. R. A. 173; 94 N. W. 469; 120 Ia. 218; Black, Law Dict. 853; 39 W. Va. 214; 19 S. E. 536; 19 S. W. 27; 93 Ky. 185; 21 L. R. A. 127; 33 Fed. 530; 56 Fed. 1; 26 S. W. 334; 7 Tex. 356.

2. The proof establishes the fact that appellant had no existence at the date of the alleged contract, and is therefore not bound by a contract to which it was not a party. Clark on Cont. § 217; 9 Cyc. 386; 109 Ala. 393; 71 Ala. 122.

3. Having no corporate existence at the date of the alleged contract, appellant can not be held responsible for the acts of F. S. Coburn, C. E. Wood or the Bonanza Mining & Smelter Company of Arkansas, on contracts made by either with appellee, previous to its incorporation. 150 Mass. 252; 5 L. R. A. 586; 141 Mass. 148; 38 L. R. A. 300.

Wood Bros., for appellee.

1. The contract was an absolute sale of the land; a contract stipulating everything to be done by both parties, in which the minds of the parties met and agreed, resulting in the sale on credit according to the tenor of the notes, and was consummated on the part of appellee by his executing a deed and delivering possession of the land. Neither party could rescind.

2. The evidence establishes the fact that the purchase was made for appellant, which was then organized for that purpose and was afterwards chartered.

A corporation is bound by a contract made for its benefit before the issuance of its charter, but after the incorporators had agreed to incorporate and had filed application for charter. 3 L. R. A. 583. The corporation can not hold the property and

refuse to pay for it. 26 L. R. A. 859. Nor can it repudiate the purchase after its obligation has accrued. 40 L. R. A. 851.

3. A corporation may ratify a contract which it has the power to make. 40 L. R. A. 851; Bishop on Cont. 304, 310, 1110; Morawetz on Priv. Corp. § § 543, 549; 10 Cyc. 1065, *et seq.;* 3 Enc. of Ev. 631, *et seq.*

WOOD, J., (after stating the facts.) The various answers leave the issues in much confusion. It is clear from the complaint that only the Bonanza Mining & Smelter Company of Virginia was sued. There is nothing in the record to show that the "Bonanza Mining & Smelter Company of Arkansas," a corporation of South Dakota, was sued. There is no order of record making it a party to the suit. No appearance was entered by it, and no answer was filed by it. True, the decree of the court recites that the Bonanza Mining & Smelter Company of Virginia and the Bonanza Mining & Smelter Company of Arkansas "come by attorney," and that the cause is heard upon, *inter alia,* the answer of the Bonanza Mining & Smelter Company of Arkansas. But we do not find any answer of the "Bonanza Mining & Smelter Company of Arkansas," a corporation of South Dakota, in the record; so that it must be taken from the record that all the answers, original, amended and separate, were filed by the "Bonanza Mining & Smelter Company" of Virginia, the only corporation sued in this action. As thus considered, the defenses set up are inconsistent. For in the original answer, which was introduced in evidence, appellant admits that it made a contract with appellee for the purchase of the lands, and executed the notes set forth in the complaint, but alleged that the purchase was to become complete upon the payment of these notes, and the delivery of a deed to the lands, which should be deposited in the Bank of Yellville in escrow, awaiting the payment of the notes. It is alleged also in this answer that the plaintiff should not recover on the notes because of the false and fraudulent representations of one Dickerson, the agent and partner of plaintiff, as to the title and character of the land alleged to have been sold to appellant. While in the amended answer, in addition to this defense, it is set forth that the contract was only an option for the purchase of the land, which should fail on account of the fraudulent representations of Dickerson concerning same; and,

in what is designated as the "separate answer," appellant for the first time denies that it executed the notes sued on, and sets up that the contract and notes were made with and by F. S. Coburn for the "Bonanza Mining & Smelter Company of Arkansas," and not for appellant, and that at the date of the execution of such notes appellant had no corporate existence. So the defenses set up in the original and the amended answers, and that set up in the so-called "separate answer" are inconsistent. However, it does not appear that any of these answers were verified. Appellee permitted them to be filed in the manner indicated without any objection, and treats them here as raising the following issues:

1. "That the contract between appellant and appellee concerning the land was merely an option to purchase.

2. That the appellant was not in existence at the time the notes sued on were executed and the alleged sale of the land made; that if there was a sale of the land, the sale was to the Bonanza Mining & Smelter Company of Arkansas, a corporation of South Dakota, and that appellant is not liable."

1. The testimony is voluminous, and it could serve no useful purpose to review it in detail.

The appellee, as the owner of the land, testified, in substance, that one Dickerson came to him to buy the land for some Washington parties. Appellee says: "They submitted another proposition, that they would pay me $6,000 of the money at the end of six months, and another $6,000 at the expiration of twelve months, notes to bear 8 per cent. interest from date until maturity. It was made by the company through Mr. Dickerson. I accepted the proposition, and took two notes for $6,000 each, dated Washington, D. C., March 23, 1901, signed by F. S. Coburn, president, and George Johnson, secretary. They were president and secretary of the Bonanza Mining & Smelter Company. The company accepted that deed as a conveyance of land, and executed a deed to said company on the 21st day of March, 1901, and the deed was the conveyance of the above-described land in consideration of the $12,000. I delivered the deeds to the Bank of Yellville for the Bonanza Mining & Smelter Company. The company accepted that deed as a conveyance of land, and turned the notes over to me, and, by agreement with me and the Bonanza Mining & Smelter Company, the deed was to be

turned over to the company by the bank on the payment of the said notes, and I turned the land over to them, and they came and took possession of it. Mr. Coburn came and took possession of it, and he and Mr. Dickerson worked the land, and I have never had any control or possession of the land since that time. I owned the land individually. Neither J. H. Dickerson nor any one else had any interest in same till I sold it to the Bonanza Mining & Smelter Company. Dickerson was not my agent in the sale of this land, and did not represent me in any way."

Dickerson, who claims to have represented appellant in the purchase of the property, and who negotiated the transaction between the parties, agrees substantially with the appellee as to the terms of the contract. Their testimony and the notes and the deeds in evidence show that the chancellor was correct in holding that the contract was a sale, and not a mere option to purchase.

In *McMillan* v. *Philadelphia Company,* 159 Pa. 142, it is said: "The distinction between an option and a contract of sale or lease is broad and plain. An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end. A contract of sale or lease fixes definitely the relative rights and obligations of both parties at the time of its execution. The offer and acceptance are concurrent, since the minds of the contracting parties meet in the terms of the agreement."

"An option is simply a contract by which the owner of property agrees with another that he shall have a right to buy the property at a fixed price within a certain time." *Litz* v. *Goosling,* 19 S. W. 527, 21 L. R. A. 128; *Hopwood* v. *McCausland,* 120 Iowa, 218; *Hanly* v. *Watterson,* 39 W. Va. 214; *Johnson* v. *Trippe,* 33 Fed. 530.

This was not a mere offer to sell on the part of the vendor, which the vendee could accept or reject at pleasure within the time prescribed for the payment of the notes. Upon the delivery

of the deed appellee had the right to demand the payment of the notes when due. True, the deed was in escrow, but that was for the benefit of the vendor, a benefit which he could waive at any time by tendering the deed to the grantee. Nothing remained to complete the sale except the payment of the notes and the delivery of the deed, and the vendee could not have escaped the payment of these notes if the vendor, either before or after the time for the payment of the last note and within the period of limitation for liability on the notes, had delivered or offered to deliver to the vendee a deed to the land. If it had been only an option to purchase, appellee could not have compelled the holder of the option to pay the notes upon an offer to deliver the deed and possession of the property under it. If an option only, the actual delivery of the deed and possession of the property under it would not have entitled the appellee as the owner of the land to payment of the notes. If an option only, the holder of the option could avoid the payment of the notes simply by refusing to do so until the time when they were due had expired. But we do not so understand this contract. There was a straightout contract for the sale of the land, the specific performance of which either party to it had the right to demand of the other when it had fully complied with the conditions on its part.

2. Having determined that there was a contract for the sale of the land, the next questions are, with whom was it made, and was appellant liable? The testimony of appellee shows that the contract he made was with Dickerson, who claimed to be representing some Washington parties. True, he testified in a general way that he "sold the lands to the Bonanza Mining & Smelter Company, that bought and operated the mine known as the Beulah on Clabber Creek." He also testified that F. S. Coburn and George Johnson were president and secretary, respectively, of the Bonanza Mining & Smelter Company, and that "he executed a deed to the company," etc. But the other uncontradicted proof in the record, documentary and oral, shows that this was matter of opinion or conclusion on the part of appellee, and that he was mistaken about it. Dickerson, who negotiated the deal with Ware, claimed to be representing Washington parties, but his evidence shows that he was really representing

one F. S. Coburn, and his testimony, as well as the testimony of Coburn, shows that the land was sold to Coburn. True, the notes name the Bonanza Mining & Smelter Company as the payer, and are signed by F. S. Coburn as president and George Johnson as secretary, and the original deed was executed to the Bonanza Mining & Smelter Company. But the articles of incorporation of the appellant, made an exhibit, show that it was not in existence at the time these notes and deed were executed. The notes were therefore not executed by appellant, nor was the deed made to it. This is conceded by appellee's counsel. But they contend that appellant was organized at this time, and afterwards chartered for the purpose of succeeding to all the rights, and assuming all the obligations of the "Bonanza Mining & Smelter Company of Arkansas," a corporation of South Dakota, that was in fact the real purchaser. There is an exhibit in the record showing that at the time the notes and deed were executed there was a corporation in existence chartered under the laws of South Dakota, and known as the "Bonanza Mining & Smelter Company of Arkansas," and there is enough perhaps to show that F. S. Coburn and George Johnson were, respectively, the president and secretary of such corporation. But, if this be sufficient, with the other proof, to show that the "Bonanza Mining & Smelter Company of Arkansas," the Dakota corporation, purchased the land of appellee, it falls far short of showing that appellant purchased same, or was liable for the purchase price thereof. There is no proof whatever in this record that appellant, the Virginia corporation, ever assumed the obligation of the Dakota corporation in any way. This was necessary, and the burden was upon appellee to show it before he could hold appellant liable. It is obvious that neither appellee nor Dickerson, his witness, knew anything about either the Dakota or the Virginia corporations, and the testimony of Coburn does not show that he was authorized by the Virginia corporation to purchase the property from the Dakota corporation, or that he did so. The utmost that his testimony tends to establish along this line is that he made the purchase. It nowhere appears that he made, or was authorized to make, it for appellant, while the proof on behalf of appellant is clear and undisputed that it was not connected in any manner with the Dakota corporation. True,

Coburn was the president of both corporations, but he was the only stockholder and member of the Dakota corporation that had any interest in the Virginia corporation. The members of the two corporations were entirely different, and the corporations were independent of each other.

One of the witnesses for appellee, towit, C. E. Wood, testified that he was one of the incorporators of appellant, and, among other things, he said: "The Virginia company was organized to handle any properties it might see fit to purchase, and it declined to purchase the Ware property and one or two other properties which Mr. Ware was desirous of transferring to the company. In fact, the Virginia company, when it was organized, purchased only the interest of F. S. Coburn and the Bonanza Mining & Smelter Company of Arkansas in the properties which were conveyed to it, but did not at any time assume any of the obligations upon these properties nor agree to pay the same, but left the matter open to the determination of the company, and it never at any time assumed or authorized assumption of any obligation given by Coburn individually, or by the Bonanza Mining & Smelter Company of Arkansas, or the South Dakota Company." He further testified: "The Bonanza Mining & Smelter Company of Virginia never at any time either purchased or agreed to purchase the J. C. Ware property, and was never at any time in possession of it or exercised any authority over it or considered that it had any title to it."

Other witnesses for appellant corroborate this, and we do not find anything in the record to refute it. There is no deed in this record showing that Coburn, or "The Bonanza Mining & Smelter Company of Arkansas," conveyed the Ware land to the appellant, and no proof that appellant assumed the obligation of Coburn or of the South Dakota corporation to pay for the land. True, Ware is now offering to convey the land to the appellant upon the payment of the notes executed by Coburn or the South Dakota corporation, but appellant refuses to take the land and pay the price. Under the proof, we think it has the right to do so. This is not the case of a corporation holding on to property and pleading the doctrine of *ultra vires* against the obligation to pay for it, as in *Seymore* v. *Spring Forest Cemetery Association,* 26 L. R. A. 859; and the facts

of this case differentiate it entirely from the case of *Spring Garden Bank* v. *Hulings Lumber Co.*, 3 L. R. A. 583, cited and relied on by appellee. In that case, it is said: "The said company was at the time the deed was delivered to and accepted by it a complete corporation duly chartered and organized; and not only this, but it had, at the date of said deed, a potential existence which subsequently became an actual and legal corporation." The same parties, who were a *partnership*, with a "potential existence" and who had signed an agreement to become a corporation, at the time the deed was executed, afterwards became the corporation, and "accepted the deed executed and delivered to it." Of course, it was held in that case that the deed vested the title to the lands described therein to the corporation. But there is nothing in this case like that, and therefore we have not thought it necessary to review that case *in extenso*. We see nothing in the facts of this record to justify appellee in invoking the doctrine of ratification against appellant. The appellee fails to show a cause of action against appellant. The decree is therefore reversed, and the complaint is dismissed for want of equity.

HILL, C. J., not participating.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* STONE.

Opinion delivered April, 7, 1906.

1. CARRIER—RE-CHECKING BAGGAGE—AGENCY.—While the authority of an alleged agent can not be proved by his own declaration, yet, since the possession of a baggage check is *prima facie* evidence of ownership or authority to receive the baggage, it was error to refuse to permit a carrier which returned a trunk to the place from which it was shipped to show that it was done under the directions of one shown to have been in intimate relationship with the owner, who had a letter from such owner requesting him to have the trunk returned, and also had in his possession the baggage check itself. (Page 320.)

2. SAME—RATIFICATION OF AGENT'S ACT.—Where a trunk was returned by the carrier to its initial point, and subsequently rechecked to another point by another carrier at the request of an alleged agent of the owner, and she thereafter accepted the new check, and the trunk was subsequently lost, the acceptance of the second check was a ratification of the act of the agent, and released the first carrier. (Page 322.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; reversed.

B. S. Johnson, for appellant.

1. It was error to exclude testimony offered by defendant to prove that one Stone had called on the agent at four or five different times asking for plaintiff's trunk before its arrival, at one time presenting the check therefor, and at another representing that she was his wife, and exhibiting a letter from her directing that the trunk be returned to Haileyville.

2. Possession of the baggage check is *prima facie* evidence that the holder is the owner or authorized to receive possession of the baggage. 24 Ill. 332; 31 Conn. 284; 94 N. Y. 278; 6 Col. 33; 20 Kan. 669; 66 Hun (N. Y.), 202. It follows that the holder of the check is entitled to possess or control the disposition of the baggage to which the same check is attached.

3. It was error to permit plaintiff to testify to the value of the contents of the trunk. The interested party may prove the contents and loss of the trunk, but not the value of the articles. 24 Ill. 332; 19 Ill. 558; 22 Ill. 272. It is the province of the jury to settle the amount of damages from the facts proved by the witness. 71 Ark. 302; 47 Ark. 501; Lawson on Ex. and Op. Ev. 448; 67 Ark. 375; 24 Ark. 251; 62 Ark. 510; 3 Sedg. on Dam. § 1293; 59 Ark. 110, and many other authorities.

4. If defendant returned the trunk to Haileyville, and plaintiff thereafter authorized it to be re-checked to Mansfield, she thereby ratified the act of defendant in returning it. Acceptance of the check for the trunk over the line of the connecting carrier from Haileyville to Mansfield was a delivery to the latter, and absolved defendant from liability.

Taylor & Jones, for appellee.

1. Under our statutes plaintiff was entitled to testify in her own behalf. Kirby's Digest, § 3093. The owner may testify to the value of the articles, though he is not shown to have any

special knowledge in respect thereto. 43 Ill. App. 609; 6 Cyc. 677.

2. Appellant's contention that possession of the baggage check is *prima facie* evidence that the holder thereof is the owner and entitled to possession of the baggage is not borne out by the authorities cited. The check is *prima facie* evidence against the carrier of receipt of the baggage by it. Carrier's liability ends only when delivery is made to the owner or his order. 6 Cyc. 671.

McCULLOCH, J. This is an action brought by appellee, Lena Swallows, *alias* Lena Stone, against the railway company to recover damages in the loss of her trunk, which was shipped as baggage over appellant's road. She purchased a ticket from Haileyville, Indian Territory, on the Choctaw, Oklahoma & Gulf Railroad, to Pine Bluff, Arkansas, on appellant's line of road, and her trunk was checked through. The trunk was checked after she left Haileyville, and by an acquaintance the check was sent to her by mail at Pine Bluff, and she exhibited it at the trial of the case. The trunk, it appears, failed to reach Pine Bluff while she was in that city, and she failed to get it there, though she demanded it. She returned to Haileyville without her trunk, and subsequently went to Mansfield, Arkansas, and has never received it, so she testified. She went to Pine Bluff with a man named Stone, and assumed the name of Stone, instead of her true name, Swallows, and passed as Mrs. Stone. They stopped in the same boarding-house there.

Appellant's baggage clerk at Pine Bluff testified that he shipped the trunk back to Haileyville on the same check, *via* appellant's road to Little Rock, and thence over the Choctaw, Oklahoma & Gulf Railroad to Haileyville. "The defendant then offered to prove by this witness," copying literally from the record, "that, four or five different times before the arrival of the trunk in controversy in Pine Bluff, one E. S. Stone called on him, asking for the plaintiff's trunk, presenting at one of the times C. O. & G. check from Haileyville to Pine Bluff No. 98013 [which was the description of the check held by plaintiff and exhibited at the trial]; that the last time he called, which was about the 4th or 5th of April, 1903, he exhibited to witness a letter purporting to have been written by the plaintiff, represent-

ing to witness that the plaintiff was his wife; and that in said letter the plaintiff requested that her trunk be returned from Pine Bluff to Haileyville as soon as it arrived at Pine Bluff; that the trunk was described in the letter as bearing check No. 98013; that, pursuant to the directions so given by Stone and said letter, witness sent said trunk back to Haileyville as soon as it arrived at Pine Bluff." The court refused to admit this testimony, on the ground that the agency or authority of Stone had not been shown. This testimony was competent, and should have been admitted. The plaintiff denied that she ordered the trunk returned to Haileyville, or that she authorized Stone to direct its return. She also denied that she had entrusted the check to Stone. It is undisputed, so far as the testimony in the record shows, that the trunk finally arrived at Pine Bluff, and was returned to Haileyville. If the plaintiff directed its return, and it reached Haileyville safely over the connecting carrier's line (which was undisputed), and the plaintiff accepted it then, or caused it to be rechecked to Mansfield (as there was testimony tending to show), then the defendant was not liable, even though the trunk was subsequently lost after it left Haileyville the second time. It was therefore important to determine whether or not the plaintiff authorized Stone to have the trunk sent back to Haileyville. It is undisputed that he did direct its return, and that it was returned according to his directions. It is well settled that the agency and authority of an alleged agent can not be proved by his own declarations. *Carter* v. *Burnham,* 31 Ark. 212; *Holland* v. *Rogers,* 33 Ark. 251; *Chrisman* v. *Carney,* 33 Ark. 316, *Howcott* v. *Kilbourn,* 55 Ark. 213; *Turner* v. *Huff,* 46 Ark. 222.

But the intimate relations between plaintiff and Stone while they were in Pine Bluff, passing themselves off before the public as husband and wife (proof of which was admitted by the court). and his possession of the check a few days before he appeared with a letter purporting to be from plaintiff, ordering the trunk sent back to Haileyville, were circumstances tending, with more or less force, to establish his authority from plaintiff to direct the return of the trunk. The jury should have been permitted to consider them, along with plaintiff's denial that she ever parted from the check or authorized Stone to direct the return

of the trunk, in determining whether the return of the trunk was ever directed by authority from plaintiff.

Possession of a baggage check is *prima facie* evidence of ownership or authority to receive the baggage. *Illinois Cent. R. Co.* v. *Copeland,* 24 Ill. 332; *Hickox* v. *Naugatuck R. Co.,* 31 Conn. 284; *Isaacson* v. *N. Y. Cent. R. Co.,* 94 N. Y. 278; *Denver R. Co.* v. *Roberts,* 6 Col. 333. This is necessarily true from the nature of the business of a carrier of passengers and baggage. The identity of the passenger is unknown to the agents of the carrier at the destination, and the only evidence of the right to receive the baggage is the possession of the check. Learned counsel for appellee urge that this would open the door for fraud by allowing a person to present a bogus check for baggage and receive it from the possession of the carrier, and thus deprive the true owner of his property. It is sufficient to say that the carrier is not permitted to surrender the baggage upon a bogus or forged check. The carrier must, at its peril, see that the check presented is genuine, and is the check issued for the piece of baggage claimed. So in this case it was for the jury to say whether, in the face of plaintiff's denial that she intrusted the check to Stone, it was in fact the genuine check which he exhibited to the baggage clerk at Pine Bluff; and Stone's recent possession of the check (if the jury believed that he had it), together with the other circumstances proved in the case as to the relation between plaintiff and Stone, should have gone to the jury to enable them to determine whether the return of the trunk to Haileyville was directed by authority from plaintiff.

For the error in excluding the testimony offered by the defendant, the judgment must be reversed.

The judgment must also be reversed for another reason. It is not supported by the evidence.

As we have already stated, it is undisputed that the trunk was returned to Haileyville and received at the latter place, and was from that place rechecked and forwarded to Mansfield, Arkansas, by a man at Haileyville named Brown. Brown testified that, by direction of plaintiff, he caused the trunk to be rechecked to Mansfield, leaving the old check on the trunk and placing an additional one on it, and that he turned the new check over to one Malloy to be forwarded to plaintiff. She admits

that Malloy sent the check to her at Mansfield, and she exhibited that check also at the trial, but she denied that she instructed Brown to recheck the trunk. She said, however, on the witness stand: "I told Mr. Brown if I stopped in Mansfield I would write him; if my trunk came back, he could send it to me. I would let him know if I stopped there." Now, whether she authorized Brown to recheck the trunk to Mansfield or not, if she accepted the check after he had done so, she thereby ratified his act in so doing. Rechecking the trunk at Haileyville was an acceptance of it there, and relieved appellant from any further duty or liability concerning it. So, upon these facts, about which there is no dispute, the defendant was not liable. Of course, if Brown did not in fact recheck the trunk, as he pretends to have done, but instead thereof, by fraudulent conspiracy with the baggage agent at Haileyville or some other person, as suggested by learned counsel in their brief, he made some other disposition of the trunk, then the acceptance of the check by plaintiff was not a ratification of Brown's wrongful act, and the defendant would not be relieved. The acceptance of the check operated only as a ratification of Brown's act in rechecking the trunk to Mansfield, as indicated on the face of the check, and nothing more.

The defendant asked for an instruction to the effect that an acceptance by plaintiff from Brown of the check from Haileyville to Mansfield was a ratification of Brown's act in rechecking the trunk, and relieved the defendant from further liability, but the court modified it by inserting the qualification "that if she knew those facts when she accepted the check." The modification was unnecessary and improper, for the reason that the check disclosed on its face the fact that the trunk had been rechecked to Mansfield, and plaintiff was bound to know it when she accepted the check.

Still we fail to see how any prejudice could have resulted from the instruction. The fault is not so much with the instruction as with the fact that the jury disregarded it, and returned a verdict for the plaintiff contrary to the undisputed evidence.

Reversed and remanded for a new trial.

WOOD, J., concurs in the judgment.

TILLAR v. LIEBKE.

Opinion delivered April 7, 1906.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—It was not abuse of discretion to refuse a new trial for newly discovered evidence of a certain witness in the shape of an affidavit which was in conflict with the deposition of such witness in the case, if it does not appear that the newly discovered evidence might not have been elicited on cross-examination of the witness when his deposition was taken.

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellant on 21st day of May, 1900, sued out an attachment against one G. W. Hargrove in the Desha Circuit Court for $1,012.16, amount due appellant for certain cottonwood, ash, and oak timber which appellant had sold to Hargrove. The sheriff levied the attachment on 392 cottonwood logs, 336 ash logs, and 197 oak logs, lying in Cypress Creek. Appellee claimed the logs attached, made bond, and the logs were delivered by the sheriff into his possession. Appellee intervened, alleging that the logs at the time of the attachment were not the property of Hargrove, and that appellant had no lien thereon; that the oak and ash logs were, at the time of the issuance of the writ of attachment, his property, and were still his property. Appellant answered the intervention, denying that appellee owned the logs or had possession of same when they were seized under the attachment, and alleged that the logs were the property of Hargrove. Hargrove made no defense. The court directed a verdict for the appellee.

Appellant requested the following instruction:

"The plaintiff, T. F. Tillar, sues the defendant, G. W. Hargrove, in this action for the sum of $1,000 and $12 and six cents as purchase money due him for certain oak and ash timber sold to the defendant which has been cut and sawed into logs and prepared for rafting in Red Fork Bayou and in Cypress Creek of Desha County. Hargrove being so indebted to plaintiff, and neglecting to pay him, and having absconded, plaintiff sued out his writ of attachment, and on the 22d day of May, 1900, the

same was levied upon the logs in controversy. C. F. Liebke intervenes in this action, and sets up a claim that he was the owner of the logs and in the possession of the same at the time the writ of attachment in this case was levied upon the logs.

"If the jury find from the evidence that neither the defendant, Hargrove, nor his authorized agent delivered the property in question to the intervener prior to said attachment, they will find for the plaintiff, T. F. Tillar, in the suit with six per cent. interest on the sum sued for from the date of the institution of this suit.

"The question of ownership and possession of the property is a question of fact to be found by the jury, not only from the direct testimony, but from all of the evidence introduced in the case." This the court refused.

Judgment upon the verdict was rendered for appellee, and this appeal prosecuted.

Taylor & Jones, for appellant.

1. There was a conflict in the evidence, and it was error to instruct the jury peremptorily to find for the intervener.

2. A new trial should have been granted because of newly discovered evidence.

W. F. Coleman, for appellee.

1. There was a written contract for sale of the logs in controversy which had been duly assigned to appellee, the purchase money had been paid, and the logs delivered and in actual possession of appellee and his agents at the time of the attachment. This is uncontroverted. Where there is no evidence to sustain an issue of fact, the court declares the law, in so instructing the jury. 57 Ark. 461. It is error to leave a question to the jury where the evidence is all one way. 72 Ark. 440.

2. Appellant did not show the reasonable diligence required by statute to authorize a new trial on the ground of newly discovered evidence. Kirby's Digest, § 6215. He could have cross-examined the witness when his deposition was taken. Newly discovered evidence that goes only to impeach a witness is no ground for a new trial. 45 Ark. 328; 72 Ark. 404.

WOOD, J., (after stating the facts.) The undisputed evidence shows that Hargrove sold the logs in controversy to the Liebke Hardwood Lumber Company by written contract, and

that it, on the 21st of May, 1900, assigned this contract for a valuable consideration to the appellee, who thus acquired title to the logs, and who was in possession thereof through his agents when the attachment was levied thereon. This the testimony of the witnesses for appellee establishes beyond question, and the testimony of appellant does not conflict with this. At the time the attachment was issued and levied upon the logs, Hargrove could not be found. He was out of the State. His testimony by deposition, which was before the court and jury, (but which does not appear in this record, having been lost since the trial), shows that, after leaving the State, he wrote to one R. B. Golder, who was the agent of appellee, directing him as such agent to take possession of the oak and ash logs in controversy for the appellee. The testimony of Golder shows that he took such possession, as does also the other witnesses' for appellee, as we construe it. There is some little conflict on minor points, but, after a careful consideration of it, we are of the opinion that such is its only legal effect. The appellant found one Willis and Bowles in possession of it when he went down to see about the timber before suing out the attachment. Bowles was the constable, or claimed to be, and the testimony of Willis showed that at that time he was the agent of appellee, so that appellant's testimony in nowise conflicts with the testimony of the appellee as to who was in possession of the logs when they were attached.

The court was correct therefore in directing the verdict for appellee. One of the grounds of the motion for new trial was on account of newly discovered evidence. In support of this, the affidavit of Hargrove is attached. In this affidavit he admits writing the letter to Golder, but says that the letter directed him to take charge of the logs for him, Hargrove, and he denies that he ever wrote a letter turning the logs over to Golder as the agent of appellee.

In the bill of exceptions is a statement showing what the deposition of Hargrove was, and also showing that the affidavit of Hargrove, made after the trial, contradicts his deposition which was used on the trial in every material particular. There is nothing in this newly discovered evidence which appellant might not have elicited on the cross-examination of Hargrove when his deposition was taken. Moreover, the alleged newly discovered

evidence, according to the statement in the bill of exceptions, was mainly in contradiction of the testimony of Hargrove, given in his deposition. Under these circumstances we do not think the court abused its discretion in refusing a new trial on the ground of newly discovered evidence.

It follows also from what we have already said that the court did not err in refusing appellant's prayer for instructions.

Judgment affirmed.

HILL, C. J., not participating.

DRAKE v. POPE.

Opinion delivered April 7, 1906.

1. BROKER FOR UNDISCLOSED PRINCIPAL—LIABILITY.—While a broker will not be held liable upon a contract for a disclosed principal, or where the third party knew or ought to have known that he was acting for another, yet, if he does not disclose his principal nor the fact that he is acting for another, then he is liable, although in fact he acted as broker, in which case the third party may elect to hold him instead of his after-disclosed principal. (Page 329.)
2. SAME—LIABILITY—INSTRUCTION.—An instruction that if a broker caused another to fill an order for merchandise made to him it released him, and that if the buyer paid the draft of the other that released the broker and substituted the other, was properly refused, as, if the order was a personal one, and not one to be filled according to broker's custom, it was within the broker's right to have another fill it for him, and it was immaterial to whom the draft was payable. (Page 330.)
3. INSTRUCTIONS—FAILURE TO ASK.—Appellant can not complain that the case was tried without instructions embodying his theory of the case if he failed to ask them. (Page 331.)

Appeal from Howard Circuit Court; *James S. Steel,* Judge; affirmed.

W. C. Rodgers, for appellant.

1. Appellant acted only as a broker, did not sell the feedstuff himself, had no part in filling the order, had no interest in

the company that filled the order, and is not liable. The commission company shipped the corn to appellee, direct, with bill of lading attached. The mere sending of an order did not constitute a contract.

2. The order sent to appellant was merely an offer to buy. He could not fill the order, did not accept it, but requested the commission company to do so. They accepted and filled the order, and were paid by appellee. The court's instruction making appellant liable if he caused the corn to be shipped was too broad, besides being in direct conflict with the instruction given to the effect that appellee could not recover unless the evidence showed that it was bought from appellee, and the order therefor filled by him. Conflicting instructions are no guide to juries and should never be given. 74 Ark. 437.

Feazel & Bishop, for appellee.

1. Appellant did not disclose to appellee that he was acting as a broker in the transaction. Under the facts both appellant and the commission company are liable. An agent can make a valid contract with a third party in his own name without disclosing his principal, which is binding upon the agent in his individual capacity, and either party may enforce the contract against the other independently of the undisclosed principal. 76 Ark. 558.; 114 N. Y. 535; 43 Am. Dec. 681 and note; 57 Am. St. 536. Having made such a contract, he can not relieve himself by showing that he was acting simply as an agent or broker for a principal, whether the latter was disclosed or not. 84 Wis. 52; 42 Wis. 565. If appellant would excuse himself on the ground of agency, he must show that he disclosed his principal at the time of the contract. 60 Ark. 68.

2. The commission company, in shipping the corn at appellant's request, did so as *his* agent. Having selected it to carry out the contract, he became responsible for its failure to comply with the terms of the contract.

HILL, C. J. O. T. Pope ordered of A. F. Drake a carload of feedstuff, containing corn of a certain grade, among other stuff. The car arrived with bill of lading attached to draft in favor of Cunningham Commission Company for the price of the carload. Pope paid the draft, and received the car, and dis-

covered the corn was not in compliance with the order, and returned it. This suit is to recover the price of the corn, and the only question litigated was whether Drake or the Cunningham Commission Company was the responsible party.

The court instructed the jury that if Pope ordered the corn from Drake at a guarantied price and quality, and Drake shipped or caused to be shipped the corn which was of an inferior quality to that ordered, and Pope was compelled to pay for the corn before he had an opportunity to inspect it, then he was entitled to recover, without regard to whether said corn was shipped by Drake or some other person from whom said Drake procured it to be shipped. This instruction was correct, and in consonance with the facts as testified to by Pope. It could make no difference whether Drake personally furnished the corn or caused another to furnish it for him in compliance with his order from Pope.

The evidence on Drake's behalf tended to prove that he was a mere broker, and had not the corn for sale, and acted as broker in procuring it for Pope, and had no interest beyond his brokerage, and that these facts were known to Pope. Not only does his testimony tend to prove this to have been the status, but there are statements in Pope's testimony corroborative of this theory, and the draft in favor of the Cunningham Commission Company, attached to the bill of lading, was a circumstance of more or less probative force on the same side of the controversy. Thus an issue of fact was squarely presented. The instruction referred to and instructions 1, 4 and 5 given at instance of appellant (all of which will be set out by the Reporter)* correctly presented the requisite facts to be found for Pope to recover, and Pope's evidence sustained this view, and the jury accepted it as true. On

*Instructions 1, 4 and 5, given by the court, were as follows:

"1. The jury are instructed that the plaintiff cannot recover anything against the defendant, A. F. Drake, for any damages to the corn in controversy, unless the evidence shows that the same was bought from A. F. Drake, and the order therefor filled by him.

"4. The plaintiff cannot recover anything from the defendant, A. F. Drake, unless he bought the corn and feed stuff in controversy from the said Drake.

"5. The burden of proof is on the plaintiff to show by a preponderance of the testimony that he bought the corn in controversy from the defendant, A. F. Drake." (Reporter.)

the other hand, Drake was entitled to have submitted to the jury his theory of a sale as broker, and he had ample evidence to have gone to the jury and to have sustained a verdict, if it had been accredited by the jury. It is well established that a broker can not be held personally liable to the third party upon a contract for a disclosed principal; and if the third party knew, or had sufficient knowledge to create an inference, that the broker was acting for another, then the broker is not liable. But if he does not disclose his principal nor the fact that he is acting as a broker, but deals personally, then he is liable, although in fact he acted as broker, and his principal may be held after disclosure, but this does not prevent his personal liability if the third party elects to hold him instead of his after-disclosed principal. 2 Clark & Skyles on Agency, § 786; *Shelby* v. *Burrow*, 76 Ark. 558.

No instructions were given presenting the appellant's contention, and the case seems to have been tried solely on whether appellee's contention was the truth, and, the jury having found that it was true, the question before the court is limited to whether the court erred in the instructions given or in refusing those offered by appellant. As before stated, the court finds those given to be correct. The Reporter will set out the two refused instructions, Nos. 2 and 3.† They assume that if Drake caused another to fulfill the order which was made to him, it released him; and if Pope paid the draft of the other party (Cunningham Commission Company), that of itself released Drake and substituted the commission company as the contracting party. Such is not the case. If in fact the order was a personal one, and not one to be filled according to broker's custom, then it was perfectly within Drake's right to have another fill it for

---

Refused instructions Nos. 2 and 3 were as follows:

"2. If the jury find from the evidence, that the plaintiff, O. T. Pope, ordered the corn in controversy, from A. F. Drake, and that A. F. Drake did not have the corn, etc., ordered, and could not fill the order for this reason, but sent the order to the Cunningham Commission Co., of Little Rock, to be filled by them and shipped to the plaintiff, O. T. Pope, you should find for the defendant, A. F. Drake.

"3. If the jury find from the evidence that the corn in controversy was shipped by the Cunningham Commission Co., of Little Rock, Ark., to O. T. Pope, the plaintiff, and that plaintiff paid Cunningham Commission Co. for the corn and feed stuff in controversy, he cannot recover anything from the defendant, A. F. Drake." (Reporter.)

him, and no significance is to be attached to Pope paying the draft to the commission company. It was no concern of his who was to receive the money, so long as he got the goods he ordered. The draft was attached to the bill of lading. Each was a negotiable instrument, and may have been sold many times before reaching Pope, and his payment of the draft in order to obtain the title and possession of the goods ordered was a common business transaction, carrying in itself no change in the status of the parties originally contracting. It may have been a circumstance shedding light on which was the real contract between the parties, but these instructions ask nothing in that regard, and are not of themselves correct statements, and hence there was no error in refusing them.

The appellant elected to try the case on the truth of appellee's contention, and did not seek to have the theory of the brokerage contract and disclosed principal presented, and the finding of the jury against it is conclusive.

Judgment affirmed.

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY v. CANTWELL.

78 331
88 203

78 331
90 468

Opinion delivered April 7, 1906.

CARRIER—NEGLIGENCE—EXEMPLARY DAMAGES.—A railway company is not liable for exemplary damages for negligent failure to transport a passenger, unless it was guilty of willfulness, wantonness or conscious indifference to consequences from which malice will be inferred.

Appeal from Sebastian Circuit Court, Greenwood District; *Styles T. Rowe,* Judge; affirmed with remittitur.

E. B. Peirce and *T. S. Buzbee,* for appellant.

1. There was nothing in the evidence to justify a verdict for more than compensatory damages. 53 Ark. 7; 70 Ark. 136. Negligence, however gross, will not justify a verdict for exemp-

lary damages unless the negligent party is guilty of willfulness, wantonness or conscious indifference to consequences from which malice may be infered. Cases *supra; Ark. & La. Ry. Co.* v. *Stroude,* 77 Ark. 109.

2. If, however, there was testimony upon which to base instructions on exemplary damages, those given did not properly present the law. They eliminated all questions as willfulness and malice, danger attendant on backing the train to the station or allowing it to stand unprotected on the main line, and the necessity of avoiding delays in order to make connections for other passengers. 69 Ark. 81.

3. The measure of damages was such sum as would compensate plaintiff for loss of time, expense incurred and inconvenience in waiting for another train. 67 Ark. 124.

Youmans & Youmans, for appellee.

1. It was appellant's duty to allow appellee a reasonable time in which to board the train. 73 Ark. 548; 5 Am. & Eng. Enc. of Law, 567; 6 Cyc. 613. The time to be allowed depends on circumstances. 27 Minn. 178.

2. If the train was started with a wanton and willful disregard of appellants' duty to allow appellee a reasonable time to board the train, she was entitled to exemplary damages. 42 Ark. 328.

3. The instructions complained of do not, as contended, eliminate the question of wantonness and willfulness, but on the contrary require the finding of specific facts constituting wantonness and willfulness. If, however, there was error in that instruction, it was cured by the instruction 3 given at appellant's request, wherein the jury are told that, if wrong was done plaintiff, yet, if they found it was not wantonly and willfully done, they could not award exemplary damages. 73 Ark. 552.

BATTLE, J. On the 21st day of August, 1903, Jane Cantwell purchased a ticket of the Choctaw, Oklahoma & Gulf Railroad Company for transportation over its road from Mansfield in Arkansas to Holdenville in the Indian Territory. She was on the depot platform with her three children, ready to take the train when it arrived. It remained from five to ten minutes. She succeeded in getting the eldest child, a little girl, on the train, when

it moved out and left her and the other two children at the depot. Upon discovering the little girl on board, the trainmen stopped about one or two hundred yards from the depot and put her off. They made no effort to run the train back to the depot. To have done so, it would have been necessary to send a brakeman back about a half mile with a flag to protect against collisions and delayed the train until it would have missed connections with other trains. Mrs. Cantwell made no effort and showed no disposition to get to the train when it stopped, and it moved on.

The railway company filed an offer in court to confess judgment in favor of Mrs. Cantwell for the sum of ten dollars, which exceeded her actual damages, and she refused to accept it.

The jury in the case returned a verdict in her favor for $150, and in it included exemplary damages to which she is not entitled; for the evidence shows that the servants and employees of the railroad company were guilty of nothing more than negligence; and "negligence, however gross, will not justify a verdict for exemplary damages, unless the negligent party is guilty of willfulness, wantonness, or conscious indifference to consequences from which malice will be inferred." *Railway* v. *Hall,* 53 Ark. 7; *St. Louis, I. M. & So. Railway Co.* v. *Wilson,* 70 Ark. 136; *Arkansas & Louisiana Ry. Co.* v. *Stroude,* 77 Ark. 109.

If Mrs. Cantwell will remit $140, her judgment will be affirmed as to $10; otherwise the judgment will be reversed, and the cause will be remanded for a new trial.

HILL, C. J., did not participate.

78	333
83	524
78	333
f78	577

SMITH v. CALDWELL.

Opinion delivered April 7, 1906.

EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.—A written contract in terms for the rent of land, with an option in the lessee to purchase, can not be shown by oral testimony to have been intended as a sale.

Appeal from Monroe Chancery Court; *John M. Elliott,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The plaintiff, A. S. Caldwell, commenced an action at law against the defendants, J. P. Smith and H. W. Long, to recover the amount of a note, dated September 23, 1897, and payable October 1, 1898, for $324, given for rent of certain lands in Monroe County. The note recited the fact that it was given for rent of the lands described.

The defendants answered, in substance, that they purchased said lands from plaintiff for the sum of $2,576, payable in installments (the note sued on being the installment for the year 1898). That they went into possession of the land, and made valuable improvement thereon, and rented the same out for the year 1898 to various tenants, who raised crops of cotton thereon. That on January 15, 1899, plaintiff entered upon said land, and took charge of same, and prevented their tenants from gathering the crop, consisting of about twenty bales of cotton, of the value of $400, and that they again rented the place for the year 1899 for the rental sum of $600, and that plaintiff interfered with the tenants, and prevented them from occupying and cultivating said lands. The answer was made a cross-complaint, and contained a motion to transfer the cause to equity, which was done. The plaintiff filed an answer to the cross-complaint, denying all the allegations thereof.

The contract between the parties introduced in evidence was in form of a rent contract for a term of years, giving the defendants an option to purchase the lands for a price named. It was the same form of contract used by the parties in the case of *Carpenter* v. *Thornburn,* 76 Ark. 578, and contained the following clause:

"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 mentioned be not promptly paid to the lessor, then this lease, including the option to purchase hereinafter mentioned, shall, without notice, terminate and cease, and the lessor and his agents 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 and for the then current year, though the same shall not have matured, and said lessee shall thereupon be further liable to said lessor in liquidated damages in the sum of one-half of the face of such rent notes as represent rents for future years, and said lessees shall not be entitled to any credit on this amount by reason of any sums said lessor may collect as rent from others for such future years, and all such sums above provided for shall be held to become due and payable to said lessor at once upon such termination of such lease and option as aforesaid."

The court sustained exceptions to parts of the testimony of defendants which tended to contradict the terms of the written contract by showing that it was intended to be a contract for the sale of the land, and not for rent, according to its express terms; and rendered a decree in favor of the plaintiff for the full amount of the note and interest. The defendants appealed.

M. J. Manning and *C. F. Greenlee,* for appellants.

N. W. Norton, for appellee.

McCULLOCH, J., (after stating the facts.) The court properly sustained exceptions to the testimony contradicting the terms of the written contract. It was a contract for rent, and not for sale of the land (*Carpenter* v. *Thornburn,* 76 Ark. 578), and oral testimony was not admissible to contradict or vary its terms. *Colonial & U. S. Mortgage Co.* v. *Jeter,* 71 Ark. 185.

According to the express terms of the contract, time being of the essence thereof, the defendants, having failed to pay the rent for the year 1897, were not entitled to hold possession for the succeeding year, nor to claim reimbursement for improvements made on the leased premises.

The chancellor found that the plaintiff did not take possession of the crop on the farm, nor interfere with the defendants or their tenants in gathering the crop. The findings of the chancellor seem to be supported by the preponderance of the testimony and should not be disturbed. The rent was past due, and defendants, acording to their own admissions, had gathered and sold six bales of cotton without paying the rent. Plaintiff, there-

fore, had the right to go upon the premises to look after the collection of rent, and the threat to attach the crop for the rent was not an unwarranted interference with the tenants. The evidence does not establish an interference to any further extent.

Plaintiff received the sum of $14.25 of the proceeds of cotton, and the same should have been credited on the note. This small item was doubtless overlooked by the chancellor. The decree will be modified by reducing the amount decreed to the extent of that sum with interest from the date of payment. In all other respects the decree is affirmed.

78	336
80	232

78	336
88	433
188	497

SPENCER MEDICINE COMPANY v. HALL.

Opinion delivered April 7, 1906.

1. CONTRACT—TERMINATION—RIGHT TO SUE.—Where a party to a contract has, either by words or conduct, distinctly and unequivocally manifested his intention not to perform the contract, the other party will be justified in treating the contract as at an end for the purpose of suing for a breach thereof. (Page 340.)
2. SAME—TERMINATION—DAMAGES.—One who, being employed under a contract whereby he was to receive a commission on sales to be made by him, held himself ready to perform the contract, and was prevented by the other party from performing it, is entitled to recover, not only the commissions earned by him under the contract up to the time the suit was brought, but also such commissions as he would have earned thereunder up to the time of the trial. (Page 341.)
3. SAME—DAMAGES—PROSPECTIVE PROFITS.—When there is a breach of a contract of employment in which the parties expressly contracted for the earning of profits by way of commission on sales of goods to be made by the agent, they must necessarily have had in contemplation the loss of such profits as an element of damages upon breach of the contract. (Page 343.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield,* Judge; affirmed.

Atkinson & Patterson, for appellant.

1. The second instruction given at plaintiff's request was erroneous, in charging the jury that any manifestation by defend-

ant of an intention not to perform the contract authorized plaintiff to repudiate it. Nothing short of complete renunciation will suffice. 9 Cyc. 636, II, A. & B.

2. The court erred in giving plaintiff's third instruction and in refusing the second asked by defendant. Profits he would have earned, had he continued, were an element of damage too uncertain for recovery. 1 Suth. Dam. § 69; 2 *Ib.* § 694. "Where the agent is to be paid in part by a commission, he can in general recover no damages on account of possible future commissions." 2 Sedg. Dam. § 6871; 8 Am. & Eng. Enc. Law, 624*d;* 77 Ala.

suffice. 9 Cyc. 636, II, A & B.

3. The fourth instruction given for plaintiff was erroneous. The law does not require a merchant to accept an order for goods. He may establish his own rules and methods. If defendant for business reasons rejected any orders, plaintiff was bound thereby. He contracted with reference to defendant's judgment.

4. Plaintiff can not recover for past services, and at the same time damages for breach of contract for future employment. 58 Ark. 621; Clark & Skyles on Agency, 826, c.

Marshall & Coffman, for appellee.

1. Manifestations by words or acts of an intention not to perform the contract will authorize the other party to treat it as repudiated and bring his action. 48 Minn. 119; 27 Ark. 61. Any act inconsistent with intention to be longer bound is enough. 19 Am. Rep. 288; 10 Ont. App. 677; 61 N. W. 876; 35 Pac. 136. It was a question peculiarly for the jury. 58 Ark. 504; 30 N. E. 986; 83 Hun, 610.

2. Plaintiff adopted the course laid down in 58 Ark. 504, cited by appellant, and sued for damages for the breach at once. The trial being had after the expiration of the period when the service would have ended, he was entitled to his entire damage on the contract. The agent may recover the unpaid compensation earned prior to the breach, and in addition the damages sustained by reason of the breach. 1 C. & S. on Ag. 826; 39 Ark. 840; 41 Am. Rep. 584; 19 *Id.* 285.

3. Where the agent presents a purchaser ready, willing and able to take the property at the price and on the terms named, his commissions are earned.

4. The profits plaintiff would have made, had the contract been carried out, were susceptible of proof. Such damages are not speculative or remote, and the difficulty in ascertaining them does not deter the courts from awarding such compensation for their breach as the evidence shows with reasonable certainty the wronged party is entitled to. 1 Suth. on Dam. § 69; 10 N. Y. 489; 99 Fed. 222; 101 N. Y. 205; 127 Fed. 403; 55 N. W. 391; 52 Pac. 522; 69 Ark. 219.

McCULLOCH, J. This is an action brought by appellee against appellant to recover commissions on sales of goods earned by him as traveling salesman of appellant, and for prospective commissions which he was prevented by wrongful discharge from earning under the following written contract:

"CONTRACT.

"Chattanooga, Tenn. December 29, 1902.

"We agree to pay Dan Hall fifty per cent. on sales amounting to $10,000, twenty per cent. of this sum to be spent by him in advertising and to pass through our office. Commissions due when orders are accepted. This contract terminates when the amount of $10,000 has been reached.

"Spencer Medicine Company.
"By C. C. Nottingham, Secretary."

The plaintiff sued for $65 commission on sales made, and $1,500 on prospective commissions as damages for breach of contract. He testified that defendant owed him a balance of $64.05 on earned commissions, including two orders which defendant declined to ship. He also testified that, judging from past experience, he could have made sales amounting to $2,000 in sixty days, and could have sold $10,000 in about one hundred days—that he made sales of $336 in the four days that he worked, and that he made more than his expenses in selling "side lines," which did not interfere with his sales for defendant.

The defendant denied that it had failed or refused to comply with the contract, or that it had refused to allow plaintiff to comply with the contract. It also denied that plaintiff had complied with the terms of the contract, or had earned the commissions claimed, or had paid the stipulated amount in advertising.

The court gave the following instructions at the request of plaintiff, to each of which the defendant objected:

"2. It is not only an absolute refusal in words to perform a contract, but also manifestations by words or acts of an intention not to perform it according to its terms, that will authorize the other party to treat it as a repudiation and bring his action; and if you find from the evidence that the Spencer Medicine Company manifested its intention by words or acts not to perform the contract in question according to its terms, then Hall had a right to treat it as at an end, and is entitled to damages, if any be shown by the evidence to have accrued to him thereby, providing he himself had performed his part of the contract.

"3. If you find for the plaintiff (Hall), you will allow him whatever sum, if any be shown by the evidence to be due him, for commissions earned and not paid, and you will also allow him whatever profits he would have made, if any be shown by the evidence, had the contract been carried out according to its terms.

"4. If you find from the evidence that orders were taken by Dan Hall from parties who were ready, willing and able to pay same, and that said Hall complied with the instructions of the Spencer Medicine Company in determining whether said parties were entitled to credit, then you will allow Hall his commissions on such orders, notwithstanding the fact that said orders were not accepted by Spencer Medicine Company, unless such non-acceptance was for good business reasons."

The court also gave the following instructions at the request of defendant:

"1. The plaintiff, in order to recover for the amount alleged to have been due him when he left defendant's employment, must show that he did spend 20 per cent. of the amount of his sales in advertising defendant's goods and report the same to its office and return all articles charged to him, if you find there was an agreement to that effect, and in his hands belonging to them, unless the performance of same has been waived by parties.

"3. If the jury find in this case that the defendant discharged the plaintiff from its service, but that the plaintiff habitually and regularly violated the terms of the contract, and could not be induced to comply with it, they will find for the defendant.

"4. If the jury find from the evidence that by a mutual

understanding between plaintiff and defendant the plaintiff retired from its services, they will find for the defendant.

"7. If the jury find for the plaintiff for damages because of his discharge, they will assess his damages at what he would have earned, judging by his past success, less what he did thereafter earn, during the term he would have been engaged in fulfilling his contract."

The following instructions asked by defendant were refused:

"2. The court instructs the jury that if it finds that the defendant without proper cause discharged the plaintiff from its employment, and that under his terms of contract he was selling goods upon a commission, he can not recover for the damages therefor because the damages are too uncertain.

"5. The court instructs the jury that the plaintiff in this case can not recover in this action for the amount of the wages for his services while in the employment of the defendant company, and at the same time for damages for a breach of the contract for future employment.

"6. The court instructs the jury that there is no evidence in this case that the defendant discharged the plaintiff, Dan Hall, from its employment, and he is therefore entitled to no damages for a breach of the contract."

The jury returned a verdict in favor of the plaintiff for $65 commissions on sales and $500 damages for breach of contract.

It is argued that the second instruction given at the instance of plaintiff was erroneous, but we do not think so, especially when this instruction is considered in connection with those given at the instance of defendant. It is sufficient, where a party to a contract has, either by words or conduct, distinctly and unequivocally manifested his intention not to perform the contract, to justify the other party in treating it as at an end for the purpose of suing for breach thereof.

It is insisted by appellant, in this connection, that the evidence was insufficient to support a finding that it had discharged the plaintiff, and thereby repudiated the contract, but we are unable to reach a conclusion in accord with either of the contentions that the instruction on the subject was erroneous or that the evidence was insufficient. The evidence on the point is far from satisfactory, but, considering the correspondence between the

parties which was put in evidence, the conversations between the plaintiff and the secretary of defendant company as detailed by the former in his testimony, and the transaction with reference to the refusal of defendant to fill certain orders sent in by plaintiff for goods, we can not say that the jury were not warranted in reaching the conclusion that the defendant plainly evinced an intention not to perform the contract. This was a question peculiarly for the jury upon all the proof.

"The true test, stated generally," says Judge Mitchell in *Armstrong* v. *St. P. & P. C. & I. Co.,* 48 Minn. 113, "is whether the acts and conduct of the party evinced an intention no longer to be bound by the contract; and the fair result of the authorities is that it is not only an absolute refusal in words to perform a contract, but also any clear manifestation by words or acts of an intention not to perform it according to its terms, that will authorize the other party to treat this as a repudiation and bring his action." See also *Paine* v. *Hill,* 7 Wash. 437; *Pinet* v. *Montague,* 103 Mich. 516; *Lake Shore & M. S. Ry. Co.* v. *Richards,* 152 Ill. 59; *Nicholls* v. *Scranton Steel Co.,* 137 N. Y. 471.

Withers v. *Reynolds,* 2 Barn. & Adol. 882, is a leading English case on the subject of damages for breach of contract. The contract was for sale of straw to be furnished at stated periods and paid for as delivered. After a portion of it had been delivered, the purchaser refused to pay for the last load until the next load should be delivered, thus holding the price of one load in hand so as to insure the delivery of another load. The court held that the refusal to pay for the straw upon delivery as agreed and the announcement not to pay for future delivery except by that method was an abandonment of the contract.

In *Franklin* v. *Miller,* 4 A. & E. 599, Coleridge, J., commenting on *Withers* v. *Reynolds,* said: "Each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a total failure, and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract."

It is next contended that the court improperly gave instructions allowing a recovery for earned commissions on goods which defendant refused to ship, and also for damages for breach of the contract. It is said by learned counsel for appellant that there

can not be a recovery for both in the same action, and they cite *Van Winkle* v. *Satterfield,* 58 Ark. 621, in support of their contention. In that case the court said: "A servant who has been wrongfully discharged by his employer before the time for which he was hired has expired has these remedies: First, he may consider the contract as rescinded, and recover on a *quantum meruit* what his services were worth, deducting what he had received for the time during which he had worked. Second, he may wait until the end of the term, and then sue for the whole amount, less any sum which the defendant may have the right to recoup. Third, he may sue at once for a breach of the contract of employment. He, however, can adopt only one." But the court did not say that the recovery must be limited to the amount of compensation due up to the time of the commencement of the suit. On the contrary, it was held that wages up to the date of the trial might be recovered; citing *McDaniel* v. *Park.* 19 Ark. 671. The contract in that case was for employment of the servant for a stated period at a fixed salary, and the court held that there could be no recovery for wages to accrue after the date of the trial, for the obvious reason that they could not, in advance, be assessed as damages, as the plaintiff "might, after the recovery of the judgment, obtain employment from other persons and receive for the residue of the term for which he was hired in the first instance as much as or more than he would have been entitled to under the broken contract, had he served his time out; or he might die before his term expires."

In the case at bar the testimony tends to show that the plaintiff could have fulfilled the contract by sale of $10,000 worth of goods before the date of trial, if he had been permitted to continue in the service of the plaintiff.

In *Frost* v. *Knight,* L. R. 7 Exch. 111, Lord Cockburn, in discussing the rights of a party whose contract has been repudiated, said: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party reponsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the

contract, if so advised, notwithstanding his own previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from a non-performance of the contract at the appointed time, subject, however, to abatement of any circumstances which may have afforded him the means of mitigating his loss."

Some of this language of the learned judge has been criticised because it appears to involve a contradiction of terms, it being said in criticism that a contract could not be regarded as at an end, and at the same time be made the basis of a suit for damages; but, giving it the meaning that he doubtless intended, that the contract could be treated as at an end except for the purpose of being sued upon, a conclusion is stated that under those circumstances a recovery may be had upon the repudiated contract for all the damages sustained by the breach, that which have already accrued as well as that which is anticipatory. That view is sustained by the weight of authority. *Roper* v. *Johnson,* L. R. 8 C. P. 167; *Johnson* v. *Milling,* 16 Q. B. Div. 460; *Lake Shore & S. M. Ry. Co.* v. *Richards, supra; Wells* v. *National Life Assn.,* 99 Fed. 222; *United States* v. *Behan,* 110 U. S. 338; *Cutter* v. *Gillette,* 163 Mass. 95; 1 Clark & Skyles on Agency, pp. 828, 829.

The most difficult question presented in the case is whether the plaintiff should have been permitted to recover, at all, commissions on prospective sales under the contract. The defendant asked an instruction saying that such prospective commissions were too uncertain to become the basis of a recovery of damages. While the question is not free from doubt, we think that the doubt arises more in the application of the doctrine of required certainty of recoverable damages. As said by this court in *Border City Ice Co.* v. *Adams,* 69 Ark. 219: "The difficulty is not so much in determining whether or not the appellee has a cause of action for his damages by reason of loss of profits which he would have enjoyed, had appellant fulfilled his contract, but

rather in determining with any degree—that is, with the proper degree—of certainty the amount of such damages and how to measure them." In the anxiety of the courts to measure damages by the most certain estimate, profits on future transactions are rejected as too remote to be the proximate result of the breach of contract, and a more definite and certain estimate adopted as the damages which the parties had in contemplation when they entered into the contract. The courts are therefore inclined to reject the more uncertain admeasurement of damages in a given case, and seize upon that which is most certain as the less remote damages; and for this reason the courts are led to refuse to allow prospective profits on sales of property and confine the recovery to the difference between the market value and the contract price. But when, as in this case, there is a breach of a contract in which the parties expressly contracted for the earning of profits by way of commission on sales of goods to be made by the agent, they must necessarily have had in contemplation the loss of such profits as an element of damages upon breach of the contract. They can not, therefore, be said to be either too uncertain of assessment or too remote to be considered as the proximate result of the breach of the contract. *Wells* v. *National Life Assn. supra; United States* v. *Behan, supra; Dennis* v. *Maxfield,* 10 Allen, 138; *Mueller* v. *Bethesda Mineral Spring Co.,* 88 Mich. 390; *Hitchcock* v. *Supreme Tent K. of M.,* 100 Mich. 40; *Wakeman* v. *Wheeler & Wilson Mfg. Co.,* 101 N. Y. 205; *Cranmer* v. *Kohn,* 7 S. D. 247, 76 N. W. 934; *Kenney* v. *Knight,* 127 Fed. 403; *Ramsey* v. *Holmes Elec. Pro. Co.* (Wis.), 55 N. W. 391; *Somers* v. *Wright,* 115 Mass. 292; *Fell* v. *Newberry,* 106 Mich. 542; *Schumaker* v. *Heinemann,* 99 Wis. 251; *Wolcottt* v. *Mount,* 38 N. J. L. 496.

In *Howard* v. *Stillwell & Bierce Mfg. Co.,* 139 U. S. 199, Mr. Justice Lamar, in delivering the opinion of the court, after stating the general rule that speculative profits are excluded from estimates of damages, said: "But it is equally well settled that profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of that of uncertainty and remoteness, or where from the express or implied terms of the contract

itself, or of the special circumstances under which it is made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

In *Fell* v. *Newberry, supra,* the court said: "The general and simplest rule of damage is that the injured party is entitled to compensation for the loss sustained. In actions on contract this rule is so far qualified as to limit the recovery to such damages as can be said to have been in the contemplation of the parties. * * * It has been frequently held by this court that when the breach of contract results in the loss of profits to the plaintiff, and the contract is one in which a profit accruing to the plaintiff was contemplated, the amount of such profit is recoverable."

We are aware that some courts of great ability have held that prospective profits on sales of goods, under contract similar to one we have under consideration now, are not recoverable as damages upon breach of the contract; but we think that the other view is more consonant with reason, and is sustained by the weight of authority. It is also in harmony with the previous decisions of this court. *Border City Ice & Coal Co.* v. *Adams, supra; Railway Co.* v. *Beard,* 56 Ark. 309.

Instruction number seven given at the request of appellant was more favorable to it than the proof justified. It told the jury that they should determine the amount the plaintiff would have earned, "judging by his past success, etc." This was not necessarily the test, though it was one of the means of arriving at a correct estimate of his future earnings. Nor was the instruction correct in telling the jury that a deduction should be made of "what he did thereafter earn during the time he would have been engaged in fulfilling his contract." The evidence showed that he was selling goods for defendant in connection with other lines of goods not in competition with defendant's goods, and without any additional expense or time. As no additional time was consumed in selling defendant's goods, no deduction should have been made for value of his time saved, unless he procured a similar line of goods, instead of that of which defendant deprived him by the breach of contract. Appellant can not, however, complain at the instruction being too favorable.

Judgment affirmed.

HILL, C. J., not participating.

78 346
80 41

McNUTT v. McNUTT.

Opinion delivered April 16, 1906.

1. PLEADING—AMENDMENT TO CONFORM TO PROOF.—Permitting the complaint to be amended after judgment to conform to testimony introduced without objection is not error. (Page 350.)
2. STATUTE OF ANOTHER STATE—EFFECT OF ADOPTION.—Where the Legislature adopts a statute of another State which has received a definite construction by the courts, it will be taken that this interpretation also was adopted. (Page 350.)
3. DIVORCE—RESTORATION OF PROPERTY.—Kirby's Digest, § 2684, providing that "in every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration and by reason thereof," does not apply to property which the husband conveyed to the wife upon a voluntary separation, or to property which he conveyed to her upon a restoration of marital relations. (Page 353.)

Appeal from Miller Chancery Court; *James D. Shaver*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellant was granted a divorce from appellee on September 25, 1903, on the ground of indignities which rendered his condition intolerable. In the complaint for divorce appellant alleged concerning property as follows:

"That finally about two years ago * * * a separation was agreed between them, and plaintiff turned over to her about $5,000 of property, $3,600 of which was cash. That afterwards he acquired a place on State Line in this (Miller) county, for which he paid $2,500, and it was conveyed to him. That after that about one and one-half years ago he and defendant resumed living together as husband and wife, she agreeing to conduct herself properly and live on the same place with him, provided he would deed her a half interest in the same; that he conveyed it to a third person, who re-conveyed it to this plaintiff and defendant as husband and wife; that since that he has purchased another $800 worth of land, and the deed was made to them both as husband and wife. That when she returned to live with this

plaintiff she did not return or restore to him any of the property he gave her when the separation was agreed to, nor has she ever done so, but on the contrary has kept it all, and now has it. Copies of the deeds to the two pieces of land above mentioned, containing a correct description of them, are hereto attached as exhibits 'A' and 'B,' and made a part of this complaint."

The prayer as to this was "that the lands described be restored to him, or that they be partitioned between them, each being given one-half thereof in severalty; that, if necessary to do so, it be sold and the money equally divided between them; that she be barred of any and all interest in his property; finally, for costs and all other proper relief."

To this appellee in her answer and cross-complaint and amended answer and cross-complaint alleged the following: "that by her own exertions and economy she acquired and accumulated considerable property, and that about two years ago, under an agreement that they should live separate, the defendant took as her part of the property $3,600 in cash and some real estate. Defendant admits that, upon their agreement to live together again, the one-half interest in the place on State Line in Miller County, Arkansas, was deeded to her, and that plaintiff agreed to treat her kindly and give her ample support; that it is true that under the terms of said agreement defendant was to receive one-third of plaintiff's property, and retain what she already had in her name."

However, defendant states that she allowed a reduction of $800 of her one-third interest on account of the residence on Pecan Street in the city of Texarkana, although said property was in her name, and had been purchased with her funds. Further defendant states that by express agreement she was to and actually did retain a certain endowment policy of life insurance for $5,000 upon the life of plaintiff, which policy was the property of the defendant, and further that she has kept up the payments on said policy since said separation.

"Defendant further states that in a few weeks after said separation the plaintiff came to her house and began negotiations with a view of inducing her to resume living with him, and that she refused to do so unless he would grant her an undivided one-half interest in a certain farm on State Line known as the

Pete Ivy farm. Plaintiff agreed to make such conveyance, and did so. Defendant denies that she agreed to return the plaintiff the property and money she had received upon the separation agreement, and states that she retained it and has since used the same in part by investment and in part for her own support."

Her prayer in regard to the property was that the court gave her "such property as by law she is entitled to," and for general relief.

The court, after hearing the evidence, rendered the following decree concerning the property, towit: "The question as to the property heretofore deeded to her by the plaintiff, A. B. McNutt, and the insurance policy described in the complaint, and as to her right to the property given to her by said plaintiff in the separation deed, and the court, being well and sufficiently advised as to the facts and law arising thereunder, is of opinion that the said defendant did not obtain the same from or through the plaintiff during the marriage, and is of opinion that the plaintiff has no claim upon said property.

"It is therefore by the court considered, ordered, adjudged and decreed that the said defendant have and retain all the property now in her name and held by her which is claimed by the plaintiff in this cause."

The record then recites: "Thereupon the plaintiff asked the court for permission to file an amendment to his complaint, which the court granted, and said amendment was thereupon filed, to the filing of which amendment the defendant at the time objected. Such objection being overruled, it was agreed between the attorneys that the defendant might have her answer noted upon the record by an oral denial, which was done. To each and all which rulings and decree of the court the plaintiff at the time excepted, and asked that his exceptions be noted of record, and prayed an appeal to the Supreme Court."

The amendment to the complaint, made after the decree was rendered, was as follows:

"Comes the plaintiff, and, after leave obtained, amends his complaint, and states that the deed to one-half of the property on State Line was without consideration, and was obtained by fraud and imposition on plaintiff, defendant having failed and refused to return the insurance policy or any of the other prop-

erty acquired by her under the separation agreement as she agreed to do when said agreement was set aside, and they resumed living together, and said last conveyance of the State Line property was made; that all of said property was obtained from the plaintiff during their said marriage, and in consideration and by reason thereof. Wherefore plaintiff prays, in addition to the relief already asked, that all the property acquired and turned over to said defendant by this plaintiff under the separation agreement, and the agreement resuming living together as shown by the proof, be restored to him, and for all other relief."

Facts stated in the opinion.

W. F. Kirby, for appellant.

1. The court erred in refusing to restore to appellant the property obtained by the wife from him, upon her agreeing to live with him. An agreement to live with her husband and conduct herself properly as his wife is not in law either a good or valuable consideration for the conveyance of property. It is her duty, and as such required by law. The property was therefore obtained by reason of the marriage, and the court, in granting appellant a divorce, should also have made an order restoring to him the property. Kirby's Digest, § 2684; 7 Ky. Law Rep. 832. Property paid for by the husband and conveyed to the wife during the marriage, without valuable consideration from her, must be restored. 52 S. W. 927.

2. Appellee is not entitled to hold the property transferred to her pursuant to the separation agreement. That agreement was annulled, and afterwards appellant was granted a divorce because of her misconduct. Where divorce is granted because of the wife's misconduct, she shall not be endowed. Kirby's Digest, § 2694; 59 Ark. 441; 64 Ark. 518.

3. The decree for divorce is conclusive of the fact that appellee failed to comply with her agreement to conduct herself properly as the wife of appellant. If it is held that the agreement to live with appellant and so to conduct herself was a good consideration for the grant of the farm, then, since she failed to perform the agreement, was there not a failure of consideration?

Scott & Head, for appellee.

Our statute (Kirby's Digest, § 2684) differs from the Kentucky statute of 1854 only in being made to apply to cases where divorce is granted to the husband. Construing the Kentucky statute it is held that "property settled upon a wife in consideration of her compromising a suit for divorce which she had instituted, and consenting to a separation, is not property received by reason of the marriage or in consideration thereof, within the meaning of the statute." 68 Ky. 167. When a husband, to secure domestic felicity, executes a deed to his wife conveying real estate, the facts that his wife, in view of his bounty, and to secure it, promises in the future to perform her conjugal duties, and afterwards fails to do so, do not authorize a court of chancery to set aside the conveyance in his behalf in case the wife subsequently obtains a divorce from bed and board. 71 Ky. 156. Held also that the provision for restoration of property does not include land conveyed by a husband to his wife after their marriage in consideration of love and affection. 72 Ky. 183.

Having adopted the Kentucky statute of 1854 after the decisions of that State construing the same, rather than the later amended statute, it is to be presumed that the Legislature adopted also the Kentucky construction of the former statute. See also 22 S. W. 497; 26 N. E. 137.

WOOD, J., (after stating the facts.) The court permitted the amendment to the complaint, after decree, to conform the pleadings to the undisputed proof in the cause. To present the issue as both sides have presented it in the testimony without objection by an amendment to the pleadings after verdict or judgment is not error. Section 6145, Kirby's Digest; *Hanks* v. *Harris,* 29 Ark. 323; *Healy* v. *Conner,* 40 Ark. 352; *Ry. Co.* v. *Triplett,* 54 Ark. 289; *Frizzell* v. *Duffer,* 58 Ark. 612; *Texarkana Gas & Electric Light Company* v. *Orr,* 59 Ark. 215; *Ry. Co.* v. *Dodd,* 59 Ark. 317; *Shattuck* v. *Byford,* 62 Ark. 431; *Bank of Malvern* v. *Burton,* 67 Ark. 426.

As we understand the pleadings, the proof, and the decree, the question for our determination is, did the court err in refusing to decree to appellant any property to which he was entitled under section 2684, Kirby's Digest, and in allowing appellee to retain same? That section, so far as applicable here, is as follows:

"In every final judgment for divorce from the bonds of

matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration and by reason thereof."

Section 462 of the Civil Code of Kentucky in 1854 is as follows: "In every final judgment for a divorce from the bond of matrimony, an order shall be made that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof." Kentucky Code of Practice (1854), § 462. See Kentucky Statutes 1894 (Barbour and Carroll), p. 772, § 2121. Meyers, Ky. Code (1867), § 462.

The language of the two statutes "that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage, and in consideration and by reason thereof" is almost identical.

The Supreme Court of Kentucky, in construing the word 'consideration' in this act, held it to mean "the act of marriage, or some agreement or contract touching or relating to the act of marriage," and the expression "by reason thereof" "to relate to such property as either party may have obtained from or through the other by operation of the laws regulating the property rights of husband and wife." *Phillips* v. *Phillips,* 9 Bush (Ky.), 183. In *Flood* v. *Flood,* 5 Bush (Ky.), 167, the husband conveyed to a trustee for the use and benefit of his wife a large amount of real estate. This was in pursuance of a compromise in a suit by the wife for divorce, in which a perpetual decree of divorce from bed and board was agreed upon, and the compromise was confirmed by the judgment of the court. After divorce from bed and board the wife married another man. The husband sued for a divorce *a vinculo matrimonii,* and also for a restoration of property. He obtained his divorce, but the court refused to restore the property, saying: "Our statute requires that all property remaining in kind which one party may have obtained from or through the other, during the marriage, in consideration of, or by reason thereof, shall be restored on granting

a divorce. But here she did not get the property in consideration of, or by reason of, her intermarriage with him, but because they could not live in the proper conjugal relations and were severing the same."

In the Code of Civil Practice of Kentucky of 1876, the section of the Code of 1854 under consideration was amended so as to read as follows:

"Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action which either party may have obtained directly or indirectly from or through the other, during marriage, in consideration, or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage." Code of Practice (Ky.), 1876, § 425.

In *Irwin* v. *Irwin,* 52 S. W. 927, a husband had deposited a Louisiana lottery ticket in a certain bank, probably in the name of his wife. The ticket drew $15,000, and the proceeds were invested in real property in the name of his wife. Afterwards, in a suit between them in which both parties asked for divorce, the husband also sought restoration of the real property, contending that the property was not obtained by the wife directly or indirectly from or through the husband during marriage, in consideration or by reason thereof, and therefore that the provision of the Code of 1876, § 425, did not apply. The court, in disposing of that contention, said: "The earlier cases under section 462 of the Civil Code of Practice of 1854 tended to support this theory. Citing *Flood* v. *Flood,* and *Phillips* v. *Phillips, supra.* "But," the court continues, "in view of the decision in *Phillips* v. *Phillips,* the words directly or indirectly, were inserted in section 425 of the present Code (1876) and it was further provided that "any property so obtained without valuable consideration shall be deemed to have been obtained by reason of marriage." And the court further said: "If the property was obtained directly or indirectly through the husband, and there was no valuable consideration moving from her, it must have been obtained by reason of the marriage, and the statute must apply," etc.

The Legislature in passing our statute, section 2684, Kirby's

Digest (act of 1893), instead of adopting the provisions of the Code of Ky. of 1876, chose rather to adopt the language of the Code of Ky. of 1854; and as this provision of the Code had been construed by the Kentucky Court of Appeals in the manner indicated *supra,* we must presume that the Legislature adopted it with that interpretation. *McKenzie* v. *State,* 11 Ark. 594; *Nebraska Nat. Bank* v. *Walsh,* 68 Ark. 433, 438.

In Massachusetts, under a statute authorizing the court after a divorce to make a decree restoring to the wife the whole or any part of her personal estate that had come to her husband by reason of the marriage, it was held "that the statute did not apply to property which came to a husband by a trust deed made by his wife after marriage and in settlement of differences between them." *Phillips* v. *Culliton,* 26 N. E. Rep. 137.

The proof showed that on account of "unhappy differences" the appellant and appellee, long before the institution of this suit, had signed articles of separation, in which, among others, occurred the following paragraphs:

"It shall be permitted either party at any time to sue for an absolute divorce, but in such suit no alimony shall be prayed for or granted, the considerations herein given being given, accepted and received in full for all interest either one may have in the estate of the other."

"The said husband has and now pays to the said wife the sum of $4,141.50 in cash, being a full one-third of the worth of all the property, money or choses in action of the said husband; and the same is here and now accepted by the said wife in full of all her dower or marital rights in the present or any future estate of the said husband, and the balance of the present or future estate of the said husband shall belong absolutely to him free from any interference or claim by the said wife thereto."

A few weeks after their separation, they concluded to live together again, upon condition that the husband would deed her one-half of the farm on the "State Line," and that she should be satisfied, do "what was right" by her husband and the children, and would "help to improve the farm with the money she had." The deed was executed by him to a third party, and by this party conveyed, according to previous understanding, to appellant and his wife jointly. Some time after that he purchased another

place, and had the deed made to himself and wife jointly. At the time of the separation he paid her in cash, according to his testimony, $3,719. The proof showed that she had an insurance policy on her husband's life worth $1,150. "She did not turn over to her husband, when they resumed living together, any of the property she got on separation."

It follows from what we have said that the property in controversy was not in consideration and by reason of the marriage, and can not be restored to appellant under the statute. But appellant contends that the consideration upon which the property was given and conveyed to appellee failed when appellee failed to live with appellant and conduct herself properly as his wife, and that the property should be restored to him, regardless of the statute.

In *Kinzey* v. *Kinzey,* 115 Mo. 496-502, the Supreme Court of Missouri said: "A court of equity can and will interfere to restore to a party injured property which has been obtained from him by imposition or deceit. But in this case no property was obtained from the plaintiff by imposition or deceit. He was simply mistaken in the moral worth and virtue of one of the objects of his bounty. From the consequences of such a mistake of judgment a court of equity can not relieve him." The only assignment of fraud and imposition is in the amendment to the complaint, where appellee is charged with "having failed and refused to return the insurance policy or any of the other property as she agreed to do when said agreement was set aside and they resumed living together and said last conveyance of the 'State Line' property made." There is no definite allegation in this that the conveyance of the State Line farm was made in consideration that appellee would return the insurance policy or any other property. But the proof upon this point is more indefinite than the allegation. Appellant testifies that it was agreed upon the separation that he was to have the insurance policy, and it was after that, and when they had agreed to live together again, that the conveyance of the State Line farm was made. There is no clear preponderance of the evidence in appellant's favor, to say the least of it, that appellee acquired her interest in the State Line farm upon consideration that she would return the insurance policy, or any other property, and that she

practiced a fraud upon appellant in failing to perform her agreement.

The proof fails to show by a preponderance that there was any such agreement. Appellee testifies positively that there was no such agreement.

As we gather from the whole of appellant's pleadings and proof, he seems to have relied mainly upon the statute for a restoration of property, and, as we have already shown under the statute, he can not recover. The decree is therefore affirmed.

HILL, C. J., and RIDDICK, J., not participating.

---

78 355
f 83 70

78 355
f78 524
80 188

78 355
88 531

78 355
90 23

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY *v.* BASKINS.

Opinion delivered April 7, 1906.

1. RAILROAD—CROSSING—DUTY OF TRAVELER.—A traveler approaching a railroad crossing must take notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains before he goes upon the track, but must continue to look and listen until he has passed the point of danger. (Page 358.)

2. SAME—CONTRIBUTORY NEGLIGENCE OF TRAVELER.—Where deceased stopped on the highway at a railroad siding for half a minute while watching the passing of a regular train on the main track going west, and was struck and killed by a work train fifteen or twenty feet away which was backed toward him from the opposite direction without noise or signals, it was a question for the jury whether, considering that deceased was blind in the eye next to the work train, and that it was his duty to look both ways, he failed to turn and look in each direction with sufficient frequency to acquit himself of negligence. (Page 359.)

3. INSTRUCTIONS—DUTY TO ASK.—A party who has not asked for a specific instruction in proper form upon a given theory can not complain of the failure of the court to give an instruction upon that theory. (Page 362.)

4. RAILROAD—CONTRIBUTORY NEGLIGENCE OF TRAVELER.—Where deceased was killed by a work train on a side track while waiting for a passenger train to pass on the main track, it was not error to refuse to charge that he was guilty of negligence if he could have waited for the passenger train to pass before going upon the side track, and

failed to do so, as the fact that he went upon the side track without waiting for the departure of the passenger train had no proximate relation to the injury. (Page 362.)

5. DAMAGES—EXCESSIVENESS.—An assessment of $2,000 as compensation for loss of a husband and father of industrious habits and with a life expectancy of about 17 years, and with an earning capacity of $400 a year, is not excessive. (Page 363.)

Appeal from Perry Circuit Court; *Edward W. Winfield,* Judge; affirmed.

E. B. Peirce and *T. S. Buzbee,* for appellant.

1. It was error to refuse defendant's request for a peremptory instruction. A traveler upon the highway is bound to exercise ordinary care and diligence at the intersection of a railway to ascertain whether a train is approaching, in order to avoid collision with it. If he fails to do what an ordinarily prudent person would do under the circumstances, he is guilty of negligence. 54 Ark. 431; 56 Ark. 457. Under the facts in this case it was not necessary for appellant to prove affirmatively that appellee failed to look and listen, because it appeared that if he had looked he could have seen. If the passenger train moving out was making noise so as to affect his hearing the approaching freight train, it was the more incumbent on him to look, and not to place himself where by reason of a defect in one eye he could not see the train. 61 Ark. 549; 56 Ark. 271; 61 Ark. 617. See also 62 Ark. 156; 65 Ark. 235; 74 Ark. 372.

2. The court erred in modifying and giving as modified the ninth instruction asked by appellant. That it was the duty of deceased to continue both to look and listen in both directions is the law as settled by this court, and it was material to appellant that the jury be so instructed. 69 Ark. 138; 74 Ark. 372.

3. In view of the age of deceased, the testimony as to the number in his family, only one of his children being a minor, his earning capacity, and the absence of evidence that he contributed anything to the support of his family, the verdict was excessive.

J. F. Sellers and *Jno. D. Shackleford,* for appellant.

1. That it is the duty of one about to cross a railroad track to look and listen, and to use ordinary care for his own safety, is conceded; but whether or not deceased was guilty of contributory negligence was a question of fact for the jury under

proper instructions from the court. Instructions given at appellant's request covered very phase of the case. It will be presumed that the deceased was in the exercise of due care, until the contrary is made to appear. 48 Ark. 333; *Ib.* 460; 58 Ark. 125; 8 Am. Rep. 811; 18 Am. Rep. 407.

2. It is culpable negligence to push a train backward by a locomotive in a reversed position without warning and in the absence of a lookout. Elliott on Roads and Streets, 611. Under the circumstances, deceased, as a man of ordinary prudence, was not chargeable with same degree of care to look and listen as he would have been had the train been headed the other way. *Ib.* 616; 8 Am. & Eng. Enc. Law (2 Ed.), 420. Deceased had the right to assume that the train would not be pushed back until he could see that an exception was being made to the usual course; and in the latter case a watchman should have been on the rear car, and signals should have been given, to give warning. 2 Sherman & Redf. on Neg. (5 Ed.), § 471. See also 23 Am. & Eng. Enc. of Law (2 Ed.), 745.

McCULLOCH, J. This was an action brought by F. P. Baskins, as administrator of the estate of Owington Baskins, deceased, against the Choctaw, Oklahoma & Gulf Railroad Company to recover damages for alleged negligent killing of deceased. He was run over and killed by a train of cars operated by appellant at Casa, Ark., and damages for the benefit of the widow and next of kin of deceased in the sum of $2,000 were asked.

Appellant pleaded contributory negligence on the part of deceased, and it is contended now that the court erred in refusing to give a peremptory instruction to the jury to return a verdict in its favor.

The details of the injury, as related by witnesses, were as follows:

The railroad track runs due east and west, and the depot at Casa is situated on the north side of the main track. There is a side track south of the main track, and both intersect a street running due north and south immediately west of the depot. The injury occurred about five o'clock in the afternoon, and a few minutes before the arrival of a passenger train from the east a work train with a caboose or box car attached to the rear end came in from the east, and passed the station, and backed in

on the side track to await the arrival and departure of the passenger train. The rear end of the work train stopped on or near the street crossing mentioned above. When the passenger train arrived, deceased started toward the depot from one of the storehouses south of the track, and walked along the west side of the street, going north until he came within a short distance of the track, when he crossed the street diagonally, following a footpath which crossed the track on the east side of the street, and walked upon the side track, and stopped 15 or 20 feet east of the rear end of the caboose or box car. The witness who related these facts said that deceased stopped there from a half minute to a minute and a quarter, when the work train backed up and struck him, and that the end of the train was about 15 or 20 feet from him when it began to move. The work train had been standing there from three to five minutes. The passenger train was then moving out, and was making considerable noise, but no signals were given from the work train either by bell or whistle, and no lookout was kept from the rear end. Deceased was blind in his left eye, the eye on the side next to the work train. There is no evidence that deceased did not look for the moving train, except the fact that it was broad daylight, and he could have seen it if he had been looking that way at the time. It is evident from the testimony that deceased stopped momentarily on the side track awaiting the departure of the passenger train, which was then just moving out from the station, and the rear coach was passing deceased when he was struck by the backing work train.

It is not insisted that the evidence is insufficient to sustain a finding of negligence on the part of the men in charge of the work train in failing to give signals by bell or whistle and in failing to keep a lookout. This is conceded. But appellant contends that deceased could have seen the moving work train if he had looked, and that his failure to see it and get out of the way establishes negligence on his part which prevents a recovery. It is, of course, too plain for controversy that he could have seen the end of the car if he had been looking that way at the moment, but it does not necessarily follow that he was negligent in failing to see it. The doctrine has been repeatedly stated by this court that a traveler approaching a railroad crossing must take

notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains before he goes upon the track, but must continue to look and listen until he has passed the point of danger. He must continue his vigilance until the danger is passed, and must look both ways up and down the track. *Railway Co.* v. *Cullen,* 54 Ark. 431; *Railway Co.* v. *Tippett,* 56 Ark. 457; *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549; *Martin* v. *L. R. & Ft. S. Ry. Co.,* 62 Ark. 158; *Little Rock & F. S. Ry. Co.* v. *Blewitt,* 65 Ark. 235; *St. L. & S. F. Ry. Co.* v. *Crabtree,* 69 Ark. 134; *St. L., I. M. & S. Ry. Co.* v. *Johnson,* 74 Ark. 372; *Tiffin* v. *St. Louis, I. M. & S. Ry. Co., ante,* p. 55.

But, as the traveler is required to look both ways for danger, it is obvious that he can not do so at precisely the same moment. It must be remembered that deceased was upon the track probably not more than half a minute, and in that time he was required to look toward the east as well as toward the west. He would have been guilty of negligence if he failed to do so. It does not appear from the evidence that he did not look both ways before as well as after he went upon the track. He may have done so, and the burden was upon the defendant to show that he did not do so. The work train was headed in an opposite direction, with the rear end standing upon or near the street crossing. There is no proof that deceased knew that an engine was attached to the cars on the side track; but if he did know, he might reasonably have assumed that the train would pull out of the switch forward and not backward. We do not mean to say that this state of facts justified deceased in ignoring the possibility or probability of the train backing toward him and in failing to keep a lookout for such emergency, but it was a circumstance for the jury to consider whether deceased, being at the time under obligation to look both ways for his own safety, might not, in the discharge of that duty, have reasonably relaxed his vigilance to some extent in looking toward the west where this train was situated, and consumed more time than he otherwise would have done in looking toward the east where there was also a possibility of danger. He might have done so consistently with due care. Though he was bound to look both ways, the frequency with

which he was bound to change his view depended upon circumstances and the probability of danger to be apprehended, and of this the jury were the judges. The law required him to exercise such degree of care in that respect as was reasonably necessary to discover the danger and avoid injury.

The train was standing within fifteen or twenty feet of him, backed up to the street crossing and headed in the other direction; he had doubtless observed its position before and perhaps after he went upon the track, and seen that it was motionless; it was put in motion noiselessly and amidst the noise of the departing passenger train, and there is no evidence that he did not look in that direction the moment before it was set in motion. Under those circumstances, and with the burden upon appellant to show that deceased did not exercise proper care, how can we say, as a necessary conclusion from this evidence, that he was guilty of negligence in failing to discover the motion of the car over a space of fifteen or twenty feet? We can not do so. That was for the jury, and we will not disturb a verdict based upon a conclusion they reached upon that state of the proof.

The following language of the New York Court of Appeals, in discussing the same question upon a somewhat similar state of facts, is quite appropriate here:

"Whether she looked exactly at the right moment, or in each direction in proper succession, or from the place most likely to afford information, can not be determined as a matter of law, and whether upon the whole, and in view of all the surrounding circumstances, including the negligent conduct of defendant, she exercised due care, was a question which the trial court could not properly decide for itself, but was bound to submit to the jury as one which they alone could answer." *Greany* v. *Long Island R. Co.*, 101 N. Y. 419.

Learned counsel for appellant press upon our attention, with much force, as conclusive of this case, the decision of this court in *St. Louis, I. M. & S. Ry. Co.* v. *Martin.* 61 Ark. *supra;* but we can not agree with them that that case is decisive of this. We do not undertake to depart from the principles of law announced in that case, nor do we recede from its application to the facts of that case. But it is not applicable to the facts of the case

at bar. In that case the injured party went upon the track at night, and the witness testified that the noise of the approaching train was plainly heard—that he heard it plainly, though his sense of hearing was imperfect. So the court said, the injured person's sense of hearing being unimpaired, that he must have heard the noise and failed to avoid the injury, and was therefore guilty of contributory negligence. In the case at bar, though it was the duty of deceased to look out for the danger, it was for the jury to say whether, considering all the circumstances and his duty to look in the other direction also, he failed to turn and look in each direction with sufficient frequency to acquit himself of negligence. *St. L., I. M. & S. Ry. Co.* v. *Tomlinson,* 78 Ark. 251.

"It will be presumed that the injured party was in the exercise of due care until the contrary is made to appear." *Little Rock & Ft. Smith Railway Co.* v. *Eubanks,* 48 Ark. 460; *L. R., M. R. & T. Railway Co.* v. *Leverett,* 48 Ark. 333; *Jones* v. *Malvern Lumber Co.,* 58 Ark. 125; *St. Louis, I. M. & S. Railway Co.* v. *Martin,* 61 Ark. *supra.*

The court, on motion of appellant, gave instructions to the jury covering generally the doctrine of contributory negligence and the duty of travelers going upon a railroad crossing to look and listen for the approach of trains. But the court refused to give an instruction asked by appellant containing a specific declaration as to the duty of the traveler to continue to look and listen until all danger be passed.

The instruction in question was modified by the court, and is as follows (that part which was stricken out by the court appears here in parentheses, and the addition thereto made by the court appears in italics):

"You are instructed that a railroad track is, in itself, a warning of danger; and if you find that deceased went upon the side track of defendant, and stopped on said side track to wait for a train on the main line to pass, and that while on said side track he was backed over by a freight train (but that deceased could have waited for said passenger train to pass before going on to the side track, or) *and* by looking in the direction from which said freight train came could have seen it *and failed to do so,* and thereby *have* avoided being injured, *and such failure contri-*

buted to the injury, then he was guilty of negligence as a matter of law, and your verdict will be for the defendant, notwithstanding you may find that defendant was also guilty of negligence (and you are instructed in this connection that it was the duty of the deceased to continue to look and listen in both directions until all danger had passed)."

As we have already said, this court has repeatedly declared the rule that travelers upon a railroad crossing must maintain the required vigilance and continue to look and listen until the danger be passed; and if an instruction on that subject in proper form had been asked, the court should have given it. But the court should not have given an instruction containing erroneous statements of the law in other respects, and was not bound to give an instruction on the subject when none was asked in proper form. A party who has not asked for a specific instruction in proper form upon a given theory can not complain at the failure of the court to give an instruction upon that theory when the instructions given by the court are free from error. *Allison* v. *State,* 74 Ark. 444.

Now, the instruction, as framed by appellant, contained an erroneous statement of law, which was stricken out by the court, to the effect that, if deceased could have waited for said passenger train to pass before going on to the side track, and failed to do so, he was guilty of negligence. This was manifestly erroneous, and was properly stricken out by the court. The fact that deceased went upon the side track without waiting for the departure of the passenger train had no proximate relation to the injury. It might as well have been said that if he had remained at home that day, instead of coming to town and crossing the railroad track, he could have avoided the injury, and was, therefore, guilty of negligence. If deceased was guilty of negligence at all which was the proximate cause of the injury, it was in failing to look and listen for the moving train. With this objectionable part of the instruction stricken out, and the additions which were made, the court might well have given it to the jury without further subtraction; but it was a correct statement of the law in the form in which it was given; and if the defendant desired that the clause concerning the duty of the traveler to continue to look and listen should be retained

in the instruction, it should have made the request. Not having done so, it can not complain of the giving of an instruction which, as modified, was a correct statement of the law, nor of the refusal of the court to give an instruction which, without modification, was, as a whole, an erroneous statement of the law.

It is next urged that the assessment of $2,000 damages was excessive. Deceased was a stout, healthy man, 56 years of age, actively engaged in farming, with an earning capacity of from $400 to $500 per annum. He labored in the field himself, as well as superintended the work on his farm, and, as the testimony shows, made a good hand at labor. His wife and daughters and one of his sons (one of his children being a minor) lived with him on the farm. There is no direct proof of the amount of his contributions to the support of his family, but the presumption will be indulged that, as they lived with him on the farm, a reasonable amount of his earnings was contributed to their support. There is not, under those circumstances, an entire absence of proof of such contributions, as contended by appellant. We must presume that he discharged his duty, in some measure, to them. An assessment of $2,000 as compensation for loss of a husband and father of industrious habits, and with a life expectancy of about 17 years, and with an earning capacity of $400 a year, can not be said to be excessive.

The proof of the amount of contributions to the support of his family by deceased could have been more specific and satisfactory, but we think it was sufficient to justify a verdict for the amount awarded by the jury.

Judgment affirmed.

LIDDELL v. BODENHEIMER.

Opinion delivered April 7, 1906.

78 364
f78 228

78 364
s87 441
87 442

1. JUDGMENT—AMENDMENT.—Parol evidence that an order was omitted from the record, if satisfactory, is sufficient to authorize its entry *nunc pro tunc*. (Page 365.)

2. SAME—TIME OF AMENDMENT.—There is no limitation to the time within which an order omitted from the record may be restored. (Page 365.)

3. SAME—MODIFICATION AFTER TERM.—A court has no authority to set aside or modify a judgment after the term at which it was rendered, even though it was not entered until the term at which the application to set aside or modify it was made. (Page 365.)

Appeal from Clay Circuit Court, Eastern District; *Allen N. Hughes,* Judge; reversed in part.

F. G. Taylor, for appellant.

While parol evidence is competent to show that a court made an order or rendered a judgment which by inadvertence was omitted from the record, such evidence is not admissible to contradict or change a record already made. 86 S. W. 822; 40 Ark. 224; 50 Ark. 338; 49 Ark. 397.

J. D. Block, for appellee.

Parol evidence of a judgment which was omitted from the record is sufficient to authorize a *nunc pro tunc* judgment. 40 Ark. 224; 86 S. W. 822.

Where a judgment or order has been omitted from the record, or improperly copied into the record, the power of the court to correct the same by *nunc pro tunc* entry is always proper. 1 Freeman on Judg. (4 Ed.), § 61; 78 Ill. 152; 50 Cal. 289; 76 Mo. 643; 33 La. Ann. 1056; 24 Neb. 103; 123 Ind. 518; 30 Ga. 929; 57 Miss. 730; 6 How. 260.

BATTLE, J. An action was brought in the name of Bodenheimer, Landau & Company against Robert Liddell, before a justice of the peace of Clay County, to recover the possession of certain personal property. Plaintiffs recovered judgment, and the defendant appealed to the circuit court.

In the circuit court (the term is not shown) plaintiffs represented to the court that the action was brought without their consent, and asked that it be dismissed, and thereupon S. D.

Hawkins, who had possession of the property in controversy and claimed the same, appeared, and asked that he be substituted for plaintiffs, and that the action proceed in his name as such. The action was dismissed as to Bodenheimer, Landau & Company, and revived in the name of S. D. Hawkins as plaintiff. This order was not entered of record.

At the January, 1894, term of the Clay Circuit Court for the Eastern District, the action proceeded in the names of Bodenheimer, Landau & Company and S. D. Hawkins, plaintiffs, against Robert Liddell and John Matthews Apparatus Company, defendants, and Hawkins recovered judgment against the defendants for the property in controversy. This proceeding was had after the action was dismissed as to Bodenheimer, Landau & Company. On motion of the defendants the judgment in favor of Hawkins was set aside, and a new trial was granted.

At the August, 1895, term of the Clay Circuit Court for the Eastern District of Clay County, the action was called for trial, and the plaintiffs failed to appear. Judgment by default was rendered against Bodenheimer, Landau & Company in favor of the defendant, Robert Liddell, for the property in controversy and costs.

In August, 1901, Bodenheimer, Landau & Company filed an application in Clay Circuit Court for the Eastern District, in which they stated the foregoing facts, and asked that the order omitted from the record be entered *nunc pro tunc*. All parties appeared, and the court heard the application and the evidence adduced in respect thereto, and found that the order was made, and ordered that it be entered, and ordered that the judgment in favor of Liddell against Bodenheimer, Landau & Company for property be corrected so as to be against Hawkins, and to show that Bodenheimer, Landau & Company were and are not parties thereto; and Liddell appealed.

Parol evidence of an order omitted from the record, if satisfactory, is sufficient to authorize a *nunc pro tunc* order or judgment. *Bobo* v. *State,* 40 Ark. 224; *Ward* v. *Magness,* 75 Ark. 12. The application for the order was not barred by the statute of limitations. 1 Freeman, Judgments (4 Ed.), § 73, and cases cited.

The court erred in setting aside or modifying a judgment

which was actually rendered. It had no authority to set aside or modify a judgment after the term at which it was rendered has expired, on application for a *nunc pro tunc* order.

The *nunc pro tunc* order is affirmed, and the order setting aside or modifying a judgment rendered at a previous term is reversed.

HILL, C. J., did not participate.

FORT SMITH SUBURBAN RAILWAY COMPANY *v.* MALEDON.

Opinion delivered April 7, 1906.

1. ACTION—MISJOINDER OF CAUSES.—A complaint which alleged that defendant railroad company acquired a right of way over land of which plaintiff was in possession as tenant, and that another defendant, a contractor employed to construct the railroad, entered the land and destroyed part of plaintiff's crops, without plaintiff's consent, does not misjoin two causes of action, but states a single cause of action for a joint tort for the destruction of crops. (Page 372.)
2. RAILROAD—LIABILITY FOR CONTRACTOR'S TORT.—A railroad company which has authorized and directed a contractor to build its road upon land which it has acquired subject to an existing lease is liable as a joint tort feasor with the contractor and his servants for damages done by them, in the prosecution of the work, to the crops of the lessee. (Page 372.)
3. SAME—LIABILITY FOR CROP DESTROYED—CONTRIBUTORY NEGLIGENCE.—A lessee was not guilty of contributory negligence in planting crops upon the leasehold after a railroad company had filed for record a deed from the lessor for right of way across the land, where the railroad had acquired no right of way as against him. (Page 373.)
4. SAME—DUTY OF OWNER TO PROTECT CROP.—In an action for damages against a railway company for injuries caused to growing crops by throwing down plaintiff's fences, the measure of plaintiff's duty to exert himself to lessen his damages is such care and diligence as a man of ordinary prudence would use under the circumstances. (Page 373.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Styles T. Rowe,* Judge; affirmed.

Oscar L. Miles, for appellants.

1. The record of the deed conveying right of way to the railway company was notice to appellee that it had acquired the right of way. Kirby's Digest, § 762. Under the law the appellee could only recover the fair rental value of the land included in the right of way for the remaining period of his lease. He could not enhance or exaggerate his damages by following up the engineers and planting a crop where they had driven the location stakes for the line of railroad. 67 Ark. 375. If a party can, at a trifling expense or by reasonable exertions, avert the damages caused by the wrongful act of another, it is his duty to do so. If he fails therein, he is entitled to recover only such damages as were not the result of his negligence or omission. 67 Ark. *supra;* 44 Mo. 303.

2. There was a misjoinder of causes of action and of parties. It is apparent that the contractor to whom was let the construction of the railroad across the leasehold estate could not be held for the taking of the right of way by the railway company, and it is equally true that the latter, having let the construction of its line across the leasehold estate to an independent contractor, could not be held liable for the negligent acts of the employees of that contractor. 52 Ark. 503; 54 Ark. 424. The court therefore erred in permitting the case to proceed jointly against the railway company and the independent contractor for two separate causes of action, and in permitting a joint verdict against them for injuries flowing from separate causes and sources.

Brizzolara & Fitzhugh, for appellee.

1. It is proved that appellee had rented the land long before appellant acquired its right of way, and was in possession thereof. He had the legal right to cultivate the whole field until the railway company had settled with him.

The deed to the right of way in no way described the boundaries of the strip conveyed, the only limitation being that the road should not be built within 50 feet of the improvements on the place.

The measure of appellee's duty was submitted to the jury in the court's fourth instruction, wherein they were told that if plaintiff by reasonable exertions could have averted the damages

caused by defendant's wrongful act it was his duty to do so, and if he failed to perform the full measure of his duty in protecting his crops he could recover such damages only as were not the result of his negligence or omission. 38 Iowa, 518; 43 Iowa, 96; 1 Sutherland on Dam. (3 Ed.), § 90, and cases cited; 63 Tex. 200; 9 S. E. 139; 26 Pac. 576.

2. Where a railway company acquires a right of way across lands in possession of a lessee, it takes the same subject to the leasehold estate. 54 Ark. 424; 10 S. E. 730; 11 S. E. 839. Until appellee had been settled with for his interest in the right of way, neither of the appellants had any right to enter appellee's enclosure; and when the railway company ordered the construction company to enter and do wrongful and unlawful things, they became trespassers, joint *tort feasors,* each liable for all damages done. 15 Ark. 452; 67 Mo. 118; 4 Ohio St. 399; 39 Ohio St. 477; 3 Elliott on Railroads, 1590-1594; 13 S. E. 278; Cooley on Torts, 644.

BATTLE, J. This action was brought by Charles E. Maledon against the Ft. Smith Suburban Railway Company and Archer-Foster Construction Company. The plaintiff, after alleging that he is in possession of certain lands as tenant, alleges in his complaint:

"That the Ft. Smith Suburban Railway Company has acquired a right of way over and across said land without the consent of this plaintiff, who owned a growing crop thereupon at the time of the acquisition of the right of way by said railway from the owner thereof. That the said railroad company has let or sublet the construction of its railroad across said property to the Archer-Foster Construction Company, and the Archer-Foster Construction Company, in the construction of the said Ft. Smith Suburban Railway over and across said tract of land, has destroyed a crop of cotton, turnips, cabbage and beans belonging to the plaintiff; that part of said crop was destroyed by reason of the actual construction of the road, and the remainder destroyed by the negligently letting down and keeping down of the fence, whereby through their negligence cattle went in upon and destroyed the same, to the plaintiff's damage in the sum of $145. Wherefore plaintiff prays judgment for the said sum of $145 and for his costs, and all other proper relief.

"HILL & BRIZZOLARA,
"Attorneys for Plaintiff."

The Ft. Smith Suburban Railway Company, after denying the material allegations in plaintiff's complaint, by way of defense says:

"The Ft. Smith Suburban Railway for further answer says that it acquired a right of way over and across the land set out in plaintiff's complaint on the 24th of January, 1903, and that at that time neither the plaintiff, Charles E. Maledon, nor any one else had planted upon said right of way upon said land any crop or crops of whatsoever nature. And the defendant, the Ft. Smith Suburban Railway Company, charges that, at the time the deed conveying said right of way was placed upon the public records in the Ft. Smith District of Sebastian County, neither the plaintiff, Charles E. Maledon, nor any one else had planted upon said right of way any crop or crops of whatsoever nature; and that whatever crop or crops were planted upon said right of way during the year 1903 were planted there with the full knowledge that the said railway company had acquired a right of way over and across said land, and intended to construct and build its line over said right of way."

And the Archer-Foster Construction Company, after denying the material allegations in the complaint, in a separate answer says:

"For further answer herein, this defendant says that, if the plaintiff was damaged in any manner as set out in his complaint, he was damaged by reason of his own contributory negligence in failing to take proper precautions to prevent the destruction of the said crops. That, with knowledge of the right of way having been acquired by the Ft. Smith Suburban Railway Company through and across said land, he proceeded to plant and cultivate and expend time and labor upon crops upon the right of way so acquired, after being informed of its acquisition by said railway company. And the plaintiff negligently failed and refused to take proper precautions to keep the cattle out of his said crops; and negligently failed and refused to gather said crops at a time when he had an opportunity to do so, to the end that it might not in any manner be destroyed or injured."

On the 16th day of September, 1902, plaintiff leased from

Lena Schutheiss the lands mentioned in his complaint for the year 1903 for the sum of $70, and in the same contract, for a different consideration, rented the same land for the remainder of the year 1902, and during the fall of the year 1902 entered into and remained in actual possession during the term of the lease.

On the 24th day of January, 1903, plaintiff's lessor conveyed to Ft. Smith Suburban Railway Company, by quitclaim deed, a right of way one hundred feet wide, over and across the land leased by her to plaintiff. The boundaries of the right of way were in no way described in the deed. The only limitation on the right of way was that the road should not be built within fifty feet of the improvements on the land. This deed was filed for record on the third day of April, 1903.

"Early in April, 1903, plaintiff planted about nine acres of cotton, and thereafter, in season, planted crops of turnips, cabbages and beans."

"In the latter part of October, or early in November, 1903, the defendant, Archer-Forster Construction Company, as subcontractor, in performance of its contract to construct a portion of the line of defendant Suburban Railway Company, without right of entry as against plaintiff, entered these premises, constructed the defendant railway company's roadbed thereon, thereby destroying a portion of these crops, and cut and left down the fencing whereby cattle entered and destroyed the remainder."

Evidence was adduced tending to prove that the value of the crop was $125 or $130.

The evidence as to the trespass is in substance, as follows:

Maledon, the plaintiff, testified: "Archer or his crew came down and cut the fence down after I forbid them, ran their ditches through and covered up my stuff on the right of way; left the fences all open. He came down there, and I tried to get him to keep up the fence. I never did let them go in; came in unknown to me while I was off at work. He came through there afterwards while I was away, drove his men down there, and ran the outfit through my field."

Cross-examination. "Don't know when the company first surveyed its right of way through there. Several surveys were run. They ran one pretty near every day or two. McCarty

made a survey there about the first of April, 1903. Had not planted any cotton at the time of McCarty survey; was breaking up, though. Not certain at the time he ran that survey where they were going.

Q. "After this you say Mr. Archer left the fences down there, and let the stock in. When was it that the stock first got in?"

A. "That was right after breaking this fence down and going through, but what day I could not say. I never saw them put up the fence. I saw the place where the cattle got through and came out. I ran the cattle out part of the time, and the children part of the time. Did not keep count of the times. I built up the fence on the right of way to keep them out. They cut the wire fence on both sides of the right of way, and threw it up from the right of way on both sides—middle fence and outside fence. Mr. Archer told me that he cut it."

Redirect-examination. "I put the fence up every day there for quite a while; had my children running backwards and forwards over the field running stock out. I went down there and built the fence up the best I could, and when they came along they would throw it down. They did that a number of times. There was one string of wire fence around the place, and the other rail."

Mike Donahoe for plaintiff testified: "My brother went around the fence several times, and I think put it up once or twice, and Maledon put it up, and the children put it up. A good many stock were in the field. Saw Maledon and his children drive them out."

H. J. Archer, president of defendant Archer-Foster Construction Company, testified: "Work of construction on these premises commenced October 27, 1903. I went in there against Maledon's wish, as far as I know, as I never consulted him anything about it. Don't know how many times we cut the wire across the right of way. Suppose our men cut it. Anyway they had orders to. Generally cut the wire; come to a wire fence, and cut it in the center, and lay it off on each side, and you can bring it back and fasten it up in the center. Supposed to do it every night. Paid a man for doing it. Don't know whether he did it or not; only have his word for it."

The court, over the objection of the defendants, instructed the jury, in part, as follows: "If you believe that the plaintiff could have by reasonable exertion averted damages caused by the wrongful act of the defendant, then it was his duty to do so; and if you believe he failed in performing the full measure of his duty in regard to protecting his crops, he will be only entitled to recover such damages as were not the result of his negligence or omission. The plaintiff can charge the defendants only for such damages as by reasonable endeavor and expense he could (not) have prevented; and will be entitled, if you believe he was negligent in not protecting his crops, to recover whatever amount of damages he may show has been sustained, and what he could not avert by reasonable exertions."

The jury returned a verdict in favor of plaintiff for $120 for damages, and the defendants appealed.

Appellants contend that there was a misjoinder of parties and of causes in this action; that appellee seeks to recover damages for taking the right of way out of the leasehold estate, and for the negligence of the employees of the construction company in leaving down fences and permitting cattle by reason thereof to destroy the crops of appellee; that the construction company could not be held for the taking of a right of way by the railway company, nor can the railway company be held liable for the negligent act of the construction company. But this is not true. This action was not brought for damages for taking a right of way or property appropriated for public use. Appellants were sued as tort feasors for the destruction of crops. Appellee was lessee of the land in question, and in possession under his lease at the time the right of way was acquired. Appellants had no right to enter the same until he was fully compensated, or consented; and, having no such right itself, the railway company could confer none upon the construction company. In employing and directing the construction company to enter the appellee's field and commence construction, it thereby authorized and procured the commission of the trespasses, and became a trespasser, and liable, with the construction company and its servants, as a joint tort feasor for damages sustained. *Railway Co.* v. *Knott,* 54 Ark. 424; *Ullman* v. *Hannibal & St. J. R. Co.*, 67 Mo. 118;

Carman v. *Steubenville & I. R. Co.*, 4 Ohio St. 399; 3 Elliott on Railroads, pp. 1590, 1594.

Appellants insist that appellee was guilty of contributory negligence in planting his crops after the railway company had filed its deed for right of way for record. But this was no reason why he should have refrained from planting and cultivating any part of his farm. He was entitled to the possession of the entire tract of land, and appellants to no part of it. Until they had acquired the right to possession, he had the right to plant such crops in such parts thereof as he saw fit, and no one had any right to interfere with him in so doing.

It is urged by appellants that appellee can recover only such damages to his crops as he could not by reasonable exertions have averted. He should reasonably have exerted himself to lessen his damages. "The measure of the duty is such care and diligence as a man of ordinary prudence would use under the circumstances." The evidence shows that efforts were made by the appellee to keep the cattle from destroying his crops, but without success. "Whether they were such as an ordinary careful and prudent man would have made under the like circumstances, or whether the appellee was negligent in his efforts to save his crops from destruction, was properly left to the jury to determine." *Smith* v. *Chicago Ry.*, 38 Iowa, 518; *Downing* v. *C. R. Ry.*, 43 Iowa, 96; 1 Sutherland on Damages (3 Ed.), § 90, and cases cited

Judgment affirmed.

HILL, C. J., being disqualified, did not participate.

78 374
83 359

78 374
79 68
f79 92
f79 179
f82 63

78 374
87 127
87 206
87 370

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* BOYLES.

Opinion delivered April 16, 1906.

1. APPEAL—PRESUMPTION FROM INSUFFICIENCY OF ABSTRACT.—Where plaintiff sued and recovered damages for defendant's negligence, and defendant, on appeal, failed to set out the evidence on the subject of negligence, it will be presumed that the evidence sustained the verdict. (Page 377.)
2. SAME—SUFFICIENCY OF ABSTRACT.—Objections to the admission of evidence will not be considered on appeal where it does not appear from appellant's abstract that there was a motion for a new trial. (Page 377.)
3. SAME—HARMLESS ERROR—ADMISSION OF EVIDENCE.—Where uncontradicted evidence showed that appellant was guilty of negligence as charged, which constituted the proximate cause of the injury sued for, error of the court in admitting evidence of other negligence not charged and in permitting counsel to make reference thereto was not prejudicial. (Page 377.)
4. SAME—SAVING EXCEPTION IN MOTION FOR NEW TRIAL.—Error of the court in refusing an instruction asked will not be considered on appeal unless the exception is preserved in the motion for new trial. (Page 378.)
5. SAME—FAILURE OF ABSTRACT TO SET OUT INSTRUCTIONS.—Error of the court in refusing an instruction asked will not be considered on appeal where appellant's abstract fails to set out the other instructions given by the court. (Page 379.)
6. MASTER AND SERVANT—ASSUMPTION OF RISKS.—A servant, by continuing in the master's service, does not assume the risk incident to the negligence of the master in failing to furnish him a safe place to work. (Page 379.)
7. INSTRUCTION—AMOUNT OF DAMAGES.—It was not error to instruct the jury that in no event should their verdict be for more than the amount sued for, if they were also instructed that their finding must be based on the evidence. (Page 380.)

Appeal from Franklin Circuit Court; *Jeptha H. Evans,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee was in the employ of appellant as "cable man" in a crew that was engaged in construction work on appellant's roadbed. The crew used a construction train, consisting of an engine, tender, and three cars, and on the day appellee was injured the crew was engaged in hauling dirt and unloading it. The train was on a side track, and was backing on to the main line at the

rate of eight or ten miles an hour. The switch which connected the side track with the main line had not been thrown, so as to let the cars out, and appellee, who was riding on one of the cars, seeing the condition of the switch, and believing that the cars were going to be derailed, sprang to the ground. He was seriously injured, having his ankle thrown partly out of place, and badly sprained. He brought suit against appellant, alleging, with more or less repetition, as the gist of his action, that "the conductor in charge of the train wrongfully and negligently allowed the engineer to start up and move said train and engine without having first adjusted and thrown said switch so as to connect the rails leading from the side track to the said main line." He prayed judgment in the sum of $2,000. The appellant denied all material allegations of the complaint, and set up as an affirmative defense contributory negligence.

There was a jury trial, and a verdict and judgment for $500.

Lovick P. Miles and *Oscar L. Miles,* for appellant.

1. It was error to admit testimony as to a conversation between the conductor and engineer, prior to the time of the accident and of the starting of the train, tending to show that the latter was intoxicated. The facts germane to the case were as to the speed of the train as it approached the switch, the failure of the crew to throw the switch, and the nature of the danger apparent to plaintiff at the time he jumped. Above testimony was therefore not admissible. 58 Ark. 179; 61 Ark. 52; 66 Ark. 500; 70 Ark. 562; 55 Fed. 595; 119 U. S. 99; 57 Ga. 232.

2. In commenting on the foregoing evidence, counsel for appellee made use of language, without rebuke from the court, which was improper, and prejudicial to the appellant. This was error for which the cause should be reversed. 58 Ark. 353; 61 Ark. 138; 63 Ark. 174; 56 Ark. 626; 70 Ark. 305.

3. Appellant asked an instruction to the effect that if the jury found that appellee knew that in leaving side tracks it was the custom not to stop, but to slow down engines before reaching switches, and for an employee to run ahead and open the switch while the engine moved forward, and appellee without protest continued to work with a crew known to him to so act, then he assumed the risk of accidents and injuries from such movement of trains. It was error to refuse this instruction. 54

Ark. 297; 56 Ark. 206. Failure to instruct the jury upon appellant's theory of the case is ground for reversal. 16 Ark. 308; 52 Ark. 45. The court erred in its instruction numbered 5, in that it indicates to the jury the amount of their verdict. The amount sued for in the complaint has nothing to do with the amount of the verdict, since the jury, in assessing compensatory damages, must be governed by the testimony to show the extent of the pecuniary injury. The court ought not to direct the attention of the jury to the amount claimed in the complaint. 58 Ark. 140.

Sam R. Chew, for appellee.

1. Under the proof, it was the duty of the conductor to see that the switches were properly adjusted before starting out of the side track, and it was the duty of the engineer jointly with the conductor to look after the condition and position of the switches. The question of negligence on their part was one of fact for the jury; hence it was competent to show their condition at and immediately preceding the happening of the accident. 12 Ark. 782; 48 Ark. 333; 70 Ark. 558; 43 Ark. 99.

2. An objection to remarks of counsel is not sufficient, and can not avail on appeal, unless it was pressed to the point of a ruling by the court on the language objected to, and an exception saved to that ruling. 85 S. W. (Ark.), 428.

3. There was no error in the 5th instruction complained of. It is true that it concluded with the direction that in no event should they find for more than $2,000, the amount sued for, yet the instruction throughout limits the jury to the damages sustained as shown by the proof—to such reasonable sum as in their judgment from the evidence would compensate him for the injuries, if any, which he had sustained. Moreover, the amount of the verdict—one-sixth of the amount sued for—is conclusive that the jury were not misled, nor the appellant prejudiced, thereby, 58 Ark. 140. The instructions given defined and applied appellant's liability. 57 Ark. 306; 55 Ark. 249; 67 Ark. 209.

4. Upon the facts disclosed in evidence there could have been no other verdict than for appellee, and this court will not reverse the case for error in the instructions. 54 Ark. 289; 56 Ark. 594; 62 Ark. 228.

WOOD, J., (after stating the facts.) 1. Appellant in its brief contends that evidence of a conversation between the conductor and the engineer before the train started out in which the conductor asked the engineer "if he was not drunk," and the engineer's reply thereto, and of the appearance of the engineer, that "he seemed excited," was improper and prejudicial. The appellant does not abstract the evidence at all bearing upon the question of whether or not the conductor was negligent in allowing the engineer to start up and move the train and engine without first adjusting the switch so as to let the construction train on to the main line. This was the gravamen of the charge as to the negligence of the company. Without this, even if the above testimony were irrelevant or incompetent, it would be impossible for us to say whether or not it was prejudicial. Because, if the uncontradicted proof should show that the appellant's conductor was negligent in the manner charged, it would be wholly immaterial whether the engineer was drunk or sober just before the train started to pull out. The objection therefore could not avail appellant on the abstract he makes, and for the further reason that there is no reference to the motion for new trial in appellant's abstract, without which it is impossible for us, without "exploring the transcript," to determine whether his exception to the court's ruling was preserved. Appellant's objection to this testimony, therefore, could not avail here. But appellee has not seen proper to object to appellant's abstract, and ask for an affirmance for defects therein. On the contrary, he has set out a full abstract of the testimony from his standpoint on the question of appellant's negligence. From this, it appears, quoting from the language of one of the witnesses, that "it was the duty of the conductor to look after the condition and position of the switches. It is the duty of the conductor to see that the switches are thrown and properly adjusted with the main line before starting out of the side track. The engineer has control of the fireman and brakeman around the engine pertaining to the company's property and safety of the train. The fireman is subject to the command of the engineer. The engineer has control of the head brakeman when he is on the engine. This flagman or head brakeman is compelled to obey the orders of the engineer." This testimony is undisputed, and appellant does not deny

that a failure on the part of the conductor to perform that duty would be negligence. Conceding, therefore, without deciding, that the testimony of what the conductor asked the engineer about his being drunk, and the appearance of the engineer, was irrelevant and incompetent, it did not go to the question of the negligence of the conductor in failing to throw the switch, and could not have been prejudicial. If the proximate cause of the injury was the negligence of the conductor in failing to see that the switch was thrown before starting the train out of the side track, and this was conclusively established, then it was wholly immaterial whether the engineer was drunk or sober, and the testimony could not have been prejudicial.

2. The same may be said of the remarks of counsel for appellee in his opening statement to the jury, which were as follows: "I have an idea that the whole crew was drunk and drinking. They had been to Van Buren the night before, and it is reasonable to suppose that they laid in a supply of whisky."

3. Appellant presents in its abstract testimony tending to prove that it was a "very common thing" for engines to approach switches and continue their movements, and for brakemen to run ahead and throw the switch, while the train continued to move, and that such had been the custom on this train, and that such was attempted by a brakeman on this train when the injury occurred, but that the attempt failed because the "switch point hung, and it raised the flange, and the engine, tender, and one pair of trucks of the ledgerwood, backed off the end of the rail."

On this testimony appellant asked the following: "If you find that it was known to plaintiff that in leaving side tracks it was common for engines to not stop, but to slow down before reaching switches, and for a brakeman or other employee to jump from engine or tender, and run ahead and open the switch while the engine moved ahead, and with this knowledge, without protest, plaintiff continued to work with a crew known to him to so act, then the court tells you that plaintiff assumed the risk of accidents and injury from such movement of trains in leaving side tracks; and if he was injured by reason of such movement being pursued, then you will find for the defendant."

Appellant's counsel say in their brief that "the court refused to give this instruction. Defendant excepted, and the court

gave no other instruction presenting this theory of the case to the jury." Here again the abstract is so fatally defective that it is impossible for us without going through the transcript to determine whether the court erred in refusing this request. We do not know whether appellant preserved its exceptions to the court's ruling on this instruction in the motion for new trial.

Moreover, appellant has failed to abstract the other instructions given by the court. True, its counsel say that no other was given presenting this theory, and as they are able and truthful attorneys, they are doubtless correct. Such, at least, is their opinion. But the court might differ with them, and must determine the correctness or incorrectness of the contention of counsel from the record, and, under the rules, must have an abstract of it to see whether there is error. Chief Justice COCKRILL, speaking along this line, said: "The appellant argues that the court erred in refusing to charge the jury as requested by him, but his exception on that score has not impressed him as being serious enough to require him to point out the error by setting out the prayers in his abstract in accordance with the rules. We therefore take it as a waiver of the objection." *Koch* v. *Kimberling,* 55 Ark. 547; *Carpenter* v. *Hammer,* 75 Ark. 347; *Jacks* v. *Reeves, post,* p. 426. See also on sufficiency of abstracts, *Neal* v. *Brandon,* 74 Ark. 321; and *Shorter University* v. *Franklin,* 75 Ark. 571.

This disposes of the objection to the ruling of the court in refusing other prayers asked by appellant. But, aside from this, the uncontradicted proof in the record from the abstract as presented by appellee shows that the proximate cause of appellee's injury was the failure upon the part of the conductor to see that the switch was thrown. This was a duty devolving upon the master, and the servant did not assume the risk incident to the negligence of the master in failing to perform that duty. In this view there was no error in refusing requests for instructions set out in appellant's brief.

4. The court gave at the request of appellee the following:

"Should your verdict be for the plaintiff, then you should assess his damages at such a reasonable sum of money as you believe from the evidence will fully compensate him for the damages he has sustained, if any, and in determining this amount you

may take into consideration his loss of time, if any, from his ordinary and usual avocation, his diminished capacity, if any, to work and earn money at his usual and ordinary avocation in the future, and the amount of money, if any, he has laid out and expended for services of a physician, and in buying medicine, if any, in procuring or attempting to effect a cure of said injuries, if any, the mental and physical pain he has, or may have to endure, if any; but in no event should your verdict be for more than $2,000, the amount sued for."

We might dispose of the objection of the counsel to the giving of this instruction as we have the others, for it appears from brief of counsel for appellee that the language set out in brief for appellant is only an excerpt from an instruction. But, as counsel for appellee have abstracted enough of the instruction to make the ruling of the court below clear, we will proceed to pass upon it. Treating appellant's objection to the ruling of the court in giving this request as having been preserved in a motion for new trial, we see no error in that part of the instruction to which objection is urged here, towit: "And in no event should your verdict be for more than $2,000, the amount sued for."

In *Fordyce* v. *Nix,* 58 Ark. 140, this court said: "The trial court should not have told the jury, however, that, if the conduct of appellants was willful, etc., they may allow him additional vindictive or punitive damages, not exceeding the amount sued for," the objection being to the words, 'not exceeding the amount sued for.'" Learned counsel for appellant urge this as authority for their position that the court erred in giving the instruction containing the language pointed out *supra.* An examination of that case will discover that it is not in conflict with the instruction given by the court in this case. In that case the jury were not directed to base their verdict upon the evidence. There were no limitations and no directions except that it was their province to find an amount not exceeding the amount laid in the complaint, regardless of whether the amount laid in the complaint was reasonable or unreasonable and "commensurate with the wrong done as shown by the evidence adduced." In the present case the instruction duly circumscribed the jury within the limits of reason, and directed that their findings should be based on the evidence. Moreover, the instruction in *Fordyce* v. *Nix* was held

not to be prejudicial, because the verdict was shown not to be excessive, the jury having found for less by $1,500 than the amount claimed, which finding was amply sustained by the proof. So here.

Affirm.

STECHER COOPERAGE WORKS *v.* STEADMAN.

Opinion delivered April 16, 1906.

1. MASTER AND SERVANT—NEGLIGENCE OF FOREMAN.—A master is liable for the accidental killing of a servant caused by the carelessness of a foreman in running machinery at great and unusual speed or in operating it while out of balance. (Page 385.)
2. EVIDENCE—DECLARATION OF AGENT.—In an action against a master to recover damages for the killing of a servant in an accident, a statement made by defendant's foreman which tended to prove negligence on the master's part is inadmissible against the master, in the absence of any proof that the foreman was acting for the master in making the statement. (Page 386.)
3. SAME—RES GESTÆ.—In a suit against a master for the negligent killing of a servant, a statement by the foreman in charge at the time of the accident, made 24 hours thereafter, is inadmissible as part of *res gestae.* (Page 386.)
4. SAME—RELEVANCY.—Testimony of a witness that the machine whose explosion caused the death of plaintiff's intestate could be heard for the distance of one or two miles was inadmissible where it was not confined to the time of the accident. (Page 387.)
5. MASTER AND SERVANT—DEFECTIVE MACHINERY—NEGLIGENCE.—It was error to instruct the jury that the master is liable for the death of a servant caused by the defective condition of the master's machinery, as the master is liable only when such defects are due to its negligence. (Page 387.)
6. TRIAL—ARGUMENT OF COUNSEL—APPEAL TO SYMPATHY.—In an action against a master for the negligent killing of a servant, plaintiff's counsel appealed to the jury to remember, if "they had any little girls," that when the "finger of scorn" should be pointed at them they could be there with their "strong right arms," and to so act that they would be able "to look into this woman's countenance" and say to her that their duty had been discharged. *Held* not error. (Page 387.)

Appeal from White Circuit Court; *Hance N. Hutton,* Judge; reversed.

STATEMENT BY THE COURT.

In 1902 J. W. Steadman was employed by the Stecher Cooperage Company. He worked for the company at a machine called an edger. This machine had a large wheel, some four or five feet in diameter, made of cast iron with a rim of wrought iron or steel to make it more secure and hold it together somewhat as the tire of a wagon wheel binds the wheel and makes it stronger. On the 18th of October, 1902, while the machine was running, the wheel broke into fragments. The fragments of the broken wheel were hurled in all directions with great force, some of them being thrown through the top of the shed, and were afterwards found about two hundred yards distant from the mill. Some of the fragments of the broken wheel struck Steadman, inflicting injuries upon him which caused his death some twenty-four hours afterwards. He left a widow, Mrs. Margaret L. Steadman, and some small children surviving him. Mrs. Steadman was afterwards appointed administratrix of his estate, and brought this action against the Cooperage Company to recover damages for the death of her husband.

She alleged, in substance, that the defendant company negligently permitted the machine to be operated while in a defective and dangerous condition, that the large wheel was cracked and out of balance, and that while in this condition it was propelled and revolved with great rapidity, and that by reason of the centrifugal force of said revolving wheel it broke into fragments, some of which struck Steadman, and as a result thereof he was killed. The complaint further alleged that Steadman at the time he was struck was at work under the directions of the agents of defendant, and that his death was due to the negligence of such agents, without fault on his part.

The company filed an answer, admitting that Steadman was killed by the bursting of the wheel, but denied that the accident was the result of negligence on the part of it or its agents. It stated that if the wheel was defective the danger was obvious, and was assumed by Steadman, and that if there was any negli-

gence it was the negligence of a fellow-servant of Steadman, for which the company was not responsible.

On the trial the court, over the objection of the defendant, permitted the plaintiff, Mrs. Steadman, to testify that Otto Stecker, the manager of the company, came to her home about 24 hours after the accident, and after her husband had died, and said to her: "I am more than sorry, and I will pay the funeral expenses and the doctor's bill. I will pay for a lot in the cemetery. I don't feel myself clear. I rolled and tossed all night, and my wife says that all I kept saying was, 'That poor man!'"

There was a verdict for the plaintiff for the sum of $3,042, for which amount judgment was rendered against the defendant. The defendant appealed.

J. W. & M. House, for appellant.

1. When the danger is patent, the servant can not recover for damages arising from such danger. 60 Ark. 438; 58 Ark. 125; 65 Ark. 98; 164 Mass. 168; 161 Mass. 159; 47 Fed. 688; 57 Fed. 381; 68 Ark. 316; 35 Ark. 602; 41 Ark. 382; *Ib.* 542; 56 Ark. 206; *Ib.* 232; 57 Ark. 76; *Ib.* 503; 58 Ark. 125; *Ib.* 324.

2. The court erred in admitting incompetent evidence. Declarations by agents of corporations, if made at the time of the transaction, and within the scope of their authority, are admissible on the ground of *res gestae;* but, if made after the event, are inadmissible. 14 Am. Dec. 628, and note; 66 Ark. 494. Testimony showing the difference in the noise made by the machinery before and after the accident was inadmissible. 18 Am. St. Rep. 303; 59 L. R. A. 119; 1 Wigmore, Ev. § 283; 58 Ark. 125; 48 Ark. 473.

3. The master is not an insurer of the perfection of machinery furnished the servant. It is only required to exercise reasonable care in providing safe machinery, and ordinary care to keep it in a reasonably safe condition. It was therefore error in the first instruction to charge the jury that it was "the duty of defendant to construct and maintain its machinery and appliances in a safe condition." For like reasons it was error in the third instruction to charge the jury that "deceased had a right to rely upon the defendant to perform its duties to him by providing for his use appliances that were reasonably safe."

4. The second instruction is erroneous in that it makes the master an insurer both as to the construction and adjustment of the machinery.

5. The court erred in giving the 4th instruction, and in modifying the 11th by inserting the word "competent" before the word "foreman." The complaint does not allege negligence in employment of any person, nor incompetency of any employee. Defendant was only required to use reasonable care in the selection of its employees, and was not an insurer of their fitness or competency; and if the employee was a co-laborer, he was a fellow-servant, for whose negligence or want of skill defendant was not liable unless it had failed to use reasonable care in his employment. 69 Ark. 363; 7 Ore. 84; 15 Ore. 220; 71 Mo. 514; 72 Mo. 212; 76 Mo. 614; 90 Ill. 425; 40 Ga. 231; 12 Am. & Eng. Rd. Cas. (N. S.), 19 and note; *Ib.* 644 and note; 35 Am. & Eng. Rd. Cas. (O. S.), 387; 42 *Ib.* 325; 50 Ind. 385; 22 Pac. 1079. The rule that error without prejudice is no ground for reversal applies only where it appears so clear as to be beyond doubt that the error complained of could not have prejudiced the complaining party. 114 Fed. 458; 73 Fed. 774; 59 Fed. 860; 5 Wall. 795; 17 Wall. 630; 104 U. S. 625; 110 U. S. 47; 119 U. S. 99; 148 U. S. 664; 158 U. S. 334; 167 U. S. 624. See also 52 Fed. 371; 36 Fed. 994.

6. The jury are not warranted in finding exemplary damages unless the negligence is so gross as to imply malice, wantonness, conscious indifference to consequences, etc. 30 Ark. 377; 8 Am. & Eng. Rd. Cas. (O. S.), 541; 11 *Ib.* 673; 26 *Ib.* 274; 30 *Ib.* 576; 36 Am. & Eng. Rd. Cas. (N. S.), 636; 31 *Ib.* 776; 12 *Ib.* 14 and note; 22 *Ib.* 909; 70 Ark. 136.

7. Proof of a simple defect or imperfect operation of machinery is not sufficient evidence that the company had previous knowledge or notice of an alleged defect, imperfection or insufficiency in the machinery. 45 Ark. 567.

8. The cause should be reversed because of offensive language made use of by counsel in argument, of such character as that neither rebuke nor retraction could destroy its prejudicial influence. 70 Ark. 305; 75 Ark. 577; 74 Ark. 298; 76 N. W. 462.

J. N. Rachels and *John T. Hicks,* for appellee.

The question of assumed risk was fairly submitted to, and decided by, the jury. The testimony as to conversation with the manager was competent for the purpose of contradicting him, and the testimony as to the noise made by the machinery before and after the accident was admissible as a circumstance tending to establish the allegation that the machinery was carelessly and negligently handled and operated. Appellant can not complain of an instruction as to punitive damages, since none were awarded, and the instructions fairly submitted the law of the case to the jury.

RIDDICK, J., (after stating the facts.) This is an appeal by the Stecher Cooperage Company from a judgment rendered against it for damages on account of the injury and death of J. W. Steadman, one of its employees. At the time of his injury Steadman was working at a machine called an edger. This machine had a wheel some four or five feet in diameter made of cast iron, with a steel rim around it to strengthen and hold it together, somewhat after the manner that the tire of a wagon wheel strengthens the wheel. Attached to this wheel were knives, the edges of the blades protruding about one sixteenth of an inch beyond the face of the wheel, and set so that a stave pressed against the side of the revolving wheel would be cut and trimmed into the proper shape by the knives. While Steadman was at work pushing staves against the wheel to cut them into shape it burst into fragments, which were thrown with great violence, some of them going through the top of the shed and falling several hundred yards away. Steadman was struck by a fragment of the wheel, and severely injured, so that he died about 24 hours afterwards from the effects of his injuries.

There is nothing beyond the fact that the wheel, while the machine was being operated, suddenly flew into fragments to show that the wheel was cracked or defective in any respect. The allegation in the complaint that the wheel was cracked and otherwise defective is therefore not supported by the evidence. The evidence does not clearly show what was the cause of this accident. There was some evidence tending to show that it was caused by running the machine at too high a speed. It is also possible that the wheel may have been slightly out of balance, but this is by no means clear. If the accident was due to the fact

that the machinery was through the carelessness of the foreman of defendant run at great and unusual speed, or to the fact that through the carelessness of the foreman the wheel was being operated while it was out of balance, then the company would be liable, for we see nothing in the evidence tending to show that Steadman was guilty of contributory negligence, and he did not assume any risk due to the negligence of the foreman of the company, who was not his fellow-servant. But, while the verdict is moderate, and while there may be evidence to sustain it, yet we are of the opinion that the court during the course of the trial admitted incompetent evidence.

In the first place, the testimony of Mrs. Steadman concerning the statement of the manager, Otto Stecher, to her, about 24 hours after the accident, in which he said that he was very sorry, that he did not feel clear himself, and offered to pay the funeral expenses, was in our opinion incompetent. If Otto Stecher had been himself the defendant, his statement would have been competent evidence; for one's admissions are competent evidence against himself. But it is not shown that he was the owner, or even that he had any interest in this company. So far as the evidence shows, he had no more right to make admissions affecting its rights than any other employee of the company. The fact that one is in the employ of a corporation does not make all his acts and declarations competent evidence against the company. Only those made by its agents while acting for it in the line of their duty are thus competent. But there is nothing to show that Stecher was acting for the company at the time he made this statement.

It is said that this testimony was introduced for the purpose of contradicting and impeaching the testimony of Stecher. But this testimony was introduced as part of the evidence to make out the case for plaintiff, and was heard before Stecher was put on the stand. Besides, counsel for defendant afterwards expressly asked the court to tell the jury not to consider this evidence in determining whether defendant was guilty of negligence, but the court refused to do so, thus showing that this evidence was allowed by the court to go to the jury as evidence tending to make out the case for plaintiff. These declarations of the foreman 24 hours after the accident can not be treated as a part of

the *res gestae.* They were not made by any officer of the defendant company having the right to speak for it and bind it by declarations of that kind, and were therefore improperly admitted and prejudicial to defendant. *Fort Smith Oil Co.* v. *Slover,* 58 Ark. 168.

The testimony of several witnesses that the old machine could be heard a mile or two distant, and much further than such machines can ordinarily be heard, was probably not entitled to much weight, for the increased noise might have been caused by the lack of oil on the bearings or by the condition of the machine, as well as by high speed at which the machine was operated. But it would have been competent, had it been confined to the time of the accident. The witnesses do not fix a time at or near the time of the accident, and for that reason we think that this testimony was incompetent. The object of showing that the noise made by the edger before the accident could be heard much further than such machines could ordinarily be heard was to prove that it was the custom of the company before the accident to operate the machine at great and unusual speed. But the fact that the company may have on several occasions some months or years before the accident operated the edger at great speed does not show that they did so at the time of the accident; and, as before stated, this testimony should have been confined to the time of the accident.

The instructions given to the jury are much longer and more voluminous than necessary; but, as most of them were asked by defendant, it has no right to complain. Some of the instructions given at the request of plaintiff do not correctly state the law, for they, in effect, make the company an insurer against accidents to its employees through defects in its machinery. For instance, in instruction number one given at the request of plaintiff it is said that "if the injuries received by the deceased were caused by the defective condition of defendant's machinery, the plaintiff is entitled to recover," etc. But this is not correct, for the law makes the company liable only when such defects are due to its negligence. As this matter has been so frequently discussed by this court in recent cases, we deem it unnecessary to do more than call attention to it here.

We see nothing prejudicial in the argument of counsel for

plaintiff set out in the transcript. His appeal to the jury to remember, if "they had any little girls," that when the "finger of scorn" should be pointed at them they would be there to defend them with their "strong right arms," and so act that they would be able "to look into this woman's countenance" and say to her that their duty had been discharged, was a species of perfervid eloquence quite common in perorations of counsel for plaintiff in actions of this kind. From time immemorial such oratorical appeals to juries have been heard. Great latitude is allowed counsel in making arguments; and where there is no misrepresentation of the law or facts and no abuse of this privilege, they furnish no grounds for reversal on appeal. *Miller* v. *Nuckolls,* 77 Ark. 64.

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

JENKINS v. JENKINS.

Opinion delivered April 16, 1906.

APPEAL—RIGHT TO PROSECUTE—RES JUDICATA.—An appellee may plead that since the appeal was taken it has been adjudged in a court of competent jurisdiction that appellant has no cause of action against appellee. *Church* v. *Gallic,* 76 Ark. 423, followed.

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; appeal dismissed.

S. M. Taylor, for appellant; *White & Altheimer, amici curiae.*

1. The court shall hear and determine all demands presented for allowance, in a summary manner, without the forms of pleadings, and in taking testimony shall be governed by the rules of law in such cases made and provided. Kirby's Digest, § 127. It can adopt any method appropriate for arriving at the merits of the case. 33 Ark. 661. The administrator may prove the credit to which the estate is entitled in the account between

himself and the claimant, and the court may adjust the same and ascertain the balance. *Ib.* 662. See also 14 Ark. 182.

2. If the court had jurisdiction to determine questions of setoff or counterclaim of the estate against the claimant, the administrator was given no opportunity to file the same. The claim, as passed upon by the administrator, was not an allowance for probate against the estate, but the sum mentioned was only to be credited upon the amount due from claimant to the estate. The court was without jurisdiction to allow it as a claim against the estate without giving the administrator an opportunity to be heard in defense against it.

3. The court's holding that the words, "which should be credited on an indebtedness due the estate by N. T. Jenkins," were surplusage, and constituted no contract that the amount should be so credited, is in conflict with the evidence. If a written instrument is signed by one party and delivered to another, the latter may bind himself as fully by accepting the delivery as if he had attached his signature to the writing. 7 Am. & Eng. Enc. Law (2 Ed.), 142, and cases cited; 30 Ark. 186.

Bridges & Wooldridge, for appellee.

1. A court of competent jurisdiction having held, in a subsequent action prosecuted by the administrator against the appellee upon the same account involved in this appeal, that the appellee herein did not owe the account, and the administrator having failed to appeal from that judgment, he has therefore lost the right to further prosecute this appeal, and the same should be dismissed. Kirby's Digest, § § 1227, 1228; 55 Ark. 633; 53 Ark. 515; 75 Ark. 507.

2. Whether or not the appellee agreed that the amount allowed by the administrator should be placed as a credit upon an indebtedness due from him to the estate was a question of fact submitted to the court sitting as a jury. Its finding will not be disturbed. 60 Ark. 258; 68 Ark. 83.

3. The probate court had no jurisdiction to try the account that the administrator claimed was due to the estate from N. T. Jenkins. The administrator could not plead it as a setoff in the probate court. 44 Ark. 423; 55 Ark. 22; 57 Ark. 301; 67 Ark. 522; 52 Ark. 76; 47 Ark. 317.

McCULLOCH, J. Appellee, N. T. Jenkins, presented to appellant, P. G. Jenkins, as administrator of the estate of P. N. Vaugine, deceased, for allowance a claim of $1,168.33 against said estate.

The administrator made the following indorsement upon the claim:

"Seven hundred and eighty-eight dollars and thirty-three cents of this claim is allowed as a fourth-class claim, which should be credited on an indebtedness due estate by N. T. Jenkins. The balance of the claim is refused.

"May 11, 1900.

"P. G. JENKINS, Administrator."

Appellee thereupon filed his claim, with said indorsement thereon, in the Probate Court of Jefferson County, and the same was by said court duly allowed in the sum of $788.33 as a claim against said estate, and classed on the fourth-class.

Subsequently the administrator appeared, and took an appeal to the circuit court from said judgment of allowance, and on a trial *de novo* in the circuit court the claim was again allowed, and the administrator appealed to this court.

It is not denied that the estate of Vaugine is indebted to appellee in said sum of $788.33, but appellant set up, by way of defense, that appellee was justly indebted to said decedent in the sum of $1,746.93 on open account, and that appellee's claim should be credited on that indebtedness, and should not be allowed as a claim against the estate. He introduced testimony, tending to show that appellee was indebted to said decedent in said sum.

The circuit court decided that neither that court on appeal, nor the probate court, had jurisdiction to adjudicate the disputed setoff pleaded by the administrator against the claim of appellee; that the addition by the administrator of the words "which should be credited on an indebtedness due the estate by N. T. Jenkins" to his indorsement allowing the claim of appellee was mere surplusage, and constituted no contract between the parties that the amount of said allowance should be so credited; and that, under the law and evidence in the case, appellee was entitled to a judgment allowing his said claim.

The correctness of this ruling of the circuit court is challenged by this appeal.

Subsequent to the rendition of this judgment by the circuit court and the appeal to this court, the administrator brought another suit in the circuit court of Jefferson County against the appellee herein to recover the amount of the alleged indebtedness of $1,746.93 which he had attempted to assert by way of setoff in the other suit, and the defendant (appellee herein) pleaded (1) that he had never been indebted to said decedent; (2) that he had paid all his indebtedness to decedent during the lifetime of the latter, and (3) that the alleged indebtedness was barred by the statute of limitation. That cause was tried by the court, sitting as a jury, and the court, after hearing the evidence, found that the defendant (appellee herein) had paid all his indebtedness to said decedent during the lifetime of the latter, and was not then indebted in any sum to said estate, and rendered judgment in favor of said defendant, which judgment has not been appealed from. Appellee now files here a transcript of the record of that case, and pleads that judgment in bar of appellant's right to further prosecute this appeal.

The sole question to be determined is whether or not the estate of Vaugine has a cause of action against appellee for indebtedness on account which may be setoff against appellee's claim against the estate. It has been adjudged in the suit subsequently brought in the circuit court that the estate has no cause of action against appellee. That adjudication is conclusive against appellant, and bars the further prosecution of his appeal. *Church* v. *Gallic,* 75 Ark. 507.

It was a final adjudication of the only question which is sought to be determined by this appeal.

The appeal is therefore dismissed.

TIPTON v. SMYTHE.

Opinion delivered April 16, 1906.

1. CONSTITUTIONAL LAW—ACT CALLING IN STATE BONDS.—The act of May 3, 1901, providing for the calling in and payment of certain State bonds, is not invalid in imposing upon the treasurer the duty of ascertaining their validity, as an appeal to the courts could be had from his adverse decision. (Page 396.)
2. SAME—STATUTE OF LIMITATION.—The Legislature may prescribe a period of limitation within which rights may be asserted, even though none existed when the rights accrued, or may shorten a period of limitation which existed when the right accrued, provided the added limitation is reasonable and affords an ample opportunity for the assertion of existing rights. (Page 397.)
3. SAME—VALIDITY OF LIMITATION ACT.—Whether a statute of limitation affords a reasonable time for the assertion of rights existing at the time of its passage is a question primarily for the Legislature, and its decision will not be overruled by the courts unless a palpable error has been committed. (Page 397.)
4. SAME—ACT CALLING IN STATE BONDS.—In determining whether a statute calling in State bonds for payment is reasonable, the court must consider the circumstances under which it is to apply, and whether the notice provided for is reasonable. (Page 399.)
5. SAME.—The act of May 3, 1901, providing for calling in certain State bonds enacted, that immediately after its passage the Treasurer should make a call for all outstanding valid bonds of the State except those of the issue of 1899, and that publication thereof should be made in a daily newspaper published in Litttle Rock, and that certified copies should be filed with the secretaries of the stock exchanges of New York, Boston and St. Louis, six months before the day fixed for expiration of the day fixed in the notice for expiration of the time for presenting the bonds for redemption. *Held,* that the statute imposed no unreasonable terms either as to length of time or adequacy of the notice. (Page 400.)
6. SAME—IMPAIRMENT OF OBLIGATION OF CONTRACTS.—The act of May 3, 1901, providing that certain bonds of the State should be called in and paid, and that, unless presented within the time required, they should be barred, is not unconstitutional as impairing the obligation of the contract in depriving the bondholder who failed to present his bond in time of the right to use his bond in payment of the purchase price of Real Estate Bank lands, as provided by Kirby's Digest, § 4866, as the latter statute was enacted after the bonds were issued, so that its provisions did not become a part of the contract. (Page 401.)
7. SAME—A statute which takes away the right of a bondholder to use his bond in payment of the purchase of a certain class of public lands

can not be held to impair the obligation of the contracts if such statute provides for payment of the bond in money. (Page 402.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield,* Judge; reversed.

Robert L. Rogers, Attorney General, for appellant.

1. The act calling in the outstanding bonds was passed after they had fallen due. It was an act of limitation, and such securities were received subject to any reasonable changes the Legislature might make in this respect after the bonds were due. The right to a particular remedy is not a vested right, and the State has control over the remedies it offers suitors in its courts. Cooley's Const. Lim. 361.

The time allowed by the act, six months, was a reasonable time. 8 Bush (Ky.), 348; 168 U. S. 90. Upon leaving the realm for a considerable length of time it was incumbent upon the appellee either to present his bond for payment, or to take proper steps to have his interests protected during his absence, in the event such action should be taken by the Legislature. His absence and negligent failure should give him no advantage over one who remained but failed to present his bond. Statutes of limitation operate upon demands existing at the time of passage in the same manner as upon those accruing on the date at which they take effect. 5 Ark. 510; 6 Ark. 513; 24 Ark. 385; 15 Ark. 146; 10 Ark. 155.

2. The fourth section of the act deprives appellee of benefits under § 4866, Kirby's Digest, authorizing the acceptance of such bonds in payment for Real Estate Bank lands.

Bradshaw, Rhoton & Helm, for appellee.

1. The act seeks to take property without due process of law, and is in violation of art. 2, sec. 8, art. 2, sec. 13, and art. 2, sec. 21, Const. Ark., and also in violation of amendments 5 and 14, Const. U. S. See, also, 8 Cyc. 1080*a* and 1097, 3; 95 U. S. 565; 2 L. R. A. 655 and note.

2. When the bond was issued, no law of this State existed providing for calling in the bond, nor any limitation applicable thereto, nor provision for its cancellation, save that implied by payment thereof. 8 Cyc. 931; 42 U. S. 311; 43 N. J. L. 495. The State and Federal constitutions prohibit laws which

impair the obligations of contracts. Art 2, sec. 17, Const. Ark.; art. 1, sec. 10, Const. U. S. See also 56 U. S. 304; 114 U. S. 270; 10 How. 190; 70 Ark. 300. If a statute is so unreasonable as to impair the obligations of a contract, it will not be upheld. 135 U. S. 662; 176 U. S. 398. When the State contracts, it surrenders its sovereignty to the extent of the obligation imposed by law to perform its contracts. 15 Am. & Eng. Enc. Law, 1041; 8 Cyc. 940. The courts will uphold the contracts of a State where an official attempted to act under authority of a statute passed subsequent to the contract which impairs its obligation. 15 Am. & Eng. Enc. Law, 1048; 140 U. S. 1.

3. Though the State may change the remedy in force at the time of making a contract, if it leaves no remedy, it is void. The party is entitled to some remedy, and it must be substantially equivalent to the one in force at the date of contract. 15 Am. & Eng. Enc. Law, 1053. A creditor has a vested right in the remedies existing at the date of the contract for the recovery of his debt. 97 U. S. 293; 122 U. S. 284; 10 L. R. A. 405, note; 197 U. S. 570; 57 U. S. 16; 33 Ark. 81; 1 Neb. 373; 81 Cal. 9; 39 Cal. 270. See also 57 Ark. 400.

4. Since the act (sec. 3) only prohibits the payment of the bond out of the State treasury, it may still be received in payment for land. Kirby's Digest, § 4866; 57 Ark. *supra;* sec. 2, act April 6, 1869; 192 U. S. 286.

McCULLOCH, J. Appellee, R. M. Smythe, being the owner of a bond numbered 2034 in the sum of $1,000 with fifty-five semi-annual interest coupons of $30 each attached thereto, issued by the State of Arkansas on January 1, 1870, and due thirty years after date, applied to the Commissioner of State Lands to purchase a certain tract of Real Estate Bank lands situated in Phillips County at the price of $240, and tendered to the Treasurer of State eight of said interest coupons in payment therefor.

The Treasurer refused to accept said coupons on the ground that the bond and coupons attached were barred because not presented within the time required by an act of the General Assembly approved May 3, 1901, and appellee thereupon presented to the circuit court of Pulaski County his petition for writ of mandamus to require the Treasurer to accept said coupons in payment for the land.

The Treasurer appeared, and demurred to the petition; the demurrer was overruled, and final judgment was rendered awarding the writ in accordance with the prayer of the petition, and the Treasurer has appealed to this court.

Said bond was issued by the State pursuant to the provisions of an act of the General Assembly of April 6, 1869, providing for the funding of the public debt of the State, the particular bond in question being a reissue, under said act, of Real Estate Bank bonds then outstanding. Section 10 of said act of 1869 pledged the faith of the State for the payment of said bonds and interest, and to provide annually a sinking fund to pay off the principal as the same should become due. Section 11 of the act provides that "the proceeds of all of the mortgages, notes, bills, and other securities in possession of the State, obtained as security for the bonds issued to the Real Estate and State Bank, are hereby set aside as a sinking fund for the payment of the interest and principal of the bonds to be issued in pursuance of this act."

The act of May 3, 1901, the validity of which is challenged by appellee, is entitled "An act to provide for the cancellation of certain State bonds, and to fix the rate of Sinking Fund tax." It provides (sec. 1) that immediately after its passage "the State Treasurer shall make a call for all outstanding valid bonds of the State, except those of the issue of 1899;" and (sec. 2) that the publication should be made in a daily newspaper published in the city of Little Rock, and certified copies of the call should be filed with the secretaries of the stock exchanges of New York, Boston and St. Louis, six months before the day fixed in the notice for expiration of the time in which the owners of bonds were allowed to present bonds for redemption. Section 3 provides that the call or notice shall warn all holders of bonds to present same for redemption and payment within six months from the first day of said publication, "or that said bonds shall thereafter be null and void and nonpayable out of the treasury." Section 5 provides that all valid bonds presented within the time prescribed shall be redeemed and paid by the Treasurer out of the moneys in his hands to the credit of the sinking fund, and the succceeding section provides for a levy of taxes to raise a sinking fund, out of the which the bonds shall be paid.

Section 4 of the act is as follows:

"All persons who shall hold any of said valid bonds, and shall neglect or refuse to present same to the Treasurer of State for redemption within the time prescribed by this act and set out in said notice, shall thereafter be debarred from deriving any benefit from same; and said bonds shall thereafter be invalid and nonpayable. The Treasurer of State shall, upon expiration of the period of presentation and redemption herein fixed, indorse on the record of each of said bonds herein called in but not presented that same is barred of payment by the provisions of this act, and same shall no longer be carried on the books of the Treasurer or Auditor as part of the valid indebtedness of this State."

Appellee in his petition attacks the validity of the act of May 3, 1901, on the following grounds:

"A. Because said act seeks to deprive the owner of this bond of his property, without due process of law, by canceling said bond without payment, in violation of the Constitution of the State of Arkansas, and of the Constitution of the United States.

"B. Because said act seeks to call in or to cancel, without payment, an obligation of the State of Arkansas, under terms and condition which were not the law, and not therefore a part of the contract at the time of the issuance of said bond, and thereby impairs the obligation of the contract between the State of Arkansas and the holder of the bond, and said act is in conflict with the Constitution of the State of Arkansas, and the Constitution of the United States.

"C. Because the time within which to present said bond for payment is too short, and in violation of public policy.

"D. Because said act does not repeal section 4866 of Kirby's Digest, providing for the acceptance of said bonds in payment of the purchase price of Real Estate Bank lands belonging to the State of Arkansas."

A feature of both the first and second contentions of appellee, that the act in question seeks to call in and cancel the bonds of the State without payment thereof, can easily be disposed of by reference to the express terms of the act itself. The express object and purpose of the act is to call in the bonds for payment and redemption, and not for adjudication as to their validity or

cancellation without payment. No unreasonable provisions are found in the act requiring the bondholder to submit his bond to the Treasurer or any other person or board for final determination as to its validity. It is true that the act authorized the Treasurer to pay valid bonds only, and thereby imposed upon him the duty of ascertaining the validity of all bonds presented for payment; but his adverse decision as to the validity of a bond was in no wise binding upon the bondholder, to whom the courts are always open for an adjudication of such questions. In this respect the act in question is entirely different from the statute condemned by this court in *McCracken* v. *Moody,* 33 Ark. 81, whereby holders of school district warrants were required to present them within a fixed time for cancellation and reissue, and to submit them for final determination as to their validity to a board composed of the county judge and county clerk.

It is urged against the validity of the statute that it is in violation of the Constitution of this State and of the Constitution of the United States, because the time within which the bonds must have been presented was too short, and the effect was to deprive the holder of his property "without due process of law," and that it impaired the obligation of the contract between the State and its bondholders inasmuch as, at the date of the issuance of the bond, no authority existed in the law for peremptorily calling in such obligations.

We do not think either contention is sound. The statute merely prescribes a period of limitation within which outstanding past-due bonds of the State might be presented for payment and redemption. That the Legislature may prescribe a period of limitation within which rights may be asserted, even though no limitation existed when the right accrued, or may shorten a period of limitation which existed when the right accrued, is too well settled now for controversy. The only restriction upon that power is that the added limitation must be reasonable and must afford an ample opportunity for the assertion of existing rights, otherwise the effect would be to impair the obligation of a contract or to deprive a person of property without due process of law.

Chief Justice WAITE in delivering the opinion of the court in *Terry* v. *Anderson,* 95 U. S. 628, said: "This court has often

decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect (citing *Hawkins* v. *Barney,* 5 Pet. 451; *Jackson* v. *Lamphire,* 3 Pet. 280; *Sohn* v. *Waterson,* 17 Wall. 596; *Christmas* v. *Russell,* 5 Wall. 290; *Sturges* v. *Crowninshield,* 4 Wheat. 122). It is difficult to see why, if the Legislature may prescribe a limitation when none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. * * * In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the Legislature is primarily the judge; and we can not overrule the decision of that department of the Government unless a palpable error has been committed."

The same doctrine has been announced by that court in the following cases: *Koshkonong* v. *Burton,* 104 U. S. 668; *Vance* v. *Vance,* 108 U. S. 514; In re *Brown,* 135 U. S. 703; *Turner* v. *New York,* 168 U. S. 90; *Saranac Land & Timber Co.* v. *Comptroller of N. Y.* 177 U. S. 318; *Wilson* v. *Iseminger,* 185 U. S. 57.

To the same effect see Cooley's Const. Lim. (7 Ed.), p. 523; 2 Lewis' Sutherland, Stat. Const. § 668; *Meigs* v. *Roberts,* 162 N. Y. 371; *Bigelow* v. *Bemis,* 84 Mass. 496.

It being therefore clear that the Legislature had the power to pass a statute fixing a period within which the State's obligations should be presented for payment and redemption, it only remains for us to determine whether the statute in question prescribed a reasonable limitation upon the right of presentation. Of this the Legislature is primarily the judge, as we have already seen. *Koshkonong* v. *Burton, supra.*

"It is essential," says Judge Cooley, "that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the Legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the

time allowed is manifestly so insufficient that the statute becomes a denial of justice." Cooley's Const. Lim. (7 Ed.), p. 523.

In determining whether or not the statute is reasonable, the court must consider the circumstances under which it is made to apply, and also whether the notice provided for is reasonable.

"It is evident from this statement of the question that no one rule as to length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another." In re *Brown, supra.* However, a reference to cases will illustrate the shortest periods which the courts have approved as reasonable. The shortest statute of limitation of this State which has theretofore been passed upon by this court is the two years statute as to suits to recover lands held under sales for nonpayment of taxes, and the court has repeatedly upheld the statute. *Ross* v. *Royal,* 77 Ark. 324; *Finley* v. *Hogan,* 60 Ark. 499.

In *Terry* v. *Anderson, supra,* a statute which limited the time for bringing suit to nine and a half months was held not unreasonable.

In *Turner* v. *New York, supra,* the Supreme Court of the United States, following the decision of the New York Court of Appeals in *Meigs* v. *Roberts, supra,* held that a statute of that State providing that deeds from the Comptroller of the State of lands in the forest preserve sold for nonpayment of taxes should, after having been recorded for two years and in any action brought more than six months after the act took effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, was a statute of limitation, and as such was reasonable and valid. This decision was also followed in *Saranac Land & T. Co.* v. *Comptroller, supra,* where Mr. Justice McKENNA, speaking for the court, said: "The decision (in *Turner* v. *New York*) establishes the following propositions:

"1. That statutes of limitations are within the constitutional power of the Legislature of a State to enact.

"2. That the limitation of six months was not unreasonable."

In *Vance* v. *Vance, supra,* the same court upheld as reasonable a provision of the Constitution of the State of Louisiana

adopted in 1868, and a statute pursuant thereto passed March 8, 1869, requiring that all "tacit mortgages [in favor of a minor on the property of his tutor] and privileges now existing in this State shall cease to have effect against third parties after January 1, 1870, unless duly recorded." The statute gave only the period from the date of passage March 8, 1869, until January 1, 1870, within which such mortgages might be recorded, and the court held it to be a reasonable provision, even against an infant.

In *Krone* v. *Krone,* 37 Mich. 308, the court, by Judge Cooley, upheld a statute shortening the period of limitation to one year on causes of action then existing. In *Osborne* v. *Lindstrom,* 9 N. D. 1, a statute under which an existing cause of action could be asserted within nine months after the statute went into effect was upheld as reasonable. In *Bigelow* v. *Bemis, supra,* the Supreme Court of Massachusetts held that a statute was reasonable which shortened the period of limitation and left about five months within which an existing cause of action might be asserted.

Applying the rule illustrated by these cases, we see no grounds upon which the statute under consideration can be held to be unreasonable.

It must be remembered that when this statute was passed the bonds were past due about a year and a half. The statute required the notice to be published in a daily newspaper in the capital city of the State, and certified copies to be filed with the secretaries of the stock exchanges of New York, Boston and St. Louis for six months before the expiration of the time for presenting the bonds for payment.

It is alleged in the petition that appellee was, at the time of the passage of this act and the publication of the notice, without the limits of the United States, and had no information thereof. It is argued that the statute was unreasonable because a bondholder so situated could receive no notice of the terms of the statute. The same argument could be made in favor of a bondholder in foreign lands if the statute had given six years, instead of six months, for presentation if he had been making no effort to secure payment of his matured demand against the State. The Legislature doubtless had in contemplation, when it fixed a short period, that the bonds were past due, and that the

holders were accessible and in waiting for payment. It was not unreasonable to anticipate such a condition, and indulge the reasonable presumption that the holders of matured bonds would receive notice given in the manner pointed out by the statute. It is known that such securities are generally handled through the medium of the stock exchange in the principal cities of the country, and that information concerning their value may be ascertained through those channels.

We can not say that the statute imposed such unreasonable terms, either as to the length of time or adequacy of the notice, that it deprived the bondholder of his property "without due process of law," or impaired the obligation of the contract.

Again, it is argued that the statute in question impairs the obligation of the contract if it be construed to bar the bondholder of using the bond in payment of Real Estate Bank lands, as provided by statute. Kirby's Digest, § 4866. The statute just cited provides that such bonds shall be receivable in payment of the purchase price of Real Estate Bank lands, but it was enacted February 26, 1879, long after the issuance of the bonds, and therefore its provisions did not enter into and become a part of the contract. But, conceding that they did, the contract was in no wise impaired by the act of May 3, 1901, as payment of the bond in money was provided for, and would have been made if it had been presented. The Supreme Court of the United States in the case In re *Brown, supra,* where a statute authorizing the issuance of refunding bonds, as an inducement for acceptance of the bonds, provided that they should be receivable for taxes, held that a subsequent statute limiting the time within which the same might be so used was void because it impaired the obligation of the contract. The decision was placed upon the ground that, as long as the bonds remained unpaid, the holder had, according to the terms of the original statute authorizing the issuance of the same, the right to use them in payment of taxes, and that a restriction of that right impaired the obligation to that extent. No provision was made for payment of the bonds within the limits prescribed by the new statute, and the court found that it would be impracticable for the bondholder to use all the bonds in payment of taxes within the time prescribed.

The statute we are now considering is vastly different in its operation. There can be no higher method of discharging a past due obligation than by payment in money; and when this method of payment was provided by the statute, the bondholder sustained no impairment of his contract by being deprived of the right to use it in payment for lands.

Lastly, it is contended that the statute does not in express terms repeal the act of 1879, making the bonds receivable in payment of the purchase price of Real Estate Bank lands, and should be construed not to deprive the holder of that right given by the former statute. The statute in the broadest terms provides that bonds not presented within the time prescribed should thereafter be treated as invalid and barred for all purposes. By no sort of reasoning can the act be construed to leave the bonds in force for the purposes of use in payment for lands purchased from the State.

The circuit court erred in awarding the writ of mandamus, and the judgment is reversed and cause remanded with directions to sustain the demurrer to the petition.

WYNNE v. SCHNABAUM.

Opinion delivered April 16, 1906.

1. FACTORS—LIABILITY.—Where cotton was, without instructions, consigned to commission merchants for sale, the consignees are held merely to the exercise of good faith, and are not liable if they sold within a reasonable time for a fair market price. (Page 406.)
2. SAME—HOW MARKET VALUE DETERMINED.—Where cotton was shipped to commission merchants in a certain city to be sold by them, the market value of cotton in that city at the time the cotton was sold determines the price which the cotton must bring. (Page 406.)
3. SAME—LIABILITY—EVIDENCE.—Proof that, during the same season in which cotton was shipped by appellee to appellants to be sold, appellee sold cotton to other parties in the same city and realized more for it than appellants realized for what they sold does not tend to prove that appellants failed to sell within a reasonable time or for a fair market value. (Page 406.)

Appeal from Randolph Circuit Court; *John W. Meeks*, Judge; reversed.

G. B. Oliver, for appellant.

1. A commission merchant is only required to exercise ordinary and reasonable skill and diligence in his employment, and to obtain only the common market price in effecting sales, and is not liable for losses except through failure to use such diligence and skill. 12 Am. & Eng. Enc. Law, 658, and note 2; *Ib.* 667 and note 3; 66 Am. Dec. 316; 18 Ill. App. 273; 61 Mo. App. 627.

2. The court erred in refusing the second, third and fifth instructions requested by plaintiffs.

J. B. McCaleb and *Witt & Schoonover*, for appellee.

1. The instruction complained of, as appears by the corrected record, does not require more than ordinary care and diligence to realize all the plaintiffs reasonably could for the cotton, selling in the customary way.

2. The second, third and fifth instructions requested by plaintiffs were properly refused. They were misleading. Evidence to show the price of cotton in Pocahontas, the relative prices there and in Memphis, and that there was such difference in the prices obtained as to show that plaintiffs did not realize in Memphis the full market price, was competent as tending to establish the defense that plaintiffs did not exercise the ordinary and reasonable care and diligence required of them.

3. A judgment which is right on the whole record will not be reversed for error in charging the jury, nor where substantial justice has been done. 10 Ark. 9; 23 Ark. 115; 46 Ark. 542; 33 Ark. 811.

4. A verdict supported by sufficient evidence or substantially supported by the evidence will not be disturbed on appeal. 18 S. W. 762; 17 S. W. 879; 55 Ark. 31; 51 Ark. 459. See also 57 Ark. 136; 46 Ark. 524; 25 Ark. 89; 15 S. W. 469.

BATTLE, J. This action was brought in the Randolph Circuit Court by Wynne, Love & Company against A. Z. Schnabaum. Plaintiffs allege in their complaint that they are cotton factors and commission merchants, located in the city of Memphis, in the State of Tennessee; that the defendant was a merchant, doing

business at Pocahontas, in this State, and was engaged in buying selling and shipping cotton; that on the 18th of June, 1900, they entered into a contract with him, by which they were to advance and lend to him $2,000, and he was to ship to them 200 bales of cotton, or one bale for each $10 loaned, in default of which shipment he was to pay plaintiffs one dollar and twenty-five cents per bale for each bale he failed to ship according to the terms of the contract; that they loaned him $1,889.50, and he shipped to them only forty-two bales of cotton, and refused to ship the remainder or pay the dollar and twenty five cents as he agreed to do. They asked for judgment against him for $183.75, with interest, on account of such failure to ship.

The defendant answered, and admitted the allegations in the complaint, but denied that he wrongfully failed to ship them more than forty-two bales of cotton, and for defense says that plaintiffs sold the cotton shipped to them for less than its market price, and less than they could have sold it for, and that thereby he suffered and sustained a loss of $10 on each bale of cotton shipped, and that for this reason plaintiffs forfeited their right to insist upon a performance of said contract.

The issues in the case were tried by a jury. The evidence shows that the shipments of the cotton extended from October 25, 1900, to April 8, 1901, and the sale thereof extended from November 1, 1900, to July 3, 1901. J. E. Love, of Wynne, Love & Company, testified that thirty-four bales of it were sold for more than their market price, and two bales of it were sold for less than the market price of such cotton, on account of the extreme low grade thereof and the poor demand for that class of cotton. At another time he testified that "the cotton could not have been sold for any more than plaintiffs got for it; for the market during the entire season of 1900 and 1901 was a dull dragging market, and quotations hard to realize; but quotations in Memphis market were not the market value in every instance during the season of 1900 and 1901, owing to the poor demand for cotton, and concessions had to be made to effect a sale. Some of the cotton was so low in grade, and handled so badly, that there was absolutely no demand for it. Therefore we were unable to realize any premium over quotations, and had to make concessions in order to effect a sale." He made a statement of

the grades of the cotton which shows only nine bales grade middling. Another statement, which was admitted to be correct except wherein it was in conflict with the testimony of Love, was admitted as evidence. It shows that eight bales were sold at market price of middling, six for more, and twenty-eight for less. The testimony of the purchasers of the cotton, except one who did not testify, corroborates the testimony of Love.

Defendant testified, in part, as follows: "During that season I handled about 1200 bales of cotton. I sold some at Pocahontas, some at Newport, and some at Memphis, and during that year other parties than the plaintiffs sold cotton for me in Memphis. My reason for not shipping more cotton to plaintiffs that year was that I was realizing more for my cotton by selling at home than they were getting for me for the same. * * * *During the time the plaintiffs* were handling this cotton, I made sales to other parties, and in all cases realized more for cotton than they did for me. I sold most of my cotton that year at Pocahontas, and got from ¼ of a cent to a cent per pound more for it than plaintiffs sold for. *During the time* that plaintiffs were selling cotton for me at Memphis I sold cotton to other parties in Memphis, and realized more for it than the plaintiffs allowed me for what they sold. I had shipped about 600 bales of cotton to another party, and sold it myself to a buyer who came here to Pocahontas."

The plaintiffs asked, and the court refused, to instruct the jury as follows:

"2. The fact, if proved, that defendant sold cotton in Pocahontas for more than he realized for the cotton shipped to and sold by plaintiffs would be no defense in this suit, nor would it be a defense that defendant sold cotton in Memphis for which he realized more than for the cotton sold by the plaintiffs.

"3. Defendant by way of defense claims that the plaintiffs sold his cotton for less than the market price. Before you could find for him on this issue, he must show, by a preponderance of the evidence, either that plaintiffs failed to use care and skill in the sale of the cotton, or that they corruptly sold it for less than its value, and the fact, if proved, that defendant sold cotton in Pocahontas, so that he realized more for it than for cotton shipped to and sold by plaintiffs, or that he sold cotton in Mem-

phis otherwise than in the customary manner, for more than he realized for cotton sold by plaintiffs would be no defense in this action.

"5. Defendant claims by way of defense in this suit that plaintiffs sold cotton shipped them for less than he realized for it here in Pocahontas, and for less than he sold cotton in Memphis. You are instructed that this of itself would be no defense to this suit."

The jury returned a verdict in favor of the defendant, and plaintiffs appealed.

Wynne, Love & Company were commission merchants, located in the City of Memphis, in the State of Tennessee. Appellee consigned to them for sale forty-two bales of cotton, without instructions. They thereby became bound, and bound only, to exercise a fair and reasonable discretion, under the circumstances. By consigning cotton without instructions, the presumption is that he relied upon the sound discretion of appellants. If they exercised it fairly and in good faith, and sold the cotton within a reasonable time after they received it, they discharged their duty. But appellee complains only of the price for which they sold the cotton. The measure of their duty in that respect was to sell for the fair value or market price. They were not bound to consult the market of Pocahontas. The cotton was shipped to Memphis, to be sold there according to the market of that city. *Gregory* v. *McDowel,* 8 Wend. 435; *Wemple* v. *Stewart,* 22 Barb. 154; *Durst* v. *Burton,* 47 N. Y. 167; *McCarty* v. *Quimby,* 12 Kan. 494. Neither were they governed by one or two sales of cotton in Memphis, probably unknown to them. Proof of a single sale or two sales in a city like Memphis is not sufficient evidence to establish the market value of the cotton sold. Such evidence could not show that they failed to discharge their duty to appellee. See Mechem on Agency, § § 1016, 1018, 1019; 2 Clark & Skyles on Agency, § § 856-858, and cases cited.

Appellee testified that "during the time that appellants were selling cotton for him in Memphis he sold cotton to other parties in that city and realized more for it than appellants received for what they sold." The time during which appellants were selling cotton for him extended from November 1, 1900, to July 3, 1901, a period of eight months. He fails to show that the sales made

by him in Memphis approximate any of the days on which appellants sold. This evidence does not tend to show that they failed to exercise a reasonable degree of discretion and judgment in reference to the time of selling, or that they failed to get the fair value or market price for the cotton sold; and this was the full measure of their duty in that respect. The prices of cotton are too unsteady, and fluctuate too much, for this evidence to have such effect.

On account of the evidence adduced the instructions asked by the appellants and refused by the court should have been given.

Reverse and remand for a new trial.

HILL, C. J., (dissenting.) The second instruction given at the instance of appellee and the fourth instruction at instance of appellant presented fully and correctly the law governing the question at issue.

Evidence of sales in Pocahontas should not have been admitted, for the Memphis market was where the cotton was to be sold; but the appellant did not object to this evidence, and after trial and verdict can not assign error for something he acquiesced in at the trial. Evidence of the sales in Memphis was proper, as tending to prove the allegation of want of due diligence in selling the cotton of appellee for less than the market price.

The second instruction requested by appellant was properly refused, for it singles out the evidence of sales under the market and says their evidence would be no defense. These sales were not admissible of themselves as constituting a defense, but merely as circumstances tending to prove that the market price of cotton in Memphis was better than received by appellants, at the same time. Hence it would have been improper to have singled out these facts and minimized their importance as evidence by saying that they did not constitute a defense.

The 5th refused instruction contains the same error, and should not have been given.

There was evidence to sustain the verdict, and in my opinion the judgment should be affirmed.

HALL v. WELLMAN LUMBER COMPANY.

Opinion delivered April 16, 1906.

1. INJUNCTION—CUTTING TIMBER—GENERAL RULE.—The general rule is that equity will not grant relief by injunction against the cutting of timber unless it is shown that an irreparable injury to the property will result, or that the destruction of the timber will render the freehold less susceptible of enjoyment, or that the acts of trespass are of a nature to constitute a nuisance, or that the defendant is insolvent. (Page 411.)
2. SAME—ESTOPPEL.—Equity will enjoin the cutting of timber where plaintiff was led, by defendant's conduct in apparently abandoning a claim thereto, to erect a sawmill on or near the land for the purpose of cutting the timber, and where reimbursement to the extent of the market value of the timber would not fairly compensate for the injury which will be done by the threatened trespass. (Page 412.)
3. TIMBER—CONTRACT FOR REMOVAL—EFFECT.—A consent decree which either conveys the timber on the land or confers the privilege of cutting and removing it contemplates that the timber shall be removed within a reasonable time. (Page 413.)

Appeal from Jefferson Chancery Court; *John M. Elliott*, Judge; affirmed.

STATEMENT BY THE COURT.

The Wellman Lumber Company brought this suit in equity to restrain the defendants, Joseph Hall and J. N. Albright, from cutting and removing the cypress timber owned by plaintiff from certain lands in Jefferson County.

The lands were formerly owned by Abraham Rhea, J. S. Anderson and Leonidas Bills; and W. H. Langford is the owner thereof under mesne conveyances from those parties. Plaintiff claims title to the timber under a conveyance from Langford. Defendants claim the right to cut the timber under a deed executed to them by S. G. Smith and C. S. Sadler, dated May 16, 1903, conveying the cypress timber on said lands. Title to the timber in S. G. Smith is asserted as follows:

That said lands were forfeited to the State for nonpayment of the taxes for the year 1892, and that Smith purchased the same from the Commissioner of State Lands. Rhea and others, the original owners, brought suit against Smith in the Jefferson Chancery Court to cancel said tax forfeiture and the State's deed

to Smith, on the ground that the tax sale was illegal and void for sundry reasons stated, and on March 16, 1897, a consent decree was entered in said suit declaring the tax sale and the State's deed to Smith to be void, and canceling the same.

The decree contained further provisions as follows: "It is further decreed by the court that the defendants take nothing for the redemption of the said lands, and that the plaintiffs waive all rights to recover any compensation or damages for any trespass the defendant may have committed on said lands. It is further adjudged and decreed that said defendant, S. G. Smith, shall have the right to be and remain in possession of that portion of the said lands which is now in cultivation and under fence for the period of three years, commencing on the first day of January, 1897, and ending on the 1st day of January, 1900, the said defendant having already paid to the plaintiffs the sum of $325 for the use and occupancy thereof. It is further decreed that the said S. G. Smith shall have the right and privilege to occupy free of rent the ground upon which his mill is now situated, together with the tenement houses and stables and lots pertaining to said mill, until such time as the cypress timber on said lands shall be sawed and marketed, and shall have the right, at any time, to remove from the said lands the said mill, together with all the machinery and attachments thereunto in any manner belonging to said mill, and shall have free ingress and egress over the said land for the purpose of removing the same at such time as he may see proper. It is further decreed that the said defendant, S. G. Smith, shall pay to the plaintiffs the price of fifty cents per thousand feet according to the Scribner's scale for cypress that he may cut or use from the said lands at his mill or otherwise from and after the date of this decree, and that he shall have the right of ingress and egress over the said lands necessary for the purpose of bringing the timber to the mill and hauling shingles and lumber away from it, and said defendant shall keep an accurate account of all the timber cut from the said lands, and scale the same, and settle for and pay for the actual amount of said timber cut from the lands, every three months, and shall make all necessary repairs and improvements on the said lands during the said three years at his own expense."

The plaintiff in its complaint asserted that under the terms

of said decree the right of Smith and those claiming under him to remain in possession of the land and cut timber expired on January 1, 1900, and it alleged that during the year 1900 Smith ceased to cut timber and removed his mill from the land. It further alleged that thereafter the plaintiff purchased said lands, and "at great expense erected a mill on or near said land for the purpose of cutting said timber, believing it had a right and title to said timber, and that the rights of Smith had expired with the said three years, and that he claimed no further right to said timber and no further right to cut it, and said Smith knew of the expenditure of plaintiffs in its purchase of the timber and erection of the mill and preparations to cut said timber, and stood by and made no claim to it while plaintiff was making said expenditures, and plaintiff states that said expenditures would not have been made had said Smith then claimed said timber, and plaintiff alleges and submits that said Smith and the defendants claiming under him are now estopped to claim said timber, even if his rights were not terminated by the expiration of said three years and by the removal of his mill and ceasing to cut timber."

It is also alleged that three years were, under the circumstances, a reasonable time within which the timber could have been removed.

At the commencement of the suit the chancellor granted a temporary injunction, restraining the defendants, their agents and employees, from cutting or removing any timber from said lands; and on final hearing of the cause the court granted the relief prayed for and made the injunction perpetual.

The defendants appealed to this court.

Taylor & Jones, for appellant.

1. The appellee, in purchasing, was bound to take notice of the rights of appellants as to the timber, and acquired no interest that could be set up to defeat or impair defendant's rights to the use of the land needed, or to cut and take the timber, as provided in the decree. 57 Ark. 231; 12 Ark. 564; 31 Ark. 491; 36 Ark. 217; 69 Ark. 442.

2. In the absence of allegations (and of proof to sustain the same) of irreparable injury to the freehold, continuing trespass or multiplicity of suits to redress injury, and of insolvency,

appellee had its complete remedy at law. 33 Ark. 637. And injunction did not lie. 67 Ark. 413; 75 Ark. 286.

Crawford & Gantt, for appellee.

1. The provision in the decree for cutting cypress timber was by its terms a mere privilege or license granted to Smith. Plaintiff could not hold him to cut the timber, but only to pay for such as he did cut—a privilege which he could abandon when he chose, and did abandon when he removed his mill.

If the decree by its terms does not establish that it was the intention of the parties to limit this privilege to three years, then the law fixes a reasonable time. 11 Am. Dig. Cent. Ed. Col. 1043, § 945; *Ib.* Col. 1045, § 947; 65 Ark. 51; 2 Parsons on Cont. 661, *et seq.*; 5 Col. App. 167; 38 Pac. 390; 56 Ky. 483; 8 N. E. 767; 2 Chit. Cont., 14 Am. Ed. 1062.

2. If Smith's rights had not ceased by lapse of time named in the decree, or by lapse of a reasonable time, the circumstances show an abandonment of his rights. Abandonment may be shown by the conduct of the parties and circumstances. 71 S. W. (Mo.) 1068, and cases cited; 21 S. W. 944; 7 S. W. 467.

3. Defendants and those under whom they claim, having by their conduct induced appellee to build its mill and construct its railroad for the purpose of cutting and removing the timber, asserting no claim to it in the meantime, are estopped now from setting up any further claim. 1 J. C. R. 354; 24 Ark. 371; 10 Ark. 211; 35 Ark. 376; *Ib.* 293; 37 Ark. 47; 50 Ark. 427; 52 Ark. 207.

4. Inasmuch as the only damages recoverable in an action at law would be the fair market value of the timber cut, the remedy at law would have been inadequate.

The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. 130 U. S. 514. Injunction is the only adequate remedy under the state of facts alleged and proved in this case. 10 So. 848; High on Inj. § 724; 33 L. J. Ch. 451.

McCULLOCH, J., (after stating the facts.) 1. It has been held by this court in a number of cases that equity will not grant relief by injunction against the cutting of timber unless it be

shown that an irreparable injury to the property will result, that the destruction of the timber will render the freehold less susceptible of enjoyment, or the acts of trespass are of a nature to constitute a nuisance, or unless it is obvious that the defendant is insolvent, and can not be compelled to respond in damages. *Ellsworth* v. *Hale*, 33 Ark. 637; *Myers* v. *Hawkins*, 67 Ark. 413; *Western Tie & Timber Co.* v. *Newport Land Co.*, 75 Ark. 286; *Haggart* v. *Chapman & Dewey Land Co.*; 77 Ark. 527. Appellants invoke this doctrine against the decree in this case. There may, however, be other grounds existent for the exercise of jurisdiction to grant the relief, and we are of the opinion that they sufficiently appear in this case.

This is not a suit by a landowner to restrain a trespass or trespasser upon the land. It is a controversy between rival claimants to the title to the timber, and the plaintiff alleges and proves, not only that defendants have no valid and subsisting right to cut the timber, but that, by abandoning their previously asserted claim to the timber, and by remaining silent and failing to assert a claim thereto, they induced the plaintiff to purchase the timber from the owner of the land, and to erect, at great expense, a mill on or near the land to manufacture the timber into lumber. Plaintiff also shows that recovery of damages at law to the extent of the market value of the timber would not, under those circumstances, afford full compensation for the injury, and that there is, therefore, no adequate remedy at law. We think that contention is sound, and that the distinction is plain between this case and those cited above holding that equity jurisdiction will not be exercised to restrain a mere trespass.

It is unnecessary in this case to go to the extent of holding, as in the case of *Wadsworth* v. *Goree*, (Ala.), 10 So. 848, cited by counsel, that, merely because the plaintiff has purchased the timber and erected a sawmill in the vicinity of the land on which it is situate for the purpose of sawing it into lumber, the jurisdiction of the court of equity may be invoked to enjoin other persons from trespassing by cutting the timber; but when to this element is superadded the other found in this case that the defendants, or one under whom they hold, have, by their conduct in failing to reassert an apparently abandoned claim, induced the plaintiff to erect a mill at great expense, and when it is shown that reim-

bursement to the extent of the market value of the timber would not fairly compensate for the injury which will be done by the threatened trespass, we think the jurisdiction of a court of equity to prevent it by injunction is plain. The loss, is, under those circumstances, irreparable, and the remedy at law for recovery of damages is inadequate.

2. Appellants contend that, under the terms of the consent decree, there being no limit of time fixed within which the timber should be removed, Smith and his grantees could remove it at his or their own pleasure or convenience. On the other hand, appellee contends that the right of Smith and his grantees to cut timber expired January 1, 1900, the time limit of his occupancy of the lands in cultivation; or, that, being without time limit fixed by the decree, the law implies the right to remove the timber within a reasonable time.

The recent decision of this court in the case of *Liston* v. *Chapman & Dewey Land Co.*, 77 Ark. 116, settles the question in favor of the latter contention of appellee.

The court there said: "In the absence of something in the instrument itself, or in the proof *aliunde,* showing a contrary intention, a deed to merchantable timber which specifies no time for its removal conveys a terminable estate in the timber, which ends when a reasonable time for the removal of such timber, after the execution of the deed, has expired." The authorities on both sides of this question are fully collected in that opinion, and need not be cited or discussed again. The same rule of construction applies to a decree of court, especially a consent decree, which is a contract as well as a judicial decree. We need not determine whether the decree passed the title to the timber to Smith, or whether it operated merely as a privilege or license to cut the timber, as contended by counsel for appellee. The rule would, in either event, exclude the right of the grantee or licensee to cut and remove the timber after a reasonable time had elapsed.

The evidence in this case establishes the fact that the timber could, with reasonable diligence, have been removed long before appellants asserted their right to cut it, and no excuse is given why it was not cut and removed earlier. The chancellor found that a reasonable time had long since elapsed, and we see no ground upon which his findings should be disturbed.

Other grounds are assigned by counsel for appellee why the decree of the chancellor should be sustained; but as those already discussed are decisive of the case, we need not pass upon others.

Decree affirmed.

---

78 414
83 406
78 414
182 458

ARKADELPHIA LUMBER COMPANY v. MANN.

Opinion delivered April 16, 1906.

1. SPECIFIC PERFORMANCE—PARTIES.—All of the owners of the land involved in a suit for specific performance are necessary parties, and relief will not be granted against one of the owners only, though he is agent and attorney in fact for the others. (Page 419.)
2. NEW PARTIES—NECESSITY.—Where, for replevin for lumber cut from certain land, defendant, instead of relying as a defense upon his equitable ownership of the land with right to cut timber, asked relief by way of specific performance against third parties, it was incumbent on him to bring in the necessary parties affected by the relief sought. (Page 419.)
3. LACK OF PARTIES—FAILURE TO RAISE OBJECTION.—In a suit to enforce specific performance of a contract to convey land where some of the owners are not made parties the court must deny relief, whether objection for want of parties is raised by demurrer or otherwise or not. (Page 420.)

Appeal from Dallas Chancery Court; *Emon O. Mahoney*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant, Arkadelphia Lumber Company, sued appellee, John W. Mann, in replevin in the circuit court of Dallas County for possession of 10,000 oak staves, of the value of $200, alleged to have been cut by Mann from land belonging to W. Burres Head and others, who had sold the timber to the lumber company.

The defendant filed his answer and cross-complaint, in which he denied the lumber company's alleged ownership of the staves, and alleged that said Head and the other owners of said land had entered into an agreement with him for the sale of the land for $300, and had placed him in possession of same, and agreed to execute a conveyance, and that he had paid the purchase price

and demanded a deed. That said owners had, in violation of their contract, refused to execute the deed, but had executed a deed to the lumber company attempting to convey the timber on the land for the sum of $350, and that the lumber company had entered upon said land, and cut timber worth $300. He asked that the cause be transferred to equity, that Head be made a party to the suit, and that a specific performance of Head's agreement to convey the land be required, and that the timber deed to the lumber company be canceled as a cloud on his (defendant's) title.

The cause was transferred to equity and the lumber company answered the cross-complaint and made its answer a cross-complaint against Mann and Head. It denied that Mann purchased the lands from Head, that Head placed him in possession, or that he was ever rightfully in possession; denied that it confederated with Head to cheat and defraud Mann. It alleged that the pretended contract from Head to Mann was verbal; that it was void under the statute of frauds. That in April, 1902, Mann represented to it that he owned said land, and sold the pine timber thereon to it for $500, and received its two checks for $300 and $200; that the $200 check was paid by it. That, after receiving the timber deed and paying the check for $200, it discovered that Mann had no title to said land on the timber thereon, so it purchased the pine and oak timber from W. Burres Head, acting for himself and as attorney in fact for the other heirs of his father, W. B. Head, deceased, and paid therefor $350; the names of the said heirs, besides the said W. Burres Head, being Mrs. Della Head, the widow of W. B. Head, deceased, Mrs. Virginia Smith, Mrs. Rivers Hearon, Olive Head and Bertha Head. It prayed for judgment against Mann for $200 paid to him for timber he did not own, and that the $300 unpaid check be canceled, and, in the alternative, for judgment against Head for $350 for failure of consideration, if it be held that the title to the lands had previously been legally contracted to Mann.

The defendant, W. Burres Head, answered, and made his answer a cross-complaint against Mann, and alleged that he was not the sole owner of the lands in controversy, but that same was owned by him, jointly with the other heirs of the W. B. Head estate, naming them. As to the attempt of Mann to purchase

said land, he admitted that there had been negotiations looking to that end, but no deed was executed, possession given, or money paid under the alleged purchase. That said negotiations for said purchase between Mann and this defendant was through Pledger, his agent. That Pledger had no power of attorney to sell, and whatever agreement was entered into with him was subject to approval by this defendant. That, if said negotiations amounted to an agreement to sell, the same was void because induced by the false, fraudulent and willful misrepresentations of Mann as to the timber upon said lands, which was a material element in said agreement, and caused this defendant to sell said lands for less than their real value. He alleged that the contract was by parol, and pleaded the statute of frauds. That Mann entered wrongfully into the possession of said lands and without authority collected rents from Head's tenant. He prayed for an accounting by Mann as to the rents collected by him.

The other owners of said land were not made parties to the suit.

The staves originally sued for were, by consent of parties, sold for the sum of $86.21, and the proceeds paid into the registry of the court to await the final decree upon the merits of the suit. The cause was heard by the court upon the pleadings and proof, and a final decree rendered in favor of the cross-complainant, John W. Mann, and Arkadelphia Lumber Company and W. Burres Head appealed to this court.

The chancellor found that the land was owned by said W. Burres Head and Virgie Smith, Rivers Hearon, Olive Head and Bertha Head, heirs at law of W. B. Head, deceased, and that said W. Burres Head, acting for himself and as attorney in fact for his said co-owners, had agreed to sell the land to said John W. Mann for $300, who had complied with the contract of sale by paying said price to the party who it was agreed should receive it, and had entered into possession of said land, but that said W. Burres Head had refused to perform the contract by executing a conveyance, and that Mann was entitled to a specific performance of the contract of sale.

The decree was entered accordingly, requiring said W. Burres Head to perform the contract of sale by executing a deed conveying said land to Mann, and also that the said proceeds of

sale of the staves in the registry of the court be paid over to Mann.

J. H. Crawford, for the Lumber Company; *W. E. Patterson,* for W. Burres Head.

1. Appellee's fraudulent representations as to the timber on the land will defeat his prayer for specific performance. Though a purchaser is not bound to disclose his superior knowledge of the value of the thing to be sold, yet he must not by word or act mislead the seller. 1 Benj. on Sales, § § 668, 669; 2 Kent's Com. 490; 40 Fla. 362.

2. To satisfy the requirements of the statute of frauds, the writing relied upon must be explicit as to names of the grantor and grantee, the terms of the sale, correct description of the land, price to be paid and the time of payment. Mutual mistake will defeat it. 49 Ark. 306. See also, 56 Ark. 139; 45 Ark. 17; 99 U. S. 100; 47 N. J. Eq. 44; 48 Miss. 247; 85 Tenn. 707. If a party sets up part performance, to take a parol agreement out of the statute, he must show acts unequivocally referring to and resulting from the agreement; such as the party would not have done unless on account of the agreement, and with a direct view to its performance. 1 Johns. Ch. 149; 1 Ark. 391, 418; 39 Ark. 424. Nothing is part performance which does not put the party in a situation which would be a fraud upon him if the contract be not performed. 32 Ark. 478. See also 1 Greenleaf, 117; 28 Mo. 138; 33 N. J. Eq. 650; 5 Wend. 638; 19 Cal. 447; 33 Minn. 373. Mere possession of the land, if wrongfully obtained and wholly independent of the contract, will not be deemed part performance of the agreement. If possession be delivered and obtained solely under the contract, and in reference exclusively to it, then the possession will take the case out of the statute. 1 Ark. 418. See also 21 Ark. 277; 44 Ark. 334; 4 Wall. 513; 47 N. J. Eq. 201; 6 Atl. 350; 47 Ia. 486; 13 Minn. 462; 30 Pittsb. Leg. J. 416; 74 Tex. 69; 28 Am. Dec. 45; Hoff. Ch. Rep. 470; 48 Am. Dec. 133; Browne, Stat. Frauds, § 478; *Ib.* § § 483, 486, 473. Payment of purchase price is not such part performance as will induce a decree for specific performance. 89 Va. 696; 27 Am. Dec. 745; 55 Am. Dec. 578; N. E. 727; Bispham, Eq. Jur. 509. An agent acting without a power of attorney authoriz-

ing him to sell and convey, can not bind his principal by the terms of a mere verbal contract, or by acts done by him in connection therewith. 70 Ark. 351.

3. If appellee had no ownership by reason of the alleged verbal purchase from W. Burres Head, he is without title to the oak timber cut by him; and appellant lumber company, having purchased the same from the Heads, should recover the staves sued for, and also the $200 paid to appellee for purchase money for the pine timber, because of failure of consideration. 21 Ark. 283; 40 Ark. 420; 15 Ark. 466; 35 Ark. 384.

R. C. Fuller and *Thornton & Thornton,* for appellee.

1. As to the staves replevied, appellant lumber company can prevail, if at all, only upon the strength of its own title; and the burden is upon it to establish that title. Appellee was in possession, which was *prima facie* evidence of title in him. 11 Ark. 271; 42 Ark. 314.

2. Representations to amount to fraud must be known to be false. 22 Ark. 254; 23 Ark. 289. Mere naked hardship of the bargain is not sufficient to set aside a contract. 21 Ark. 110.

3. Appellant lumber company is in no position to invoke the statute of frauds. The statute can not be invoked by a stranger to the contract. The defense is personal, and can not be raised by a third party. 71 Ark. 304; 45 S. W. 401. As to appellant Head as agent for the owners, it is established by uncontradicted proof that the appellee is entitled to a decree for specific performance. The statute is not inflexible. 30 Ark. 262. It was intended to prevent fraud, and was not designed to be used as a means of fraud by permitting one to make a contract, and afterwards, on learning that it has turned out to be an unprofitable one, defeat his adversary by pleading the act. 1 Ark. 301; 40 Ark. 391; 2 Story's Eq. Jur. 759. Delivery of possession is sufficient to take a case out of the statute of frauds. 30 Ark. 249. Specific performance of a verbal sale of land will be decreed, where the consideration was paid and possession had. 21 Ark. 127; 42 Ark. 246. To conform to the requirements of the statutes, no special form of language is necessary. Any writing from which the intention may be gathered will suffice. Browne, Stat. Frauds, § 346, *et seq.;* 17 Ill. 360. All that the statute

requires is written evidence from which the whole contract can be made out. 45 Ark. 17; Fry, Spec. Per. Con. 228 *et seq.* See also Browne on Stat. Frauds, § 385; 21 S. W. 1036. An entry or continuance in possession with the knowledge and acquiescence of the vendor would reasonably be evidence of his assent. 21 Ark. 279. See also 8 Ark. 272.

4. While, as a rule, in the absence of authority express or implied, an agent has no power to employ a subagent, so as to affect the rights of the principal, there are exceptions to the rule, growing out of the necessities and exigencies of a case, based upon the customs and usages of trade. 81 S. W. 574; 51 N. Y. 123; 1 Cush. 177; 4 Gray, 618; Mechem on Agency, § 194; 56 Ia. 527. Appellant Head ratified the acts of Pledger, with full knowledge of the conditions of the trade, and this made it his act. 11 Ark. 204; Story on Agency, § 253; Mechem on Agency, § 115. A party who has permitted another to act on the faith of an agreement may not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. 43 Ark. 535; 21 Ark. 110.

McCULLOCH, J., (after stating the facts.) All the owners of the land against whom a decree for specific performance of the contract of sale was sought were necessary parties to the suit. The relief could not be granted against one of the owners only, though he was agent and attorney in fact for the others. Such a decree has no binding force against the other owners. An agent, though properly authorized by his principals to execute a deed of conveyance, can not be compelled by a court of equity to execute a conveyance in specific performance of a contract to convey. The legal title being in the principals, the decree of the court must be directed against them, and they must, of course, be parties to the suit before they can be affected by the decree. *Aiken* v. *Gill,* 23 Ark. 477; *Kiernan* v. *Blackwell,* 27 Ark. 235.

Appellee might have defended the replevin suit by showing that he was the equitable owner of the land, and in possession with the right to cut timber. He did not content himself with this, but asked affirmative relief in the specific performance of the contract to convey, and also in adjusting the payments made by the lumber company for timber. It was therefore incumbent upon him to bring in the necessary parties affected by that relief.

The court was absolutely powerless to grant that relief without the presence of all the owners of the land who, through their agent, had contracted to convey it.

It is true that no objection was made, by demurrer or otherwise, to the nonjoinder of parties, and, ordinarily, the defect of parties would thereby be waived; but not so in a case like this where the court is without power to grant the relief except as against persons who are not parties to the record. Without their presence as parties to the suit, no cause of action is stated. Under such circumstances the court must deny the relief, or cause the necessary parties to be brought in.

Kirby's Digest, § 6011, is as follows: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But where a determination of the controversy between the parties before the court can not be made without the presence of other parties, the court must order them to be brought in."

We deem it unnecessary to determine whether or not the testimony would justify the decree for specific performance, inasmuch as the other parties, when brought in, may adduce other proof, or may tender other defenses to the cross-complaint.

The decree is therefore reversed, and the cause remanded for further proceedings in accordance with this opinion.

---

78 420
f 84 492
78 420
85 86

BOGGIANNA v. ANDERSON.

Opinion delivered April 16, 1906.

DEED—UNDUE INFLUENCE.—To avoid a deed for undue influence, it is not sufficient that the grantor was influenced by the grantee in the ordinary affairs of life, or that he was in close touch and upon confidential terms with him; but there must be a malign influence resulting from fear, coercion, or other cause which deprives the grantor of his free agency in disposing of his property.

Appeal from Lee Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

P. D. McCulloch, for appellants.

The undisputed facts, Raggio's age, his weakened physical and mental condition, defendant's daily and constant intimate attendance upon and association with him, and her supervision over him and every detail of his business affairs, remove the *prima facie* presumption that the deed was his voluntary act, free from undue influence, and impose upon her the burden of establishing the legal integrity of the conveyance. 29 Am. & Eng. Enc. Law, 120, 121 and cases cited; 67 Ala. 368; 62 Ala. 347; 3 Baxter (Tenn.), 283; 4 *Ib.* 41; 63 N. J. Eq. 245; 201 Ill. 70; 92 Cal. 632; 32 Minn. 25; 141 Mo. 466; 56 S. W. 512; 8 Humph. (Tenn.), 145; 1 Cold. 290.

Extreme weakness will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity. 2 Mason, 378. It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render him entirely incapable of executing a valid deed. It is sufficient to show that, from sickness and infirmities, he was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration. From these circumstances imposition or undue influence will be inferred. 94 U. S. 506; 11 Wheat. 125; 2 Pom. Eq. § 947; 15 Ark. 555.

W. A. Compton, for appellee.

The mental capacity of Raggio to execute the deed is established, and hence the chancellor's finding to that effect, and his decree dismissing the complaint for want of equity, should stand. The evidence discloses no undue influence exerted by the appellee, and none will be presumed. Absolute soundness of mind is not necessary to enable one to make a valid conveyance. It is sufficient if the grantor fully comprehended the import of the particular act. 4 Ind. 443; 36 Ill. 109; 44 N. H. 541; 55 Me. 256; 4 Bush, 239. To avoid the conveyance, the undue influence exerted, if any, must be such as to destroy the free agency of the party. 4 Metc. (N. Y.), 163; 27 Am. & Eng. Enc. Law, 497, note 2; 77 Ill. 397; 49 Ark. 371. Old age, physical infirmities

and even partial eclipse of the mind will not prevent making a valid conveyance. 29 Ark. 159; 49 Ark., *supra*.

HILL, C. J. Dominic Raggio left his native village of Borzonasca, Italy, in 1851, and came to the United States. He served as a soldier in the civil war, and not a great while after the close of the war he settled in Lee County, Arkansas, where he resided until his death on the 8th of January, 1901, at the age of 78 years. He was of more than average intelligence, and through industry and frugality gathered an estate yielding an income of about $1,600 per annum, estimated to be worth from $12,000 to $15,000. His estate consisted of 371 acres of land, of which 160 or 170 were in cultivation, and upon it was situated the village of Raggio, the rents therefrom amounting to about $800 per annum; and he had a home nearby the village on the same tract. He had a friend in Memphis named Nick Malatesta, and he had a warm friendship for him and for his (Malatesta's) family. A few years before his death a young Italian named Bruno represented himself as his nephew, and Raggio accepted him as such for a time, but later learned he was an impóster. Raggio at some time in his life had a wife and child, and they were buried in a Catholic cemetery in Memphis, but the exact location of their graves was unknown to him, and he had requested Miss Malatesta to see that he was buried in this country, as he wanted his body to lie near his loved ones. For the last five or six years of his life Raggio was grievously afflicted with a cancer, which gradually extended its ravages from lip to eye, exposing the teeth and nearly destroying the vision. Death came, however, not from this encroaching disease, but from pneumonia, and he was confined to his bed only a few days, in his last sickness. Up to this sickness he was more or less active and healthy, according to varying views; remarkably so, considering his age and affliction. Over five years before his death, the appellee, Mrs. Anderson, was employed as housekeeper, cook and nurse for Mr. Raggio. She did all the cooking and household work, bathed and dressed his sores, and attended to his business affairs in a limited way under his directions. He never learned to speak English fluently, and it was always difficult to understand his broken speech, and this difficulty greatly increased as the disease destroyed lip and nostrils. Mrs. Anderson was

constantly called upon to interpret his conversations. Mrs. Anderson's moral character, before going to Raggio's, was a subject of neighborhood gossip. She was once divorced and thrice married. But her character, be it good or bad, is not an issue in this case. There is not even an insinuation that her relations with Raggio were meretricious. The evidence from all sides establishes without doubt that she faithfully ministered unto the manifold necessities and afflictions of this aged man. That he became attached to her and dependent upon her services is natural and evident, for she was the only person who stayed with him and cared for him when he became an object of horror and repulsion. His condition was hardly less pitiable than the lepers of Judea, driven without the gates of the cities and compelled to cry out "Unclean! Unclean!" whenever a fellow being approached.

In 1890 Raggio made a will, in which he appointed his friend, Nick Malatesta, executor and trustee, and gave him 25 per cent. of his estate for his compensation as such executor and trustee. The estate was to be sold by the executor, and the residue "distributed among my nephews and nieces in the Kingdom of Italy that may be living at my death, *per capita.*" In 1893 he added a codicil, providing that, in case his nephews and nieces did not claim their respective shares within two years from his death, all of the estate should go to Nick Malatesta. In 1895 Nick Malatesta died, and in 1897 Raggio added another codicil to the will, reciting his friend's death and substituting his eldest daughter, Miss Rosa Malatesta, to the office and compensation of her father; and providing, in case the nieces and nephews failed to appear in two years, that the heirs at law of Nick Malatesta (naming them) should succeed to the estate. Nearly a year after this he executed a power of attorney to Miss Malatesta, authorizing her to manage and control all of his property for him. She attended to various matters for him, but does not appear to have acted under this sweeping power given her. He made a later will, and Miss Malatesta destroyed it as she did not regard him as mentally capable. There is some confusion as to its contents, but it was principally in favor of Miss Malatesta, and provision was also made for Mrs. Anderson.

When the psuedo nephew imposed upon him, he made a

will in his favor, and provided for Mrs. Anderson having the home place and $15 per month for life, and more in case of disability. After the discovery of Bruno's imposture, Raggio destroyed this will; and about five months before his death made a deed, conveying all the property to Mrs. Anderson. The deed was delivered and recorded. Raggio stipulated that she was not to act under it until his death. This suit is by his heirs at law to set aside this deed on the grounds of undue influence and mental incapacity. The chancellor decided against them, and they have appealed.

Much testimony was introduced by each side to sustain their respective contentions.

That Mrs. Anderson was in a position to influence Raggio is apparent, and her conduct should be subjected to the closest and most jealous scrutiny. It is not sufficient that the grantor or testator was influenced by the beneficiary in the ordinary affairs of life, or that he was in close touch and upon confidential terms with him; but there must be a malign influence resulting from fear, coercion, or any other cause which deprives the grantor or testator of his free agency in disposing of his property. *McCulloch* v. *Campbell,* 49 Ark. 367.

The application of the law announced in the foregoing case to the facts at bar eliminates the question of undue influence. The most serious question is the one of mental capacity, and witnesses of the highest character are in hopeless conflict in their opinions on this question. A distinguished lawyer of Memphis declined to write his will six months before Raggio's death, and one month later a prominent lawyer of Eastern Arkansas wrote the deed in question. Each interviewed and studied the man; one was convinced of his capacity, the other of his incapacity, and this illustrates the conflict in the testimony. Near the same time, a Catholic priest, noted for learning and intelligence, spent a day and night with him; the object of the visit was to present him the rites of his church if he was able to receive them. The rules of the church required the communicant to have an appreciation and understanding of the sacrament before receiving it. The priest, after deliberation, decided that Raggio was capable, and administered the sacrament to him. That his mentality was weakened by age, disease and excessive drink is unquestionably

true; but whether his mind was so weakened that he did not understand and appreciate the force and effect of his deed is the question. It seems to the court that the weight of the evidence sustains his capacity to execute this instrument, and that he did it freely and understandingly. Certainly, it can not be said that the weight of the evidence is against the chancellor's finding; and this kind of conflict is one where the chancellor's finding has persuasive authority, and is entitled to weight and consideration. Raggio's broken speech, increased by his affliction, would render difficult the determination of his mental status, and hence this conflict of opinions can be explained more readily than some other conflicts in evidence.

This disposition of his property was the natural one for him to make. In his prior dispositions of his property Mrs. Anderson received liberal consideration, which clearly showed his intention to provide for her was a fixed determination of long standing. In fact, Miss Malatesta once wrote him, advising him to leave his property to her, rather than to a stranger, evidently referring to Bruno. Miss Malatesta says that he always expressed himself as wanting to leave his property to his relatives, yet the various dispositions he made showed a tendency to favor his friends, the Malatestas and later Mrs. Anderson, rather than his relatives; as each disposition gave less to them and more to his friends. A half century had elapsed since he had seen his kindred, and evidently he knew little of them, and they of him. The depositions of several of his early friends were taken to prove the relationship, and none of these intimate friends of his family knew he had ever been married; and he makes provision in his will and codicils for his nephews and nieces, and yet this suit discloses that he had a sister living, and he evidently did not know it. The kindness of his attendant was ever present to him, and the ties of blood, weakened by fifty years' absence, were easily loosened, and naturally the change came, and in this change the court fails to find any malign and sinister influence producing it, and finds Raggio had sufficient intellect to make the deed, and made it understandingly, and accordingly the decree is affirmed.

WOOD, J., dissents.

MCCULLOCH, J., disqualified and nonparticipating.

78 426
78 379
78 426
85 126
78 426
189 588

JACKS v. REEVES.

Opinion delivered April 16, 1906.

1. APPEAL—RULE AS TO ABSTRACTS.—Rule nine, in requiring the appellant to file an abstract or abridgment of the facts, did not intend to compel counsel to abridge the testimony when he felt it necessary to set it forth in full. (Page 428.)
2. SAME—PRESUMPTION FROM FAILURE TO ABSTRACT INSTRUCTIONS.—Failure of appellant to set forth the instructions of the court in full in his abstract raises the presumption that correct instructions were given curing those complained of, wherever they are curable. (Page 428.)
3. NEGLIGENCE—MAINTENANCE OF WIRE IN HIGHWAY.—One who maintains a wire in and along a public highway is charged with the duty to take care that it shall be constructed of good materials in a substantial manner so as to withstand all strains that may reasonably be anticipated, and that it shall be maintained in good order. (Page 428.)
4. SAME—PRESUMPTION.—Upon proof that defendant permitted a wire to sag down in the highway for two days, and that, while plaintiff was driving along, the top of her surrey was caught and her horse frightened, so that he ran away and injured her, a *prima facie* presumption of negligence on the part of the defendant is raised, which is not rebutted by proof that defendant had given general orders to his men to repair the line whenever it was reported to be out of order. (Page 429.)
5. CONTRIBUTORY NEGLIGENCE—FAILURE TO SEE WIRE.—It is not contributory negligence for a traveler driving along a public highway in a covered vehicle to fail to see a wire which sagged down so as to catch the top of the vehicle. (Page 430.)
6. SAME—INFANT DRIVING HORSE.—It is not contributory negligence for a fourteen-year-old girl, accompanied by two grown women, to drive a gentle horse along a public highway in daytime. (Page 431.)
7. SAME—ACTS IN EMERGENCY.—When one is placed in danger through the negligence of another, his action in the emergency suddenly thrown upon him can not be weighed in scales to determine whether he acted wisely or foolishly in the imminency of great danger. (Page 431.)

Appeal from Phillips Circuit Court; *Hance N. Hutton*, Judge; reversed.

Mrs. J. L. Jacks sued W. D. Reeves for damages for personal injuries alleged to have been caused by the negligence of defendant in the construction and maintainance of a telephone line along a highway. The complaint alleged that as plaintiff was driving along the road the top of the carriage was caught

by defendant's wire and torn off, causing the horse to become frightened, run away and throw her violently to the ground, whereby she suffered physical pain, etc.

The answer denied negligence, and alleged contributory negligence.

Verdict and judgment were for defendant. Plaintiff has appealed. The other facts are stated in the opinion.

R. W. Nicholls and *W. G. Dinning,* for appellant.

1. It was error to instruct the jury "that the plaintiff, in order to entitle her to recover damages under this action, is required to *prove* that the accident occurred through the negligence of W. D. Reeves." The accident and cause being shown, a *prima facie* case of negligence is made out, and it devolved upon defendant to prove that the occurrence was unavoidable. The maxim, *"res ipsa loquitur,"* applies. 57 Ark. 435; *Ib.* 421; 54 Ark. 213.

2. The burden of proving contributory negligence is on him who pleads it. 61 Ark. 549; 46 Ark. 423; *Ib.* 182. Appellant was under no obligation, being upon the public highway, to look for possible obstructions in mid-air. Neither was she required to leave the highway. 80 S. W. 411.

John I. Moore and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

1. The appeal should be dismissed for non-compliance with Rule 9. A literal copy of parts of the evidence is no abstract, within the meaning of the rule, and the instructions are not set out.

2. No proper exceptions were saved to the instructions. Where there is a single charge to the jury, the parts objected to must be specifically pointed out. 73 Ark. 316.

3. If an instruction is defective in form, and exceptions sought to be taken thereto, specific objection should be made, and a form suggested that would be more acceptable. 66 Ark. 46; 65 Ark. 255; *Ib.* 63; 66 Ark. 267; 73 Ark. 594.

4. Where negligence is denied, the burden of proving it is necessarily on the plaintiff. 1 Thompson on Neg. § 45. It was therefore proper to instruct the jury that plaintiff was required to prove that the accident occurred through the negli-

gence of defendant. The doctrine *res ipsa loquitur* is not in conflict with this rule. It only means that the plaintiff may prove a state of facts from which negligence will be inferred. 1 Thompson on Neg. § 15. The plaintiff must present proof of the facts necessary to the recovery which he seeks. Keasbey on Elec. Wires, § 232.

5. The whole question of negligence, both on the part of the defendant and of the plaintiff, was for the jury. Croswell on Elec. § 250; Keasbey on Elec. Wires, § 230; 76 Ark. 88. See also 54 Ark. 17; 57 Ark. 435.

HILL, C. J. 1. The appellee insists upon a dismissal of the appeal on the ground that the abstract is not prepared in accordance with Rule 9, in that parts of the evidence are copied literally and not abstracted, and the instructions are not set out in full. Counsel for appellant believed it was necessary to set forth in detail the evidence of the respective litigants, so as to fully present his cause, and the other testimony was stated. Counsel should always abstract and condense, where he can do so without injury to a proper presentation of the case, but the rule was never intended to compel the counsel to abstract when he felt it necessary to set forth in full. The instructions should always be set forth in full, and a failure to do so invokes the presumption that correct instructions were given curing those complained of, if they are curable. *Carpenter* v. *Hammer,* 75 Ark. 347, and cases there cited.

2. The charge consists of nine separate paragraphs, but they are not numbered, and the exception is to each and every instruction. The motion for new trial sets forth so much of the charges as it assigns as error. Appellee insists that this is an unavailing exception. The question of general and gross exceptions is discussed in *Darden* v. *State,* 73 Ark. 315; *Young* v. *Stevenson,* 75 Ark. 181; *Wells* v. *Parker,* 76 Ark. 41.

This case is disposed of on another ground, and the court will not pass upon this question.

3. The instruction chiefly complained of is this: "That the plaintiff, in order to entitle her to recover damages under this action, is required to prove that the accident occurred through the negligence of W. D. Reeves."

Abstractly, this is, of course, correct. No liability rested

upon him except through negligence, but the instruction was misleading in this case in not being qualified or coupled with another one explaining that the evidence of the accident and injury following therefrom, when the occurrence was not out of the usual course, was *prima facie* evidence of negligence, and shifted the burden on to the defendant to prove that it was not caused by any want of care on his part. The facts disclosed in evidence brought this case squarely within this rule as announced in *Railway Company* v. *Hopkins*, 54 Ark. 213; *Railway Company* v. *Mitchell*, 57 Ark. 418; *Arkansas Telephone Co.* v. *Ratteree*, 57 Ark. 429.

The application of this rule to the duty of the owners of electric wires to the passerby is thus stated: "The occupier is not liable in the absence of negligence; but in some cases, as for example, the falling of an object from a building upon the highway, the accident itself, in the absence of explanation, is evidence of negligence. The maxim *res ipsa loquitur* is applied, and the defendant can only discharge himself by showing affirmatively that the accident was due to some cause consistent with due repair and careful management of the structure." Keasbey on Electric Wires, § 232.

It is said that, the foregoing instruction being abstractly correct, appellant should have asked the qualification, and, failing to do so, can not complain of the court failing to give what was not asked when what was given was a correct statement so far as it went. Probably this is the correct view. As the case must be reversed on another ground, it is unnecessary, as heretofore stated, to decide these questions of practice.

4. The facts, briefly stated, are: Reeves owned a private telephone line running from his sawmill into the city of Helena. It was strung on trees and posts, and at places in the public road. The line was illy constructed, and usually in bad condition at places. The place in question was on one of the leading thoroughfares out of the city of Helena, about a mile and a half from the city. Owing to a broken pole, the wire sagged over the highway, and was in this condition for two days prior to the accident. In broad daylight Mrs. Jacks, Mrs. Fitzpatrick and Miss Ione Fitzpatrick, drove along this road in a surrey drawn by a gentle horse. Miss Fitzpatrick was driving, and the other

ladies were in the rear seat. The sagging wire caught the top of the surrey, made a rasping, scraping noise, tore off the top, and frightened the horse into running. The evidence is not clear whether Mrs. Jacks was thrown out or in her fright jumped out. Her last remembrance was the crash of the top of the surrey. She was seriously injured. The only evidence to rebut the presumption of negligence was that of Mr. Reeves. He says his teamsters passed this road nearly every day, and were instructed to give notice of the line being "out of fix," and he had the line repaired when out of order. He was absent for several months, and left instructions with the foreman to repair it when it was reported out of order by the teamsters. No other means were adopted. There is a total dearth of evidence as to whether teamsters were passing at this time, whether the broken pole and sagged wire were observed or reported. The whole defense rested on mere instructions to teamsters to report to the foreman and to the foreman to repair when reported, and that some teamsters usually passed there every day. The evidence is uncontradicted that the line was usually in bad order, and was crudely constructed along a much-traveled road, and the pole and wire, which caused this injury, were down for at least two days prior to the accident. It is obvious that this evidence was wholly insufficient to rebut the presumption of negligence.

The rule is thus stated: "Entirely apart from the fact that the wires may be charged with a dangerous current, the fact that such a structure is set up in a public street, even though duly authorized, involves the obligation to take care that it shall be constructed of good materials, in a substantial manner, so as to withstand all strains that may reasonably be anticipated, and that it shall be maintained in good order." Keasbey on Electric Wires, § 233.

The appellee failed to affirmatively show "that the accident was due to some cause consistent with due repair and careful management of the structure." Keasbey on Electric Wires, § 232.

The appellee contends that the question of contributory negligence was properly submitted to the jury, and that there was evidence justifying the jury in finding appellant guilty of contributory negligence. The statement from Keasbey, *supra,* (§ 230)

is relied upon: "It is not to be expected that a man in driving, or even in walking along a street, will see a small wire stretched across the way or lying upon the pavement when he has a right to suppose that the street is unobstructed; and the fact that he runs into such a wire is not held, as a matter of law, to be contributory negligence, but the question whether he exercised due care will be left to the jury." The author cites no authority for this statement, but likely it is a fair deduction from the cases. Many of them are reviewed and cited in this section, and they are cases where the traveler saw the wire or knew it was there. Conceding, without deciding, the above statement to be correct, still it does not reach to this case. Certainly it is not expected or required of a traveler driving easily along the middle of a much-traveled highway to be looking up to see if perchance a stray wire is in reach of the top of the vehicle.

It is said that contributory negligence may have been inferred from permitting a fourteen-year old girl to do the driving. It can not be said as a matter of fact or of law that it is negligence for a fourteen-year old girl accompanied by two grown women to drive a gentle horse along a public highway in broad daylight.

It is also said that if Mrs. Jacks had stayed in the surrey, instead of jumping out, she would not have been injured. The evidence is not clear whether Mrs. Jacks jumped out or was thrown out; nor is it the least material. When any one is in danger through the negligence of another, his action in the emergency suddenly thrown upon him can not be weighed in scales to determine whether he acted wisely or foolishly in the imminency of great danger. This has been too often held to need citations. The court fails to find any contributory negligence in evidence.

The judgment is reversed, and cause remanded for a new trial.

WOOD, J., dissents; MCCULLOCH, J., disqualified and not participating.

RICE v. PALMER.

78 432
78 471
78 500
78 501
82 586

Opinion delivered April 23, 1906.

1. CONSTITUTIONAL AMENDMENT—ADOPTION.—The question whether an amendment to the Constitution has been adopted by the required majority is not concluded by the action of the Speaker in joint session of the two houses of the Legislature in declaring it adopted, followed by the Governor's proclamation to the same effect, but is a judicial question to be settled by the courts. (Page 438.)
2. SAME—POWER OF SPEAKER TO DECLARE RESULT OF ELECTION.—Kirby's Digest, § 718, providing that "if it shall appear that a majority of the electors voting at such election adopt such amendment, then the Speaker shall declare such proposed amendment duly adopted by the people of Arkansas," only calls for a decision by the Speaker from the face of the returns, and does not deprive the courts of jurisdiction to determine whether any particular amendment has been adopted by the constitutional majority. (Page 440.)
3. SAME—MAJORITY REQUIRED TO ADOPT.—Under Const. 1874, art. 19, § 22, providing that amendments to the Constitution shall be submitted to the electors of the State for approval or rejection at a general election for senators and representatives, and that "if a majority of the electors voting in such election adopt such amendments the same shall become a part of the Constitution," the majority necessary to adopt an amendment must be a majority of the electors voting at a general election for senators and representatives, and not a mere majority of those voting on the subject of the amendment. (Page 446.)

Appeal from Lincoln Circuit Court; *Antonio B. Grace*, Judge; reversed.

R. R. Rice brought suit, under the usurpation statute (Kirby's Digest, c. 155), against Henry D. Palmer to recover possession of the office of circuit clerk of Lincoln County.

The cause was tried before the circuit judge sitting as a jury, and these findings of facts were made, towit:

"That the plaintiff is a citizen of Lincoln County, Arkansas, and was on the 31st of October, 1904, eligible to the office of clerk of the circuit court of that county. That at the general election held in that county in September, 1902, the defendant, H. D. Palmer, was duly elected to the said office of circuit clerk. That he qualified as such on the 31st of October, 1902, entered upon the discharge of his duties as such, and has continued to hold such office from that time to this. That in the general elec-

tion held in said county in 1904 one B. A. Meroney was duly elected to the office for the ensuing term, and thereafter, but before he had received a commission or qualified, he departed this life. That on the 31st day of October, 1904, the Governor of the State, by commission of that date, appointed and commissioned the plaintiff to be the circuit clerk of the county during the term made vacant by the death of said Meroney. That said commission was duly received by the plaintiff, who gave bond as the law prescribes, which was presented to the judge of the county court of Lincoln County during the vacation of the court, and was by him approved. That plaintiff took and subscribed the oath prescribed in the Constitution, and thereupon demanded of the defendant that he surrender to plaintiff the office of circuit clerk, which defendant declined to do. That the Governor, in appointing the plaintiff to the office of clerk, assumed to act under and by virtue of the authority contained in Amendment No. 3 to the Constitution of the State of Arkansas; that said amendment was duly submitted to the qualified voters of the State at the general election in September, 1894; that the vote upon said amendment was duly submitted to the joint assembly of the two houses of the General Assembly of the State of Arkansas on January 17, 1895, when it was ascertained that there had been 43,446 votes in favor of the amendment and 40,207 against it; and thereupon the said amendment was declared by the Speaker of the House of Representatives, as presiding officer of the said joint assembly, to have been duly adopted by the people of Arkansas; and thereupon the said speaker caused a true copy of said amendment to be signed by the President of the Senate and himself, and attested by the secretary of the Senate and the Clerk of the House of Representatives, and to be filed in the office of the Secretary of State, there to remain as a record in said office; and thereupon the Governor published his proclamation in a newspaper of general circulation, announcing the ratification and adoption of said amendment. That the return made to the said joint assembly of the vote cast in said election in 1894, showed that there had been a total vote of 126,986 cast for the office of Governor."

And upon said finding of facts the court declares the law to be as follows:

"1. That there was a vacancy in the office of circuit clerk

of Lincoln County on the 31st of October, 1904, to be filled in the manner prescribed by law.

"2. That Amendment No. 3 to the Constitution of the State of Arkansas was not ratified and adopted by vote of the people at the general election in September, 1894, and is not a part of the Constitution of the State.

"3. That the defendant by virtue of his election and qualification as circuit clerk in 1902, and the subsequent death of B. A. Meroney before his qualification in 1904, is entitled to hold the office and perform the duties of same until his successor is elected in the manner provided by section 50, article 7, of the Constitution of this State."

Judgment was entered for defendant, and plaintiff appealed.

Cantrell & Loughborough and *Rose, Hemingway & Rose,* for appellant.

1. The finding of the joint session of the Legislature, being upon a political question, is final, and is not subject to review in the courts. Section 22, art. 19, Const., prescribes the essential steps for the valid adoption of an amendment. No provision exists in the Constitution specifying the details for submitting the amendment, and necessarily these matters were reserved for the Legislature to provide for. These details are found in Kirby's Digest, § § 703, 718. A State constitution is not an enumeration of powers in the legislative department, but is a restriction of supreme legislative power. The Legislature can exercise all the power not expressly or impliedly prohibited by the Constitution. 1 Ark. 513; 15 Ark. 619; 31 Ark. 511; 26 Ark. 523; Cooley on Const. Lim. 205. The power, therefore, since there is no prohibition in the Constitution, existed in the Legislature to constitute a body to ascertain the result of an election for an amendment, and to make the finding of this body conclusive. Such an act does not invade the province of the judiciary. Cooley on Const. Lim. 110. The General Assembly is empowered to provide by law the mode of contesting elections in cases not specifically provided for in the Constitution. Sec. 24, art. 19, Const. Since it appears by sec. 51, art. 7, Const., that the framers of the Constitution intended that contests for the offices there enumerated should be taken to the courts, they must have intended

that in contests of other elections the Legislature should be supreme. It has been held that the Legislature might create a special tribunal to hear election contests. 32 Ark. 533. See also 62 Mich. 466; 1 Met. (Ky.), 533; 15 Ohio St. 114; 531 Ohio St. 250. And the finding of that tribunal or person is conclusive. 22 Md. 170; 77 Ga. 544. See also 83 Ga. 180; 27 La. Am. 544; 84 N. C. 158; 86 N. C. 8; Cooley, Const. Lim. 75; 40 Atl. 740; 29 Ark. 173; 7 How. 1-7; 69 Ind. 505; 32 Me. 508. Having the power to constitute a body to ascertain the result of an election for an amendment, the Legislature has done so by the enactment of sections 717 and 718, Kirby's Digest, and the result of the election as announced by the joint assembly is conclusive. 78 Md. 152, and authorities *supra*.

2. The finding of the joint assembly can be reviewed, if at all, only in a direct proceeding. The conclusions of canvassing boards on the result of an election are not open to collateral attack. 15 Cyc. 387; McCrary on Elections, § 316; Cooley, Const. Lim. 938; 32 Tex. 243.

3. If the court holds that it is at liberty to inquire into the number of votes cast at the election upon the amendment, then it is submitted that the amendment received the number of votes required by the Constitution. Sec. 22, art. 19, Const. If the term "electors voting at such election" was intended by the framers of the Constitution to refer to all who might appear at the polls and vote on measures other than the amendment, then the majority required is foreign to the spirit of our government and to the spirit of the Constitution itself, as evidenced by its other provisions. Electors present at an election and not voting acquiesce in the election made by those who do vote. 2 Burrow, 1017; 16 Wall. 644. See also 20 Wis. 572; 130 N. Y. 319; 29 Kan. 36; 68 Md. 146; 5 N. D. 594; 20 Ore. 154; 22 Minn. 400; 20 N. Y. App. 53; 49 La. Ann. 442; 40 Atl. (N. J.) 740, 47 S. W. (Ky.) 773; 41 Fed. 322; 1 Wash. 303; 16 Wall. 644; 95 U. S. 360; 111 U. S. 565; 45 Ark. 400; 67 Ark. 591; 69 Ark. 336.

4. There was a vacancy in the office at the time appellant was appointed, by reason of the death of Meroney, who had been elected but had died before the time came to qualify. Appellee, the former incumbent, had no title to the term, but only had au-

thority to hold over for the public convenience until the vacancy could be filled. 73 Pac. 582.

Taylor & Jones, for appellee.

1. The amendment was never legally adopted. Appellee contends that the framers of the Constitution intended by the provisions of sec. 22, art. 19 Const. 1874, that the adoption of a proposed amendment should be by a majority of the electors voting at a general election at which senators and representatives were to be chosen, and not by a mere majority of electors voting on the question of the amendment. *Knight* v. *Shelton,* 134 Fed. 423; 17 Neb. 188; 51 Neb. 801; 46 Ohio St. 677; 77 Miss. 545; 37 Wis. 524, criticising, if not overruling, 20 Wis. 544; 54 Mo. 392; 73 Mo. 435; 138 Mo. 187; 16 Minn. 249; 22 Minn. 53; 102 Cal. 298; 108 Mich. 693; 99 Ky. 475; 20 Ill. 160; 48 Ill. 263; 68 Ill. 132; 15 Kan. 500; 47 Pac. 259; 20 Ore. 154; 68 Md. 140. The importance of contemporaneous legislative and executive construction is recognized, but such construction, to influence courts, must have been uniform, and within a reasonable time of the enactment construed. Cooley on Const. Lim. (5 Ed.), 67; 105 U. S. 691, 695; 110 U. S. 219-21; 147 U. S. 661; 152 U. S. 384; 163 U. S. 331; 181 U. S. 283. In this State such construction has not been uniform. The State Board, composed of the Governor, Attorney General and Secretary of State, declared that the "First Fishback Amendment," which had received a majority of the votes cast on the question of the adoption of that amendment, but had failed of a majority of the votes cast in the general election of 1880, was not adopted. The only object of the subsequent enactment (Kirby's Digest, § 717) requiring the returns of the election to be made to the Secretary of State, and by him sent to the Speaker of the House of Representatives, was to enable the latter to determine from the returns of the election for the principal offices whether the vote cast in favor of an amendment was a majority of all votes cast at such election. The rule of *stare decisis* does not apply in this case. The validity of the amendment was not raised in 69 Ark. 336, nor that of amendment No. 2 in 67 Ark. 591. Courts seldom pass upon the validity of legislation unless the question is raised by the parties. 94 U. S. 645. By comparing the different clauses of the present

Constitution on the subject of elections and majorities with those of the Constitution of 1868 on the same subjects, it becomes clear that the framers of the present Constitution intended to establish a different rule for different elections.

2. The question as to whether or not an amendment to the Constitution has been legally adopted is judicial, and the action of the legislative and executive departments thereon is not conclusive upon the courts. 77 Miss. 545; 6 Am. & Eng. Enc. Law, 906; 11 Ark. 481; 4 Mo. 303; 56 N. J. L. 480; 8 Cyc. 728; 24 Ala. 100; 69 Ind. 505; 60 Iowa, 534; 29 Minn. 474; *Ib.* 555; 54 Wis. 318; James. Const. Conv. (4 Ed.), 617; 6 Am. & Eng. Enc. Law (2 Ed.), 1052; 3 Am. & Eng. Enc. Law, 671 and cases cited; 6 Cush. (Mass) 573; 14 R. I. 649.

3. There was no vacancy. "All officers shall continue in office after the expiration of their official terms until their successors are elected and qualified." Art. 5, sec. 19, Const.; 42 Ark. 398. A vacant office is an office without an incumbent; and it can make no difference whether the office be a new one or an old. 48 Ark. 89. The death of a person elected to an office before he qualifies does not create a vacancy where the Constitution provides that the incumbent shall hold the office for his term, and until the election and qualification of his successor. 14 L. R. A. 858. See also McCrary on Elec. (4 Ed.), § 349.

R. R. Rice, appellant, *per se.*

1. An incumbent in office is not entitled to hold beyond the duration of the term of his office unless the law grants the right to hold beyond the term fixed. The term of circuit clerk is limited to two years, with no hold-over privilege. Sec. 19, art. 7, Const. Before appellee could set up any right under sec. 5, art. 19, Const., two things must concur, (1) his official term must have expired, and (2) there must be a vacancy in the official term succeeding his. If there is a vacancy, he is continued in office for the public convenience until a successor is lawfully qualified, not as a matter of right, but of grace merely. This court has held that Amendment No. 3 applied to elective offices only. 72 Ark. 94. That in all cases where, prior to its adoption, vacancies were filled by special elections, subsequent to its adoption it was the duty of the Governor to appoint persons to fill such vacancies. 69 Ark. 336. *Ib.* 392. It was, therefore, the duty of

the Governor to appoint some one to fill the vacancy caused by the death of Meroney, since, if the amendment had never been adopted, a special election would have been necessary.

2. The court is concluded by the doctrine of *stare decisis.* 69 Ark. 336; *Ib.* 392.

HILL, C. J. This is a contest over the office of circuit clerk of Lincoln County, and calls for a decision as to whether Amendment No. 3, authorizing the Governor to fill vacancies by appointment, was legally adopted as part of the Constitution. Rice holds under an appointment made by the Governor; and against his claim to the office thereunder Palmer asserts, first, that Amendment No. 3 was not legally adopted, and, second, that there was no vacancy in the office, within the meaning of the law. The view the court takes of the first question renders unnecessary a decision of the second.

The clause of the Constitution under question is section 22, art. 19, as follows:

"Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all the members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for senators and representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution; but no more than three amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately."

The county election commissioners are required to certify the vote on the amendment to the Secretary of State, and the Secretary of State is required to transmit these sealed returns to the Speaker of the House of Representatives at the time and in the same manner that the returns for Governor and other executive officers are required to be transmitted to the Speaker. Kirby's Digest, § 716. The Speaker is required, during the first week of the session, in the presence of both Houses of the Gen-

eral Assembly, to open and publish the votes cast for Governor, Secretary of State, Treasurer, Auditor and Attorney General. and the person having the highest number of votes for each respective office shall be declared duly elected thereto, and the President of the Senate and Speaker of the House shall file a certificate with the Secretary of State, declaring what persons have been elected to the offices named. Kirby's Digest, § 2852.

On the occasion of the ascertainment and declaration of the vote for Governor and said other executive officers, the returns on the amendment "shall be opened and counted in the presence of the General Assembly in joint convention assembled." Kirby's Digest, § 717.

Then follows this provision: "If it shall appear that a majority of the electors voting at such election adopt such amendment, then the Speaker shall declare such proposed amendment duly adopted by the people of Arkansas." Then follow provisions for certificate to be filed with the Secretary of State, and for the Governor to make proclamation of the adoption of this amendment. Kirby's Digest, § 718.

The declaration of the Speaker as to the result of the vote for Governor, Secretary of State, Treasurer, Auditor and Attorney General is not necessarily the final conclusion, for a contest may be had thereafter, and it shall be settled by the joint vote of both Houses, in which joint meeting the President of the Senate shall preside. Kirby's Digest, § 2877.

There is no statutory provision for any tribunal to determine a contest over the result of the election on an amendment, and the section above quoted, requiring the Speaker to declare the result from the votes then before him, is the only method of ascertainment of the result prescribed by statute.

In the general election of 1899 Amendment No. 3 received 43,446 votes, and there were 40,207 votes against it, and there were 126,986 votes cast for governor.

The Speaker in joint session of the General Assembly of 1895, upon the votes aforesaid then before him, declared the amendment adopted; it was duly certified by the President of the Senate and Speaker, and proclamation made by the Governor. Two questions are involved: First, is the action of the Speaker, followed by the executive proclamation, the ultimate

decision of this question which the courts can not review because committed to the other departments of State to determine, or is it a judicial question not to be settled until settled rightly in a judicial court? Second. Does an amendment require a majority of all the votes cast in the election or a majority voting on the question?

First. It is strongly pressed upon the court that the General Assembly has delegated to the Speaker, as the servant and the mouthpiece of the joint session, the power to determine as to whether a constitutional amendment has been adopted; and that question is a political one, determined by a co-ordinate department of government, and the judiciary is precluded from entertaining it. This argument has often been made in similar cases to the courts, and it is found in many dissenting opinions, but, with possibly a few exceptions, it it not found in the prevailing opinion of any court of last resort. The authorities are practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of the existing constitution is a judicial question, and it is a paramount duty of the courts to pass upon it. An examination of some of the leading cases may be both interesting and profitable. This exact question came before the New Jersey Court of Errors and Appeals on writ of error from the Supreme Court. The law of New Jersey provided that the Governor should summon four or more members of the Senate to sit with him, and they should constitute a board of canvassers to canvass and estimate the vote given for and against a constitutional amendment which had been voted on, and the board was empowered to "determine and declare" which amendments were adopted, and to certify the same, and its certificate would make the amendment part of the organic law. After the board had decided that an amendment relating to lotteries and one relating to appointments to office were adopted, and one on woman's suffrage was rejected, citizens and taxpayers caused the question to get into the courts, and the final court said:

"The question naturally arising first in this case concerns the legitimate scope of our inquiry: Have we authority to consider and decide whether the determination of the board of State canvassers that the proposed amendment had been adopted was lawful, or did that determination, followed by the proclamation

of the Governor, preclude judicial cognizance of the subject?" After stating the exact questions involved in regard to the amendments and how the case arose in the Supreme Court (there a court of general and original jurisdiction), the court continues: "It thus becomes manifest that there was present in the Supreme Court, and is now present in this court, every element tending to maintain jurisdiction over the subject-matter, unless it be true, as insisted, that the judicial department of the Government has not the right to consider whether the legislative department and its agencies have observed constitutional injunctions in attempting to amend the Constitution, and to annul their acts in case they have not done so. That such a proposition is not true seems to be indicated by the whole history of jurisprudence in this country." The court then goes into an interesting review of the authorities, and then says: "The examination made supports the assertion of Chief Justice Day (of Iowa) that the decisions, so far as they deal with the existence of the principle, are not in conflict. The only case found in which the jurisdiction of the court was denied is *Worman* v. *Hagan,* 78 Md. 152." (The court then discusses this case, which will be referred to later.) *State* v. *Bott,* 45 L. R. A. 251, 43 Atlantic Rep. 744.

In Mississippi a case arose as to the adoption of a constitutional amendment, and the first question which arrested the attention of the court was whether it was a judicial or a political question. Chief Justice Whitfield, in a clear and positive decision, puts at rest any doubts on the question. He reviews the decided cases on the subject, and says it is settled by an overwhelming weight of authority that this is a judicial question; and then he continues:

"The true view is that the Constitution, the organic law of the land, is paramount and supreme over Governor, Legislature and courts. When it prescribes the exact method in which an amendment should be submitted, and prescribes positively the majority necessary to its adoption, these are constitutional directions mandatory on all the departments of government, and without strict compliance with which no amendment can be validly adopted. Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or non-compliance with the constitutional directions as to

how such amendment shall be submitted and adopted, and whether such compliance has in fact been had, must, in the nature of the case, be a judicial question." *State* v. *Powell,* 77 Miss. 545, 48 L. R. A. 652.

In the case of *Koehler* v. *Hill,* 60 Ia. 545, a very exhaustive examination of this question was had. There was a majority and minority opinion, and then on motion for rehearing this question was threshed over. Chief Justice Day delivered a vigorous opinion, overruling the motion for rehearing. He reviewed the adjudged cases fully, and concluded his opinion on this branch of the case as follows:

"We have then seven States, Alabama, Missouri, Kansas, Michigan, North Carolina, Wisconsin and Indiana, in which the jurisdiction of the courts over the adoption of an amendment to a constitution has been recognized and asserted. In no decision, either State or Federal, has this jurisdiction been denied. We may securely rest our jurisdiction upon the authority of these cases. He would be a bold jurist, indeed, who would ride roughshod over such an unbroken current of judicial authority, so fortified in principle, sustained by reason, and so necessary to the peaceful administration of the government."

The Alabama court said:

"The Constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It is said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required or the requisitions enjoined, if the Legislature or any other department of the government can dispense with them? To do so would be to violate the instrument they are sworn to support; and every principle of public law and sound constitutional policy requires the court to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." *Collier* v. *Frierson,* 24 Ala. 108.

The following States in the following cases have entertained jurisdiction of suits to determine the validity of the adoption of constitutional amendments, and treated such questions as judicial questions: Missouri, *State* v. *McBride,* 4 Mo. 303; North Carolina, *University of N. C.* v. *McIver,* 72 N. C. 76;

Michigan, *Westinghausen* v. *People,* 44 Mich. 265; Indiana, *State* v. *Swift,* 69 Ind. 505; Wisconsin, *State* v. *Timme,* 54 Wis. 318; California, *Oakland Paving Co.* v. *Hilton,* 69 Cal. 479; Kansas, *Prohibitory Amendment Cases,* 24 Kan. 700; Minnesota, *Secombe* v. *Kittelson,* 29 Minn. 555; New Jersey, *State* v. *Wurts,* 45 L. R. A. 251, s. c. 43 Atl. Rep. 244; Alabama, *Collier* v. *Frierson,* 24 Ala. 108; Iowa, *Koehler* v. *Hill,* 60 Ia. 543; Mississippi, *State* v. *Powell,* 77 Miss. 545. And against this array of authorities is only the Maryland court in *Worman* v. *Hagan,* 78 Md. 152.

The strength of appellant's contention is in the argument that the General Assembly delegated to the Speaker, as the presiding officer of the joint session, the determination of this question. Chief Justice Whitfield said in *State* v. *Powell, supra,* "It may be that where the Constitution creates a special tribunal, and confides to that tribunal the exclusive power to canvass votes and declare the result, and make the amendment part of the Constitution, as a result of such declaration, by proclamation, or otherwise prescribed method fixed for such tribunal by the Constitution, then the action of the special tribunal would be final and conclusive, whether its action be judicial or not. This is so because it was competent for the sovereign people, speaking through their Constitution, so to provide."

It will be noted that Chief Justice WHITFIELD limits the exception to constitutionally created tribunals, but other courts recognize statutory tribunals as possessing the same power of ultimate conclusion where the Legislature expressly provided. Judge Cooley thus expressed it in an analogous proposition:

"As the election officers perform for the most part ministerial functions only, their returns, and certificates of election which are issued upon them, are not conclusive in favor of the officers who would thereby appear to be chosen, but the final decision must rest with the courts. This is the general rule, and the exceptions are those cases where the law under which the canvass is made declares the decision conclusive, or where a special statutory board is established with power of final decision." Cooley, Const. Lim. p. 937.

In view of this exception to the rule of judicial review, which has in a few instances been applied to adoption of constitutional amendments, it is important to consider whether sec-

tion 718, Kirby's Digest, can be construed as creating the Speaker, either individually or as the representative of the joint session, a tribunal to determine the result of the election on amendments.

It is true that he must make declaration of the apparent result from the votes before him, just as he makes declaration of the election of governor and other officers from the votes before him. In the event of contest over one of the executive offices it is expressly provided that the joint session at a meeting presided over by the President of the Senate shall determine it, thereby showing clearly that there is no finality to this declaration from the face of the returns. Must it be taken, because there is no express provision for the joint session or other tribunal to determine a contest over an election on the amendment, that the only determination of it shall be the *prima facie* one from the face of the returns before the Speaker?

Suppose a few votes determine the fate of an amendment, and the returns from one county are known to be indubitably stained with fraud, and the proof is at hand. The Speaker is powerless to do more than declare the result as it appears from these returns sent him by the Secretary of State, who hands them to him as received from the county boards. Is it to be thought for a moment that it was ever intended that this perfunctory duty of the Speaker, limited to the face of the returns, should preclude inquiry and permit the organic law to be changed contrary to the expressed wishes of a majority of the people? Can it be possible that the lawmakers intended the organic law to be changed on the face of the returns, and yet no officer, from Governor to constable, is necessarily concluded by the face of the returns? The statement of the position carries its own refutation. Certainly no such intention can be imported into the legislation which imposed this formal duty on the Speaker, as the words of the act negative the thought of a final decision of the question by the Speaker. "If it shall appear that a majority," etc., is the language employed.

The Century Dictionary gives six definitions of the word "appear," comprehending all shades of meaning attached to it, and none of them convey the idea of judicial or final determination or decision, but all convey the thought of the surface, the apparent, the obvious, that which is to be seen at first sight. The

use of this word in defining the duties of the Speaker in this regard was quite apt, and properly imposed the formal and ministerial functions of casting up and declaring in open session what would appear to be the result. The votes on the principal State offices were then before him, and from these he could reach, at least approximately, the votes in the election, and the votes on the amendment would give the other necessary data to a *prima facie* decision from the face of the returns, and, in the language of Judge Cooley, "the final decision must rest with the courts."

The strongest case cited by appellant is *State* v. *Wurts*, 40 Atl. Rep. 740, but this was not the final decision of that case, and while the judgment was affirmed the ultimate conclusion on this question was different in the court of last resort, the gist of which has been given. *Worman* v. *Hagan*, 78 Md. 152, s. c. 21 L. R. A. 716, seems to support the appellant, although Chief Justice Whitfield in *State* v. *Powell, supra,* treats this case as one where a constitutionally created special tribunal took it out of the general rule, and does not regard it as antagonistic in principle with the other cases. While it is possible for that distinction to be made and save it from being an exception, yet the Maryland court itself did not make that distinction, and this appears to be merely a case out of plumb.

Luther v. *Borden*, 7 How. 1, is relied upon by counsel here, as it has been by counsel on the losing side in most of the other cases. There is a statement in the body of the opinion to this effect: that in forming the Constitution of the various States, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people, and the judical power has followed the decision. This was not a point decided in the case, and the statement was made merely in the course of the argument leading to the points decided. The case grew out of "Dorr's Rebellion" in Rhode Island. The question was not as to an amendment of the Constitution, nor as to the adoption of the "Dorr Constitution," but was that where there were two opposing governments in a State, the determination of which was the legitimate government was a political, and not a judicial, question, and where the courts of the

State decide which was the proper government under its own laws, the Federal courts must follow the State decision. That this case, notwithstanding some general language, is not an authority for appellant is obvious; but if any doubt remains on the subject, the analysis of the case by Chief Justice Day in *Koehler* v. *Hill, supra,* will remove it. There can be little doubt that the consensus of judicial opinion is that it is the absolute duty of the judiciary to determine whether the Constitution has been amended in the exact and precise manner required by the Constitution, unless perchance a special tribunal has been erected to determine this question; and even then many of the authorities hold that this tribunal can not be permitted to illegally amend the organic law. Therefore it is the duty of the court to decide the question on its merits.

Second. This brings a consideration of the question whether in fact the amendment was adopted as required by the Constitution. The Constitution provides how an amendment shall be passed through the General Assembly for submission to the people and for publication for at least six months "immediately preceding the next general election for senators and representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting in such election adopt such amendments, the same shall become a part of the Constitution." Art. 19, § 22.

"Such elections" evidently refers to the general election for senators and representatives. Any other construction would be straining the natural meaning of clear and proper English. The majority necessary to adopt it must be the majority of electors voting at the general election for senators and representatives, and not a mere majority voting on the subject of the amendment. The framers of the Constitution of 1874 used plain and simple English. They knew what they wanted, and what they did not want, and this, more than any other Constitution of the State, is full of details and explicit limitations. The time in which it was framed begot positiveness and strong convictions. This method of amending the Constitution by direct vote of the people is an adaptation to the American constitutional system of the initiative and referendum of the Swiss Republic. For a change there to be made in the organic law, it must secure a majority, not only

of all the citizens of the Republic, but of all the Cantons of the Republic. This system is common to many States, and the prevailing rule is to require a majority of all the voters in the election, and not a mere majority of those voting on the question. Of course, the framers of the Constitution could have provided for either method; there were precedents for either of them when that clause was written, but, having deliberately and clearly adopted the rule that it must be a majority of the electors voting in the election, instead of a majority voting on this question, it is only for the court to bow to the express terms of the Constitution. This language needs no extrinsic aids to discover its meaning, but the court is not without authority for this construction. Similar or almost similar language has been before the courts many times, and while there is some conflict in the decisions, still the conflict is more apparent than real, and arises more from difference in language employed than in principles of construction. The authorities on this subject are reviewed at length by Judge Trieber in *Knight* v. *Shledon,* 134 Fed. 423, and by Chief Justice Whitfield in *State* v. *Powell,* 77 Miss. 545. The case law is carefully gone over in these opinions, and it would be an idle task to repeat what has been so well done. These two decisions demonstrate that the great weight of authority sustains the construction reached by the court as above stated.

In view of the foregoing opinion, it necessarily follows that the conclusion is that Amendment No. 3 was not adopted, and therefore the Governor did not have authority to appoint Rice circuit clerk. This was the judgment of the circuit court, and it is affirmed.

Justices BATTLE and WOOD concur.

Mr. Justice RIDDICK concurs in the judgment; his reasons will be stated in an individual opinion.

Mr. Justice MCCULLOCH dissents.

RIDDICK, J., (concurring.) The facts in this case are as follows: H. D. Palmer was at the general election in September, 1902, elected to the office of circuit clerk of Lincoln County. On the 21st day of October, 1902, he duly qualified and entered upon the duties of the office, and has continued to discharge the duties thereof up to this time. At the general election in September,

1904, B. A. Meroney was elected to the same office, but he died on the 6th day of October, 1904, before he received his commission and before he had qualified or entered upon the duties of the office. Afterwards on the 31st day of October, 1904, the Governor of the State appointed R. R. Rice to the office, and issued a commission to him as circuit clerk of Lincoln County. Palmer, who had possession of the office, claimed that he had the right to continue in office until his successor was elected and qualified, and refused to surrender it to the appointee of the Governor, and Rice brought this action in the circuit court to recover possession. The circuit court decided against Rice, and he appealed.

There are two questions presented by this appeal. (1) Whether Amendment No. 3 to the State Constitution, which authorizes the Governor to fill vacancies by appointment, was legally adopted. (2) If this amendment has been adopted, and is a part of the Constitution, whether there was any vacancy in the office of circuit clerk of Lincoln County that the Governor could fill by appointment.

1. As to the first question: The amendment was duly submitted at a general election. The returns on the election were sent to the Secretary of State in sealed envelopes, who presented them to the Speaker of the House of Representatives, by whom they were opened and counted in the presence of the General Assembly in joint convention assembled, and the result declared that the amendment had been duly adopted by the people of the State. This was a decision of the question by the duly constituted and proper tribunal, and I do not think we can go behind or question the correctness of that decision in this proceeding. But, as that matter has been fully discussed by Mr. Justice McCULLOCH, I shall not do more than say that I concur in his opinion, and in the conclusion that he has reached on that point. See Ex parte *Danley*, 24 Ark. 1.

If, however, as the majority of the judges have concluded, we are free to review this decision of the Speaker and the General Assembly, it seems to me that it was correct. There were polled 43,446 votes for the amendment to 40,207 against it. It thus received a clear majority of over three thousand votes cast on that question.

The section of the Constitution which directs how amend-

ments shall be adopted provides that the proposed amendment shall be published "for six months immediately preceding the next general election for senators and representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting at such election adopt such amendment, the same shall become a part of this Constitution." Const. 1874, art. 19, § 22.

Now, the words "if a majority of the electors voting at such election" may mean either a majority of the electors voting for senators and representatives, or they may mean a majority of all electors voting at that general election, whether for the amendment or for any of the candidates voted for at that election, or they may mean a majority only of the electors voting on the question of the adoption of the amendment. As we have stated, the amendment received a majority of over three thousand of the votes cast on that question. It is not shown how many votes were cast for senators and representatives. The only thing shown against the amendment is that the amendment did not receive a majority of the votes cast for Governor at that election. So, to hold this amendment invalid under the facts of this case, we must conclude that to adopt an amendment the Constitution requires that it shall receive the votes of a majority of all the electors voting at that election, whether for the amendment, or for senators and representatives, or for any of the numerous officers voted for at the general election. And this is what a majority of the court holds; and as the number of those voting for the amendment is not equal to a majority of those voting for Governor, the court holds that the amendment was not legally adopted. I dissent from this conclusion.

If the framers of the Constitution intended that, in order to adopt an amendment, there should be a majority, not only of those voting for the amendment, but of all who voted at the election, whether for senators, representatives or other officers, it seems to me they would have used language which would have put the matter beyond question. The usual rule, when an officer is to be elected or a question is to be settled by a majority vote, is to consider only those votes cast for that office or on the particular question to be decided. All voters who absent themselves, or who, being present,

do not vote on the question, are presumed to assent that the matter may be decided by the majority of those voting unless the law under which the election is held clearly shows to the contrary. *Vance* v. *Austelle,* 45 Ark. 400; *Carroll County* v. *Smith,* 111 U. S. 556; *Cass County* v. *Johnson,* 95 U. S. 360; 15 Cyc. 388; 10 Am. & Eng. Enc. Law (2 Ed.), 754.

This principle, it seems to me, applies not only when the question is submitted at a special election, but also where the law requires it to be decided by a majority vote at a general election. The object in requiring the submission to be made at a general election is that at such an election more of the electors will attend and vote, and thus a fuller expression of the opinion of the electors will be secured. But if, after attending, any of them choose to vote for certain candidates, and not to vote for or against the amendment, it should be presumed that they assented to the decision of the majority who did vote thereon. Their failure to vote should not be allowed to defeat the will of those who do vote, unless the meaning of the Constitution to that effect is clear. *Vance* v. *Austelle,* 45 Ark. 400; *Rex* v. *Foxcraft,* 2 Burrow, (Eng.), 1017; *Walker* v. *Oswald,* 68 Md. 146; *Montgomery County Fiscal Court* v. *Trimble,* 104 Ky. 629; *Gillespie* v. *Palmer* 20 Wis. 572.*

In discussing a question of this kind in a recent case the Court of Appeals of Kentucky said: "It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed; and to that end it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take suffi-

*It is said in *State* v. *Powell,* 77 Miss. 583, that *Gillespie* v. *Palmer* had been overruled; but that seems to be an error. It was criticised in *Bond v. Railroad Co.,* 45 Wis. 579, but the judge who did so was writing a dissenting opinion, and did not speak for the court.

cient interest in its affairs to vote upon questions submitted to them. * * * Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose. *Montgomery County Fiscal Court* v. *Trimble,* 104 Ky. 629, s. c. 47 S. W. 773. The court in that case held that a majority of those voting on the question was sufficient, without regard to how many votes were cast for the various candidates voted for at that election. In doing so it overruled one or two earlier cases that had held to the contrary.

The simplest and most common way to submit a question for determination by popular vote is to count only those who vote on that particular question. To require that a question submitted to a popular vote at a general election should be determined by the majority of the votes cast, not only for it, but for all of the various candidates voted for at that election, is such an inconvenient, awkward and unusual way of deciding questions by popular vote that we should not expect such a conception from the framers of our Constitution; much less should we expect that, having that idea, they would give not even a hint as to how the majority of all the electors voting at a general election for so many different offices, township, county, district and State, should be determined.

Certainly, no such construction should be adopted unless the language clearly shows that such was the intention. But it does not do so. If, leaving out all other considerations, we stick alone to a close technical meaning of the words used, they may be said to require a majority of all electors voting for senators and representatives. There would be something definite and tangible about such a rule, much more in consonance with the character of the framers of the Constitution, whom the majority of the court speak of as men of "positive and strong convictions," "fond of detail" and "explicit limitations" and users of "plain and simple English," than what the court holds that they intended. For the court, after having complimented those men in that way, proceeds to hold that they did a thing the very opposite of what one should

expect from men of that kind. We should expect of such men that they would require that the adoption of the amendment should be determined by the votes on that measure alone, either by a simple majority or by a two-thirds majority, if thought necessary, for that would be definite and certain, and would exclude any possibility of mistake. It is possible that men of that kind might make a majority of those voting for senators and representatives or for some other office the test, but it seems to me inconceivable that they should make the test a majority of all the votes cast for the numerous offices voted for at a general election, without giving any rule by which such majority could be determined. For that would be so general, inexplicit and impracticable that the Legislature would be compelled to provide some method by which such majority could be approximately determined. Surely men of "strong convictions," "fond of detail" and "explicit limitations" would not have left their work, on such a vital point, in a condition that it must at once be retouched by the legislative hand. Either the majority of the court are mistaken in the character of those framers of the Constitution, or they are mistaken in the meaning of their language. I think they are mistaken in the meaning intended to be conveyed.

As before stated, the simplest, most direct and the most common way to determine a question by popular vote is to consider only those who vote on that question. If there are others who do not vote, they, to quote the language of an old case by a great judge, should be held "to acquiesce in the election by those who do." Lord Mansfield in *Rex* v. *Foxcraft,* 2 Burrow, 1017.

The natural presumption, where there is any doubt, should be that the makers of the Constitution intended to follow the usual rule, and to require for the adoption of an amendment a majority of those voting on that question. In my opinion, the words, "if a majority of the electors voting at such election adopt the amendment," refer to a majority voting on the question of the adoption of the Constitution. This language has been so construed by the Speaker and the General Assembly, not only when the returns on this amendment were before them, but as to the several other amendments that have been declared adopted. These amendments have for years been treated as valid parts of

the State Constitution. Appointments made by the Governor by virtue of this amendment have been received by the people of the State as valid, and have been recognized as such by this court. *Childers* v. *Duval,* 69 Ark. 336. Whether the decisions of the Speaker and the General Assembly on the adoption of these amendments is conclusive or not, they are certainly persuasive, and every reasonable doubt should now be resolved in their favor. When this rule is applied, it seems clear to me that this amendment should be sustained. I cite cases the reasoning of which tends more or less to support this view, though, this being a question concerning the meaning of our own Constitution, I attach no great weight to decisions from other States, for the language construed is seldom the same in all respects as that before us. *Vance* v. *Austelle,* 45 Ark. 400; *Childers* v. *Duval,* 69 Ark. 336; *County of Cass* v. *Johnson,* 95 U. S. 360; *Carroll County* v. *Smith,* 111 U. S. 556; *Walker* v. *Oswald,* 68 Md. 146; *Montgomery County Fiscal Court* v. *Trimble,* 104 Ky. 629; *Gillespie* v. *Palmer,* 20 Wis. 572; *State* v. *Longlie,* 5 North Dakota, 594; *State* v. *Grace,* 20 Ore. 154; *Smith* v. *Proctor,* 130 N. Y. 319; *Metcalfe* v. *Seattle,* 1 Wash. 303.

There are other cases to the same effect as these, and as many, probably more, cases to the contrary, one of the best considered and ablest being the decision in *Knight* v. *Shelton,* 134 Fed. 423, delivered by the United States Circuit Court for the Eastern District of this State. But for the reasons stated, I am unable to concur in the conclusion reached in that case and by the court in this case, for in my opinion only a majority of those voting on that question is necessary to adopt an amendment to our Constitution.

As I think that this amendment is now a valid part of our State Constitution, it follows that in my opinion the Governor has power to fill a vacancy in a county office by appointment, and I shall proceed to consider the question as to whether there was a vacancy in the office of circuit clerk of Lincoln County to be filled.

A vacancy in an office may be caused by the death, resignation or removal of the official holding the office, or by the creation of a new office. *Smith* v. *Askew,* 48 Ark. 89. "As a general rule, there is a vacancy in office whenever there is no incumbent

to discharge the duties of the office, that is whenever the office is empty or unfilled; but as long as there is any one authorized to discharge the duties of the office, the office is not to be deemed vacant so as to authorize the exercise of the power to fill vacancies in office." 23 Am. & Eng. Enc. Law (2 Ed.), 348, 349; *State* v. *Harrison,* 113 Ind. 434, 3 Am. St. Rep. 663; *People* v. *Edwards,* 93 Cal. 157; *Baxter* v. *Latimer,* 116 Mich. 356.

Now, our Constitution provides that "all officers shall continue in office after the expiration of their official terms until their successors are elected and qualified." Art. 5, § 19, Const. 1874. Meroney, who was elected to fill the office of circuit clerk as successor to Palmer, having died before the expiration of Palmer's term of office, and before he had taken the oath of office and qualified as such official, his death created no vacancy, for Palmer has, under the Constitution, the right to continue in office until his successor is both elected and qualified. If Meroney had been commissioned, and had qualified and entered upon the duties of the office, and then died, his death would have caused a vacancy in office. But he died before this. He had not been commissioned, and had not qualified, and held no office when he died, and, holding no office, his death created no vacancy. Palmer's right to the office, until his successor is elected and qualified, is as clear as that of any clerk in the State. As there was no vacancy in the office, the Governor had no right to appoint, and his appointment conferred nothing upon his appointee, Rice. The judgment of the circuit court in favor of Palmer was correct, and for the reasons stated I concur in the judgment of affirmance. Mr. Justice WOOD authorizes me to say that he also is of the opinion that there was no vacancy to be filled, and concurs in this opinion to that extent.

MCCULLOCH, J., (dissenting.) I do not agree with the majority of the court in the conclusion reached in this case. I will not discuss the question as to the number of votes required by the Constitution to adopt the amendment, as it seems plain to me that the ascertainment of the result of the election made by the joint session of the Legislature, and its declaration, made through the Speaker of the House, of the adoption of the proposed amendment, are conclusive of that fact, and must be accepted by the courts as final.

I fully concur, however, in all that is said by Mr. Justice RIDDICK in his separate opinion to the effect that the framers of the Constitution meant to require, for the adoption of an amendment, only the affirmative vote of a majority of all the electors voting upon that question at the election.

The Constitution provides how amendments thereto may be originated and submitted to the people for adoption, but it is silent as to the method by which the result of elections upon the question of adoption or rejection shall be ascertained and declared. At least, there is no express provision of that instrument upon the subject, except that they shall, at the next succeeding general election for senators and representatives, "be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution."

The nearest approach to an express provision of the Constitution on the subject is found in a section of the same article (sec. 24, art. 19) as follows:

"The General Assembly shall provide by law the mode of contesting elections in cases not specifically provided for in this Constitution."

But whether this be held to be authority for the Legislature to provide a method of ascertaining, declaring and contesting the result of an election upon the adoption or rejection of a proposed amendment to the Constitution, certainly nothing is found anywhere in that instrument restricting the power of the Legislature in this regard.

According to the American system of government, the Constitution of a State is not a grant or enumeration of powers vested in the legislative department, but is a mere limitation upon the exercise of such powers. The Legislature can exercise all the powers not expressly or by fair implication prohibited by the Constitution. "The Legislature," said Mr. Justice LACY in delivering the opinion of this court in *State* v. *Ashley*, 1 Ark. 511, "then, can exercise all the power that is not expressly or impliedly prohibited by the Constitution; for whatever powers are not limited or restricted, they inherently possess as a portion of the sovereignty of the State." The same doctrine has been so often announced that it has become elemental. I am not aware of it

ever having been controverted. *State* v. *Fairchild,* 15 Ark. 619; *Eason* v. *State,* 11 Ark. 481; *Baxter* v. *Brooks,* 29 Ark. 173; *Ruddell* v. *Childress,* 31 Ark. 511; *Dabbs* v. *State,* 39 Ark. 353; Cooley, Const. Lim. § 205.

Then, if it be held that the Legislature possesses the power to provide a method for ascertaining and declaring the result of an election upon the submission of a proposed amendment to the Constitution, it seems equally clear that the Legislature of the State has done so.

The statutes on the subject, after providing for the method of publication of the proposed amendments, the form of the ballots and duties of the judges of election with respect to certifying the returns, are as follows:

"Section 716. County election commissioners, at the same time and in the same manner that they are required to send the abstracts of election of senators and representatives in the General Assembly, shall send to the Secretary of State copies of the abstracts filed in their office of the returns of the vote on said amendment, plainly marked on the envelope thereof the words: 'Returns of vote on Amendment No..... From the county of .....' And in case of a failure to receive any returns of such vote at the seat of government for ten mails after the same is due, the Secretary of State shall dispatch a messenger to the county from which returns have not been received, with directions to bring up such returns or copies thereof.

"Sec. 717. When all the returns have been received by the Secretary of State, said Secretary shall keep such returns in the original envelopes with the seals unbroken until the General Assembly shall convene, when he shall send such returns to the Speaker of the House of Representatives at the same time and in the same manner as is now provided by law for sending in the election returns for Governor and other State officers, and said returns shall be opened and counted in the presence of the General Assembly in joint convention assembled.

"Sec. 718. If it shall appear that a majority of the electors voting at such election adopt such amendment, then the Speaker shall declare such proposed amendment duly adopted by the people of Arkansas. And when so declared adopted, the Speaker of the House of Representatives shall cause a true copy of such

amendment to the Constitution of the State of Arkansas; signed by the President and the Speaker of the House of Representatives, and attested by the Secretary of the Senate and the Clerk of the House of Representatives, to be filed in the office of the Secretary of State, and the same shall be and remain a record of said office. The Governor shall, thereupon, publish his proclamation in some newspaper of general circulation, announcing the ratification and adoption of said proposed amendment, and it shall have all the force and effect of any other part of the present Constitution, and shall be recognized by the legislative, executive and judicial departments of the State of Arkansas, from the filing of such certified copy in the office of the Secretary of State, as a part of the organic law of the State."

It appears that the provisions of the statute were complied with as to canvassing the returns and declaring the adoption of the amendment in question.

The record of the joint session of the two houses of the Legislature recites the following proceedings:

"The joint assembly then proceeded to open and canvass and publish the returns of the election held September 3, 1894, for Amendment No. 4, and against Amendment No. 4.

"The Speaker of the House declared the result of such election as appears from the returns so opened and published to be as follows:

"For Amendment No. 4, 42,426.

"Against Amendment No. 4, 40,207.

"And it appearing from the said returns that the majority of the electors voting at said election voted for said amendment, the Speaker of the House of Representatives declared the amendment adopted by the people of Arkansas."

That the statutes in question contemplate a final and conclusive determination of the result of the election and the adoption of the amendment, there can scarcely be a doubt.

They provide that when the Speaker declares the adoption of the amendment, and a duly attested copy thereof is filed in the office of the Secretary of State, the "Governor shall thereupon publish his proclamation in some newspaper of general circulation, announcing the ratification and adoption of said proposed amendment, and it shall have all the force and effect of any

other part of the present Constitution, and shall be recognized by the legislative, executive and judicial departments of the State of Arkansas, from the filing of such certified copy in the office of the Secretary of State, as a part of the organic law of the State."

It is contended by those who deny the legal adoption of the amendment that the Speaker of the House of Representatives, in complying with the terms of the statute, only performs a ministerial duty in announcing the result of the election, and that no determination of the result is thereby recorded. The majority of the court are pleased to refer to the ascertainment and declaration of the result of the election as the act of the Speaker alone. I think this is entirely too narrow a scope to give to the statute. It is inconceivable to my mind that, if the framers of the statute intended to give no more force and effect to it than that, they would have provided for the useless ceremony of having both houses of the General Assembly convene in joint session in order to sit idly by and witness the performance of so perfunctory a duty. If the members of the two houses, representing as they do the sovereignty of the people, were to do no more than stand as silent witnesses to the ceremony, without power to protest against or correct a false or erroneous declaration of the result of the election, as well might the result be declared to bare walls instead of in the presence of the Assembly. As well might the returns be left with the Secretary of State to open them and declare the result, the same as he does with the returns of the election of certain State officers which are not required to be certified to the Speaker of the House of Representatives.

The Speaker is the mouthpiece, the creature and servant of the House, not its master in any sense or in the performance of any duty. He merely does the bidding of the House. And, according to all settled rules of statutory construction and of parliamentary law, if he should, in the performance of the duty imposed upon him by this statute, announce a result different from the will of the majority of the members of the joint session, that body would undoubtedly have the power to revise or reverse the ruling and correctly declare the result of the election. The joint session of the two houses also, in my opinion, has the power to hear and determine a contest as to the result of the election. It

is not essential that the word "contest" should have been used, if it may be fairly implied from the terms of the act that it was meant to give the joint session the power to ascertain and declare the correct result of the election. The power to hear and determine a contest for the purpose of ascertaining the correct result of the election would necessarily follow.

This court, in *Baxter* v. *Brooks,* 29 Ark. 173, in dealing with the power of the Legislature to hear contest for the office of Governor, said: "The mere failure on the part of the Legislature to provide a mode of conducting the trial would no more oust the jurisdiction than a failure to establish laws governing actions before justices of the peace or probate courts would destroy their constitutional jurisdiction, and give power to bestow it somewhere else by a simple enactment." In other words, the framers of the Constitution, by failing to expressly provide for a method of ascertaining and declaring the result of elections for the adoption of amendments, or for contesting the result by proceedings in the courts, have left it to the legislative branch of government for treatment as a political question, the same as the election of certain officers and contests thereof, and the same as the enactment of laws for the welfare of the people. Viewing the question in that light, the courts have nothing to do with it further than to decide whether or not amendments have been properly proposed and submitted to the people and the result of elections thereon determined and proclaimed by the proper legislative authority.

It is noteworthy, as indicative of the legislative intention in framing the statute in question, that the returns of an election upon the adoption or rejection of an amendment are required to be certified and delivered to the Speaker of the House of Representatives, the same as returns of the election of those State officers (Governor, Secretary of State, Treasurer, Auditor and Attorney General) contests of which the Constitution provides shall be before the General Assembly. This indicates an intention to provide a tribunal, not only for the ascertainment and declaration of the result, but also for a contest over a disputed result.

Much may be said, in support of this contention, of the expediency of a speedy and definite ascertainment of the result of such an election, so that the people at large, and especially

those who are charged with enforcement of the law, may be informed as to changes in the organic law and, knowing them, may obey its mandate. I can conceive of no more intolerable condition of public affairs that that of having the result of an election for the adoption or rejection of an amendment to the Constitution left in doubt until such time as the adjudication in the courts of personal rights shall demand a decision of the question. It is chaotic. For, so long as the question of fact whether or not a proposed amendment has received the approval of a majority of the voters remains unascertained by some final arbiter of that question, no man may with certainty know the law.

In the very nature of things, the courts can only adjudicate the validity of an amendment to the Constitution when it is drawn in question in suits involving private rights, and can then base a judgment only upon the facts proved and presented in the record of that particular case. No decision of the question in one case can ever become binding upon the court or parties in another case where the proof is different as to number of votes cast at the general election at which the proposed amendment has been submitted. Therefore the question can never be regarded as definitely settled if its settlement is a judicial question to be adjudicated by the courts. To illustrate: Amendment No. 5, known as the "Road Tax Amendment," received only a small majority of all the votes cast at the general election of September, 1898, at which it was submitted for adoption or rejection, if the total number of votes cast for the several candidates for Governor be taken as the test. According to the decision of the court, however, the vote for Governor does not necessarily afford the test, and it is always open to question the actual number of votes cast. Now, suppose that in a suit by one taxpayer to restrain the collection of the road tax assessed against his property, he should prove to the satisfaction of the court by proper certificates of the total number of votes cast for the various candidates for county officers that the vote for Governor did not represent the total vote cast at the election, and that the amendment did not receive a majority of all the votes cast at the election. The trial court would then declare that the amendment was not adopted, and that the assessment of road tax was void, and this court on appeal would of course affirm the decision. Let us suppose also

that another taxpayer should bring suit for the same purpose, but should be less diligent than the other successful litigant in getting proof of the total number of votes cast at the election, and content himself with the proof of the number of votes cast for candidates for Governor. The trial court would in that case declare the amendment to have been legally adopted, and enforce the payment of the tax, and this court would of course affirm the decision. We would then have presented the novel spectacle of this court declaring in one case the amendment legally adopted as a part of the organic law of the State, and in another case declaring it to have been rejected. Who, then, could know the law?

But it is said that this is necessarily a judicial question, to be settled by the courts. Why so? Haven't the people, in framing the Constitution of the State, the right to leave with the Legislature, as a political question, the power to provide a method of ascertaining and declaring the result of an election upon an amendment? It seems plain to me that in framing the Constitution of 1874 they have done so, and that the Legislature has provided a method of definitely and finally ascertaining the result of such election. I can see no reason, either as a matter of expediency or of law, why this could not be done, or, with due deference to the opinions of my brothers, how a conclusion can be reached that it has not been done.

Other questions of like import and equal importance have been left with the legislative branch of government for final decision, and this court has recognized the binding effect of the provision.

The Constitution of 1868 provided that the General Assembly should canvass the returns of the election of Governor, Secretary of State, Treasurer, Auditor and Attorney General, declare the result and hear contests for said offices, and this court has held that it is a valid provision for the final settlement of the result of such election as a political question.

No suggestion has ever been made that that is a judicial question which must be settled by the courts. On the contrary, this court has held that the courts can not review the decisions of the Legislature. *Baxter* v. *Brooks,* 29 Ark. 173. This decision sustained by the great weight of authority. *Taylor* v. *Beckham,* 108 Ky. 278; *Batten* v. *McGowan,* 1 Metc. 533; *State* v.

Marlow, 15 Ohio St. 134; *People* v. *Goodwin,* 22 Mich. 496.

The Constitution provides that no local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated; but this court has repeatedly held that the question whether the notice has been given is one exclusively for the Legislature, and that the courts will not treat it as a judicial question, and review the action of the Legislature. *Davis* v. *Gaines,* 48 Ark. 370; *Waterman* v. *Hawkins,* 75 Ark. 120.

The Constitution also provides that "in all cases where a general law can be made applicable, no special law shall be enacted" by the General Assembly; but this court has often held that the question whether the desired result can be accomplished by a general act must be determined by the General Assembly, and that its determination is conclusive. *Boyd* v. *Bryant,* 35 Ark. 69; *Davis* v. *Gaines, supra; Carson* v. *Levee District,* 59 Ark. 513; *St. Louis S. W. Ry. Co.* v. *Grayson,* 72 Ark. 119; *Waterman* v. *Hawkins, supra.*

The court, in the case last cited, quoted with approval the following language from Judge COOLEY: "The moment a court ventures to substitute its own judgment for that of the Legislature in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference." Cooley's Const. Lim. (7 Ed.), p. 236.

The Constitution provides that no appropriation of money shall be made except for defraying the necessary expenses of government, and for certain other purposes named, without the concurrence of a majority of two-thirds of the General Assembly; yet this court held that the General Assembly must be the judge whether the object of an appropriation is for "necessary expenses of government," and that its determination is binding upon the courts. *State* v. *Sloan,* 66 Ark. 575; *State* v. *Moore,* 76 Ark. 197.

If these are not judicial questions to be determined by the courts alone, how can it properly be said that the result of an election upon the adoption or rejection of a proposed amendment to the Constitution is essentially a judicial question, which

must be determined by the court, even though the framers of the Constitution have seen fit not to restrict the power of the Legislature to provide a method of finally and conclusively ascertaining the result of such election?

It is not material whether the Constitution itself provides that the Legislature shall determine the result of the election, or whether, by silence upon the subject, and by failing to restrict the power of the Legislature in that respect, it has left that branch of government free to provide a method of ascertainment. The effect is the same, for, as we have already seen, the Legislature is vested with sovereign power, except as is expressly or by fair implication restricted by the Constitution. I think the views I have expressed are fully sustained by authority.

The following cases sustain the doctrine that where the Legislature, by authority of the Constitution, has erected a tribunal for the purpose of determining the result of an election upon any subject, the decision of such tribunal is conclusive, and can not be reviewed by the courts. *Govan* v. *Jackson,* 32 Ark. 553; *Batten* v. *McGowan,* 1 Metc. 533; *Taylor* v. *Beckham,* 108 Ky. 278; *Luther* v. *Borden,* 7 How. (U. S.) 1; *Taylor* v. *Beckham,* 178 U. S. 548; *State* v. *Harmon,* 31 Ohio St. 250; *Corbett* v. *McDaniel,* 77 Ga. 544; *Simpson* v. *Commissioners of Mecklenburg,* 84 N. C. 158; *Miles* v. *Bradford,* 22 Md. 170; *Worman* v. *Hagan,* 78 Md. 152.

The case of *Worman* v. *Hagan, supra,* is precisely in point, except that the Maryland Constitution provided that the returns of elections should be made to the Governor, and that he should ascertain and declare the result. The court said: "It will be seen that the Constitution confides to the Governor exclusively the power and duty of ascertaining the result of the vote from an examination of the returns made to him. And, on his proclamation that a proposed amendment has received a majority of the votes cast, it becomes *eo instanti* a part of the Constitution. There is no reference of the question to any other officer, or any other department. It is committed to the Governor without qualification or reserve, and without appeal to any other authority. Most certainly, no jurisdiction is conferred on this court to revise his decision. It may be asked what is to be done in case the Governor should violate his duty, and wrongfully proclaim an amendment

as adopted which in point of fact had been rejected. It would not be becoming in this court to suppose that such a contingency would ever happen. The courtesy due to the executive department forbids us to entertain such a conjecture. But, if, unhappily, in future times it should ever occur, assuredly a sufficient remedy will be found. The resources of a free government are ample, and will always be found adequate to punish and repress offenses against its sovereignty."

I do not think that the conclusion of the majority of the court upon this question is by any means sustained by the array of authorities cited in the opinion. Few, if any of them, are decisive of the precise point presented.

The case of *Koehler* v. *Lange,* 60 Iowa, 543, which seems to be relied upon with much confidence in the opinion of the majority, decides a totally different proposition. The Constitution of Iowa provided that constitutional amendments might be proposed by one session of the General Assembly, and "entered on the journals with the yeas and nays taken thereon, and referred to the Legislature to be chosen at the next general election," and the same published for three months before such election, and, if agreed to by a majority of the members elected to each house of the next session, it should then be submitted to the people for adoption. The question arose whether or not the amendment had been properly proposed at the first (eighteenth) session of the General Assembly, the journals of that session disclosing the fact that the amendment as proposed at that session was materially different in phraseology from the one agreed to at the next session and voted upon by the people. It was contended on behalf of those who maintained the validity of the amendment that the joint resolution adopted at the next session agreeing to the proposed amendment was a conclusive determination of the fact that it had been legally proposed at the previous session, but the court (quoting the syllabus) said: "When the Eighteenth General Assembly proposed an amendment to the Constitution, a recital of such proposed amendment by the Nineteenth General Assembly, in a joint resolution agreeing to the same, is not conclusive upon the court as to the form of such amendment as originally proposed, nor as to whether the Eighteenth General Assembly actually agreed to the same in the manner required by the Constitution; and such recital does

not preclude and estop the courts, in a proper case, from examining the journals of the Eighteenth General Assembly, to ascertain whether or not the amendment, as originally proposed, was in fact the same as that recited and agreed to by the Nineteenth General Assembly, and whether or not it was legally and constitutionally agreed to by the Eighteenth General Assembly."

The several opinions of the court took a very wide range in discussing the question stated above, but nowhere was the question involved in the case at bar raised or discussed. It is therefore not an authority on this question. No question was involved there of the conclusiveness of the findings of a tribunal especially created to determine the result of an election upon a proposed amendment. On the contrary, the opinion in that case expressly recognized the force of former decisions of that court (*Ryan* v. *Varga,* 37 Iowa, 78; *West* v. *Whitaker, Id.* 598) holding that under a statute authorizing township trustees, upon presentation of the petition of one-third of the resident taxpayers, to order an election to vote a tax in aid of railroads, the decision by the trustees of the question whether or not the petition contained the requisite number was judicial, and could not be reviewed collaterally by the court.

The same court had previously held, in the case of *Baker* v. *Board,* etc., 40 Iowa, 226 (Chief Justice Day, who delivered the opinion of the court in *Koehler* v. *Lange,* also delivering the opinion in this case), that (quoting the syllabus) "the decision of the Board of Supervisors that a petition asking for a submission of the question of relocating a county seat is signed by a majority of the legal voters in the county is judicial, and is conclusive until set aside or reversed upon appeal, writ of error, certiorari or other method provided for direct review."

None of the decisions of the courts of Missouri, North Carolina, Indiana, Michigan, Wisconsin, California, Kansas, Minnesota or Alabama, in the cases cited by the majority, are upon the questions presented in the case at bar. At most, they only decide that the courts may declare proposed amendments to the constitution not legally adopted where it is shown that they have not been made in accordance with the requirements of the Constitution; but in none of them is the question raised or decided as to the powers of the legislative branch of government to create a

tribunal for the final and conclusive determination of the result of an election.

The North Carolina court, in the case cited by the majority, decided that a certain amendment had been legally adopted; and subsequently in the *Simpson* v. *Commissioners,* 84 N. C. 158, and *Cain* v. *Commissioners,* 86 N. C. 8, the same court held that the decision of the commissioners to the effect that a majority of the voters favoring the adoption of the provisions of a fence law was final, and could not be reviewed by the courts.

The Michigan court in the case cited by the majority merely held that an amendment had been submitted to the people at a general election as authorized by the Constitution, and had been legally adopted. The same court, in a later case (*Hipp* v. *Board,* etc., 62 Mich. 456) held that the decision of a board of commissioners announcing the result of an election for removal of a county seat was conclusive, and could not be reviewed.

The Minnesota case cited by the majority, instead of sustaining their views, held valid an amendment to the Constitution of that State upon grounds which would uphold the amendment we are now considering. That court held in the case cited that acquiescence by the officials and people in the terms of an amendment amounted to a ratification thereof. The court, speaking through Judge MITCHELL, said: "As ultimate sovereignty is in the people, from whom all legitimate civil authority springs, and inasmuch as in the inception of all political organizations it is this original and supreme will of the people which organizes civil government, a court has no right to inquire too technically into any mere irregularity in the manner of proposing and submitting to the people that which they have solemnly adopted and subsequently recognized and acted upon, as part of the fundamental law of the State. We doubt whether a precedent can be found in the books for the right of a court to declare void a constitution, or amendment to a constitution, upon such grounds. But, however this may be, there are, in our opinion, two conclusive reasons why the right to inquire into any irregularities in the mode and means by which this constitutional amendment was proposed and adopted must be now forever closed. First. Such irregularities if any, must be regarded as healed by the subsequent act of Congress admitting Minnesota into the Union.

Second. They must be deemed cured by the recognition and ratification of this amendment, as a part of the Constitution, by the State after its admission into the Union. This was done by the issue of the State railroad bonds, and accepting the security for the protection of the State under its provisions, etc."

Amendment No. 3, as well as several other amendments to the Constitution which are by this decision declared not to have been legally adopted, have for many years been acquiesced in and treated as a part of the organic law of the State by the people and by all the departments of government alike. Judges have sat upon the bench holding commissions from the Governor pursuant to the authority of this amendment. Officers of all departments of government have been appointed by the Governor to fill vacancies, and no one has heretofore questioned his power to do so. In fact, this court has upheld the validity of such appointments. For more than twelve years Amendment No. 2, which falls by this decision, has limited the right of every citizen to vote at elections to the payment of a poll tax, and no one has questioned its validity. For several years a road tax has been regularly levied and paid, without objection, in most of the counties of the State pursuant to Amendment No. 5, and its validity is yet to be adjudicated.

I do not mean to express the view that this amounts to a legal ratification of the amendments, but I mention the matter in order to call attention to the fact that the Minnesota decision cited by the majority in support of their views, instead of doing so, by the application of doctrines therein declared would uphold, instead of rendering invalid, the amendment we are now passing upon.

The two decisions of the Mississippi and New Jersey courts are the only cases cited in the opinion of the majority which, in any degree, tend to support their views on this question. The Mississippi case (*State* v. *Powell,* 77 Miss. 545) is not precisely in point, because it does not appear either that the Constitution or statutes of that State provide that the returns of the election shall be made to the Legislature or that that body shall ascertain and declare the result. Some of the reasons stated in the opinion in that case sustain the majority view, but, though it expresses the views of a court of great learning and ability, and

was delivered by a learned judge for whose opinions on any subject I entertain the utmost respect, I am unwilling to follow its lead, believing, as I do, that it is based upon unsound reasoning.

The New Jersey court bases its conclusions upon the fact that the proceedings in which the question of the adoption or rejection of the amendment was a direct and not a collateral attack upon the findings of the State board of canvassers, and that it was in that way subject to review. The court reached a conclusion upon the facts in accord with the findings of the State board, and approved the findings to the effect that the amendment had received the necessary majority, and had been legally adopted.

I am therefore firmly convinced that the majority have reached the wrong conclusion in this case, and, on account of the importance of the question, feel constrained to record my dissent therefrom.

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. KAVANAUGH,

Opinion delivered July 9, 1906.

1. CONSTITUTIONAL AMENDMENT—ADOPTION—EVIDENCE.—Const. 1874, art. 6, § 3, requires the returns for the election of Governor, Secretary of State, Auditor, Treasurer and Attorney General to be sealed up separately and transmitted to the Speaker of the House of Representatives, who during the first week of the session shall open and publish the vote cast for each of the candidates for said offices in the presence of both houses of the General Assembly. Kirby's Digest, § § 716-718, requires the vote on constitutional amendments to be separately sealed and delivered to the Speaker at the same time and manner as provided in the case of the returns for Governor and other State officers, to be opened and counted in the presence of the General Assembly in joint convention; and that if a majority of the electors voting at such election adopt such amendment, then the Speaker shall so declare. *Held,* that the act contemplated that, in determining whether there was a majority of the electors voting

at a general election in favor of a particular amendment, the Speaker shoud consider as evidence only the votes cast for the five officers above named. (Page 471.)

2. SAME—TEST OF MAJORITY.—Const. 1874, art. 19, § 22, providing that amendments to the Constitution shall be submitted to the electors at a "general election for senators and representatives," and that "if a majority of the electors voting at such election" adopt such amendment it shall become part of the Constitution, did not intend that the vote on senators and representatives should be the test as to whether "a majority of the electors voting at such election" voted for the amendment. (Page 473.)

3. SAME—LEGISLATIVE RULE OF EVIDENCE.—Though it is a judicial, as distinguished from a political, question whether an amendment to the Constitution has been adopted, yet, since the constitutional provision (art. 19, § 22) is not self-executing, the Legislature may prescribe such rules of evidence for determining whether it has been adopted by the required vote as reasonably tend to prove its adoption by the required majority. (Page 474.)

4. SAME—MAJORITY OF ELECTORS—TEST.—The vote for the five State officers required to be returned to the Speaker of the House, which is adopted by the Legislature as the test for determining whether or not a particular amendment has received the constitutional majority, affords a fairly accurate method of determining that question, and therefore the statute adopting it (Kirby's Digest, § § 716-718) is constitutional. (Page 477.)

Appeal from Pulaski Chancery Court; *Jesse C. Hart,* Chancellor; affirmed.

S. H. West and *Bridges & Wooldridge,* for appellant.

1. The Constitution nowhere provides for a method of ascertaining the result of the vote upon an amendment. Hence the Legislature is without authority to pass an act prescribing the method of arriving at the result of the vote upon an amendment to the Constitution that would, within itself, be conclusive upon the courts in inquirng into the legal adoption of such amendment. *Rice* v. *Palmer, ante* p. 355; 48 L. R. A. 655.

2. Since the Constitution requires a majority of all the electors voting at a general State election, the statute limiting the inquiry to a majority of those voting for the five constitutional offices is to that extent defective and unconstitutional. Cases *supra;* 156 Ind. 104; 51 L. R. A. 722, 725; 138 Mo. 187; 51 Neb. 805.

James P. Clarke, J. C. Marshall, Gray & Gracie and *Fulk, Fulk & Fulk,* for appellee.

1. Action by the legislative department is necessary to supplement the constitutional provisions, and to give effect to the constitutional right of amendment. Within the limits of legislative discretion, the lawmaking power is supreme, and the courts concede and respect it.

2. That which is implied in a statute is as much a part of it as if specifically expressed. 103 Fed. 420 and cases cited. Every provision of the statute, and the contemporaneous history of its enactment, plainly show the purpose of the Legislature to make the vote cast for the five constitutional officers the standard for ascertaining the number of electors voting at such election, and the courts will respect the standards thus established. 134 Fed. 423; 45 Ark. 409; 69 Ark. 436; 28 Ark. 328; 15 Kan. 500. For rules adopted by the courts under similar constitutional provisions, where no method was established by the statute of ascertaining the number of electors who voted at such elections, see 71 N. W. 779; 70 N. W. 252; 26 Neb. 517.

HILL, C. J. This appeal questions the validity of Amendment No. 5 to the Constitution, commonly called the "Road Tax Amendment," which was declared adopted by the Speaker of the House of Representatives on the 13th day of January, 1899, and duly certified and proclaimed as part of the organic law. The Constitution, art. 6, sec. 3, requires the returns for the election for Governor, Secretary of State, Auditor, Treasurer and Attorney General to be sealed up separately and transmitted to the Speaker of the House of Representatives, who, during the first week of the session, shall open and publish the vote cast for each of the candidates for said offices in the presence of both houses of the General Assembly.

The act of March 1, 1883 (p. 70), as modified by the general election law of 1891 (now sections 716-718, Kirby's Digest) requires the vote on amendments to be separately sealed and delivered to the Speaker and opened, and the result as it appears from the returns then before him ascertained and declared at the same time the vote on said offices is opened and published. When this was done in regard to the amendment in question, it was found that there were 27,209 votes for the amendment and 24,071

votes against it, and the highest vote cast for the candidates for any of the five offices then before the Speaker was for the office of Governor; the total vote cast for the four candidates for that office being 111,897. A simple calculation demonstrated that the amendment received a large majority voting on that question, and received 1260 more votes than a majority of electors voting for any of the said State offices, and the Speaker, on these returns, declared the amendment to have been adopted.

To overcome this result, the appellant shows from the returns on file with the Secretary of State that if the highest vote cast in each county for any office voted for is taken as a basis, and these highest votes aggregated, 116,378 electors voted for some officer at said election, and that therefore the amendment lacked 970 votes of receiving "a majority of the electors voting at such election." The Speaker had none of these county returns before him, showing that there were more votes cast than appeared from the returns before him on the said State officers.

This court recently said, in regard to the Speaker's duty in this matter: "The votes on the principal State officers were then before him, and from them he could reach, at least approximately, the votes in the election, and the votes on the amendment would give the other necessary data to a *prima facie* decision from the face of the returns, and, in the language of Judge Cooley, 'the final decisions must rest with the courts.'" *Rice* v. *Palmer, ante,* p. 432.

In the Rice-Palmer case the Speaker had declared Amendment No. 3 adopted, although the votes before him showed that it did not receive a majority of the electors voting for any of said State officers. The Speaker was acting upon the erroneous theory that the vote upon the question of the amendment alone controlled. The court held that the decision of the Speaker was not a finality; and where it was shown to be wrong, as in that case, the courts must declare the true result. Now, this is a case where the Speaker acted correctly on the returns before him; and, as the integrity of the returns were not and are not questioned, the only point for decision is whether the Speaker, and the courts, will be bound to confine the evidence of the "majority of the electors voting at such election" to the votes cast for said

five officers, or shall the courts receive evidence that more electors voted in the said election on other offices or questions than upon the offices whose votes were before the Speaker?

It was the evident purpose of the act of 1883 to confine the evidence to the votes sent to the Speaker. The act does not in terms so declare; but, when read in the light of the history of legislation on this subject, all doubt as to this fact is removed. The clause of the Constitution providing for the submission of constitutional amendments (art 19, § 22) was not self-executing, and required legislation to effectuate its purpose. The General Assembly of 1879 provided the machinery for amending the Constitution, and the same assembly submitted to the electors Amendment No. 1, commonly called the "Fishback Amendment." This act required the election judges to count the votes for the amendment separately from the offices, but to return the same with the other returns to the county clerk, and the clerk was required to separately abstract the vote, but to make the return of it to the Secretary of State in like manner as the returns on the candidates voted for. It was then provided that when all the returns were in the office of the Secretary, the Governor, Secretary of State and Attorney General should canvass the vote; "and if it be found that a majority of the votes (voters) of the State voting at such election have voted for any such amendment, the officers herein directed to canvass the same shall certify the facts," etc.

In the general election of 1880 the Fishback amendment received a large majority of the votes cast on the subject, and a clear majority of the votes cast on the State office receiving the highest vote. But the count was not based on any of these votes. It was thus explained by the Secretary of State: "As no provision was made by law for ascertaining the actual number of votes cast at the election of September 6, as contemplated by the Constitution, in order to ascertain the same, I addressed a circular letter to all the county clerks in the State, in which they were required to certify to this office the actual number of votes cast at each and all the precincts in the several counties, as shown by the poll books of each and every precinct in each county." See Public Documents of Arkansas, 1880-1881, pages 17 and 18. The aggregate vote made up in this way demonstrated that the

amendment had not received "a majority of all the electors voting at such election," and it was declared "defeated." See *Id.* pages 34-38. Hempstead's History of Arkansas, pages 281, 283.

This result was very unsatisfactory to the supporters of the Fishback amendment, and its adoption and a different method of ascertaining the vote upon amendments became public questions of moment. The General Assembly of 1883 resubmitted the amendment to the electors, and the same assembly repealed this act of 1879, and substituted the present system therefor, which, briefly stated, segregates the vote on the amendments from all the other returns except said five offices which are the only returns going before the General Assembly, and required the Speaker from the votes then before him to declare the result of the election on the amendment. This bit of history explains this legislation, and points its evident purpose.

While the Speaker's duty is perfunctory, and confined to narrow lines, yet it is contemplated that he shall have the true basis to ascertain the result, which he must declare, and this basis must be accepted by the courts, as well as the Speaker, if it was competent for the Legislature to create this basis as the only evidence of the number of electors voting in the election for the purpose of deciding whether or not an amendment has been adopted.

The court has held that it was a judicial, as contra-distinguished from political, question whether the Constitution has been amended in the manner prescribed by the Constitution itself. In other words, that it is the paramount duty of the court to see that the constitutional requirements have been fulfilled. But this holding is far from deciding that the Legislature can not prescribe the rules of evidence for reaching the question at issue. The case then resolves itself into an inquiry whether the rule of evidence furnished is a reasonable compliance with the Constitution, or whether it is an evasion of it.

Appellant's counsel frankly meet the issue, and the force of their argument in brief and at bar is in the contention that the act of 1883 is unconstitutional. They contend that holding the question to be a judicial one lets in any competent evidence to establish the fact that more electors voted in the general election than appeared from the votes given on the amendment and

on the five offices whose vote goes to the General Assembly. The evidence they offer is practically of the same kind which the canvassing board received when it declared the Fishback amendment defeated in 1880, and to avoid which the act of 1883 was passed. Recognizing this act as an obstacle in the way of their position, they say it must be stricken down as unconstitutional. If, in truth, it is unconstitutional, the court must so declare, and then any competent evidence to prove the fact in issue would be admissible. Passing then to the clause of the Constitution invoked, it is found that it can not be literally construed. It describes the election as the "general election for senators and representatives." The vote on senators and representatives can not be taken because only one-half of the State votes on senators in each biennial election, and many counties, like Pulaski and Sebastian, have more than one representative, and it is practically impossible to tell the number of voters participating in such contest. But the Constitution did not mean to be taken literally. The term was intended to be descriptive, not definitive, of the election, and meant the general election at which senators and representatives were elected. It is a matter of great difficulty to obtain the evidence of the number of electors voting in a general election.

No basis can be obtained which will yield the exact truth in such a matter. The appellant says that if the Legislature required the election judges of each precinct to return to the county commissioners the total number of votes cast as shown by the poll books, and the county commissioners were then required to return the total number of votes in each county to the Secretary of State or the Speaker, together with the vote on amendment, this would give the total number of electors voting in the State, and with such returns it could be easily and accurately determined whether or not the amendment received the required majority.

This method could have been adopted by the Legislature, and it looks like the natural method to adopt to comply literally with the Constitution; but even this method is only an approximation. It is common knowledge that many electors vote a blank ticket, and others vote defective tickets, and they are not counted as voting in the election, but would be counted as voting on the amendment under this plan, as this number would increase

the majority required to be reached to adopt the amendment.

An examination of the returns of any general election discloses this fact also: Many electors vote on the subject of license who do not vote for any office; they are only interested in the sale or prohibition of the sale of whisky. This is not voting in the "general election," within the meaning of this clause, and yet, if the method proposed was adopted, their votes would swell the total number of electors voting and increase the majority required to be reached to adopt an amendment. The same may be true when one or more amendments are submitted. An elector may vote for or against one or more, and not vote otherwise in the election. Sometimes a hot contest for justice of the peace or constable will cause the electors to vote on those offices, and not touch the State or county ticket, and then electors frequently go to the polls to vote for a single individual. In a sense in all of these instances the electors participated in the election; but in a broader sense they were no more participants in the general election for State and county officers than the electors who passed by the polls without stopping to cast their ballots. In its final analysis no basis is exactly accurate in these matters.

The Constitution of Kansas contained this clause: "No county seat shall be changed without the consent of a majority of the electors of the county." The Legislature enacted a statute making the number of votes cast the evidence of the number of electors in the county. Manifestly, this was no nearer the true yard stick than the one furnished in the case at bar. The Supreme Court of Kansas, speaking through that eminent jurist, Mr. Justice Brewer, then associate justice of that court, said: "Doubtless, the Legislature might make other things evidence of this fact. It might require, as preliminary to every election, a registration, and make that registration the evidence. We do not mean that it may, by the mere machinery of the rules of evidence, override or set at naught the restrictions of the Constitution, or that it could arbitrarily make conclusive evidence of the number of voters any list, or roll, which in the nature of things has no connection with that fact, and does not reasonably tend to prove it. But when it adopts as conclusive evidence of the fact anything which, according to the rules of human experience,

reasonably tends to prove the fact, the courts are not at liberty to ignore or go behind such evidence." *County Seat of Linn County,* 15 Kan. 500.

The Constitution of 1874 provides: "For every two hundred electors there shall be elected one justice of the peace, but every township, however small, shall have two justices of the peace." The General Assembly in 1893 passed a statute declaring that, in ascertaining the number of justices of the peace to be voted for and commissioned, the number of votes cast in the preceding general election should be taken as conclusive evidence of the number of electors in the township. It was found that, according to the vote at the election in question, there were 1800 electors, but at the preceding election only 1346, and it was contended that the Legislature could not make the number of votes at a preceding election control when the last vote furnished evidence that the township was entitled to two more justices. This court, speaking through Chief Justice BUNN, said: "It was the duty and within the province of the Legislature to adopt some method of determining the number of electors in a township, in order to determine therefrom the number of justices of the peace to which it is entitled; for, without the establishment of such a method, there could be no election of certain validity. The plan adopted by the act of 1893 is certainly not accurate, for changes in the number of electors are at least liable to take place within two years; but the question really addressed to the Legislature was, not to adopt a perfect method, but the most perfect available under the circumstances. In its final conclusion on the subject, it doubtless reasoned that the harm that might be done by the adoption of the best available, but inaccurate, method would be by no means equal and commensurate with the evil arising from the absence of all method, or from the expense and inconvenience of endeavoring to make everything subservient to mere accuracy. * * * In other words, the act in question was doubtless the embodiment of the very best methods the Legislature could conceive under the circumstances. This being the case, we do not feel at liberty to declare the enactment unconstitutional." *Alford* v. *State,* 69 Ark. 436.

Applying these principles to the act under review, it seemed to the Legislature that this was the best available method, even

if inaccurate, because the other method had been tried and found unsatisfactory and uncertain in these particulars:

1. It left the evidence of adoption to depend upon the vote for so many offices, largely local, that it was difficult of ascertainment; and, when ascertained, liable to be unsettled by a local contest or a series of local contests. It was certainly an unstable basis for a part of the organic law to rest upon.

2. While the Constitution requires the affirmative vote of a majority of the electors voting in the general election to adopt an amendment, yet it contemplated a majority of those really participating in the "general election for senators and representatives;" but the method pursued enabled those who voted merely on license or the amendment, or some one county or township candidate, to so swell the total vote that an amendment supported by a good majority of electors voting for State officers was defeated.

The system having worked unsatisfactorily, the General Assembly of 1883 sought to remedy what it conceived to be a mischief in the act of 1879, and presented this rule of evidence to govern the ascertainment of the number of electors voting in the election. Can this be said to be "mere machinery of rules of evidence" to "override or set at naught the restrictions of the Constitution?" If it is, the court must annul it; but if it "has a connection with the fact, and does reasonably tend to prove it," it must be sustained. Instead of taking one vote on one office, as is done in some States, this act takes the vote on the five principal executive offices as the test. This guards against unpopular candidates for any one office reducing the vote below a fair average. The vote on these offices would naturally excite the greatest interest, and therefore call for the largest vote. The evident purpose is not to evade the highest vote, but to secure the highest vote by taking the offices where such vote is to be expected.

The various county returns could be used, but would not their uncertainty in involving so many more factors, and their liability to be upset in contests over which the Legislature had no jurisdiction or cognizance or information, render this unwise? Would not the reasoning in *Alford* v. *State, supra,* apply to this? "In its (the Legislature's) final conclusion on the subject,

it doubtless reasoned that the harm that might be done by the adoption of the best available, but inaccurate, method would be by no means equal and commensurate with the evil arising from the absence of all methods, or from the expense or inconvenience of endeavoring to make everything subservient to mere accuracy?" The inaccuracy may or may not be great under the act of 1883. If there is a large number of voters on single candidates on the township or county ticket or the questions on the ballot who do not vote the State ticket, it may be large; on the other hand, it is susceptible of being absolutely accurate; and, as the inaccuracy can only be made great by those who do not fully participate in the general election, their exclusion from the count can not offend the spirit of the Constitution. In the election at bar the inaccuracy was not great, and there is no special circumstance to mark this election as one out of the ordinary. The certificate in the transcript shows that in one-third of the State the greatest vote was cast for one or another of those five offices; and an examination of the full returns shows no great differences between the office receiving the highest vote and some one of those State offices. In some instances the difference is less than a half dozen.

Taking it "by large and by small," there is no reason why the vote on these offices should not be a fairly accurate method of reaching the number of electors voting in the general election. Certainly, its inaccuracy is not so great that it shows a purpose of defeating, instead of effectuating, the object of the Constitution: The language of Mr. Justice BREWER is applicable: "When it (the Legislature) adopts as conclusive evidence of the fact anything which, according to the rules of human experience, reasonably tends to prove the fact, the courts are not at liberty to ignore or go behind such evidence."

It also has merits which would justify the Legislature in sacrificing a small degree of accuracy to safeguard this gravely important matter. This method offers a certain and fixed standard; the evidence is in highest form and submitted and inspected in the forum of the people—a joint session of the General Assembly.

On the whole, this act is considered a fair and substantial fulfillment of the Constitution, and seems to make the constitutional requirement as to the number of electors voting in the

election more stable; and thereby the will of the framers of the Constitution is the better effectuated.

The judgment is affirmed.

Mr. Justice RIDDICK concurs in the judgment.

---

78 479
84 363

78 479
89 508

SHELL v. YOUNG.

Opinion delivered April 16, 1906.

1. ADMINISTRATION—SALE OF LAND SUBJECT TO DOWER.—A sale of land of an intestate's estate to pay debts without assigning the widow's dower is inoperative so far as her dower is concerned, but is not void. (Page 481.)
2. SAME—VALIDITY OF SALE TO PAY DEBTS.—An administrator's deed is not void collaterally because it recites a sale of land to pay the debts of the estate, as it will be presumed that the lands were sold to pay the debts of the intestate which were duly probated against the estate. (Page 481.)
3. HOMESTEAD—IMPRESSMENT.—The fact that the owner of land was intending to make it his homestead as soon as he completed a residence thereon, that he had put some of the land in cultivation, had built a stable and crib, and was hauling corn to the crib when he died, was not sufficient to impress upon it the character of a homestead. (Page 481.)

Appeal from Clay Circuit Court; *Allen Hughes,* Judge; affirmed.

F. G. Taylor, for appellants.

1. The probate court was without authority to order a sale of the land without first assigning the widow's dower. 33 Ark. 294; 40 Ark. 17.

2. The probate court is without jurisdiction to order a sale of land to pay debts of the estate. Unless the sale was made to pay debts of the decedent, the sale was void for want of jurisdiction, and confirmation of the sale does not cure the defect. 84 S. W. 1044; 52 Ark. 320; 46 Ark. 373.

3. The land was the homestead of P. F. Shell, under whom appellants claim; had been impressed with that character prior to his death; and the probate court had no jurisdiction to order

it sold for any purpose. 69 Ark. 596; 1 Martin's Chancery Decisions, 40; 51 Mich. 541; 47 Am. Rep. 594; 64 Mich. 593; 76 Mich. 126; 126 Mich. 706; 35 Ia. 407; 77 Am. Dec. 715; 125 Ill. 437; 48 Ill. App. 514; 9 Kan. 425; 4 S. Dak. 628; 70 Am. Dec. 292; 60 Tex. 135; 64 Tex. 76; 48 Am. St. Rep. 815; 57 *Ib.* 927.

4. The statute does not begin to run until the youngest child has attained majority. The plea of the statute of limitation does not apply under the facts of this case. 53 Ark. 400.

Hawthorne & Hawthorne, for appellee.

1. The fact that dower has not been assigned at the time sale is ordered does not defeat the jurisdiction of the probate court to order the sale. Such sale would not affect the right of dower. 40 Ark. 17, 33 Ark. 294.

2. The administrator's deed is *prima facie* evidence of the facts recited in it and the legality and regularity of the sale. Kirby's Digest, § 760; 50 Ark. 294. The presumption is that the land was sold to pay the debts of the intestate. 73 Ark. 612.

3. Occupancy is necessary to impress land with the homestead character. Intention to occupy is not sufficient, unless it is manifested by some of the usual constituents and concomitants of occupancy. 69 Ark. 596; 57 Ark. 179; 22 Ark. 400; 29 Ark. 280; 31 Ark. 466; 33 Ark. 399; 42 Ark. 175. The wife and children could not impress the land with the homestead character by moving on to it after the husband's death. He must have acquired a homestead in his lifetime. 31 Ark. 145; 33 Ark. 399.

4. The fact that the widow married before the land was occupied adversely will not enable her to recover the dower interest, even in the absence of the confirmation decree. She is barred by the seven years statute. 22 Ark. 263; 33 Ark. 294.

HILL, C. J. P. F. Shell owned the land in controversy, and was living near it with his wife and two children when he died. He intended to make it his homestead, and had a house in the course of construction and nearly completed when he sickened and died. He expected to have the house ready to move into it on Christmas day, 1880, but he took sick on December 13, and died on December, 17. Fifteen acres had been cleared and fenced, and he had planted turnips thereon; a stable and crib

were finished, and Shell was hauling corn to the crib when he took sick. The house was finished after Shell's death, and the family moved into it and occupied it for a time. Subsequently they removed to relatives in Tennessee, and Mrs. Shell married again. The land was sold under orders of the probate court, and purchased by Samuel Crockett, and Crockett sold to appellee, Young. Crockett and Young have been continuously in possession since the purchase till this suit, a period of 14 years. The suit is by the widow and heirs of Shell to recover the land, and they lost in the circuit court, and have appealed.

1. The first error alleged is that the sale by probate court without assigning the widow's dower was void for want of jurisdiction to order it. Such is not the law. The sale is simply inoperative, so far as the widow's dower is concerned, as it is an interest in the land superior to the claims of creditors, and the purchaser simply took subject to the right of the widow's dower, which may be set aside against the purchaser as well as the heirs and creditors. *Livingston* v. *Cochran,* 33 Ark. 306; *Webb* v. *Smith,* 40 Ark. 17.

2. The appellant claims that because the deed recites that the sale was "to pay the debts of said estate" the sale was for the purpose of paying the expenses of administration, and would be void under the decision of *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81. This recital does not prove any such proposition, and is a quite common expression, and means, of course, the debts of the intestate. The presumption is that the lands were sold to pay the debts of the intestate duly probated against the estate, and an unlawful sale would not be presumed.

3. The next proposition is that the confirmation could not cure a void sale. As the court finds the sale is not void, it is unnecessary to discuss this point.

4. The principal question in the case is whether the land was a homestead. If it was impressed with the homestead character, then the probate court could not sell it for the debts of the decedent. It has been settled by a long line of decisions that actual occupancy of land as a home, not a mere intention to occupy it, is essential to the impressment of the homestead character. In consonance with the liberal construction of the homestead laws, which is the settled rule, this court held that where

the *bona fide* intention to occupy is manifested by some of the usual constituents and concomitants of occupancy, such as repairing and cleaning the house and moving in household goods and kitchen furniture, the actual personal presence of the members of the family were not necessary in order for the homestead character to attach. *Gill* v. *Gill,* 69 Ark. 596. This case in the chancery court evoked a learned opinion from the chancellor, where many cases along the same line are reviewed and discussed. 1 Martin's Ch. Dec. 40.

But this case fails to reach to this humane extension of the homestead character. There was no house ready for occupancy, and no place for the family to reside, and there never had been. The house was nearing completion, but the roof tree made it no more the homestead than the mudsill. The usual constituents of occupancy were absent, and necessarily absent until there was a house upon the land "occupied as a residence," or ready to be "occupied as a residence," in the language of the Constitution. Art. 9, § 4.

Chief Justice ENGLISH said: "A homestead necessarily includes the idea of a house for a residence, or mansion house. The dwelling may be a splendid mansion, a cabin, or tent. If there be either, it is under the protection of the law, but there must be a *home residence* before it, and the land on which it is situated, can be claimed as a homestead." *Williams* v. *Dorris,* 31 Ark. 466. This statement was quoted and affirmed in *Tillar* v. *Bass,* 57 Ark. 179, where the court said: "In short, there was no evidence to show that he actually and in good faith occupied his land as a residence before the levy of the execution. His intention to do as at a future time, and failure on account of his wife's condition, did not endow it with the character of a homestead." See also *Gibbs* v. *Adams,* 76 Ark. 575.

Under the settled law in this State, giving the most liberal construction to the homestead exemption in order to effectuate the design of the framers of the Constitution, the facts here fail to show an impressment of the homestead character upon the land.

Judgment is affirmed.

ARKANSAS SOUTHWESTERN RAILWAY COMPANY v. DICKINSON.

Opinion delivered April 23, 1906.

1. RAILROAD—POWER TO OFFER REWARD.—A railroad company has implied power to offer a general reward for the arrest and conviction of any person found maliciously placing obstructions upon its track for the purpose of causing derailments or wrecks. (Page 486.)
2. SAME—POWERS OF GENERAL MANAGER.—Authority to offer rewards for persons obstructing its track is within the scope of the powers of the general manager of a railroad company. (Page 486.)
3. SAME—AUTHORITY OF GENERAL MANAGER—NOTICE.—Evidence that one who offered a reward for the conviction of any one obstructing a railroad track acted for three years in the capacity of general manager of the railroad company, and that printed notices offering the reward were posted at every station of the road where it must have been seen by the president of the road, and that the notices were furnished to such general manager by the vice-president of the road, and that his act in offering the reward was never repudiated, was sufficient to sustain a finding that the officers of the road were cognizant of the general manager's act in offering the reward. (Page 486.)
4. REWARD—OBSTRUCTION OF RAILROAD—CONSTRUCTION.—A reward offered by a railroad company for "the arrest and conviction of any person or persons found maliciously, without regard to the lives of employees or passengers, placing obstructions upon its track, changing switches, etc., for the purpose of causing derailments and wrecks" should be construed as an offer of a reward for a conviction of any person or persons charged with placing obstructions upon a railroad track under Kirby's Digest, § 1999. (Page 487.)
5. SAME—CONVICTION AS EVIDENCE.—Where a railroad company offers a reward for the conviction of any one charged with a violation of Kirby's Digest, § 1999, a conviction of a violation of the statute will be admissible as evidence of the fact that the offense has been committed, and that the person convicted was the real offender. (Page 489.)
6. APPEAL—PRESUMPTION.—Where the record shows that a paper was introduced in evidence, it will be considered that its contents were made known to the jury. (Page 490.)

Appeal from Polk Circuit Court; *James S. Steel,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee sued appellant on the following:

"REWARD.

"One thousand dollars reward will be paid upon the arrest and conviction of any person or persons found maliciously, with-

out regard to the lives of employees or passengers, placing obstructions upon the track, changing switches, etc., for the purpose of causing derailments or wrecks.

"ARKANSAS SOUTHWESTERN RY. CO.
"J. J. Kress, Manager."

Appellee alleged:

"That said reward was offered by posting same along the tracks and at the depot houses of the defendant company, in Pike County, Arkansas; that on the 6th day of October, 1902, the plaintiff procured the arrest of one Zach Furlow charged with the offense of maliciously placing obstructions upon the track of the defendant company in Pike County, Arkansas, the said Zach Furlow subsequently being indicted by the grand jury of Pike County, Arkansas, for said offense, and he was on the 20th day of August, 1903, duly convicted of said offense by the consideration and judgment of the circuit court of Pike County, which said judgment was on the 30th day of April, 1904, duly affirmed by the Supreme Court of the State of Arkansas. Copies of said record of conviction are filed herewith, and made a part of this complaint."

Appellee further alleged that he had, at great expense of time and money, procured the arrest and conviction of the said Zach Furlow, and is entitled to recover said reward, amounting to the sum of one thousand dollars, which the defendant wholly neglects and refuses to pay after proper demand made therefor."

Appellant answered, denying specifically all the allegations of the complaint, and denying that it ever authorized J. J. Kress or any other person to offer said reward, and set up that the person alleged to have been arrested and convicted at the instance of Joe Dickinson, Jr., was not guilty of said offense or any other offense; that the said Zach Furlow, the person arrested, was found maliciously, without regard to the lives of employees and passengers, placing obstructions upon the track, changing switches, or anything else, for the purpose of causing derailments or wrecks, and denies that said Zach Furlow was ever at any time found placing obstructions upon tracks and changing switches for any purpose whatever.

Plaintiff recovered judgment for the amount of the reward, and defendant appealed.

B. S. Johnson, for appellant.

1. The burden of proof is upon the plaintiff; and in order to recover he must prove, (1) that the offense or wrongful act for the punishment of which offer of reward was made was committed. (2) That the offer of reward was by authority of the corporation, through some duly authorized agent. (3) That, induced by the offer of reward, plaintiff caused the arrest of the offending party. (4) That the party arrested and convicted was the party who had committed the offense. (5) That the party who had been indicted, tried and convicted was the party who had committed the offense. 9 Ore. 350; 41 Cal. 665; 34 Cal. 61.

2. The indictment, record of conviction and the offer of reward not having been read to the jury before the testimony of the witness was closed, it was error to permit them to be read, over the defendant's objection, by plaintiff's counsel in argument to the jury. Kirby's Digest, § 3145.

McRae & Tompkins, for appellee.

1. The company had the power to make the conditional contract for the protection of its property. 24 Am. & Eng. Enc. Law (2 Ed.), 943, Tit. Corporations; *Ib.* 944, Tit. Offers by Corporations. The law enters into the contract, and becomes a part of it. If the company offered a reward for the conviction, it must have been for the offense named in the statute. Having the right so to do, the company imposed terms that a conviction must be had. The conviction makes a *prima facie* case, and shifts the burden to appellant to show fraud or mistake in the conviction. 1 Hilton (N. Y.), 151; 156 Mass. 28.

2. The company offered the reward. The proof shows that it was sent to the manager from the office of the vice-president with instructions to post. The cards were signed with the company's name by the manager. It is further shown that the president frequently passed over the road, must have seen the reward cards, and never disavowed the offer. Had the manager been without authority to issue the reward, the company has ratified his act, and is bound by it. 85 Ala. 292; 53 Ark. 208. The offer of reward became a contract with appellee when he acted under it and performed the service. 21 Am. & Eng. Enc. Law (1 Ed.), 391 and cases; 24 Am. & Eng. Enc. Law (2 Ed.), 955. Notice

of performance is not essential. The contract is complete immediately upon performance. *Ib.* 957.

3. The record does not show that the indictment, record of conviction and offer of reward were not read to the jury at the time they were offered.

WOOD, J., (after stating the facts.) 1. Appellant contends that it did not offer the reward. The proof showed that one who had acted for more than three years under the title and in the capacity of general manager of the road, with the knowledge of the president, had posted the reward. He had received the card offering the reward by express from the office of the vice-president in St. Louis, with instructions to post same. This was done at every station, and the president of the road passed over it as often as every ten days.

In *Central Railroad & Banking Company* v. *Cheatham,* 85 Ala. 292, it was held that a railroad corporation has the implied power to offer a general reward "for the detection, apprehension and bringing to justice of persons obstructing the road," and that authority to offer such rewards is incident to the business and duties of the superintendent, and to the purposes of his department, and consequently within the scope of this agency. This is sound doctrine. But appellant contends that the agency of Kress has not been established by competent proof. The court ruled that the agency of Kress could not be established by what he said, but that his acts in the capacity of superintendent and general manager might be considered. This was correct, since there was proof to justify the conclusion that these acts were assented to by the company. *St. Louis, I. M & S. Ry. Co.* v. *Bennett,* 53 Ark 208. We are of the opinion that the proof was sufficient to show that Kress was the superintendent and general manager of the road he was seeking by the offer of the reward to protect. But, if not, still appellant is shown to have had knowledge of his acts as superintendent and general manager, for he had acted in that capacity and under that title for more than three years, and appellant had not repudiated any of his acts as such. And appellant is shown to have had knowledge, not only of his acts in general, but of this specific act, for the knowledge of its president would be sufficient to show that the company had knowledge. The company can only act through its representatives. The pres-

ident of the company, as we have said, went over the road every ten days, and these rewards were posted at every station. This and other evidence, such as the fact that the reward came from the office of the vice-president, was entirely sufficient to show that the company had knowledge of the act of Kress in offering the reward. In *Central Rd. & Banking Co.* v. *Cheatham, supra,* the court said: "On questions of ratification, facts that circulars were posted at various places on the line of the railroad, by direction of an employee who was under the control of the superintendent, and remained posted for several months and until after the rendition of the service, were proper to go to the jury as tending to show that the officers of the company were cognizant of the superintendent's act in offering the reward."

2. Appellant contends that, before it could be held liable, it was essential that the appellee prove that Zach Furlow placed obstructions upon appellant's track within the terms of the published reward. Appellants contend that there is no such proof, and that the papers and record of the proceedings showing that Zach Furlow had been arrested and convicted of the criminal offense in which he was so charged was not sufficient to show that appellant's track had been obstructed in the manner set forth in the offer of reward, and appellant objected to such papers and record going to the jury as evidence of that fact. There is in the record an affidavit made by appellee before a justice of the peace charging Zach Furlow, with others, of the offense of "maliciously placing obstructions on the Arkansas Southwestern Railroad." Appellee testified that he procured the arrest of Zach Furlow on this charge, and assisted in his prosecution for same because of the offer of the reward. The indictment on which Zach Furlow was convicted in the circuit court charged that he "did unlawfully, feloniously, etc., place an obstruction upon the track of the Arkansas Southwestern Railway Company." The trial court permitted the indictment and the record of conviction of Zach Furlow in the circuit court to go before the jury for the purpose of showing his conviction, and also the mandate of the Supreme Court, showing that the judgment of the circuit court was affirmed, for the same purpose.

On the cross-examination of appellee by appellant, this appears in the record: "Q. This is the affidavit (exhibiting paper)

that you made, is it? A. Yes, sir. Q. Now, you say the reward was put up the next day after the offense was committed? A. Well, I saw it the next day after it was committed."

One of the witnesses for appellee testified as follows: "Q. Mr. Westbrook, do you remember the circumstances of the track having been obstructed between Delight and Antoine? A. Yes, sir. I remember hearing of it. Q. With reference to that, when was the reward stuck up, as you remember? A. To the best of my knowledge, it was two or three days, something like that, after the obstruction was placed on the track; wouldn't be positive about that; just after something of that kind had happened, whether it was that particular obstruction I could not say. Q. You remember the circumstance of Zach Furlow being arrested charged with this offense? A. Yes, sir. Q. And he was arrested for an obstruction between Delight and Antoine?" The defendant objected to that part of the question referring to the place where the obstruction occurred, and the objection was by the court sustained.

Another witness testified that he "remembered the circumstance of Zach Furlow's being arrested over there for placing obstructions on the track."

A reasonable interpretation of this contract is that the railroad company offered a reward of one thousand dollars for the arrest and conviction of any person or persons charged with the offense of placing obstructions upon a railroad track under section 1999, Kirby's Digest. The arrest and conviction of any person for the offense was evidently aimed at by the appellant, and the appellee accepted and duly performed the contract on his part when he secured the arrest and conviction of a person for that offense. It is obvious from the language of the reward that the company contemplated in its offer that the conviction for the offense should be taken as an evidence of the fact that the offense had been committed, and that the person convicted was the real offender. If this be the correct construction of the contract, the doctrine of *res inter alios* does not apply. In *Brown* v. *Bradlee,* 156 Mass. 28, the offer of reward was as follows: "$2,500 reward will be paid for any person furnishing evidence that will lead to the arrest and conviction of the person who shot Mr. Edward Cunningham." The plaintiff in that case had furnished

evidence that led to the arrest and conviction of a person for the shooting of Cunningham. In the civil suit for the reward it was proved by the record that one De Lucca had been convicted for shooting Edward Cunningham, and De Lucca's evidence at his trial, admitting that he shot Cunningham, was also put in, but the defendants contended in that case, as appellant contends here, that such evidence was *res inter alios,* and not competent to prove the action against them for the reward that De Lucca was the guilty man. The court said: "This position rests on too strict a construction of the words 'the person who shot Mr. Edward Cunningham' in the contract. We will assume that they mean a little more than 'a person for shooting,' and that it would be open to the defendants to prove mistake or fraud in the conviction. But we have no doubt that the contract so far adopts the proceedings of the criminal trial as a test of liability that the conviction is *prima facie* evidence of guilt." In *Borough of York* v. *Forscht,* 23 Penn. St. 391, a reward was offered "for the detection and conviction of the person who set fire to" a certain barn, and the suit was to recover on this offer of reward by one who had given the information upon which a certain party was arrested, and afterwards tried and convicted. The court held, quoting syllabus, "where a reward is offered for the detection and conviction of an offender, and a person is detected and convicted, the record of conviction is evidence in an action for the reward that the person convicted is the true offender." The doctrine of these cases comports with our construction of the contract under consideration. See *Brennan* v. *Haff,* 1 Hilt. (N. Y.), 151, and *Mead* v. *Boston,* 3 Cush. (Mass.) 404. See also, *contra, Burke* v. *Wells, Fargo & Company,* 34 Cal. 61.

But, aside from this, it is doubtful from the state of the record whether appellant could avail itself of a failure on the part of appellee to make proof that the offense was actually committed and that Zach Furlow was the real offender, when on the trial below it objected to evidence that was tending in that direction.

3. The objection made here for the first time that the court erred in permitting the indictment and the record of conviction in the circuit court and the mandate of the Supreme Court in the case of *Furlow* v. *State,* (72 Ark. 384), to be introduced in

evidence without being read to the jury, can not avail appellant. The record shows that "it was agreed by the parties that they (these papers) be considered as read to the jury." Such being the case, appellant is in no position to complain that such papers were not read, and it will not be heard to make such complaint. An amended record, brought here by agreement, shows that "upon the trial of this case in the lower court, the mandate, judgment and indictment were introduced." That effectually answers the contention in the brief that the court erred in not having these papers read to the jury under section 3145, Kirby's Digest. Where a paper "is introduced in evidence," it must be considered here that its contents were made known to the jury.

4. Measured by the doctrine already announced, we find the instructions of the court correct.

Affirm.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. JAMES.

Opinion delivered April 23, 1906.

1. APPEAL—INSTRUCTION—EXCEPTION.—Error of the court in giving a certain instruction can not be insisted upon on appeal if there was no objection to it, and no exception saved. (Page 492.)
2. BILL OF EXCHANGE—STATUTORY ACCEPTANCE.—Under Kirby's Digest, § 500, providing that "every person upon whom a bill of exchange is drawn, and to whom the same may be delivered for acceptance, who shall * * * refuse within twenty-four hours after such delivery, or within such time as the holder may allow, to return the bill, accepted or non-accepted, to the holder, shall be deemed to have accepted the same," a mere neglect or failure to return does not constitute an acceptance, in the absence of any demand for their return. (Page 492.)
3. SAME—ACCEPTANCE BY FAILURE TO RETURN.—In the absence of any demand or request for a return of a bill of exchange delivered to the drawee for acceptance, a mere failure to return the same does not bind the drawee as acceptor. (Page 493.)
4. CIRCUIT COURT—JURISDICTION.—The circuit court has jurisdiction of an action to recover a sum exceeding $100 due upon a single contract,

though made up of various items of account, each less than the jurisdictional amount. (Page 494.)

Appeal from Craighead Circuit Court, Jonesboro District; *Allen Hughes,* Judge; reversed.

S. H. West and *J. C. Hawthorne,* for appellant.

1. The burden was on appellee to show that the wages were due on the orders given, and were not paid. 14 Ark. 389; 40 Ark. 187. There was no contract requiring appellant to return the unpaid orders to appellee, and it was under no obligation to do so, unless they come within the provision of Kirby's Digest, § 500. If they do not come within the provision of that section, the court erred in instructing the jury that appellant was under obligation to either pay or return the orders, and if it did neither for an unreasonable time it was liable for the amount. If they do come within its provision, the court has no jurisdiction. 55 Ark. 143; 35 Ark. 287.

2. On the question of damages for failure to repair the house and range, the verdict is excessive.

Lamb & Caraway, for appellee.

1. Since the entire amount sued for was within the jurisdiction of the circuit court, there was no error as to jurisdiction. 59 Ark. 86; 24 Ark. 177.

2. The question of damages for failure to repair was one of fact for the jury under proper instructions. With sufficient evidence to support the verdict their verdict is conclusive.

RIDDICK, J. This is an action by J. B. James against the St. Louis Southwestern Railway Company to recover damages on account of the failure of the company to repair a building used as a restaurant or railway eating-house, and which he had leased from the defendant, and also for failure to pay board for certain of its employees. The complaint thus embraced two separate causes of action based on separate contracts.

In the contract by which the company leased the building in question to James, it was agreed that the company should make all necessary repairs on such building. The company also agreed with him that it would pay all board orders given by its employees when, to quote the language of the contract, "it appears that deduction can be made out of the wages due them." On the trial

before the jury, the jury returned a verdict in favor of the plaintiff for $35 on board orders, and $147 for other damages.

As to the $147 for damages for the failure of the company to repair building, we think the evidence is sufficient to support the verdict. Appellant contends that the court by its eighth instruction submitted to the jury the question as to whether defendant was liable to plaintiff for an item of $12 expended by him in screening the house, and that this amount was included in the sum found by the jury. This instruction is rather vague, and we are not certain that it was the intention of the court to submit this question to the jury, or that the jury included that item in the the amount found. The plaintiff contends that the court by that instruction intended to exclude the item referred to from the consideration of the jury. As defendant did not except to this instruction, or object to it in any way, we are of the opinion that its contention on this point should be overruled.

As to the orders given by employees of the company on it in payment for meals or board due by them to the plaintiff, the testimony shows that it was the custom of the company, when the company was due the employees an amount equal to or greater than the orders, to charge the order to the employee, and account to the plaintiff for the amount of the order. If nothing was due the employee, the orders were returned to the plaintiff unless the employee was still in the service of the company, in which event the orders were sometimes retained with the view of collecting them from future wages of the employee. It does not appear that any objection to such retention of the orders was made by James; and, as it was done in his interest, he probably did not object to it. But in instructing the jury on this point the court told them that the company was liable for the amount of such orders if it kept them, "unaccounted for, an unreasonable length of time, without notifying the plaintiff of any reason why they could not be paid." Now, counsel for plaintiff contends that these orders, being drawn for a specified sum, were bills of exchange within the meaning of our statute (Kirby's Digest, § 507), and that a failure to return the same made the company liable under the following section, towit:

"Every person upon whom a bill of exchange is drawn, and to whom the same may be delivered for acceptance, who shall

destroy such bill, or refuse within twenty-four hours after such delivery, or within such time as the holder may allow, to return the bill, accepted or non-accepted, to the holder, shall be deemed to have accepted the same." Kirby's Digest, § 500.

It will be noticed that, to make the company liable under this section, it must be shown that the orders were destroyed, or that there was a refusal to return the same. A mere neglect or failure to return does not constitute an acceptance under this statute. Statutes similar to this are found in many of the States, and it has been held by courts in several of those States that the refusal mentioned in the statute "refers to something of a tortious character, implying an unauthorized conversion of the bill by the drawee." *Matteson* v. *Moulton,* 11 Hun (N. Y.), 268; *Matteson* v. *Moulton,* 79 N. Y. 627; *Dickinson* v. *Marsh,* 57 Mo. Appeals, 566.

As it is not shown that any demand for the return of these orders had ever been made on the company, or that it had ever refused to return the orders, we do not think this statute has any application in this case. Leaving out the statute, it can not be said that a failure to return the bill of exchange constitutes an acceptance in this State, for our statute expressly requires that an acceptance to bind the acceptor shall be in writing. Kirby's Digest, § 495. In the absence of any demand or request for a return, it is clear that a mere failure to return does not in this State bind the drawee as acceptor. *Overman* v. *Hoboken City Bank,* 31 N. J. L. 564; *Colorado National Bank* v. *Boettcher,* 5 Col. 190, 46 Am. St. Rep. 142; *Hall* v. *Flanders,* 83 Me. 242, 21 Am. & Eng. Enc. Law, 220; *Rousch* v. *Duff,* 35 Mo. 312.

But there was nothing in the contract between the plaintiff and the defendant railway company that required the company to return the orders of its employees forwarded by the plaintiff to it when there was no money due from the company to the person by whom they were drawn. The evidence showed that it was the custom of the company to return the orders which it did not intend to pay, and the failure of the company to return an order was no doubt a circumstance tending more or less to show that the employee by whom it was drawn had money in the hands of the company with which to pay it, and that the company intended to pay it. But this was not conclusive, and the company

had the right to show that the failure to return was due to other reasons. The failure to return may have been due to oversight, and the plaintiff may have suffered no injury from such failure. We are therefore of the opinion that the court erred in instructing the jury, over the objection of defendant, that, as a matter of law, the company was liable if it kept the orders an unreasonable time without notifying plaintiff of its reasons for not paying them.

Counsel for appellants contends that if these orders drawn by the employees on the company in payment for board be considered as bills of exchange, then the circuit court had no jurisdiction, for the reason that neither of them is for an amount greater than one hundred dollars. But this is not an action on those orders. It is an action to recover for amount due for board of employees of the company under the contract of the company with plaintiff, and the orders are only evidence tending to establish the different items of the account. The whole account sued for being in excess of one hundred dollars, the circuit court had jurisdiction. *Friend* v. *Smith Gin Co.*, 59 Ark. 86.

The result is that, in our opinion, the judgment should be affirmed as to the $147 allowed for repairs, but reversed as to $35 allowed for board, and remanded for a new trial on that cause of action. It is so ordered.

---

78 494
182 343

BOYETT v. COWLING.

Opinion delivered April 23, 1906.

1. OFFICERS—STATUTORY REQUIREMENT AS TO COMMISSION AND OATH.—Kirby's Digest, § 647, 648, providing that State and county officers who are required to be commissioned by the Governor shall forward the legal fee for their commissions within 60 days after their election, and within fifteen days after receipt of their commissions shall forward their duplicate oath of office to the Secretary of State, and that upon failure or neglect to do so the office shall become vacant, were not repealed by the act of March 4, 1881, pp. 73-75, nor by the act of March 2, 1883, pp. 73, 74. (Page 498.)
2. ASSESSOR—REQUIREMENT AS TO BOND AND OATH.—Kirby's Di-

gest, § § 6955, 6956 and 6958, which require the assessor, within 15 days after receiving his commission, to enter into bond, and, that, on or before the first of January, and before discharging the duties of his office, he shall take the constitutional oath and an additional oath, and that a failure to obey the foregoing provisions shall cause a forfeiture of the office, are not inconsistent so far as assessors are concerned, with the provisions of Kirby's Digest, § § 647, 648. (Page 498.)

3. CONSTITUTIONAL LAW—REQUIREMENT AS TO COMMISSION AND OATH OF OFFICE.—Kirby's Digest, § § 647, 648, regulating the time within which officers required to be commissioned should apply for their commissions and should thereafter file their duplicate oaths of office, are valid and constitutional. (Page 499.)

4. GOVERNOR—POWER TO FILL VACANCIES.—Under Const. 1874, art. 7, § 50, providing that "all vacancies in any office provided for in this article shall be filled by special election, save that in case of vacancies occurring in county and township offices six months, and in other offices nine months, before the next general election, such vacancies shall be fllled by appointment by the Governor," the Governor had no power to fill a vacancy in the office of county assessor which occurred more than six months before a general election. (Page 500.)

Appeal from Hempstead Circuit Court; *Joel D. Conway,* Judge; reversed.

Thos. C. Jobe and *Jas. H. McCollum,* for appellants.

1. Sections 647 and 648 were repealed by the act approved March 14, 1881. Acts 1881, pp. 73, 74 and 75. The whole subject covered by the statute (act 1875) was covered by the act of 1881, and the latter was evidently intended as a substitute for the former. Where the Legislature takes up a whole subject anew, and covers the entire ground of the subject-matter of a former statute, and evidently intended it a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provisions not embraced in the new. 10 Ark. 588; 31 Ark. 17; 46 Ark. 438; 47 Ark. 488; 65 Ark. 508; 70 Ark. 25; 4 L. R. A. 308 and cases cited. Sections 6955, 6956 and 6958, Kirby's Digest, enacted in 1883, are in direct conflict with sections 647 and 648, in this: the latter provides that the assessor shall take the oath of office within fifteen days after he receives his commission, while the former provides that he shall take the oath on or before the first day of January succeeding his election. The former (§ § 6955-6-8) apply only to the office of assessor, while § § 647-8 are

general. "The more specific provision controls, without regard to their order and date." 50 Ark. 132; 60 Ark. 59.

2. The statutes are unconstitutional. All political power is inherent in the people. Art. 2, sec. 1, Const. "All officers provided for in this article, except constables, shall be commissioned by the Governor." Art. 7, § 48, Const. The Legislature is without power to limit the provision of the Constitution entitling one elected to a county office to his commission, or to limit his right thereto by placing upon him the burden of the payment of

3. The Governor was without power to make the appointment. The amendment No. 3 to the Constitution, not having been carried by a majority of the votes cast in the general election at which the proposed amendment was submitted for adoption or rejection, the same was lost. It was never legally adopted. Section 22, art. 19, Const. "Every word employed in the Constitution is to be expounded in its plain, obvious and common-sense meaning." 52 Ark. 336; 51 L. R. A. 722, and cases cited; 6 L. R. A. 422; 48 L. R. A. 652; 134 Fed. 423. Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or non-compliance with the constitutional directions as to how such amendments shall be submitted and adopted, and whether such compliance has in fact been had is a judicial question. 48 L. R. A. 652 and cases cited; 6 Am. & Eng. Enc. Law (2 Ed.), 908; 8 Cyc. 728; 4 Mo. 303; 23 L. R. A. 354; 45 L. R. A. 251. If the amendment was legally adopted, still the Governor was without authority to make the appointment, since there was no vacancy. Appellant, Boyett, holds over by virtue of his former election. Section 5, art. 19, Const.; 18 Am. Rep. 321; 14 L. R. A. 858; 21 L. R. A. 539. If there was a vacancy, and the amendment not adopted, the only way the vacancy could be filled was by special election. Section 50, art. 7, Const.; § 2691, Sand. & H. Dig.

C. C. Hamby, for appellee.

1. Repeals by implication are not favored. 45 Ark. 90; 41 Ark. 149. The intention of the Legislature is shown by its declaration that the act of 1881 is only amendatory of section 1 of the acts of 1875, p. 22. The whole therefore stands. 55 Ark. 389. If the Legislature amended section one of the act of 1875, and did not mention section two of that act, the latter is still the

law: The provision in the act of 1883 allowing the Secretary of State to issue and send out to the county clerks the commissions was simply one of convenience to officers elected throughout the State. It does not deprive the officer of the right nor relieve him of the duty of forwarding the fee or seeing that it gets to the Secretary of State within sixty days. It is the law (section 648), and not the Governor, that declares the vacancy. When it exists, the Governor is the only one who has power to fill the vacancy, and nothing that Boyett could do would reinstate him. 42 Ark. 114.

2. The Constitution is a check on powers, but not a grant of power. The Legislature may enact any law not prohibited by the Constitution. All officers are within the power of the Legislature, except so far as the Constitution forbids interference with them. 32 Ark. 241. It also has power to require the performance of an act as a condition precedent to holding an office, though that office is provided for in the Constitution, and to declare a vacancy if the person elected fails to comply with the condition. 52 Miss. 665; 42 Ark. 392; 46 Neb. 514. The constitutional right of holdover is of no advantage to appellant. It was for the benefit of the public, and not for himself. 33 Am. Rep. 659; 42 Ark. 394; 52 Miss. 665. Moreover, it can not apply to this case, because, if there is a vacancy, it is because of his own default.

3. The question of the validity of the adoption of Amendment No. 3 has been passed upon by this court in favor of its adoption. 69 Ark. 392; 45 Ark. 400. See also 111 U. S. 550.

HILL, C. J. Ruff Boyett was assessor of Hempstead County, and was re-elected to said office without opposition in the general election of September, 1904. On the 21st of November he wrote the Secretary of State requesting his commission as assessor, and sending the fee, $2, therefor. On December 2, 1904, the Governor took the position that the failure of Boyett to apply for his commission within 60 days and pay the fee therefor and file his duplicate oath of office within fifteen days after the receipt of the commission, vacated the office, and he thereupon appointed L. E. Cowling assessor. This suit resulted, the circuit judge gave judgment for Cowling, and Boyett appeals.

The appellant makes these contentions:

1. That sections 647-648, Kirby's Digest, containing the provisions above referred to, viz.: applying and paying for commission within 60 days and filing duplicate oath within 15 days thereafter, were repealed.

2. That said statutes are unconstitutional.

3. That the Governor did not have the right to fill a vacancy in the office of assessor.

1. The contention is made that said sections were repealed by act of March 14, 1881 (pp. 73-75), and said act being in turn repealed by act of March 2, 1883 (pp. 73-74), which is found in Kirby's Digest, § 646.

The act of 1881 provides for commissions for district, county and township offices to be sent to the clerks of the several counties, and that the clerk should collect the fees therefor and deliver the commissions to the officers upon their payment of the fees, and when default was made should return the commissions to the Secretary of State. The clerk was required to notify the officers, and to keep a record of the commissions, date of qualifications and other details. The act of 1883 provided for payment into the treasury, and required the Secretary of State, on receiving duplicate receipt from the Treasurer, to forward the commission. Section 646, Kirby's Digest. None of these matters reached to the point covered in the act of 1875, which constitutes § § 647 and 648. The requirement that the commission be applied for and paid for within 60 days, and that the oath of office be taken within 15 days thereafter, and the duplicate filed with the Secretary of State, was consistent with each change in the method of receiving the commissions and the amount of fees due therefor and the officer to whom the fees were payable.

It is elemental that repeals by implication are not favored, and they are only recognized when efforts to harmonize the legislation are futile. These acts are susceptible of being read together without being inconsistent or in conflict with each other.

It is also argued that sections 6955, 6956 and 6958, Kirby's Digest, parts of the Revenue Act of 1883, repealed sections 647, 648, in so far as the assessor is concerned. Section 6955 requires the assessor, within 15 days after receiving his commission, to enter into bond, and section 6956 requires him on or before

the first day of January, and before discharging the duties of his office, to take the oath prescribed by the Constitution for all officers, and also an additional oath therein set out, pertaining to his office, which must be indorsed on his book, and section 6958 provides for a forfeiture of the office for failing to obey the foregoing provisions. These are all additional requirements to sections 647, 648, and there is no such inconsistency between them as to require the court to hold the former act repealed. The whole subject-matter is not covered by any of this later legislation, and, the acts all being susceptible of standing without impinging on each other, it is the duty of the court to give effect to each of these legislative enactments, and therefore the court holds sections 647, 648 not repealed.

2. Are these statutes unconstitutional?

The State has a right to require its officers to take an oath to support the Constitution of the United States and of the State of Arkansas and to faithfully discharge the duties of the office. This is not denied. The Constitution requires certain officers to be commissioned by the Governor. Some fee has always been attached to official commissions. In early days only the fee to the Secretary of State for affixing the Great Seal, but later an act graduating fees for the various offices, from one to fifteen dollars, was passed. Persons elected to office take the office subject to such regulations, impositions and restrictions as the General Assembly may impose which are not forbidden by the Constitution, directly or by necessary implication. *Hyde* v. *State,* 52 Miss. 665.

It is urged that the constitutional requirement that the Governor commission the officers carries with it an inhibition on the Legislature fixing a fee to be paid for the commission; but it would be a straining of the purport of this clause to construe it into such a prohibition; it was only a mandate that the officers should be commissioned, and that the Governor was to perform this duty. No question of an unreasonable restriction on the issuance of the commission is in this case as there was in *Chism* v. *Martin,* 57 Ark. 83.

The New Hampshire court said: "The choice of a person to fill an office constitutes the essence of his appointment. After the choice, if there be a commission, an oath of office, or any cere-

mony of inauguration, these are forms only, which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable." *Johnson* v. *Wilson,* 2 N. H. 202, s. c. 9 Am. Dec. 50; Mechem on Officers, § 114.

It will be noted that this statute renders commission and oath indispensable to the incumbency of the office. In *State* v. *Johnson,* 26 Ark. 281, it was held that a provision of the schedule of the Constitution of 1868 requiring officers to qualify within 15 days after notification of election or appointment was mandatory.

After a careful and exhaustive review of the authorities, the Nebraska court says: "It will thus be seen that the overwhelming weight of authority under statutes much less mandatory than our own is to the effect that, where a time is prescribed within which one, in order to be inducted into office, must take the oath or file a bond, the taking of the oath or the filing of the bond is a condition precedent to the right to enter upon the office, and that the right is absolutely lost by a failure to perform the condition within the time limited." *State* ex rel. *Berge* v. *Lansing,* 46 Neb. 514, s. c. 35 L. R. A. 124. The statutes at bar are of exactly the same character as those above mentioned, and the foregoing statement is equally applicable to them. It follows that these statutes are valid.

3. This brings the case to the question of whether the Governor could fill the vacancy.

In the case of *Rice* v. *Palmer, ante,* p. 432, the court holds that the amendment conferring the appointing power upon the Governor failed to be adopted.

It is contended that Boyett's having failed to comply with sections 647-648, Kirby's Digest, created a vacancy in the office of assessor, and he, having no right to the office thus lost to him, could not maintain an action against Cowling for it; and has no more right to question Cowling's title to the office than any other citizen. This would be the case if Boyett was not the hold-over assessor. He was in office when this vacancy in the new term was created, and, it not being legally filled, left him in office until a legally elected successor qualified.

The office of assessor was created by section 46, art. 7, Const. and vacancies in all offices created by art. 7 are to be filled by

special election called by the Governor, except when the vacancy occurs in county and township offices within six months and in other offices within nine months of the general election, in which event the Governor appoints for the remainder of the term. Const., art. 7, § 50; Sand. & H. Digest, § 2691 (a section not carried into Kirby's Digest).

The judgment is reversed, and judgment entered here dismissing Cowling's complaint.

Justice WOOD concurs in the judgment, but not in opinion on subject of the effect of the statutes.

Justices RIDDICK and MCCULLOCH concur in opinion except as to that part holding that Amendment No. 3 was not adopted, their views on this subject being expressed in their dissenting opinions in the case of *Rice* v. *Palmer, supra.*

---

78 501
84 307

78 501
f78 573

BAKER v. BROWN SHOE COMPANY.

Opinion delivered April 23, 1906.

1. SALE—ELECTION OF REMEDIES.—A vendor of goods can not at the same time prosecute one suit to recover the price of the goods, and another to rescind the sale for fraud and to recover the goods. (Page 503.)
2. SAME—BURDEN OF PROOF.—Where, in a suit to rescind a sale of goods, evidence is offered to show that plaintiff has prosecuted to judgment a suit to recover the price of the goods, a *prima facie* case of election of remedies is made out, which puts upon the plaintiff the burden of showing that the election was made in ignorance of the facts entitling him to rescind. (Page 503.)
3. ELECTION OF REMEDIES—MISTAKE.—Where the burden is on plaintiff corporation, in a suit to rescind a sale, to show that it has not elected to enforce the sale by suing to recover the price, it is not sufficient to show that at the time the election was made plaintiff's attorney was in ignorance of the facts entitling plaintiff to rescind; it must also be shown that these facts were unknown to plaintiff's officers and agents. (Page 504.)

Appeal from Lafayette Circuit Court; *Charles W. Smith,* Judge; reversed.

Action in replevin by Brown Shoe Company against W. H. Baker, as sheriff of Lafayette County, to recover a lot of shoes, valued at $134, held by the defendant as sheriff as the property of one O. W. Todd under orders of general attachment sued out by creditors of Todd.

The plaintiff recovered judgment below, and the defendant appealed.

Searcy & Parks, for appellant.

1. The evidence was not legally sufficient to sustain the verdict. Fraud is never presumed, and the burden is on the party alleging it to prove it. In this case it devolved on appellee to prove that Todd knowingly made a false statement concerning material facts as to his financial condition.

2. If the goods were obtained fraudulently, appellee waived the fraud by bringing suit, having attachment issued and taking judgment. 1 Benj. on Sales (Corbin Ed.), 580, note 10; Pollock on Cont. 507-8; 2 Chitty, Cont. (11 Am. Ed.), 1089, note M. Where the vendor, after learning of the fraudulent representations, prosecutes his suit to judgment, he thereby ratifies the contract, and loses his right to rescission. 52 Ark. 467; 65 Ark. 278; 3 Johns. Ch. 316; 15 Ill. App. 339; 31 Ill. App. 615; 6 Am. Dec. 158; 7 N. Y. Supp. 857; 6 S. W. 246; 24 N. E. 272; 8 L. R. A. 216; 15 Cyc. 259, Tit. Election of Remedies.

J. M. & R. L. Montgomery, for appellee.

The evidence was legally sufficient, and, since appellee's attorney, as soon as he received the financial statement made by Todd, learned of the fraud and that the goods were in the hands of the sheriff, went to the justice of the peace, and directed him to dismiss the attachment suit, appellee's right of rescission was not lost.

McCULLOCH, J. Appellee sold the goods in controversy to Todd, and demands a rescission of the sale, and seeks to recover the goods on the ground that the sale was induced by a false and fraudulent written statement made by Todd at the time of the sale. Todd failed in business subsequent to the purchase from appellee, and his property was attached for debt by his creditors.

Appellee is a Missouri corporation, domiciled at St. Louis, and on January 26, 1904, through its attorney at Lewisville in

Lafayette County, commenced an action before a justice of the peace against Todd to recover the price of the goods sold, and sued out an order of general attachment against the property of the latter. This was shortly after other creditors of Todd had commenced actions, and sued out attachments, and caused same to be levied.

Judgment was rendered in favor of appellee against Todd on February 6th for the amount of the debt, and the record of the judgment bears an indorsement dated Feburary 16th of satisfaction in full.

A transcript of those proceedings was introduced in evidence in this suit, and appellant, among other things, defended on the ground that appellee, by commencing suit for the price of the goods and by prosecuting the suit to judgment, ratified the alleged fraud in the procurement of the sale, and waived its right to treat the sale as rescinded and sue for the goods. *Bryan-Brown Shoe Co.* v. *Block,* 52 Ark. 467.

Appellee, in order to escape the binding effect of its former election to sue for the price and waive the fraud, undertook to show that the election of remedies was made without knowledge of all the facts, and that it was not therefore bound by the same. *White* v. *Beal & Fletcher Gro. Co.,* 65 Ark. 278; *Dudley E. Jones Company* v. *Daniel,* 67 Ark. 206.

In order to establish such lack of knowledge, the attorney for appellee who brought the two suits testified that he was authorized by appellee to commence the first suit, but that he did not then know of the existence of the alleged false statement made by Todd to appellee; and that, as soon as the same was forwarded to him by his client, he commenced the present suit. He does not say that he instructed the justice of the peace to dismiss the attachment suit, but he does testify, in response to a question asked him on cross-examination by appellant's counsel as to whether or not he had taken judgment in the attachment suit on February 6th, which was two days after the commencement of the replevin suit, "Yes, sir; the court did that." Doubtless, the jury understood this to mean that the justice of the peace rendered the judgment without authority from him. While the statement of the witness may fairly bear that construction, yet it nowhere appears in the testimony that appellee's attorney dismissed the

attachment suit or authorized its dismissal before the commencement of the replevin suit, or that anything was done in that direction until the attorney's indorsement of satisfaction was made on the record on February 16th, which was after the trial of the replevin suit. So far as appears from the record, appellee was at the same time prosecuting both suits, one to recover the price of the goods and the other to recover the goods. This could not be done, as the two remedies were inconsistent.

The evidence falls short of sufficiency, in another respect, to support the verdict. Appellee's attorney, who testified in the case, said that he commenced the replevin suit as soon as he received the alleged false statement made by Todd. This testimony shows that the attorney did not have the statement in his possession when he commenced the attachment suit, and that he was ignorant of its existence at that time. But, whether he knew of its existence at that time or not, his client had possession of the paper when it authorized the bringing of the suit, and of course was bound to know its contents. Appellee can not plead ignorance of that fact.

Moreover, when appellant introduced the record of the former suit brought by appellee to recover the price of the goods, a *prima facie* case of election of remedies was made out, and put the burden upon appellee of showing that the election was made in ignorance of the facts concerning its right to adopt another remedy. To escape the effect of the election, it was incumbent on appellee to show ignorance either of the statement made by Todd or of its falsity. Nor was it sufficient to show merely that the attorney who acted for appellee was ignorant of these facts. Appellee was bound by the knowledge of its officers and agents, as well as of the attorney acting for it in this suit; and until it is shown by competent evidence that appellee's officers and agents did not have information of these facts when the attachment suit was commenced, it is concluded by the election of remedies thus made.

The testimony wholly failed to bring appellee within the rule laid down in *White* v. *Beal & Fletcher Gro. Co.,* and *Dudley E. Jones Company* v. *Daniel, supra.*

On account of the insufficiency of the evidence in this re-

spect, the judgment is reversed, and the cause remanded for a new trial.

WOOD, J., not participating.

ARKADELPHIA LUMBER COMPANY *v.* SMITH.

Opinion delivered April 23, 1906.

1. MASTER AND SERVANT—SAFE APPLIANCES.—Where, at the time a servant was employed, the master undertook to furnish him a handcar and a railway track to transport him to his home after his day's labor, it is immaterial that the track belonged to a separate railroad company, and the master became liable to the servant in the same manner and to the same extent as if the railroad had belonged to the master. (Page 510.)
2. SAME—LOGGING ROAD.—Although a logging road is not expected or required to be laid with the same care and security, or to be as solid and complete, as is demanded in the construction of railway tracks in use by common carriers, nevertheless it should be so constructed and operated as to render it secure to those whose employment necessitates their going upon such road and performing services in connection with the same. (Page 510.)
3. SAME—STRUCTURAL DEFECT.—Evidence which tended to show that, at the place where plaintiff was injured by the derailment of the handcar on which he was riding, an old rail had shortly before been laid which had six or eight inches of the ball broken off, thereby causing a low joint, and that this was the proximate cause of plaintiff's injury, was insufficient to prove a structural defect for which the master would be liable without previous notice. (Page 511.)

Appeal from Clark Circuit Court; *Joel D. Conway,* Judge; affirmed.

J. H. Crawford, for appellant.

1. This case is distinguishable from 53 Ark. 347 and 70 Ark. 290, relied on by plaintiff, in that in each of those cases the plaintiff was injured in the course of his duties, while at the work he was employed to do, at a time when he was upon tracks over which the railway company operated trains under contract with the owner, while in this case the employees of one company

used at their own request a handcar upon tracks of a railway company, a stranger, for their own convenience. Plaintiff is not entitled to recover. 64 N. E. 587.

2. If any duty devolved upon defendant with reference to the tracks, there is no proof that defendant knew, or by the exercise of ordinary care ought to have known, of the defect. 46 Ark. 555; 41 Ark. 579; 54 Ark. 395; 67 Ark. 303; 17 L. R. A. 450.

3. The same degree of care and security is not required in the laying of log roads as in roads of common carriers, nor are they required to be operated with the same degree of prudence. The care required depends upon the character and nature of the work to be done. 29 So. 874; 46 Wis. 497; 18 N. W. 584. If the track is such as to be used without danger by the exercise of ordinary care, the master has discharged his duty, and is not liable for accidents. 37 Am. Rep. 686; 17 L. R. A. 452. See also 35 Ark. 615.

4. Appellee, being familiar with the track and the kind of rails used in it, assumed the risk of injury. 4 Thomp. Neg. § 4643; 48 Ark. 333; 40 Mich. 247.

5. Instructions should not be based upon unproved hypotheses. 41 Ark. 392. It is error, in instructions to the jury, to assume as true the existence of facts in issue. 24 Ark. 540; 33 Ark. 375; 45 Ark. 256. If an injury is caused by a defect common to railroads, and could not have been avoided by reasonable care, the defendant is not liable. 48 Ark. 475. Defendant's first instruction should have been given. 7 S. E. 283.

Smead & Powell and *McMillan & McMillan,* for appellee.

1. It is in evidence, uncontradicted, that appellant furnished the handcar and the track. It was the custom of appellant to furnish handcars to its employees, and it was understood, when appellee was employed, that he was to be furnished transportation to and from his work. This case is controlled by 53 Ark. 347, and 70 Ark. 295. Whether the plaintiff was in the employ of the appellant at the time of the accident was a question of fact for the jury. 17 Wall. 509. Appellee, under the facts, was in the employ of the appellant at the time the injury occurred. 87 Am. Dec. 635; 10 Cush. 228; 14 Gray, 446; 23 Pa. St. 384; 5 Am. St. Rep. 178.

2. The proof shows that the track could have been laid and maintained in a reasonably safe condition, and appellant owed this duty to the appellee. It was for the jury to say from the evidence whether appellant knew of the defect, or in the exercise of ordinary care and diligence ought to have known of it. 46 Ark. 568. The evidence being legally sufficient to sustain the verdict, it will be upheld. 51 Ark. 467; 23 Ark. 131. A new trial will not be awarded unless there is a total want of evidence to sustain the verdict. Crawford's Digest, 146. See also 89 S. W. (Ark.), 468; 57 Ark. 461; 66 Ark. 363; 88 S. W. (Ark.), 824.

3. It is not as to the general condition of the track, but where the accident occurred, that plaintiff complains, and says the track was defective. The proof is conclusive that there was a defective rail, low joint and swinging joint. The appellant should have known of its existence, and of the increased danger to appellee resulting from it. 57 Ark. 382. If appellee was injured by reason of appellant's negligence in not maintaining a reasonably safe spur track, he is entitled to recover, unless he was guilty of contributory negligence which proximately caused the injury. 48 Ark. 345; 87 Am. St. Rep. 559 and note; 92 Am. Dec. 206 and note; 152 U. S. 689; 57 Ark. 377.

4. Appellee was not required to inspect the track before using it. He could rely upon the master to furnish a reasonably safe track. The fact that he knew that the track was laid on the ground, and that worn rails were used, would not prevent his recovering. Appellant ought not to have placed this rail in the track, because there was "an apparent cause of danger in its continued use." 35 Ark. 615; 18 Am. St. Rep. 729; 92 Mo. 440; 85 Am. Dec. 720; 57 Ark. 160; *Ib.* 383; 18 S. W. 977; 60 Ark. 438; 87 Mo. 545.

5. If the instructions given at appellee's request are in the abstract right, as admitted by appellant, there is no reversible error, unless appellant had asked and been refused more special instructions. 56 Ark. 602. Instructions are to be taken as a whole and construed together. 48 Ark. 407.

BATTLE, J. On the 15th day of October, 1900, Oscar Smith was seriously injured while in the service of the Arkadelphia Lumber Company. He brought this action against the lumber company to recover damages sustained by reason of the injuries.

The lumber company is a corporation, and owned and operated a saw and planing mill at Daleville, in Clark County, in this State, on or near the railroad of the Ultima Thule, Arkadelphia & Mississippi Railway Company, and was engaged in the manufacture of lumber. A lateral railroad was constructed from the main line of the railway company to and into the timber lands of the lumber company, and was used in transporting logs from the lands of the lumber company to its mill to be manufactured into lumber. Its track was temporarily laid, and in such manner as to be removed to the timber of the lumber company on different tracts of land with the least expense. Plaintiff and many others were employed by the defendant, and were engaged in hauling logs to various places on the lateral railroad by means of teams and wagons.

The evidence in this case tended to prove that the defendant owned and furnished railroad handcars to its teamsters at the close of the day to convey them from their work to their respective homes over the railroad, and that it was understood when a teamster was employed that he would be furnished with a handcar for such a purpose, and it was so understood when plaintiff was employed; and that when the lateral road was constructed it furnished such cars to its teamsters for transportation over it to their homes after each day's work was done.

On the 15th day of October, 1900, the defendant furnished plaintiff and four other teamsters with a handcar to carry them to their homes over the lateral road. They boarded the same, and were propelling it over the lateral road at the rate of six or eight miles an hour, when it ran off the track, and violently threw the plaintiff to the ground, and seriously injured him. There was evidence tending to prove that at the place where the accident occurred the track of the lateral road had been recently laid, and an old rail, worse than the other rails on the track, with the ball or T thereof broken off for eight or ten inches, formed a part of the track at the time it was laid, and that there was a low joint in this part of the track; all of which was a defect in the construction of the track. There was also evidence tending to prove that this defect was unknown to the plaintiff at the time of the accident, and that he was making his third trip over the same when he was injured.

D. B. Hart testified that he was a tracklayer on the lateral road at the time plaintiff was injured, and as such was in the employment of the defendant.

W. E. Hubbard testified that he was an engineer operating an engine on the lateral road, and was in the employment of the defendant and of the Ultima Thule, Arkadelphia & Mississippi Railway Company.

The court instructed the jury at the request of plaintiff, over the objections of the defendant, in part, as follows:

"1. If you find from the testimony that the handcar and roadbed were furnished plaintiff by defendant or by the defendant's foreman, Will Richardson, then the source of its title to said roadbed, whether owned by the defendant, leased, borrowed or otherwise placed in his possession for use, is wholly immaterial. As between plaintiff and defendant, the roadbed is the property of the defendant.

"2. It was the duty of the defendant to exercise ordinary care and diligence to provide a reasonably safe track at this place for the use of the plaintiff; and if it failed to perform that duty, and plaintiff was injured by reason of such failure, then the plaintiff may recover, unless he was guilty of negligence which contributed to his injury, or knew or ought to have known of the defects of the track before attempting to use it.

"3. If, under all the circumstances which surrounded the plaintiff at the time of the accident, he ought to have observed and comprehended the danger of a defective rail and joint, if the same were defective, before using it [them], then he assumed the risk in that condition, and can not recover. The fact that he might know of the defects, or that he had means of knowing them, will not preclude him from recovery, unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them."

And refused to instruct the jury, at the request of the defendant, as follows:

"1. It is admitted in this case that the Ultima Thule, Arkadelphia & Mississippi Railway Company and the Arkadelphia Lumber Company are separate and distinct corporations, incorporated by and under the laws of this State, and the plaintiff must be held to a knowledge of the fact that the railway company,

and not the lumber company, was operating the railroad, and in going upon said road in a handcar he assumed all the risk arising therefrom."

The jury returned a verdict in favor of the plaintiff for $3,000, and the defendant appealed.

While appellee was going home after his day's labor was done, he was still in the service of the appellant. He was traveling in a handcar furnished by appellant according to their implied contract; and the duties of the one to the other for the day, as master and servant, were not fully discharged. *Gilman* v. *Eastern R. Corp.,* 87 Am. Dec. 635; *Gillshannon* v. *Stony Brook R. Corp.,* 10 Cush. 228; *Seaver* v. *B. & M. Rd.,* 14 Gray, 466; *Ryan* v. *Cumberland, etc., R. Co.,* 23 Pa. St. 384; *Ewald* v. *Chicago & N. W. R. Co.,* 5 Am. St. Rep. 178; *Packet Co.* v. *McCue,* 17 Wall. 508.

Appellant furnished to appellee the handcar and the portion of the lateral railroad used by him at the time he was injured. D. B. Hart was its tracklayer, and as such it was his duty to "keep up" the lateral road at the time appellee was injured. D. E. Hubbard, the engineer who hauled logs over the same, was jointly employed by it and the railroad company. Appellant owned and kept handcars to be used on the lateral road by its teamsters, and it was understood by it and them that it would furnish them with a handcar to convey them over the same from their work to their homes. This was one of the inducements to them to engage in its service. Under these circumstances, when it furnished them with a handcar to be used on the lateral road, it became bound and liable to them in the same manner and to the same extent it would had the road belonged to and been controlled by it. It assumed the same duties and liabilities. *L. R. & Ft. Smith Ry. Co.* v. *Cagle,* 53 Ark. 347; *Arkansas Central Railroad Company* v. *Jackson,* 70 Ark. 295; *Stetler* v. *Chicago & Northwestern Railway Co.,* 49 Wis. 609.

"Although a logging road," it is said, "is not expected or required to be laid with the same care and security, or to be as solid and complete, as is demanded in the construction of railway tracks in use by common carriers, nevertheless it should be so constructed and operated as to render it secure to those whose employment necessitates their going upon such road and perform-

ing services in connection with the same." *Lynn* v. *Lumber Co.*, 105 La. 455; 6 Thompson, Negligence, § § 4254, 4275, 4276.

In this case the evidence tended to prove that the portion of the track where the accident occurred was laid a short time before the injury; that an old rail with six or eight inches of the ball broken off was used in its construction, and that this rail was "worse than the other rails on the track—crumbled, caused a low joint." The jury might reasonably have inferred from the evidence that the defect in the track was made by the construction of it, and not by usage, and that it was the proximate cause of the accident and injury. In that event the appellant was chargeable with notice of the defect, and liable to its employees injured on account thereof, without any previous notice or knowledge of the same.

We find no reversible error in the giving or refusing instructions.

The evidence is sufficient to sustain the verdict.

Judgment affirmed.

BLOCK *v.* SHAW.

Opinion delivered April 23, 1906.

1. SALE—ASSIGNMENT OF FUTURE INTEREST.—The equity rule that a contract for the sale of chattels to be afterwards acquired transfers the beneficial interest in such chattels to the vendee as soon as they are acquired by the vendor is limited to the case of sales of specific articles which, on being acquired by the vendor, can be identified as the very things sold. (Page 514.)
2. SAME—CASE STATED.—Where a dealer in cotton sold a large number of bales of cotton, to be afterwards acquired, to another, and failed after having purchased a large part of the cotton, but without having delivered same to the vendee, the latter will not be entitled in equity to have the contract enforced *pro tanto,* the remedy for the breach of the contract being at law. (Page 515.)

Appeal from Pulaski Chancery Court; *Jesse C. Hart,* Chancellor; reversed.

STATEMENT BY THE COURT.

This was an action in equity by W. K. Shaw against the German National Bank and G. M. Block, trustee in bankruptcy of the George Taylor Commission Company, to enforce an equitable claim of plaintiff to proceeds of certain cotton held by the bank. The chancellor found in favor of plaintiff, and gave judgment accordingly. Block, the trustee in bankruptcy, appealed. The other facts sufficiently appear in the opinion.

Frank B. Coleman and *F. H. Sullivan,* for appellant.

This was an executory contract of sale. 20 Ohio, 304; 1 Mechem, Sales, § 41. No title would pass to appellee until the cotton was segregated and delivered, or something done which in law would be treated as equivalent to delivery. 67 Ark. 138; 1 Mechem, Sales, § § 718, 728, 733. The insolvency of the vendor is one of the risks assumed by the vendee in executory contracts of sale. 67 Ark. *supra.* The case made by appellee does not fall within the exceptions to the rule that equity will not enforce specific performance of a sale of personal property. 27 Cal. 451; 115 Mass. 248; 108 Ill. 197. Insolvency, standing alone, is not sufficient to induce a court of equity to grant relief with reference to an executory contract as to personal property. 10 N. Mex. 543; 93 Fed. 74.

Stewart, Eliot & Williams and *Moore, Smith & Moore,* for appellee.

A contract for the sale of chattels to be afterwards acquired transfers the beneficial interest in the chattels, as soon as they are acquired, to the vendee. Such is the rule in equity. Benjamin on Sales, § 81; 10 H. L. Cas. 191; Pomeroy's Eq. Jur. (2 Ed.), § 1288, footnote; *Ib.* p. 1980, note. The same rule applies to sales of property to be afterwards acquired by the vendor. 1 Pom. Eq. Jur. § 369; 3 *Ib.* § § 1236, 1288; 2 Story, 630; 30 Ark. 56; 24 Am. & Eng. Enc. Law (2 Ed.), 1043. A contract for the sale of goods to be afterwards acquired, provided they are sufficiently described to be identified, transfers the beneficial interest in them as soon as they are acquired; but it is only the equitable interest which passes, and if, before the buyer acquires the legal property, the seller disposes of the goods to a *bona fide* purchaser without notice, the rights of the buyer are defeated. Tiffany, Sales, 25; authorities *supra.* The goods may be recov-

ered, in such case, from one who takes the legal title with notice of the contract between the seller and the first purchaser. 32 N. Y. Misc. Rep. 386 and cases cited. Contracts for the sale of chattels to be afterwards acquired are regarded as equitable assignments, and as such enforced by the courts of equity. Pom. Eq. Jur. § 1288.

Frank B. Coleman and *F. H. Sullivan,* for appellant, in reply.

There can be no relief in equity as to after-acquired chattels, unless the party seeking the relief has paid the consideration. Again, a contract which does not, of itself, identify the chattels, so as to distinguish them from others of its kind, is no more valid to transfer title in equity than at law. 10 H. L. Cas. 191; Tiffany on Sales, 25; Benjamin on Sales (Bennett's Ed.), 86; 2 Lowell, 461. The property must be so described in the contract as to be capable of identification. Authorities *supra,* cited by appellee; 24 Am. & Eng. Enc. Law (2 Ed.), 1043. As to equitable rights to after-acquired chattels, the rights of the transferee are inferior to those of subsequent purchasers and creditors, and a trustee in bankruptcy is accorded the same rights as a creditor to question a claim of this kind. 96 U. S. 486; 171 U. S. 498; 125 Fed. 180; 112 Fed. 308; 115 Fed. 87.

RIDDICK, J., (after stating the facts.) This is an appeal by George M. Block, trustee in bankruptcy of the George Taylor Commission Company, from a judgment rendered by the Pulaski Chancery Court against him and the German National Bank of Little Rock in favor of W. K. Shaw for the sum of $461.84 and for the proceeds of certain cotton held by the bank. The facts, briefly stated, are as follows:

Shaw was a cotton broker of Boston, Massachusetts. The George Taylor Commission Company was also engaged in buying and selling cotton. Its principal office was at St. Louis, Mo., but it had an agent at Little Rock who bought cotton for the commission company to fill its contracts. In the year 1903 Shaw made contracts with certain manufacturers of cotton goods to furnish them cotton. In order to procure the cotton to fill these contracts, he made an offer to purchase from the George Taylor Commission Company about fifteen hundred bales of cotton of a certain grade and staple, known as long staple cotton, at a price of about 12½ to 13½ cents per pound, to be paid on delivery of

cotton. This offer was accepted by the commission company, which agreed to sell Shaw the cotton at the price named. In order to carry out this contract which the commission company had made with Shaw, its agent at Little Rock went into the market there, and from time to time, as he was able to do so, purchased cotton of the grade and staple required by the contract with Shaw. The company borrowed money from the German National Bank of Little Rock to pay for this cotton, and to secure the bank transferred to it the warehouse receipts for the cotton. Three hundred bales of this cotton were shipped to Shaw or to customers of his as directed by him on the contract, but the company failed, and became bankrupt before the other cotton was delivered or shipped to Shaw. At the time the company quit business the bank held warehouse receipts for about 1000 bales of this cotton purchased by the commission company for the purpose of carrying out its contract with Shaw. After selling all but six bales of this cotton, and discharging the debt of the commission company to it, the bank had in its possession a surplus of $461.84, and held bills of lading for the six bales of cotton.

Shaw had paid nothing on his contract, for he was not required to pay until the cotton was delivered. The price of cotton had gone up after his contract of purchase was made with the commission company, and the cotton sold by the bank brought a much higher price than Shaw had contracted to pay for it, and his loss by reason of the failure of the commission company to carry out its contract was probably much greater than the surplus held by the bank after paying its debt.

The question presented by this appeal is whether Shaw or Block, the trustee in bankruptcy for the commission company, is entitled to this money and cotton held by the bank after paying its debt.

There was no delivery of the cotton to Shaw, so as to make him the owner of the legal title thereto; but counsel for Shaw contends that in equity the cotton, so soon as purchased, belonged to Shaw, and that a court of equity will protect this equitable title. They say that, as this particular cotton was bought by the agent of the commission company specially for the purpose of carrying out its contract with Shaw, the case falls within the equity rule that a contract for the sale of chattels to

be afterwards acquired transfers the beneficial interest in such chattels to the vendee so soon as they are acquired by the vendor. Benjamin on Sales, § 81; *Apperson* v. *Moore,* 30 Ark. 56.

It is, no doubt, true, to quote the language of Professor Pomeroy, that "a sale, assignment or mortgage, for a valuable consideration, of chattels or other personal property to be acquired at a future time operates as an equitable assignment, and vests an equitable ownership of the articles in the purchaser or mortgagee as soon as they are acquired by the vendor or mortgagor, without any further act on the part of either; and this ownership a court of equity will protect and maintain at the suit of the equitable assignee." Pomeroy, Equity, § 1288; *Holroyd* v. *Marshall,* 10 H. L. Cases, 191; *Apperson* v. *Moore,* 30 Ark. 56; *Bett* v. *Carter,* 2 Lowell (U. S.), 458; *Morrell* v. *Noyes,* 56 Me. 458. But to have this effect there must be a sale or a contract for a sale of certain specific property. This question was discussed in *Official Receivers,* 13 Appeal Cases, Law Rep. 1888, 533. In that case the question was whether the mortgage of a stock of goods and all book debts which during the continuance of the security should become due and owing to the mortgagor was void as to the future book debts on account of vagueness. The Court of Appeals held that the description was too vague and general, and that no title passed, but the House of Lords reversed this judgment. The judges said, in substance, that, while it might be uncertain when the mortgage was executed what book debts, if any, would come into existence, yet, as soon as these debts were acquired, their identification was complete, and the assignee for value took in equity the same interest as if the debt had been in existence at the time the assignment was made.

As bearing on the case before us, we wish to call special attention to the language of Lord Watson, who delivered an able opinion in that case. "There is," he said, "but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing or as one of the very things assigned."

Now, in this case plaintiff shows that he had a contract with the George Taylor Commission Company to sell him a certain

number of bales of cotton of a particular grade and staple at a price named, but no particular cotton was sold or agreed to be sold. The fact that the commission company or its agent afterwards bought certain cotton of the kind described in the contract, and bought it furthermore with the intention afterwards to deliver it to the plaintiff in performance of their contract, is a matter of no moment, for it was never delivered. If the evidence showed that this cotton was kept by the commission company separate from the other cotton owned by it, this still was not a delivery to Shaw, and the title to this cotton, both legal and equitable, remained in the company up to the time of its failure. The company could, at any time before its failure, have changed its mind, and could have disposed of this cotton in any way it saw fit. It could have delivered other cotton of the same kind to plaintiff in fulfillment of its contract, and he would have had no ground of complaint, for the company, as before stated, never agreed to deliver any particular cotton, but only cotton of a certain grade and staple. It can not be said that this cotton is the identical cotton sold to Shaw or agreed to be sold to him, for, as before stated, his contract calls for no particular cotton, and the facts do not bring this case within the equitable rule referred to.

Plaintiff has neither bought any particular cotton from the company, nor paid anything to the company on its contract for cotton, and there is no reason why a court of equity should interfere in his behalf to give him a preference over the other creditors of this bankrupt company. If he has suffered loss by the failure of the company to carry out its contract, he has his remedy at law, and the insolvency of the company does not change the rule.

If he had purchased or contracted to purchase all the cotton of a certain grade and staple bought by the agent of the commission company at Little Rock during the fall of 1903, and to enable the company to carry out its contract had advanced a large part of the purchase price, a different question would have been presented, for this would have been a purchase for value of certain specific cotton, and not a contract for the purchase of a quantity of cotton of a certain kind only, upon which nothing has been paid or advanced.

In its last analysis this is nothing more than an action for

specific performance of an executory contract for the sale of cotton, an article of commerce which can at all times be bought in the market. Courts of equity do not enforce such contracts, and the remedy for their breach, as before stated, is at law.

In our opinion plaintiff fails to make out a case for the interposition of a court of equity. The judgment in favor of plaintiff is therefore reversed, and the cause remanded, with an order to enter a decree in favor of the appellant, and for other proceedings.

ARKANSAS STABLES v. SAMSTAG.

Opinion delivered April 23, 1906.

78 517
90 56

1. MARRIED WOMAN—LIABILITY AS CORPORATE OFFICER.—A married woman who, as president of a business corporation, neglects or refuses to file the certificate required by Kirby's Digest, § 848, becomes liable, under § 859., *Id.*, for all debts of such corporation contracted during the period of such neglect or refusal. (Page 519.)
2. SAME—NON-JOINDER OF HUSBAND.—Under Kirby's Digest, § 5214, providing that a married woman may sue or be sued alone on account of her separate property, business or services, it was unnecessary, in a suit against a married woman as president of a business corporation to enforce the liability imposed by Kirby's Digest, § 859, to join her husband as a party. (Page 520.)
3. SAME—FAILURE OF JUDGMENT TO SHOW COVERTURE.—A judgment against a married woman will not be vacated under Kirby's Digest, § 4431, because the judgment fails to show that she was a married woman, if there was no error in the proceeding. (Page 520.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield*, Judge; affirmed.

Gus Fulk and *J. H. Carmichael*, for appellants.

1. The statutory liability of the president of a corporation is a secondary liability, in the nature of a suretyship. In this case the president being a married woman, and the liability incurred not being for the benefit of her separate estate, she can not be held liable. 37 Mich. 185; 39 Mich. 671.

2. A married woman is not bound by a judgment against her where her coverture does not appear in the proceeding. 58 Ark. 484.

3. Except in reference to her separate estate, a married woman may not be sued without joining her husband in the suit. Kirby's Digest, § 6017, 6020; 44 Ark. 401; 64 Ark. 385.

4. The evidence is not sufficient to sustain the verdict. This court will reverse where the evidence is contrary to common observation, reason and experience, or carries on its face evidence of its falsity. 56 Ark. 217. See also 57 Ark. 402; *Ib.* 467.

5. A new trial should have been granted because of newly discovered evidence. 66 Ark. 612; 41 Ark. 232.

Eben W. Kimball and *James A. Comer,* for appellee.

1. Nothing in the record discloses that the president of the corporation in this case is a married woman. If the record is silent as to her coverture, the judgment against her is neither void nor erroneous. She may be bound by the judgment where the coverture does not appear in the proceedings. 19 Ark. 241; 39 Ark. 242; 58 Ark. 484, 486. A motion for new trial, after the defendant had appeared and answered, and after verdict, can not be used to vacate a judgment on the ground of coverture not disclosed in the proceedings. Kirby's Digest, § § 4431, 4433; 12 Enc. Pl. & Pr. 942.

2. A married woman may act as an agent or as a trustee. She may act as an officer of a corporation. 97 U. S. 308; 56 Am. Rep. 21. If she is chosen president of a corporation, and acts as such, she is estopped to deny her statutory liability.

3. It was not necessary that the husband be joined in the action. If it were necessary, the objection was waived by failure to raise it by demurrer or answer. Kirby's Digest, § § 6093-6096. It can not be raised after trial has begun. 35 Ark. 363.

4. The court did not err in denying a new trial because of newly-discovered evidence. It was merely cumulative, and offered for the purpose of impeaching evidence of appellee. 14 Enc. Pl. & Pr. 807. And no sufficient showing of diligence was made. 26 Ark. 496; 71 Ark. 65; 73 Ark. 528.

HILL, C. J. Samstag was employed by the Arkansas Stables, a corporation, as bookkeeper. He sued the corporation and the

president thereof, Mrs. Julia Simon, for unpaid wages. The president was sued upon the ground that she had failed to file the annual statement of the corporate affairs required by section 848, Kirby's Digest, and had become liable for the debts of the corporation, as provided by section 859.

No objection was made, until after trial, to the joinder of the causes of action, and none is presented here. The jury returned a verdict for the plaintiff, Samstag.

It is urged that it is not sustained by the evidence, and further that the trial court should have granted a new trial on account of newly-discovered evidence. It would serve no useful purpose to review the evidence on these questions. Suffice it to say that there was ample evidence to go to the jury and support the verdict, and its credibility has been weighed by the tribunal constituted to weigh it. The newly-discovered evidence was all cumulative; and, while it would have strengthened appellant's case, it presented no new features, and much of it was as easily procurable by diligence before trial as after it. Some interesting questions of law are presented.

1. Mrs. Simon, the president of the corporation, is a married woman, and it is contended that this statutory liability is a secondary liability, and in the nature of a suretyship, and not for the benefit of the married woman's separate estate, and her coverture prevents its attaching to her. A married woman, under modern statutes giving her a separate estate, may be a stockholder, director and officer of a corporation. 3 Thompson, Corporations, § 3857; 2 Purdy's Beach on Priv. Corp. § 708.

The rule is that when statutes are general, and apply to and include married women, the courts can work no exception in their favor. This doctrine has been applied by the Supreme Court of the United States in holding married women liable as stockholders in national banks for the liability to creditors of such banks when insolvent, imposed by statute. *Keyser* v. *Hitz,* 133 U. S. 138. Similar statutory liabilities are enforced whenever the question has been raised. 3 Thompson on Corporations, § 3103; 1 Purdy's Beach on Priv. Corp. § 390.

The reasoning which has led the courts to treat married women as stockholders subject to statutory liability necessarily leads to the same conclusion when they assume corporate office.

In virtue of their stockholding, they are eligible to corporate office, which is always desired for its emolument or to protect, care for and watch over the interest in the corporation owned by the officer, or for both reasons. It follows that she is acting in behalf of her separate estate or earning a separate income, and in these respects she is freed of her coverture. Kirby's Digest, § 5214.

2. It is said that a married woman could not be sued without her husband being joined. It is expressly provided that a married woman may sue alone or be sued in respect to her separate property, business or individual earnings. Kirby's Digest, § 5214.

It was no more necessary to join her husband herein than it would be for her to join him in any action she might be capacitated to bring in her official character as a corporation president. See Rodgers, Dom. Rel. § 217.

3. Appellant contends that the pleadings fail to disclose the coverture of Mrs. Simon, which was brought in the case in the motion for new trial for the first time, and that she is entitled to have the judgment vacated under section 4431, Kirby's Digest, as construed in *Richardson* v. *Matthews*, 58 Ark. 484. This statute only applies to erroneous proceedings against married women; and as the court holds it was not error to subject Mrs. Simon to this liability, this statute can not be invoked.

Finding no error in the judgment, it is affirmed.

---

78 520
83 70

78 520
79 245
80 20

78 520
88 531

78 520
89 358

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

Opinion delivered April 23, 1906.

1. RAILROAD CROSSING—DUTY OF TRAVELER TO LOOK AND LISTEN.—While it is the duty of a traveler approaching a railroad crossing to look and listen for trains from both directions, yet, if it appears to him as a reasonably prudent person that greater danger is to be apprehended from one direction than from the other, he may give more attention

to that end of the track from which he apprehends the greater danger, and to that extent may relax his vigilance as to the danger from the opposite direction. (Page 523.)

2. SAME—DUTY TO LOOK BOTH WAYS.—Where a traveler, on approaching a railroad crossing, brought his team to a standstill 25 feet distant from the track, and carefully looked and listened both ways, and no train was in sight for a distance of 200 yards to the west, and none in hearing, and he started across, meanwhile listening for trains and looking toward the east, whence he specially apprehended danger, and was struck by a train coming from the west, the question whether he was guilty of contributory negligence in failing to look to the west while going that short distance was properly submitted to the jury. (Page 525.)

3. INSTRUCTIONS—REPETITION.—It was not error to refuse instructions asked if the court had already given specific instructions on the same subject. (Page 526.)

Appeal from Franklin Circuit Court, Ozark District; *Jeptha H. Evans,* Judge; affirmed.

Oscar L. Miles, for appellant.

1. Under the proof in this case, the physical facts and surroundings of the plaintiff contradict and annul his claim. He was guilty of negligence which contributed to his injury. 4 Elliott on Railroads, § 1703; 38 S. W. 311; 63 S. W. 362; 30 Am. & Eng. Rd. Cas. (N. S.), 94; 23 *Ib.* 373; 67 N. W. 1120; 75 N. W. 169; 65 N. W. 852; 77 N. W. 179; *Ib.* 729; 74 N. W. 360; 70 N. W. 687; 78 N. W. 585; *Ib.* 1084; 80 N. W. 644; 82 N. W. 295. It is settled that a person about to cross a railroad track must look and listen for approaching trains and when, by the due exercise of care in this respect, the danger could have been discovered and avoided no recovery can be had. 65 Ark. 238. And he must continue on his guard against trains from both directions until the danger is past. 69 Ark. 138; 65 U. S. 697; 82 Fed. 217; 130 Fed. 839; 130 Fed. 65; 62 Ark. 158.

2. The case should be reversed for refusal of the court to specifically in each instance state what the law applicable to each phase of the case was. 69 Ark., *supra.*

Sam R. Chew, for appellee.

Appellee's duty on approaching the track to keep a constant lookout for approaching trains was fully submitted to the jury in the second and third instructions of the court. Whether or

not he complied with the duty imposed on him by law as set out in the instructions was a question of fact for the jury to determine from the evidence. If the evidence was legally sufficient, the verdict will stand. 57 Ark. 574; 51 Ark. 324. Upon the contention by appellant that the physical facts of this case contradict the plaintiff, upon the theory that to look was to see and to listen was to hear, it is submitted that the facts in the cases cited are so dissimilar as to be inapplicable. "But, assuming that appellant did in fact hear the approaching train, it does not follow that he was guilty of negligence in proceeding on his way." He could rely on the presumption that appellant would obey the law and notify him of its approach by ringing the bell or sounding the whistle. 88 Mo. 306; 56 Ark. 457. Though a traveler upon the highway is required to make every reasonable effort to see and hear an approaching train, yet he is not, as a matter of law, bound to see and hear it. Whether or not he did see or hear, and used ordinary care in attempting to cross a railroad track at a public crossing, are all questions for the jury. 24 Am. & Eng. R. Cas. 473; 64 N. Y. 524; 76 Pa. St. 157; 69 Ark. 134.

McCULLOCH, J. Appellee, David G. Dillard, sues to recover damages caused by being run over and injured by appellant's train while he was crossing the railroad track in the town of Coal Hill, in Johnson County.

The only question in the case is whether or not he was guilty of contributory negligence in crossing the track in front of an approaching train without observing the necessary precaution of looking and listening for trains. The case was tried upon the testimony of the plaintiff alone as to the details of the injury—no other witness testified as to the occurrence.

The circumstances, as detailed by the plaintiff on the witness stand, were substantially as follows:

The plaintiff was engaged in hauling coal, and on the day of the injury, about 5 o'clock in the afternoon, he was in a two-horse wagon, and drove across the railroad track at a public street crossing in the town. The track at that place runs east and west, and crosses the public street at right angles. Plaintiff was going north, and the train which struck him was crossing from the west. It was running at full speed (about 40 miles per hour), and no signals were given. As plaintiff approached the

crossing, he passed between two houses, one on either side of the public road, the one on the west side being about 50 or 60 feet from the main track of the railroad, and the one on the east side being about 25 or 30 feet from the track. When he passed the house on the west side, he could see down the track in that direction about 150 yards. He looked in that direction, but neither saw nor heard a train, and continued to listen and to look in that direction until he passed the house on the east side. He could then see down the track towards the west about 200 yards. He testified that, as he passed the house on the east side, which put him in about 25 or 30 feet of the main track, he checked his team almost to a standstill, looked up and down the track in each direction, and listened for sound of a train, and, neither seeing nor hearing a train, he released the brakes on his wagon and attempted to drive across the track. He stated that, after passing the last house and after looking both ways, he then turned his attention toward the east, where cars were always switching, and where he expected danger, and that he continued to listen, but did not again look toward the west until the front wheels of his wagon reached the main track, when he again looked to the west, and discovered the approaching engine about 60 yards distant; that it was then too late to turn back, and he whipped up his horses in the attempt to cross, but that the engine struck the rear end of the wagon, and overturned it, and threw him out.

It is contended on behalf of the appellant that if the appellee had looked constantly toward the west he would have discovered the approaching train in time to have avoided being injured, and, having failed to do so, the court must say, as a necessary conclusion from this fact, that he was guilty of negligence.

The proof narrows the omission of appellee to look toward the west down to the period of time consumed in driving about 25 feet after he had checked his team almost to a standstill and looked in that direction where he could see for a distance of about 200 yards, and neither saw nor heard a train coming. The train came in view and was in about 60 yards of him when he looked again. He says that he was listening for a train all the time, and explains his omission to look toward the west during this time by a statement that he was looking eastward where cars were always switching.

Does this necessarily make a case of contributory negligence, or was that a question for determination by the jury?

It is the duty of a traveler approaching a railroad crossing to look and listen in both directions for approaching trains, and to continue his vigilance in that respect until the danger is passed, and he is deemed to have seen or heard that which is plainly to be seen or heard. We have said this so often in recent decisions of this court that the cases need not be enumerated. But the traveler can not look both ways at the same moment, and, as was recently said in a somewhat similar case, "though he was bound to look both ways, the frequency with which he was bound to change his view depended upon circumstances and the probability of danger to be apprehended, and of this the jury were the judges. The law required him to exercise such degree of care in that respect as was reasonably necessary to discover the danger and avoid injury." *Choctaw, O. & G. R. Co.* v. *Baskins, ante,* p. 355.

In another recent case this court approved an instruction which told the jury that it was the duty of the traveler to look and listen for trains from each direction, but that, if it appeared to him as a reasonably prudent person that greater danger was to be apprehended from one end of the track than the other, he may give more attention to that end of the track from which he apprehended the greater danger. *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson, ante,* p. 251.

The court, in discussing the instruction, said: "The instruction does not relieve such person of the duty to look and listen in both directions, but says he may give more attention to the end of the track from which the greater danger is apprehended. This is reasonable, and in accordance with that prudence and care which an ordinarily prudent person would exercise."

It necessarily follows from this that when the circumstances are such as to justify the traveler in giving more attention to the direction in which danger is most to be apprehended, he may, to that extent, relax his vigilance in the direction in which danger is least to be apprehended. When strict attention is demanded, increased vigilance in one direction necessarily requires relaxation of vigilance, to that extent, in the other direction. We would not be understood to mean that a reasonable apprehension

of increased danger in one direction will justify an abandonment of vigilance in the other direction. On the contrary, we say that the obligation rests upon the traveler to constantly maintain his vigilance in both directions, as far as reasonable prudence demands; but this does not mean that he is bound under all circumstances to instantly turn from one direction to the other. If this was the legal requirement, the traveler would be the absolute insurer of his own safety; and if he crosses the railroad track at all, it would be at his own risk, regardless of any negligence on the part of the railroad employees.

Now, in this case we are asked to say, as a matter of law, that, though the plaintiff brought his team almost to a standstill in 25 or 30 feet of the track, and carefully looked and listened both ways up and down the track, and no train was in sight for a distance of 200 yards to the west, and he started across, meanwhile listening for trains and looking toward the east where he especially apprehended danger, he was guilty of negligence in failing to look again toward the west while going that distance toward the track. To so hold would be, we think, to make the traveler the insurer of his own safety and deprive him entirely of the right of recovery for injury caused by negligence of the railroad company unless he kept his eyes turned every moment, under all circumstances, towards the direction from which the train came. It is probable, from the speed at which the plaintiff says he was moving after he passed the last house and started toward the track, that less than a fourth of a minute was consumed in traveling the distance of 25 or 30 feet to the point where he again looked toward the west. Meanwhile he was listening for trains, and was looking in the other direction where he expected switching cars. We will not say, as a matter of law that under those circumstances he was guilty of negligence in failing, during the short space of time which intervened, to again look toward the west. That was a question, under the circumstances, for the jury. It was fairly submitted to the jury, and their verdict acquitting the plaintiff of negligence is binding upon us.

It is insisted that the statements of plaintiff were contradicted by physical facts, and should therefore have been rejected by the jury. Such, however, is not the case. Of course, he could have seen the train if he had been looking in that direction at the mo-

ment, but the train could have come into view and run to the point where he says he first saw it during the short space of time while he was traveling 25 or 30 feet. So, it is not a question whether he spoke the truth when he said that he did not see the engine until it approached in about 60 yards of him, but whether he was, under the circumstances, negligent in failing to look in that direction during that space of time.

The court, on its own motion, gave the following two instructions upon the subject of contributory negligence:

"2. Contributory negligence is the want of that care which the law requires of a plaintiff under the circumstances, and which causes or contributes to the injury sued for. Now, the question for you is, what care for his own safety did the law require of the plaintiff? On that subject I tell you that the law required of him that he should, before attempting to cross the railroad track, listen and look both ways, up and down the track, for approaching trains, and to continue to so look and listen until the crossing was passed; and if he failed to do so, and such failure caused or contributed to his injury, he can not recover.

"3. By the requirement of looking up and down the track for all approaching trains, it is intended that the traveler, as far as an ordinarily prudent and careful man can do, shall have constantly under his eye the whole track, as far as his powers of vision will permit, in order that he may avoid going upon the track at a time when there is danger of his being injured, and the law required the plaintiff in this case to do that, as well as to constantly listen for trains, and if the plaintiff, from the proof, did not do so, then he can not recover; otherwise, he can."

These instructions, in our opinion, fully covered the law of the case on that subject. There was therefore no error in refusing instructions asked by appellant. The same question is not involved here, as in *St. Louis & S. F. Rd. Co.* v. *Crabtree,* 69 Ark. 138, where the court gave general instructions on the subject of the duty of a traveler to look and listen for trains, and refused to give more specific instructions applicable to the particular facts of the case. The instructions given by the court were sufficiently specific to apply to all the facts of the case, and further instructions in varying form and language were unnecessary. The court

is not bound to multiply its instructions on the same subject, and it is bad practice to do so, as calculated to mislead the jury.

We find no error in the record, and the judgment is affirmed.

REYNOLDS v. BLANKS.

Opinion delivered April 23, 1906.

ASSIGNMENT OF CONTRACT—PAROL EVIDENCE OF CONDITION.—Parol evidence is admissible to show that an assignment of a contract absolute in form was intended merely as security for a loan, but such proof must be clear and decisive.

Appeal from Drew Chancery Court; *Marcus L. Hawkins,* Chancellor; reversed.

Knox & Hardy, for appellant.

1. Since there had been no forfeiture declared of appellant's contract up to the time of the assignment, nor any demand upon him for a surrender of the contract, and since appellee received the deed under the contract upon paying the amount due, he would not be permitted to plead a forfeiture made before the execution of the deed, even if it had been made. Equity does not favor forfeitures. 56 Ark. 107; 59 Ark. 405.

2. Oral testimony was admissible to show what the consideration and conditions of the contract were. 53 Ark. 4; 22 Vt. 160; 92 N. Y. 529. If appellant did not understand the contract in the sense claimed by appellee, he can not be held to its performance in that sense, especially since he offers to place appellee *in statu quo.* 52 Ark. 93. He can not be held to the fulfillment of any interpretation of the contract to which he did not at the time give his consent. 7 Am. & Eng. Enc. Law (2 Ed.), 110, par. 3 and note 1; 123 Mo. 352; 17 Ark. 78; 1 Ark. 415; 15 Ark. 555. Before he can be bound in the sense claimed by appellee it must appear that he intended to be so bound. 34 Ark. 303; 52 Ark. 93.

3. The consideration which appellee claims to have paid is of itself so totally inadequate as to show that the transaction was not a sale.

4. The evidence and the circumstances establish the allegation of fraud. It may be presumed from the advantage taken of the appellant. 41 Ark. 186. Since it is proved that appellant was seeking a loan upon the security of the assignment of his bond, if appellee understood it differently, it was his duty to make known his understanding, and his remaining silent, or failing to explain his understanding, was a concealment amounting to fraud. 1 Perry on Trusts (5 Ed.), § 178. If appellee intentionally or inadvertently misled him into believing he was signing the contract as a security for a loan, it is void as a fraud upon appellant. 17 Ark. 498; *Ib.* 71. The relations existing between the parties, the ignorance and mental incapacity of the one and the superior business ability of the other, and the circumstances surrounding the transaction, place the burden on appellee to show that no advantage was taken, and are sufficient to move a court of chancery to relieve against such advantage taken. 1 Perry on Trusts, 275, § 194; *Ib.* 206, § 210; 26 Ark. 604; 47 Ark. 148; 15 Ark. *supra.* By accepting a deed from the vendor, appellee became a trustee for appellant, and can not assume a relation of benefit or profit. 1 Perry on Trusts, 283; § 197; 33 Ark. 465. The most favorable relation he can assert for himself is that of mortgagee. 47 Ark. 528; 52 Ark. 381; 25 Ark. 604. Appellee's conduct, declarations and confidential relations with appellant, whereby appellant was misled, estop him from rights acquired under the assignment or deed to appellant's injury. 33 Ark. 495; 25 Ark. 196.

Wells & Williamson, for appellee.

1. Since the consideration is not expressed in the assignment, it may be proved *aliunde*; otherwise the instrument falls within the rule that oral evidence it not admissible to contradict or vary the terms of a written contract. 15 Ark. 543; 24 Ark. 210; 25 Ark. 191; 30 Ark. 186.

2. The burden is upon the party alleging fraud to prove it to the satisfaction of the court. 1 Perry on Trusts, § 213; 19 Ark. 278; 31 Ark. 163; 48 Ark. 169.

3. The chancellor, knowing the parties and witnesses, after consideration of the testimony and all the circumstances, having found that appellant's proof was not sufficiently clear to

overturn the written contract, his findings and decree should be permitted to stand.

Knox & Hardy, for appellant in reply.

Our courts uniformly hold that the agreement and understanding of parties may be shown, in the interpretation of written contracts by oral testimony, wherever it is necessary to show the real character of the instrument. A deed absolute on its face may be shown to be in fact a mortgage. 23 Ark. 480; 7 Ark. 505; 31 Ark. 62; 51 Ark. 433; 13 Ark. 212. An attempt to enforce a construction of a contract different from that intended, operates as if done under duress or by a person of unsound mind. 7 Am. & Eng. Enc. Law (2 Ed.), 110, par. 3, note 1.

HILL, C. J. Tony Reynolds, a negro, obtained from Wells & Williamson, as agents for a non-resident owner, a tract of 160 acres of land in Drew County. He was to receive deed upon payment of $560 within five years, with interest; and was to pay $75 per annum, as rent, but such rent payments to be credited on purchase price. He paid $178.10, and cleared 40 acres, deadened some 8 or 9 acres, built various houses, cribs and barns, and fencing. The payments for 1899 and 1900 were made; for 1901 was not made, but on March 17, 1902, $28.10 was paid. Neither Wells & Williamson nor their client, the owner, made any effort to enforce the collection or forfeit the contract.

Reynolds and appellee, Dr. Blanks, had a certain transaction, from which arose this law suit, and it was evidenced by this indorsement on Reynold's land contract:

"I hereby transfer to J. T. Blanks all my rights to the within lease.

"Attest: "TONY REYNOLDS."

"E. P. BULLOCK,

"WESLEY MOSS."

Reynolds testified that he borrowed $15 of Dr. Blanks, and made this assignment of his land contract as security therefor, and that the $15 was payable on the 10th of the ensuing December, and if paid his contract was to be returned, and if not paid then this assignment to be operative, and Dr. Blanks to own his rights under the contract. Dr. Blanks's version is that Reynolds sold him his interest under the land contract for $15; that, as Reynolds was in default in not having fully made the annual pay-

ments, he doubted whether Wells & Williamson would accept the purchase price, and Reynolds was to repay by December 10th the $15 if Blanks did not get a deed, and if he did get the deed then the $15 were to be payment for Reynolds' rights under the contract. The case turns on this issue of fact. The two witnesses to the transaction are found arrayed on opposite sides. Bullock, the white witness, sustaining the negro plaintiff, and Moss, the negro witness, sustaining the white defendant.

Bullock's testimony is positive and unequivocal, and consistent throughout; Moss's testimony is seriously impaired by a written statement he signed with Bullock, setting forth the facts as subsequently testified to by Bullock and Reynolds. Bullock testifies that Moss told him, after this written statement was made, and before they testified in the case, that they could make money by changing their testimony. Moss denies this, and says he did not understand the written statement. Moss' testimony was weakened by other inconsistent statements made to disinterested parties. Dr. Blanks testified that the place needed much repair, and that the houses and fencing of little value, and that it would take $350 to put the place in good order, and then it would be worth $1,000. The testimony of Reynolds and two disinterested witnesses fix the value of this land at $1,500 at least. Blanks took the land contract with Reynolds's assignment to Wells & Williamson, and they accepted without question the purchase price, then amounting to $588.46, which Blanks paid and received deed therefor. This suit is to set aside that deed. Proper offer of repayment, demand for deed, etc., were made, and continued in the bill. The chancellor dismissed the bill, and Reynolds appealed.

Reynolds sought to borrow $15 of several parties before he went to Blanks, and he certainly went to Blanks on a borrowing, not a selling, mission. While the attesting witnesses are evenly divided, yet Moss' testimony is so contradicted that it has no value, and the case rests on Reynolds and Bullock on one side and Blanks on the other. Stronger than the number of witnesses is the character of their testimony. Blanks's version of the transaction—that this negro would sell him his rights in this contract, his home and his work for several years past for $15, and then warrant that his rights were still good not-

withstanding his default in full payment by agreeing to repay the $15 if Blanks did not get the deed—is not consistent with common experience and observation in the daily affairs of life, and does not commend itself so strongly that it must be taken against the testimony of Reynolds and Bullock.

The circumstances of the case—Reynolds starting on a borrowing expedition, the vastly disproportionate value of the rights conveyed to the consideration received, and the written statement of both the attesting witnesses shortly thereafter—all go to sustain and corroborate Reynolds and Bullock.

The appellee appeals to the rule that oral evidence is not admissible to contradict or vary the terms of a written instrument. It is as well established as the rule itself that parol evidence is admissible to show that a deed or other conveyance absolute in terms was intended as a security for debt. The evidence to establish this must be clear and decisive, but that is a question of the quantum of evidence, and not of competency of the evidence. The various cases applying this settled rule may be found collected and summarized in Crawford's Digest, col. 698, 699. The court is of opinion that the evidence in this case meets the requirements, and is satisfied that the assignment was not absolute in fact, but was a security for debt.

Reversed and remanded with direction to enter a decree in accordance with the prayer of the complaint.

SCOGGIN v. HUDGINS.

Opinion delivered April 23, 1906.

1. ADMINISTRATION—FOLLOWING LAND DESCENDED.—Lands of a deceased debtor, while held by the heirs, may be subjected in equity to sale for the payment of claims against the estate which accrued after the two years for the probate of claims have expired; but the rule is otherwise if the lands have passed into the hands of innocent purchasers for value before commencement of the suit to subject them. (Page 534.)
2. COVENANT—CONSTRUCTIVE EVICTION.—A judgment against a covenantee in possession upon a foreclosure of a mortgage lien created prior

to the covenant, rendered after notice to the deceased covenantor's personal representative to appear and defend, constitutes a constructive eviction entitling the covenantee to his action on the covenant. (Page 535.)

3. HOMESTEAD—DECLARATION OF LIEN.—Notwithstanding Const. 1874, art. 9, § 3, provides that the "homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon," etc., a court of equity may declare that a claim of creditors is a lien on the homestead of a deceased debtor in the hands of his widow and heirs, but that it shall not be sold until the homestead expires. (Page 535.)

Appeal from Howard Chancery Court; *James D. Shaver,* Judge; reversed.

O. A. Graves, for appellants.

1. Since the administration is still pending, with both real and personal property in the hands of the administratrix unadministered, appellee's remedy is at law against the administratrix. The administrator is not by law compelled to plead the statute of nonclaim or statute of limitations. 14 Ark. 246; 22 Ark. 290; 14 Ark. 309; 27 Ark. 252; Kirby's Digest, § § 56, 59.

2. It was improper to render judgment against the homestead, subject to homestead interests of the widow and minor children. They are not to be disturbed in their possession of the homestead, and the fee can not be sold subject to homestead rights of minors. 51 Ark. 432; 47 Ark. 445; 50 Ark. 329.

3. Appellee purchased, as appears by the proof, with full knowledge of the mortgage held by the building and loan association. Having negotiated the sale, paying off installments to the association as they fell due, and knowing more about the deed than deceased himself, appellee ought not now to be heard to complain.

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

1. All claims are barred after two years from the granting of letters of administration. Kirby's Digest, § 110; 17 Ark. 533; 9 Ark. 411.

2. The action is founded on breach of covenant. In such cases the covenant is not broken so long as the vendee is in possession under his purchase and has not been evicted. 65 Ark. 495; 35 Neb. 521; 52 Neb. 46; 93 Mo. 459; 53 Kan. 560; 40 Fed. 97. This is true, though the covenant was in existence at the

time the conveyance was executed. 91 Tex. 411. Action for the breach may be brought at any time within five years from the eviction. 89 Ky. 52. If a paramount title is so asserted as that the covenantee must yield to it, his remedy is complete against the covenantor. 52 Ark. 322; 59 Ark. 629, 634; 40 Minn. 94; 11 N. H. 74; 100 Ala. 553; 82 Tex. 411; 43 La. Ann. 488; 32 Ia. 71. It is not necessary that the covenantee permit a sale under the superior incumbrances, but he may pay the incumbrance when judicially declared, and have his action for damages on the covenant. 59 Ark. 629; 62 Ia. 321; 10 Heisk. (Tenn.) 384. The cause of action on the covenant is complete in all cases where the covenantee is notified to defend and fails to do so, and judgment of ouster is rendered against the vendee. 52 Ark. 322; 2 Lea (Tenn.), 533; 89 Ky. 52; 102 Tenn. 428. See also 70 Ill. App. 33.

3. The deed speaks for itself, is the consummation of the verbal contract, and takes the place of it as a higher evidence of the contents and effect of the agreement. 5 Ark. 179 *et seq.; Ib.* 651; 13 Ark. 496; 15 Ark. 543; 24 Ark. 210; 29 Ark. 544; 30 Ark. 186; 31 Ark. 411; 35 Ark. 156.

BATTLE, J. J. J. Hudgins brought a suit against the heirs of W. G. Scoggin, deceased, to subject certain lands descended to them to the satisfaction of his certain claim against the deceased.

Sometime in the year 1892, W. G. Scoggin, in consideration of the sum of $75 paid to him by J. J. Hudgins, conveyed a certain tract of land to Hudgins, and covenanted with him that he would forever warrant and defend the title to the land against all lawful claims. At the time of the execution of the deed there was a valid mortgage on the land in favor of the Southern Building & Loan Association to secure an indebtedness of $350. Thereafter Scoggin died intestate, leaving the defendants, his heirs, surviving him; and on the 19th day of April, 1893, letters of administration were granted and issued to his widow, M. L. Scoggin. Sometime in the year 1900 J. A. Bowman, as receiver of the Southern Building & Loan Association, instituted a suit in the circuit court of the United States for the Texarkana Division of the Western District of Arkansas to foreclose the mortgage on the land in favor of the building and loan association, making

Hudgins and others defendants. When that suit was instituted, Hudgins notified and requested the administratrix of Scoggin's estate to defend against it, which she failed to do. On the 24th day of May, 1900, Bowman, as receiver in the suit instituted by him, recovered a decree foreclosing the mortgage and for $186.62; and on the 10th day of December, 1900, for the purpose of protecting and saving his lands from sale, Hudgins paid the amount recovered by the decree.

Scoggin died, seized and possessed of certain lands described in the complaint. Forty-four acres of this land constituted his homestead, and after his death was occupied as a homestead by his widow and minor heirs. The remainder contained thirty-eight acres. Before the institution of this suit W. M. Greene acquired the interest and share of one of the heirs, Jane Scoggin, in these lands, without any actual or personal knowledge on his part of any claim of Hudgins, vested or expected.

The court found that the administratrix was not a proper party to this action, and that W. M. Greene had acquired and was entitled to hold the interest of James Scoggin in the lands, and as to them, adminstratrix and Greene, dismissed the suit; and decreed that Hudgins was entitled to recover $75 and six per cent. per annum interest thereon from the 10th day of December, 1900, and that the same is a lien on the lands owned by Scoggin in his lifetime, and upon the land occupied by the widow and minors, subject to their rights of homestead; and that, if the $75, interest and costs are not paid on or before January 1, 1904, Hudgins have a special execution against the lands to satisfy his judgment and costs. The defendants appealed.

The administration of Scoggin's estate closed before the accrual of appellee's cause of action, the two years for the probate of claims having expired on the 19th of April, 1895. It is settled by decisions of this court that the lands of the deceased, while they are held by the heirs, may in equity be subjected to sale for the payment of such claims. *Williams* v. *Ewing,* 31 Ark. 234; *Hecht* v. *Skaggs,* 53 Ark. 291; *Berton* v. *Anderson,* 56 Ark. 470, 474. But interests or estates in lands acquired by innocent purchasers for value before the commencement of a suit to charge them with the payment of such claims can not be lawfully or equitably subjected to such charges. *Berton* v. *Anderson, supra.*

Hudgins's cause of action accrued on the tenth day of December, 1900, when he paid the judgment recovered by Bowman, as receiver. He was not bound to wait until he was actually disseized. If he had done so, his right of redemption would have expired, and he would have lost the land, with the right to recover on the covenant of his grantor only a small part of its value. Why submit to such loss? Why wait for the inevitable? Equity does not require such sacrifice. *Collier* v. *Cowger,* 52 Ark. 322; *Dillahunty* v. *Railway Co.,* 59 Ark. 629, 634; 8 Am. & Eng. Enc. Law (2 Ed.), p. 203, and cases cited.

The chancery court virtually declared a lien on the land occupied by the widow and minors as a homestead, and ordered that it be sold subject to such homestead. The Constitution of this State declares that "the homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, except," etc. Const. 1874, art. 9, § 3. But it does not prevent the courts from protecting creditors in their rights in such cases as this. The heirs may sell the lands descended to them to innocent parties for value before the commencement of suits in equity by creditors to subject them to the payment of their claims. Unless the lands constituting the homestead can be held in some way, creditors of a deceased person, holding claims accruing after the close of the administration of his estate, will be left to the mercy of heirs. A declaration that the claim of the creditors is a lien on the land, but it shall not be sold until the homestead expires, would be nothing more than a declaration of the equitable rights of the creditor, and would not interfere, directly or remotely, with the homestead rights, and would be stripped of the evil effects of the liens prohibited by the Constitution, and would not belong to that class of liens.

The cause is remanded with instructions to the court to modify its decree in accordance with this opinion.

HALL & BROWN WOODWORKING MACHINE COMPANY v. LOUISIANA & NORTHWEST RAILROAD COMPANY.

Opinion delivered April 23, 1906.

CONTINUANCE—AMENDMENT CHANGING ISSUES.—Where, after the evidence was closed and the witnesses were discharged, the defendant was permitted to amend its answer to set up a new defense, it was error to refuse plaintiff a continuance.

Appeal from Columbia Circuit Court; *Charles W. Smith,* Judge; reversed.

C. W. McKay, for appellant.

1. After the evidence was closed and the witnesses discharged, it was an abuse of discretion on the part of the court to permit defendant to amend its answer so as to defend on the ground that "plaintiffs failed to give written notice of their claim for damages to it within 36 hours after notice of the arrival of the goods;" and, having permitted the amendment, it was further error to deny plaintiff a continuance in order to prepare to meet this issue.

2. If it is held that plaintiffs have based their action upon the special contract by reason of having filed the bill of lading with the papers, then it is submitted that the limitation of the carrier's liability in the contract is not a condition precedent to plaintiff's right of recovery. 69 Ark. 256. The limiting clause is in the nature of a statute of limitation. Plaintiff's right of action accrued immediately upon the loss of the goods, and plaintiff was not required to wait 36 hours to bring suit. 51 N. Y. 542, 551. If the burden is on defendant to allege and prove the failure to give written notice of the loss, it was error in the court to permit the amendment. In the absence of proof that the goods were not in the car when it was reshipped to State Line, or that they were lost prior to its arrival at Magnolia, the presumption is that they were lost after they were reshipped. Hutchinson on Carriers, 761; 42 Ark. 466; 5 Am. & Eng. Enc. Law (2 Ed.), 357. Defendant could not therefore rely on a limitation of liability in a contract that had expired upon the arrival of the goods at Magnolia. It was error to permit the amendment for this reason.

J. M. Moore, W. B. Smith and *J. M. Moore, Jr.,* for appellee.

1. Appellant is without right to sue. The ownership of the goods passed, upon delivery of the goods to the carrier, from appellant to the consignees, the appellant having reserved no *jus disponendi* in itself. 51 Ark. 133; 44 Ark. 556. Appellant could not, by voluntarily reimbursing the consignees and assuming the loss, be subrogated to their rights against appellee. Sheldon on Sub. § 248; *Ib.* § § 240, 241; 27 Am. & Eng. Enc. Law, 202; Speers, Eq. (S. C.), 31, 37; 18 La. Ann. 705.

2. The trial court has at any time the discretion to permit an amendment so as to include any defense not inconsistent with those already alleged. Kirby's Digest, § 6145. The statute providing for continuance in case of amendment is not mandatory upon the court to grant the continuance, but leaves that to its discretion, upon the party complying with the requirements of the statute. Kirby's Digest, § 6150. Appellant made no showing either that he was surprised or was unprepared to meet the issue. Plaintiff must have known the stipulations in the bill of lading. There is no presumption that an injury to goods occurred at any particular point, or between any particular stations, on the line of a single carrier. Authorities cited by appellant on this point refer to shipments over lines of connecting carriers.

BATTLE, J. This action was brought by Hall & Brown Woodworking Machine Company against the Louisiana & Northwest Railroad Company for the damages sustained by it on account of the loss of parts of machinery shipped in the year 1899 over the defendant's railroad as the last of a line of three connecting carriers. It alleged in its complaint that the defendant undertook to ship certain machinery from McNeil, Arkansas, to State Line, a station on its road, in the State of Louisiana, but negligently failed to carry and safely deliver all of the same to the consignees, J. T. DeLoach & Bro., and lost certain parts thereof, to the damage of the plaintiff in the sum of $155.34. On the second day of September, 1902, in open court, the defendant filed its answer, and denied therein that the machinery was delivered to it, and that it undertook to carry and safely deliver the same to the consignee at its place of destination, and that

by reason of its negligence any part thereof was lost. On the 2d day of September, 1903, the issues in the case came on to be tried before a jury. After the evidence was closed and the witnesses in the case were discharged, the defendant was allowed to amend its answer so as to allege that it was stipulated in the bill of lading given for the shipment of the machinery that "claims for damages must be reported by the consignee in writing to the delivery line within thirty-six hours after the consignee had been notified of the arrival of the freight at the place of delivery," and that if such notice was not given the defendant should not be liable, and to allege that such notice was not given. The plaintiff thereupon moved for a continuance in order to prepare to meet the new defense, and the court overruled the motion.

The court, over the objection of the plaintiff, instructed the jury, in part, at the request of the defendant, as follows:

"3. The court instructs the jury that if they find from the bill of lading introduced as evidence in this cause that it contains a stipulation that claims for damages must be reported by the consignee in writing to the delivery line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery, they will find for the defendant, the Louisiana & Northwest Railroad Company, unless they further find from the evidence that the said J. T. DeLoach & Bro. reported said damages in writing to the defendant within thirty-six hours, as therein stipulated, provided thirty-six hours was a reasonable time, as defined in another instruction given by the court."

The jury returned a verdict in favor of the defendant, and the plaintiff appealed.

After the answer remained on file for one year without amendment the plaintiff had reason to believe no new or additional defense would be pleaded by the defendant. It was guilty of no negligence in failing to be ready to meet the new issue. It was not reasonable to presume that it would be prepared to do so, as it was not, especially after the discharge of the witnesses. Whether it could have done so, it was not allowed the time or opportunity to make the necessary inquiries for information. It was certainly just and right that it should have been

allowed the privilege to do so. The court erred in denying it the privilege.

Reverse and remand for a new trial.

LEIDIGH & HAVENS LUMBER COMPANY v. CLARK.

Opinion delivered April 23, 1906.

SECONDARY EVIDENCE—PRESS COPY OF LETTER.—If it was error to permit plaintiff to introduce a press copy of a letter written by him to defendant, without having notified defendant to produce the original, such error was not prejudicial where the letter was not the foundation of the suit, and where defendant testified that the letter was never received.

Appeal from Polk Circuit Court; *James S. Steel,* Judge; affirmed.

STATEMENT BY THE COURT.

This is an action brought by T. W. Clark in the circuit court of Polk County against the defendant, Leidigh & Havens Lumber Company, a foreign corporation, to recover the sum of $1,849.59 alleged to be due plaintiff for services rendered as agent of defendant. The complaint alleges that for some time prior to November 8, 1902, plaintiff was employed by defendant at a salary of $1,200 per annum as local manager of its mill business in the city of Mena, in Polk County, his duties being confined to the business of the defendant at that place, but that defendant was also engaged in the mill and lumber business extending into Polk, Sevier and Howard counties.

"That on the 8th day of November, 1902, the defendant notified the plaintiff that it had appointed him State agent for the defendant in the State of Arkansas. That on November 10, the plaintiff, by letter, notified the defendant that he would charge the defendant fifteen hundred ($1,500) dollars per annum for his services as State agent, and requested an immediate reply; that upon receipt of the said letter at the office of the said

defendant, in Kansas City, the defendant advised the plaintiff that one of the company would take up the matter personally with the plaintiff, on coming to Mena. That, in pursuance with this promise, Mr. Banks, treasurer of the defendant company, came to Mena, and entered into a verbal contract and agreement with the plaintiff that the defendant would pay him the sum of fifteen hundred ($1,500) dollars per annum for services to be rendered by him as the company's State agent, beginning November 8, 1902. That the said Banks was authorized and did make contracts of employment for the said company in connection with its business in the State of Arkansas, and had authority to make the contract with this plaintiff.

"The plaintiff alleges that, in pursuance to the said contract and agreement with the said Banks, treasurer of the said corporations, as aforesaid, he acted as general agent for the corporation in this State from the 8th day of November, 1902, until the 30th day of January, 1904; and that for the services rendered as aforesaid the defendant is indebted to the plaintiff in the sum of eighteen hundred and forty-nine dollars and fifty-nine cents ($1,849.59); that all of said amount is due and unpaid, and that, though requested so to do, the defendant fails and refuses to pay the plaintiff."

* * * * * * * *

"That when he assumed the duties as State agent he gave his attention to the general business of the company in this State, which required a great deal more time and attention than had been required of him when he served alone as manager of the company.

"That he attended as State agent to the matter of looking after the mills in Sevier County, to the drawing of mortgages, bills of sale, and other contracts and matters to lumber and timber; looked after suits brought by and against the company, and performed such other and customary duties as are usually required of a State agent."

The defendant filed its answer, which, after the denial of any contract with plaintiff to pay him the salary sued for, or any amount as State agent, or that its treasurer, Banks, was authorized to enter into any such contract, set forth the following defense:

"4. And for further answer to the complaint of the plaintiff, the defendant says that on or about the 8th day of November, 1902, the defendant by its president [under] the seal of said company, filed [certificate] in the office of the Secretary of State, designating the plaintiff, T. W. Clark, as its State agent, upon whom service of summons and other process might be had; that Mr. Banks, the treasurer of the company, had nothing to do whatever with the designating of the State agent, and that the only reason that a State agent was appointed by the defendant was for the purpose of complying with the requirements of the law with reference to foreign corporations doing business in this State, and was not for the purpose of enlarging the responsibilities or increasing the duties of the plaintiff, who at the time was the defendant's business manager at Mena, Arkansas, and the defendant says that long before the 8th day of November, 1902, the plaintiff was employed by the defendant at its mill in Mena, Arkansas, as its general manager, upon a salary of one hundred ($100) dollars per month, and that said plaintiff continued in the service of the said company upon said salary until the first day of February, 1904; that the plaintiff, something like a month prior to said first day of February, 1904, resigned his position as general manager for the defendant company at Mena, Arkansas, and was paid in full by the defendant for his services rendered, upon the expiration of his services for the company as such general manager."

The cause was tried before jury, a verdict was returned in favor of plaintiff for $1,500, and the defendant appealed to this court.

Botsford, Deatherage & Young and *J. I. Alley,* for appellant.

1. No notice having been given appellant to produce the original of the letter claimed by plaintiff to have been written by him to defendant, it was error to admit in evidence the letter-press copy.

2. Instructions of the court are erroneous as being inapplicable to the testimony, and misleading because not in accord with the issues raised in the pleadings. 46 Ark. 103; 7 Ark. 474; 25 Ark. 436; 15 Ark. 491; 25 Ark. 405; 63 Ark. 108; 63 Ark. 568. They are also erroneous in submitting to the jury

the question of Banks' authority when the entire case, both on the statutes of the State and the facts in testimony, show that he had no such authority. His authority to make the contract can not be assumed from other contracts made by him, unless the other contracts were of the same character.

3. The court ought to have directed a verdict for defendant on its request. Since the statute creating the position or office of State agent for the service of process upon foreign corporations provides no salary or compensation therefor, the most that plaintiff could claim would be a reasonable compensation for services actually performed; and, since it is neither alleged nor proved that he performed any service as State agent of defendant, the request for peremptory instruction should have been given. 52 C. C. A. 339, 343; 35 Ark. 155; 57 Ark. 465; 5 Ark. 649.

Pole McPhetrige and *Hal. L. Norwood,* for appellee.

1. It is established by the proof that the contract was made by Banks with appellee, that Banks had been held out by the company as having the authority, that he was authorized from the home office to make the contract, and that it was ratified by the company. It is settled that the judgment will not be disturbed where the evidence is legally sufficient to sustain the verdict, nor the verdict disturbed if there is conflict in the evidence. 25 Ark. 474; 23 Ark. 13; 31 Ark. 163; 51 Ark. 467; 57 Ark. 577; 46 Ark. 524; 47 Ark. 196; 50 Ark. 511; 67 Ark. 531. It will not be disturbed though the court may be of opinion that a preponderance of the evidence is against it. 13 Ark. 306, 324; 14 Ark. 419; 18 Ark. 598; 26 Ark. 360; 19 Ark. 119; 22 Ark. 50.

2. Proper foundation having been laid, copies of letters are admissible in evidence, and next to the originals themselves letter-press copies are the best evidence. 9 Am. & Eng. Enc. Law, 898; Wharton on Ev. § 133. Depositing a letter in the postoffice addressed to a party at his place of business is *prima facie* evidence that he received it in the ordinary course of mails. 60 Ark. 544.

3. The law of the case was fully submitted to the jury in the instructions given at the instance of appellant and appellee. They are to be considered as a whole; and, though one of several may have been too limited, or tended to mislead, still if, taken

together, they express the law, and fairly submit the matter to the jury, the verdict will stand. 48 Ark. 396; 24 Ark. 264; 21 Ark. 351; 58 Ark. 353; 59 Ark. 422.

McCULLOCH, J., (after stating the facts.) 1. Learned counsel for appellant ask for reversal mainly upon the ground that the evidence is insufficient to sustain the verdict. Their position, briefly stated, is that the appointment, in compliance with the statutes of the State, by a foreign corporation doing business in the State of an agent upon whom process may be served contemplates the performance of no service or labor except the purely formal one of receiving and forwarding copies of process delivered to the agent; and, as the statute fixes no fee of compensation therefor, none can be claimed.

This contention, however, ignores other facts alleged in the complaint as grounds for recovery. Appellee does not base his claim alone upon the performance of the perfunctory duties of agent of defendant for receipt of process. He alleged in his complaint, and introduced testimony tending to prove, that, at the time of his appointment as agent for that purpose, he was then local manager of defendant's mill at Mena, that his duties were then enlarged so as to include the general management of all the defendant's extensive business in adjoining counties, and that he then demanded, and the defendant agreed to pay him, an additiona salary of $1,500 for the performance of such additional services. He testified that he performed the additional servcies in compliance with the new contract. It is true that these things were disputed by appellant. Its contention in the pleadings and before the jury was that appellee was already employed on a salary of $1,200 per annum as general manager; that the appointment as State agent to receive service of process involved no new duties of a substantial character, and that it made no agreement to pay him an additional salary. But the jury determined these disputed questions of fact upon legally sufficient evidence against appellant, and, under the well-settled practice of this court, we are concluded by the findings of the jury.

The employment of appellee as agent to receive service of process, and with superadded duties as general manager of appellant's business in the State, at a stated salary in addition to the amount he was already receiving, was a matter about which the

parties undoubtedly could contract, and the validity and binding force of their contract in this respect must be recognized by the court. It is entirely erroneous to say, as contended by learned counsel, that, because the statute requiring the appointment by a foreign corporation of an agent to receive services of process fixes no fee or compensation, the parties may not agree upon the payment of a certain compensation, and may not also agree upon the performance of other duties than that of receiving and forwarding copies of served process.

The evidence upon this, as well as all the issues in the case, was sufficient to sustain the findings of the jury, and the verdict will not be disturbed on that account.

2. Appellee testified that on November 10, 1902, he wrote a letter to appellant, the substance of which is set forth in the complaint, notifying appellant that he would demand a salary of $1,500 per annum for his services as State agent, and that he received a reply in due course of mail to the effect that Mr. Banks, the treasurer of the company, would visit Mena in a short time and take the matter up personally with appellee. He testified that a press copy of his said letter to appellant was kept, and the same was read in evidence over the objection of appellant. Error of the court in admitting the letter in evidence is assigned here on the ground that appellant should have first been notified to produce the original letter before a copy could be introduced in evidence but the objection below was placed on entirely different grounds.

Appellee was clearly entitled to make proof of the letter as a preliminary step in the alleged negotiation for increase of his salary. Conceding that appellant was entitled to notice, so that the original could be produced, no prejudice resulted from the failure to give notice, as the officers of appellant company testified that no such letter was ever received, and that they had made search for the same on the files in the office and could not find it. The notice could, therefore, have availed nothing if it had been given.

The contract is not, according to appellee's contention, dependent upon this letter. Appellee testified that the agreement for increased salary was made with Mr. Banks, appellant's treasurer, on the occasion of his visit to Mena in January, 1903.

Banks denied having made the agreement, and denied his authority to make such an agreement with appellee. But there was evidence, sufficient to go to the jury, of his authority to make the contract, as well as the fact that he did make it.

In the trial below the only issues submitted to the jury were whether Banks entered into the alleged contract with appellee for enlargement of his duties and increase of his salary, and whether he had authority to make such a contract for appellant. Both sides accepted these as the only two issues in the case, and both asked instructions thereon which were given by the court. The instructions fairly submitted the issues to the jury, and a verdict was returned upon conflicting and legally sufficient evidence.

Judgment affirmed.

---

78 545
84 328
84 461

78 545
82 527

WESTERN UNION TELEGRAPH COMPANY v. RAINES.

Opinion delivered April 30, 1906.

1. TELEGRAPH COMPANIES—RECOVERY OF DAMAGES FOR MENTAL SUFFERING.—Kirby's Digest, § 7947, which amended the law as to telegraph companies by making them liable in damages for their negligence causing mental suffering accompanied by physical injury, permits a recovery in such cases in the same manner and on the same conditions as other special damages. (Page 549.)
2. SAME—SPECIAL DAMAGES FOR MENTAL SUFFERING—NOTICE.—The liability of a telegraph company for negligence in receiving, transmitting or delivering messages which cause mental anguish depends upon its having had notice, before or at the time of receiving the telegram, of the special circumstances on account of which mental suffering would be caused by negligence in handling the message, and this notice may be given by or through the telegram itself or otherwise. (Page 549.)
3. SAME—NOTICE OF SPECIAL DAMAGES.—A telegram was sent to a physician in following words, "Operate tomorrow. Tell Scott not home until Thursday." The sender at the time notified the operator that the telegram was important. *Held* not sufficient to notify the telegraph company (a) that the operation was a serious one, or (b) that the physician was expected to be present at the operation, or (c) that the operation would be postponed if the surgeon was not present, and that such postponement would cause the sender to undergo mental anguish. (Page 552.)

Appeal from Dallas Circuit Court; *Z. T. Wood,* Judge; reversed.

George H. Fearons and *Rose, Hemingway & Rose,* for appellant.

1. There was no actionable wrong, even for nominal damages. "All messages * * * shall be transmitted in the order of their delivery." Sand. & H. Digest, § 7331. A telegraph company has the right to establish reasonable office hours for its offices. Crosswell on Elec. § § 421, 422; 103 Ind. 505; 107 Ky. 600; *Ib.* 829; *Ib.* 469; 22 R. I. 344; 62 S. W. 136; 31 S. W. 211; 66 S. W. 17; *Ib.* 592; 43 S. W. 1053. The question of the reasonableness of the hours should be decided by the court, and not by the jury. 52 Ark. 406; 55 Ark. 138; 58 Ark. 334; 54 S. W. 963. Testimony that, on certain occasions, messages had been delivered out of business hours was not sufficient to show an abrogation of the rule respecting hours, where it is testified that they were so delivered for accommodation merely. 66 S. W. 592; 62 S. W. 136.

2. Delay in the delivery of a telegram, resulting only in a continuance of existing mental anguish, affords no basis of recovery. 75 Tex. 26; 30 S. W. 1105; *Ib.* 1107; 42 S. W. 549; 44 S. W. 538; 56 S. W. 568; *Ib.* 744; 59 S. W. 1127; 130 N. C. 447; 67 S. W. 515; 54 S. W. 825.

3. If a telegraph company is guilty of negligence, but no injury results therefrom, nominal damages only can be recovered. 58 Ark. 29; 61 Ark. 613.

4. It was error to refuse the sixth instruction asked by appellant. 53 Ark. 434; 35 Ark. 147.

T. B. Morton and *J. T. Richardson,* for appellee.

1. Appellant's agent was told, when the message was delivered for transmission, that it was important, and the message itself was sufficient to put him on notice.

2. Damages for mental suffering for negligence in the transmission or delivery of a telegraphic message may be recovered under the statute, and such recovery is in accord with the weight of authority. Kirby's Digest, § 7947; 103 Am. St. Rep. 955; 6 *Ib.* 864; 18 *Ib.* 148; 92 *Ib.* 366; 57 *Ib.* 204; 34 So. 91. True, it is for the court to pass upon the reasonableness of the

hours, but there is nothing in the instructions complained of opposed to this rule. Notwithstanding appellant's rules as to office hours, if the agent received the message as one to be delivered without delay on account of its importance, it should have been delivered after office hours, regardless of the rules. 12 Ind. App. 136; 124 N. Y. 256; 107 Iowa, 356; 69 Miss. 658; 72 Tex. 654.

3. The sixth instruction asked for by appellant ought to have been given. This is an action for tort, and not on contract. The rule in such cases is, not that the party is liable for such damages only as he can see or is advised are likely to flow from the breach, but that the injured person shall receive compensation commensurate with his loss or injury, and no more. 93 Iowa, 752; Cooley on Torts, 646, 647; Gray on Com. by Tel. § § 81, 82; Wharton on Neg. § 767. Aside from appellee's statement to the agent, the wording of the message was sufficient to put appellant on notice of the importance of prompt transmission and delivery. 82 Tex. 529; 75 Tex. 531; 106 Iowa, 529; 96 Ga. 668; 69 S. C. 531.

BATTLE, J. This action is for damages alleged to have been caused by delay in the delivery of the following telegram:

"Little Rock, Ark. Oct. 19, 1903.

"Dr. March,

"Fordyce, Ark.

"Operate tomorrow. Tell Scott not home until Thursday.

[Signed] "J. M. RAINES."

Plaintiff, J. M. Raines, alleged that this telegram was delivered to the defendant, Western Union Telegraph Company, at its office in Little Rock, Ark., at 6 p. m. on the day of its date, and that, in consideration of fifty cents paid, it undertook to send the telegram promptly; that his wife had been brought to Little Rock for an operation, and that the presence of Dr. March, who was the family physician, was desired, and plaintiff had arranged with the doctor to come upon receipt of a telegram; that the message was received in Fordyce at 7:15 p. m., but was not delivered until ten o'clock the following day, though Dr. March was in town, a few blocks away, expecting the telegram; that the doctor did not receive it in time to get to Little Rock for the operation that day, and it had to be postponed until the next day;

that the operation was a delicate one, and Mrs. Raines was subjected to a nervous strain, which rendered her less able to survive it, and the delay caused plaintiff great mental anguish.

The defendant denied that the message was delivered at six o'clock, but says it was received at Fordyce at 7:15, and denies the charges of negligence.

There was a jury trial, and a verdict in favor of the plaintiff for $500 for injuries to feelings, and $8 for time and expenses.

The facts shown by the evidence adduced at the trial are substantially as follows:

In October, 1903, plaintiff was residing in Fordyce, Ark. His wife had been in bad health for more than a year, suffering with pains in her right side. Dr. March, his family physician, advised him to take her to Dr. Runyan at Little Rock, which he did, leaving Fordyce at noon on the 18th of October, 1903, and reaching Little Rock at about 7 p. m. Dr. Runyan examined her on the next day, and decided that an operation was necessary, and set the 20th of October, 1903, for it to be performed. Plaintiff promised Dr. March that if there was an operation to be performed he would telegraph him, and the doctor agreed, in that event, he would "come up." On the 19th of October, 1903, when the sun set, as shown by the almanac at 5:27 p. m., after sunset, when it was still light enough to see outdoors, but the lights were lit inside, he delivered the telegram sued on to one of defendant's employees, paid for it, and told him it was important, and should be sent promptly. The telegram was received at Fordyce after office hours, and was delivered to Dr. March on the 20th of October, 1903, too late for him to be present at the time the operation was to be performed, and he did not reach Little Rock until the 21st. The operation was postponed on account of the absence of the doctor until that day, when it was performed, and Dr. March was present. Mrs. Raines died the next day. The result of the operation would not have been different, had it been performed twenty-four hours earlier. Plaintiff testified that "the delay in Dr. March's coming and the consequent postponement of the operation and his wife's changed condition caused him the greatest mental suffering."

The defendant asked and the court refused the following instruction to the jury:

"6. A party to a contract is only liable in case of a breach for such damages as he can see or is advised are likely to flow from the breach. In this case there is nothing in the message to indicate that Dr. March was expected to come to Little Rock to attend the operation, or that the operation would be postponed if he failed to come; and it is not shown that the plaintiff communicated either of those facts to the defendant at the time of the delivering of the message for transmission. There can, therefore, be no recovery in this case for more than the price of the telegram."

But the court modified and gave it as follows:

"6. A party to a contract is only liable in case of a breach for such damages as he can see or is advised are likely to flow from the breach; and if you believe from the evidence that there was nothing in the message, nor in the statements and conduct of the plaintiff, to notify the defendant or its operators of the importance of an immediate delivery, and the defendant delivered the same within a reasonable time, then your verdict should be for the defendant."

Should the instruction as asked have been given?

Section 7947 of Kirby's Digest of the statutes of this State provides: "All telegraph companies doing business in this State shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages; and in all actions under this section the jury may award such damages as they conclude resulted from the negligence of the said telegraph company." Before the enactment of this statute this court held "that for mental pain and anguish alone, unaccompanied by physical injury, damages are not recoverable at law." *Peay* v. *Western Union Telegraph Company,* 64 Ark. 538. The statute is an amendment of the law of this State as declared by this court, and makes damages for mental suffering recoverable in the same manner and on the same conditions as other special damages.

The damages recoverable under the statute are such as the jury may conclude resulted from the negligence of the telegraph company. Such damages are allowed as a compensation for the mental anguish or suffering; and the liability of the company for the same depends upon its having had notice, before or at the

time of receiving the telegram, of the special circumstances on account of which mental suffering was caused by negligence in transmitting or delivering the message. This notice may be given by or through the telegram itself or otherwise.

Thompson on the Law of Electricity says: "There can be no recovery for a loss arising from special circumstances not communicated to the company at the time when the dispatch is delivered to it for transmission, or before it has assumed the undertaking, or before the time has elapsed within which it has become impossible for it to perform it so as to avoid loss. Unless, therefore, the language of the dispatch, as delivered to the agent of the company, shows its importance or urgency, this must be specially communicated; otherwise no more than the cost of sending the message which the sender has paid to the company can be recovered." Section 313.

Again he says: "As damages for mental suffering, injury to family affection and the like are given on the footing of compensation, the rule of *Hadley* v. *Baxendale* applies in such a sense that the company, in order to be held liable for such damages, must have had notice, either through the wording of the dispatch or otherwise, of the *special circumstances* in consequence of which a failure to transmit it seasonably and correctly will entail mental suffering; and such we find to be the law, as recognized in several decisions." Section 386.

Crosswell on the Law Relating to Electricity says: "The courts which hold that damages for mental suffering may be recovered in these cases base the recovery, as was stated in a previous section, upon the fact that the language of the message gives direct notice to the telegraph company that the message concerns important social events, and that negligence on its part is likely to be followed by mental suffering and distress to the parties, and that the subject-matter of the contract for transmitting the telegram is a matter of feeling only, and that as damages are allowed for pecuniary loss when the subject-matter of the telegram is a pecuniary transaction, so damages should be allowed for injury to the feelings when the subject-matter of the telegram is a transaction involving feelings." Section 649.

In *Kennon* v. *W. U. Telegraph Co.*, 126 N. C. 235, the court said: "In all the cases in this court (and in all others so far as

our researches go) in which a verdict for damages for mental anguish have been sustained, the telegraph company had notice that a failure to deliver might reasonably cause mental anguish to the sender or sendee, or to some one for whom the sender or sendee was acting as agent. In such case the damages for mental anguish are really actual damages in reasonable contemplation of both parties, if the message should not be delivered."

Again it says: "The messages in regard to which damages on account of mental anguish have been allowed in North Carolina are:

"*Young* v. *Telegraph Co.*, 107 N. C. 370—'Come in haste, your wife is at point of death.'

"*Thompson* v. *Telegraph Co.*, 107 N. C. 449—'Father, come at once, mother is sick.'

"Havener's case, 117 N. C. 540—'Your mother is not expected to live; come at once.'

"Sherrill's case, 109 N. C. 527—'Tell Henry to come home. Lon is bad sick.'

"Lyne's case, 123 N. C. 129—'Gregory met accident; not live more than twenty-four, twenty-six hours.'

"Cashion's case, 124 N. C. 459—'Come at once, Mr. Cashion is dead. Killed while at work.'

"Landie's case, 124 N. C. 528—'Frank dead. Meet depot at Wadesboro. Bury him in Chesterfield. Grave three feet.'

"Dowdy's case, 124 N. C. 522—'Come home at once; baby is very sick.' "

The rule as to telegrams relating to sickness and death, and followed in the North Carolina cases, is stated in *Western Union Telegraph Company* v. *Kirkpatrick,* 76 Texas, 217; 18 Am. St. Rep. 37, is stated as follows: "In telegraph messages conveying information of sickness and death, if the language was sufficient to suggest that a near relationship existed between the person mentioned in the message and the person addressed, and that the object of the communication was to afford the latter the opportunity of going to his relative, it would be sufficient, without further notice, to render the company liable for damages for any mental suffering that should result to him from his being deprived of the consolation which his visit would have afforded, provided

the negligence of the company in failing to make a prompt delivery was the cause of the injury."

In the case at bar the plaintiff can not recover damages on account of the mental sufferings of Dr. March. Was there anything in the telegram to suggest to the defendant that plaintiff would suffer mentally by reason of delay in its transmission or delivery? It (telegram) does not indicate upon whom the operation was to be performed, or that it was to be an important or serious operation, but the contrary. On Monday, the 19th of October, 1903, he telegraphed to Dr. March, "Operate tomorrow. Tell Scott not home until Thursday." The operation was to be on Tuesday, and on Thursday he would be at home, which indicates it was not serious or important, so far as he was concerned, as he did not intend or expect to remain in Little Rock longer than one day after it was performed. There was nothing in it to indicate that Dr. March was expected to be present at the operation, or that it would be postponed if the doctor was not present at the appointed time. It indicated that there was only one thing that Doctor March was required, requested or expected to do, and that was to tell Scott that he would not be at home until Thursday, "and the reference to the operation is apparently a mere explanation of why he could not return till Thursday." The fact that he told the operator that the telegram was important did not indicate that the operation was serious, and that Dr. March was to be present, or suggest that, if he was not, plaintiff would undergo mental suffiering. It could have as reasonably been construed that the message sent to Scott was important.

This action was brought to recover damages for mental suffering of plaintiff. The special circumstances in consequence of which the failure to transmit and deliver the telegram without delay entailed the mental suffering upon plaintiff were as follows: Dr. March was expected to come to Little Rock to attend the operation, or it would be postponed if he failed to do so. These special circumstances, or either of them, were not communicated by the telegram or otherwise to the defendant; and plaintiff was not entitled to recover damages. The defendant asked the court to instruct the jury to that effect, but the court refused to do so, and gave one in lieu thereof which did not inform the jury that plaintiff was not entitled to recover, if the

defendant had no notice of such special circumstances at the time of the delivery of the telegram. The court erred in refusing to give the instruction asked by the defendant.

Reversed and remanded for a new trial.

HILL, C. J., (dissenting.) In this case I think there was sufficient evidence to go to the jury on the question of notice to the company of the special circumstances of the case to render it responsible for the mental anguish resulting from a failure to promptly deliver the message. The message was to a physician, and his title given; its subject-matter was an operation, and the sender told the operator that it was important. Notice to the operator is notice to the company. 27 Am. & Eng. Enc. Law, 1061.

It was not necessary to tell the operator the diagnosis of the physician nor the gravity of the operation. If the profession of the addressee, the subject-matter of the telegram and the statements of the sender were sufficient to give notice to a man of ordinary common sense that the message was dealing with sickness, a dangerous operation or other distressful incident, then the company was sufficiently informed of the special circumtances to render it liable for mental anguish flowing from its failure to promptly deliver. *Kennon* v. *W. U. Telegraph Co.*, 126 N. C. 232; *Darlington* v. *Western Union Tel. Co.*, 127 N. C. 448; *Western Union Tel. Co.* v. *Church*, 57 L. R. A. 905; 27 Am. & Eng. Enc. Law, 1064.

Therefore the court was correct in modifying the 6th instruction as asked by appellant, and leaving this matter to the jury.

---

78 553
p79 94
82 111

LITTLE ROCK RAILWAY & ELECTRIC COMPANY v. DOBBINS.

Opinion delivered April 30, 1906.

1. CORPORATION—LIABILITY FOR MALICIOUS ACTS OF AGENT.—A corporation, as distinguished from an individual, is liable in punitive damages for the malicious acts of its agents, done within the scope of their employment, although such acts were not ratified by it. (Page 560.)

2. STREET-RAILWAY COMPANY—EJECTION OF PASSENGER—DAMAGES.—Evidence that a street-car conductor maliciously and without provocation subjected one of its passengers to humiliating insults, and wrongfully caused him to be arrested and removed from the car in which he was riding, is sufficient to sustain a verdict for compensatory damages in the sum of $500 and for punitive damages in the sum of $250. (Page 562.)

3. SAME—SCOPE OF AUTHORITY OF CONDUCTOR.—A street-railway company is liable for the wrongful acts of its conductor in ordering a policeman to arrest one of its passengers and remove him from the car in which he was riding; but not for such conductor's subsequent acts in prosecuting the passenger for a breach of the peace, such prosecution not being within the scope of the conductor's authority. (Page 562.)

4. APPEAL—ERROR NOT COMPLAINED OF.—Where a complaint against a street-railway company, among other counts, contained one for false imprisonment, and a demurrer to this count was taken under advisement, and was sustained after evidence in support of it had been introduced by the plaintiff, the defendant on appeal can not complain that, in sustaining the demurrer, the court failed to instruct the jury not to consider the evidence so introduced, if he failed to ask that the evidence should be excluded. (Page 564.)

5. TRIAL—INSTRUCTION.—A prayer for instruction was properly refused where it submitted to the jury questions that were not in dispute or that were irrelevant to the issue. (Page 565.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield,* Judge; affirmed.

STATEMENT BY THE COURT.

The complaint was in four paragraphs. In the first, appellee alleged that he entered appellant's car at the Choctaw Depot to become a passenger, and that appellant's conductor, one Barger, "wrongfully and without cause assailed him with offensive and insulting language, and expelled him from the car, and refused to permit him to re-enter it and resume his rights as a passenger thereon, by reason of which he was insulted and humiliated, to his damages in the sum of $1,500.

In the second paragraph, he alleged that he entered one of appellant's cars at or near the corner of Main and Markham streets, for the purpose of becoming a passenger and obtaining proper transfers for himself and family, then on said car, and upon request of the conductor paid the fare. That he asked the conductor for transfers, and that said conductor in an insulting and offensive manner said to him, "I

will give you a transfer," and at once called a policeman from the sidewalk, who arrested him and took him from said car, saying, "We will furnish the evidence," and that said conductor wrongfully and maliciously did assault and lay hand upon him, and forcibly ejected him from the car without his consent, by reason of which he was separated from his family and friends, insulted, humiliated and inconvenienced to his damage in the sum of $2,000.

The third paragraph is a repetition of the second, and in addition sets up that the conductor unlawfully, maliciously, etc., did cause him to be arrested illegally and without warrant and taken into custody and through the principal streets of the city to the police station, and to be forcibly and unlawfully deprived of his liberty and falsely imprisoned, to his damage in the sum of $2,500.

The fourth, in addition to the matters already set forth, charged that appellant did wilfully, maliciously and without reasonable or probable cause, falsely charge plaintiff with disturbing the peace, and caused him to be arrested and taken from the car into custody through the principal streets of the city to the police station and there charged with disturbing the peace, and caused said charge to be entered upon the docket of the police court, so that plaintiff was compelled to answer said charge; that on the next day the defendant, through its said conductor, Barger, and through servants and agents, prosecuted the said charge wrongfully and maliciously and without reasonable or probable cause; that plaintiff was tried and acquitted, and said prosecution then wholly ended and terminated. That said prosecution became widely known, and greatly distressed and humiliated plaintiff, etc., to his damage in the sum of $2,500.

The defendant answered. Thereupon the cause came on for trial before a jury, and, after the plaintiff's opening statement of the case, the defendant, by leave of the court, entered its demurrer in short on the record to the third and fourth counts in plaintiff's complaint, and the court sustained the demurrer to the fourth count, and gave judgment in favor of the defendant, and took under consideration the demurrer to the third paragraph. Thereupon the trial proceeded, and, after hearing all the evidence adduced and the hour of adjournment having arrived, the cause

was continued until the next day. The next day the court, having heard all the evidence and being sufficiently advised as to its ruling upon the demurrer to the third count, sustained the same, and gave judgment thereon in favor of the defendant. And thereupon, after hearing the argument of counsel and the instruction of the court, the jury retired to consider their verdict, and after due deliberation returned to the court the following verdict:

"We, the jury in the case of Dobbins *v.* Little Rock Railway & Electric Company, find as follows: On count one, for the defendant; on count two, compensatory damages, $500; exemplary damages, $250. T. P. Murrey, foreman."

Judgment was entered accordingly against appellant, and it prosecutes this appeal.

The facts as stated by appellee are substantially as follows:

On the 19th of June, 1903, D. F. Dobbins, who was acting as chairman of the committee of arrangements for a picnic excursion given by the Immanuel Baptist Church, was returning with the picknickers, among whom were the members of his family, from an excursion over C., O. &. G. Ry. to Benton, Arkansas. They arrived at the Choctaw depot between five and six o'clock in the afternoon. Four or five street cars were there awaiting the picnic party. They boarded these cars. They were summer cars with seats facing the front platform. Appellee got up and gave his seat to another, and, according to his statement, turned his back toward the front end of the car, and "leaned back on the front 'dash board,'" facing the passengers in the car. The car was crowded, and there were no other seats. He was talking to another passenger, and had not noticed that there was any crank on the car, or that the conductor and motorman were not on the car. He accidentally moved his right arm and touched the controller of the car, and the car moved forward slightly. He saw that he had turned on the power, and immediately jerked the controller back to its place. The car moved some ten or twelve inches. The motorman at that moment came from the sidewalk, and took off his controller, and the conductor stepped up on the car, and ordered him off in a very abrupt and insulting manner.

The witness (appellee) then continued his account of the occurrence as follows:

"He ordered me off, and said that I should know that he was running the car. He said, 'I am running the car, and you will have to get off.' I stepped down, and he stepped down beside me, and I told him I felt very badly about the affair. I said, 'My friends and family are on the car, and I do not want to have any trouble.' I thought I could argue the matter with him, and get on the car, and it would be all settled, but he said in an abrupt way, and using an oath, 'You and your family is nothing to me. You can't ride on this car.' He said, 'You and your family ain't a damn to me' or something of the kind. He spoke in a rough and abusive way, and I felt greatly humiliated. I had entered the car for the purpose of becoming a passenger thereon, and it was an accident that I moved my arm and touched the controller. I explained that to the conductor. I then boarded the first car in front. I live at Eleventh and Ringo, and wanted to go to the western part of the city. I rode on the front car from the Choctaw depot to Main and Markham, where I understood that the car I was on was not the right car for me to go home, and, observing that the car behind me, the one I had got off of, was a West Fifteenth street car, and would pass Ninth and Main, which was my place of transfer, and, my children being on that car, I stepped back on it, for the purpose of going home with them. When I got back on it, the conductor, Barger, immediately came to me and said, 'Do you want to see me?' I replied 'No,' and he said 'Pay your fare,' and I paid him. The car was moving around the Main Street curve, and there was a notice on the car that passengers should ask for transfers at the time of paying their fare. I said to the conductor. 'I would like to have a transfer for myself and children to West Ninth Street line,' and he replied, 'I will give you a transfer; I will transfer you from this car.' The car moved around the curve, and he called for a policeman and said, 'Take this man off the car.' The policeman, accompanied by a man dressed in street car uniform, immediately came from the sidewalk, and got on the car, and the policeman took hold of me by the arm, saying, 'Come with me.' The other man, dressed in street car uniform, accompanied the policeman off the car. The conductor said to the policeman, 'Take this man off the car. We will furnish the evidence.' The policeman was the man who

took hold of me. I never knew the name of the other street car man. He was one of the men who appeared as a sort of a witness in the police court. He did not come to the police headquarters with the officer and me.

"Q. Where did the officer take you?

"A. He took me to the police station."

Counsel for appellant objected to the above question and answer on the ground that it was incompetent, irrelevant, and immaterial, which objection the court overruled, and appellant saved its exception. The testimony for appellant was in direct conflict with the above on material points.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The verdict was excessive, there being no ground for punitive damages. When an agent of a principal acts maliciously, he is presumed to act without authority; and while the agent is liable for punitive damages, the principal is not, unless it appear that he aided, adopted or ratified the malicious act of the agent with a full knowledge of the facts. 63 Ark. 387; 147 U. S. 104; 85 N. Y. Supp. 363.

2. It was error to admit testimony of witnesses in relation to the arrest and prosecution of plaintiff. 65 Ark. 149.

3. The court erred in modifying the tenth instruction asked by defendant and giving it as modified. Appellant had not become a *bona fide* passenger. If he entered the car with improper motives and not in good faith to become a passenger thereon, the relation of carrier and passenger did not exist. This was a question for the jury. 35 Am. Rep. 450; Shear. & Red. Neg. 305, § 262. For definition of "passenger," see 3 Thompson on Neg. 96. § 2634. A passenger rightfully ejected from a car who immediately gets on the car again is a trespasser. 5 Am. & Eng. Enc. Law, 500; 42 Fed. 787. One who boards a car to commit a breach of the peace with the conductor is not a *bona fide* passenger. 8 S. E. 70.

W. L. Terry, for appellant; *Walter J. Terry,* of counsel.

1. Since the court sustained the demurrer to the fourth count of the complaint, and instructed the jury that plaintiff was not entitled to recover damages for his arrest and subsequent prosecution by the conductor as charged in the third and fourth

counts of the complaint, appellant was not prejudiced by admission of evidence in relation to the arrest and prosecution.

2. Appellant's tenth instruction should not have been given as asked, because there was no issue in the pleadings and evidence on which it could be based. 63 Ark. 568. And because it submitted to the jury matters not in dispute, and which, if in dispute, could not affect the conclusion sought to be arrived at. 67 Ark. 147; 69 Ark. 497. See also 70 Ark. 443; *Ib.* 103. It was plaintiff's privilege to obtain a transfer ticket, and it was improper to assume that it was his duty to do so at any time or place. 72 Ark. 295. But, even if it were his duty to get a transfer ticket, that does not affect the question whether or not he did, or could, become a *bona fide* passenger on another car. 26 L. R. A. 222. Error can not be predicated on modification of an instruction which the appellant was not entitled to have given. 70 Miss. 275; 160 Ill. 429. If appellant objected to the instruction as modified, it should have presented one in the form desired, and excepted to the refusal to give it as asked. 26 L. R. A. 223; 60 Ark. 619; 56 Ark. 602; 31 Ark. 167.

If an expulsion was not justified, both the servant and the carrier are liable. 18 N. Y. Supp. 760; 56 Ark. 52; 58 Ark. 140; 62 Ark. 259; 67 Ark. 54. A carrier can not arbitrarily eject a person received as a passenger. 67 Ark. 396.

3. The verdict was not excessive. 71 Ill. 104. In cases of this kind exemplary damages may be awarded against a common carrier, even though not permissible against corporations generally. Mechem on Agency, 603, § 751; 56 Ark. 51; 58 Ark. 140; 67 Ark. 144; 70 Ark. 144; 72 Ark. 661. See also 42 Ark. 329; 1 Joyce on Dam. § 139; 1 Sedgwick on Dam. § 380; Watson on Dam. § 730; 2 Am. Rep. 51; 2 Wood on Ry. Law, 1242, 1243.

WOOD, J. (after stating the facts.) Appellant, with commendable compactness, has comprehended what it desires to say upon the twenty-three assignments of error in its motion for new trial in three propositions, viz.:

1. The verdict was excessive, exemplary damages being erroneously allowed. 2. Improper admission of evidence of false arrest and imprisonment. 3. Error in modifying the 10th prayer of appellant for instruction.

1. The court gave at the instance of appellee the following instruction:

"6. The court instructs the jury that if you find for the plaintiff on the first or second paragraph of his complaint, or on both, you should assess his damages at such sum as you believe from the evidence would be a fair pecuniary compensation to him for the inconvenience, injured feelings, indignity and humiliation suffered by him, if any, by reason of his being expelled, under the circumstances he was, from defendant's car; and, in addition to that, if you believe from the evidence that the act of defendant's conductor in expelling or causing plaintiff to be expelled from said car was malicious and oppressive, then you may add such sum as you may think proper, under the circumstances, by way of punitive or exemplary damages as a punishment for the wrongful conduct of defendant's conductor."

The court refused to give instructions 14 and 15, asked by defendant. They are as follows:

"14. You are instructed that the plaintiff is not entitled to recover exemplary damages in this case.

"15. A street railway company is not liable in exemplary damages for the wrongful act of its employees in ejecting a passenger from its car, in the absence of proof of want of care in the selection of such employees and of authority given it for the commission of the act, or ratification thereof after its commission."

In *Foster* v. *Pitts*, 63 Ark. 387, this court had under consideration the question of whether or not an individual was liable in punitive damages for the malicious acts of his agent in the scope of the agent's authority, and the court said: "When an agent of an individual acts maliciously, he is presumed to act without authority; and while the agent is liable, the principal is not, for punitive damages, unless it appear that he aided, adopted or ratified the malicious act of the agent with a full knowledge of the facts." We cited, to support that doctrine, the case of *Lake Shore, etc., Ry. Co.* v. *Prentice*, 147 U. S. 107, where it is said: "Exemplary or punitive damages, being awarded not by way of compensation to the sufferer but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal,

therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, can not be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. * * * The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of corporations, in the course of its business, and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances."

Counsel for appellant rely upon these cases to support their contention that exemplary damages could not be awarded in this case, and that the court erred in giving the instruction for appellee and in refusing the prayers of appellant, *supra.* But the above cases are not applicable here. The Supreme Court of the United States makes no distinction between individuals and public carriers of passengers, in holding that such corporations, like an individual, can not be held liable in exemplary damages for the malicious acts of its agents which it had not authorized or ratified. *Lake Shore, etc., Ry. Co.* v. *Prentice, supra.* This court, while enforcing the above rule as to individuals (*Foster* v. *Pitts, supra*), has applied a different rule in the case of railroad corporations. Such corporations are liable in punitive damages for the wilful, wanton, and malicious conduct of their agents and servants in the line of their duties. *Citizens' Street Ry.* v. *Steen,* 42 Ark. 321; *Railway* v. *Hall,* 53 Ark. 10; *Railway Company* v. *Davis,* 56 Ark. 51; *Fordyce* v. *Nix,* 58 Ark. 136; *St. Louis, I. M. & S. Ry. Co.* v. *Power,* 67 Ark. 142; *St. Louis, I. M. & S. Ry. Co.* v. *Wilson,* 70 Ark. 136-144.

This rule as to carriers of passengers is grounded on public policy. Chief Justice Wood in the case of *Pullman Palace Car Co.* v. *Lawrence,* 74 Miss. 803, declares the rule and the reason therefor as follows: "It is argued that vindictive damages are in their nature penal, and that no one should be liable to punishment unless the act complained of is his own act, made so by his authorization or ratification of it when committed by the servant, and that it is illogical for the courts to do anything punitive in character unless the master is directly and personally responsible

for the very act complained of. The sufficient answer to this contention is that the judge-made law of punitive damages is not the result of logic, but of public necessity, as text writers and courts have repeatedly shown. If corporations—artificial beings who can act only through agents and servants in their varied and multitudinous and constantly recurring business dealings with the public—can never be held liable in punitive damages for the acts of their servants unless expressly ratified by them, no matter how gross and outrageous the wrongful act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations. Corporations never expressly authorize their servants to beat or insult or outrage those having business relations with them, and they rarely ratify such conduct. Having by the constitution of their being to act solely by agents or servants, they must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrongs while performing the master's business and in the scope of their employment, and this to the extent of liability for punitive damages in proper cases."

This doctrine, although apparently in conflict with the decision of the Supreme Court of the United States, is supported by the majority of the States that have announced a rule upon the subject, and is in accord with our own views, as announced in several cases, *supra.* In addition to these cases and the authorities cited in them, see 1 Joyce on Dam. § 139 *et seq;* Watson on Dam. and Personal Inj. § 730, and numerous authorities cited in notes. See also 2 Redf. Rys. § 203, note 1; Hutch. on Car. § 815; 2 Wood, Railroads (Minor's Ed.), pp. 1416-17.

Accepting appellee's version of the manner of his expulsion from the car by appellant's conductor, which the jury has done, the evidence was sufficient to warrant a verdict for punitive damages. Nor can we say that the amount was excessive.

While the verdict of the jury eliminated the charge made in the first count, still we are of the opinion that what took place at the depot between appellant's servants and appellee was admissible. What appellant's conductor said and did there tended to show the animus of his conduct at Main and Markham, where the last expulsion took place. The motive of the conductor when

he ordered the arrest of appellee at Main and Markham was of vital inquiry on the question of punitive damages, and the "frame of mind" he was in just the few minutes before at the depot, as evidenced by what he did and said there and then, tended to show the intent which characterized his act at Main and Markham. Accepting the statement of appellee as true, the conductor was angry at the depot when he found that appellee had moved his car, so much so that he was unnecessarily rude and insulting, and not disposed to receive explanations and amends, however reasonable and sincere. When appellee re-entered the car at Main and Markham, and asked appellant's conductor for a transfer, his uncivil reply and the peremptory manner in which he demanded that appellee be taken from the car showed that his anger, previously aroused, had not yet abated.

Looking at the testimony from the viewpoint most favorable to appellee, there was evidence to warrant the conclusion that appellant's conductor subjected appellee, one of its passengers, to humiliating insults and indignities in the presence of his family and friends. These were begun at the depot soon after appellee entered the car, and were repeated a short while after at Main and Markham. The jury might have found from the testimony that appellee was sober and well behaved throughout, that the movement of the car caused by the appellee was unintentional, and furnished no provocation whatever for the rough treatment he received at the hands of appellant's conductor.

The court properly instructed the jury upon the subjects of compensatory and punitive damages, and the jury were warranted in finding that the conduct of appellant's conductor in the line of his duty was wilful, wanton and malicious. Therefore we will not disturb the verdict. Nor can we say, in view of the duty of street car companies to protect its passengers from insult and injury, especially at the hands of its employees, that the verdict was excessive.

2. Appellant complains because the court permitted evidence showing that appellee was arrested at the instance of appellant's conductor and taken before the police court to be prosecuted for breach of the peace. The court properly sustained the demurrer to the third and fourth paragraphs of the complaint, which sought to hold appellant liable for the prosecution insti-

gated by its conductor against appellee for breach of the peace. *Little Rock Traction & Electric Co.* v. *Walker,* 65 Ark. 149. And the court erred in not sustaining the demurrer to the third paragraph before the evidence of such prosecution was admitted, and should not have permitted such evidence to go before the jury. The court, however, corrected the error, at first committed, before the cause was argued and submitted to the jury by this instruction, viz.:

"You are instructed that the plaintiff is not entitled to recover damages of the defendant company for his arrest and subsequent prosecution by the conductor, as charged in the third and fourth counts of his complaint, and you will therefore find in favor of the defendant on both of said counts."

Counsel urge that, in addition to this instruction, the court should have at least warned the jury not to consider such evidence in determining the questions submitted on the other paragraphs. If the counsel had so requested of the court, doubtless their request would have been granted. If they had made such specific request, and the court had refused to grant it, they would have more reason to complain here. True, they objected to the testimony at the time it was offered, and the court did not then discover the error of its admission. Afterwards, when the court sustained the demurrer to the third paragraph of the complaint, counsel did not then ask of the court to exclude the evidence here complained of; and when counsel in the instruction above called attention of the court to the error of permitting a recovery for the prosecution before the police court, the circuit court promptly granted the request. It appears to us that this instruction was intended by counsel and by the trial court to remove entirely from the consideration of the jury the evidence of the proceedings before the police court for any purpose whatever in the questions the jury were to determine. The evidence of this prosecution could only have been introduced as responsive to the third paragraph of the complaint; and when it was taken from the jury, as it was, by this instruction, everything connected with it and based on it went out with it.

The evidence, so far as it related to the arrest of the appellee on the car by the policeman at the request and direction of the conductor, was proper, for this was the method adopted by

the conductor for the ejection of appellee from the car, and was therefore an act in the scope of the conductor's employment.

3. Instruction number ten as asked by appellant* was obnoxious, in form, to the suggestions of this court in *Pacific Mutual Life Ins. Co.* v. *Walker,* 67 Ark. 147, and *St. Louis, I. M. & So. Ry. Co.* v. *Tomlinson,* 69 Ark. 489-97, inasmuch as most of the first part of the instruction submitted to the jury propositions as hypotheses that were not in dispute, or that did not and could not affect the question of appellant's liability or nonliability, and, as was said in *Ins. Co.* v. *Walker, supra,* "the incorporation of all of them in a single instruction tended to make it of unusual length and more or less confusing to the jury." But the fatal objection to the instruction is that it is based upon the theory that appellee never became a *bona fide* passenger, and was therefore not entitled to recover. We find no warrant in the pleadings or proof for the submission of such issue to the jury. Appellee in the first and second paragraphs of his complaint, upon which, and the answer thereto, the issue was made and the cause finally submitted, alleged that he "entered one of defendant's cars for the purpose of becoming a passenger thereon," and "that defendant undertook, and it became and was its obligation and duty, to safely transport and carry said plaintiff," etc. In the second

*Instruction number 10 asked by appellant was modified by the court by the addition of the words which appear in italics, viz.: "10. If you find from the evidence that when plaintiff left Choctaw Station and took passage for his home on another car than that which was under the control of Barger, and that in order to continue his journey to his home it became necessary for him to change cars at Main and Markham streets, and to obtain a transfer ticket to another car for that purpose, then he should have applied to the conductor of the car on which he was a passenger for such transfer. And if you further find from the evidence that plaintiff left the car on which he was a passenger at or near the transfer point and re-entered the car of which Barger was the conductor, not for the purpose of continuing his journey on Barger's car, but with the intention of continuing his controversy with Barger *with the expectation of being put off,* then he did not become a *bona fide* passenger on Barger's car even though he paid his fare to Barger, and the relation of carrier and passenger did not exist between him and the defendant company, and he can not recover damages *for wounded feelings and pain of mind* for being ejected by Barger at Main and Markham streets." (Reporter.)

paragraph of the complaint, upon which the jury based its verdict, it is alleged that appellee, "upon request of said conductor, duly paid his fare, and became a passenger thereon." There was no denial of these allegations in the answer. The question therefore of whether or not appellee became a passenger was not in issue, and appellant had no right to an instruction submitting that question to the jury. *Rust Land & Lumber Co.* v. *Isom,* 70 Ark. 99-103. But there was no evidence to support the theory that appellee was not a passenger.

The jury eliminated the first paragraph of the complaint, doubtless upon the idea that the appellee did not become a passenger until just before the car from which he was ejected had reached Main and Markham. Whether right or wrong in this, it is certain beyond controversy that appellee had become a passenger before he was ejected from appellant's car at Main and Markham. The testimony of appellant's conductor, after reciting what took place at the depot, is as follows: "He" (appellee) "got on another car, and when we arrived at about Scott street, my car stopped, and somebody got on. I was in the rear of the car, issuing transfers, and didn't know who it was. A paper boy came to me, and said a man in front wanted to see me. I went to the front, and met Dobbins. He turned his back as I came up, and I put my hand on his shoulder, and said 'Fare, please.' He replied that he had paid his fare on the other car, and I told him that he ought to have stayed on that car, and if he rode on my car he would have to pay again. He said 'All right,' and gave me his fare. I went back to issuing transfers, and he kept hallooing to me, 'Transfer; transfer!' I told him I would give him a transfer in a minute, and just to keep quiet. There were lots of people there, and he had plenty of time. He repeated his demand, and I said, 'There is a seat! For goodness' sake, sit down and keep quiet. And if you don't, I am going to have you taken off the car.'" This is all the evidence upon the subject. There is no room to contend, in the face of this evidence, that appellee did not become a passenger.

There is nothing in this evidence that justifies the conclusion that appellee boarded appellant's car at Main and Markham solely for the purpose of continuing his controversy with the conductor, and with no intention of becoming a passenger.

If appellee entered the car there with the intention of riding as a passenger, and paid his fare, which appellant accepted, he would be a passenger, even though he intended also to continue a controversy with the conductor. So the instruction was abstract and misleading, either with or without modification. But if it were correct, the modification only tended to make clearer the idea intended to be conveyed by it, namely, that if appellee entered the car for some other purpose than the *bona fide* purpose of becoming a passenger, and with the expectation of being put off, so that he might sue appellant for unlawful ejection, then appellant would not be liable.

The testimony for appellant shows the conduct of its conductor in quite a different light from the testimony of appellee. If the testimony of appellant is true, it exonerated the conductor, and should save appellant from liability. The jury, however, settled these disputed questions of fact; and as there were no prejudicial errors in the ruling of the trial court, its judgment must be affirmed. So ordered.

HILL, C. J., not participating.

LEWIS v. STATE.

Opinion delivered March 17, 1906.

PERJURY—MATERIALITY OF TESTIMONY.—Where the grand jury was investigating whether liquors were being sold in a certain building, questions as to whether defendant guarded the back door of the building, and whether he conveyed beer or whisky into the building within a certain time, were material, and his false answers thereto would sustain an indictment for perjury.

Appeal from Hempstead Circuit Court; *Joel D. Conway*, Judge; affirmed.

Jobe & Eakin, for appellant.

The question asked by the grand jury and the answers thereto were immaterial to the matter under investigation. The verdict should have been set aside because of its form, and because

a member of the grand jury was taken and served as a member of the petit jury.

Robert L. Rogers, Attorney General, for appellee.

Appellant can not complain of the bias of the trial juror, after having neglected to challenge him when he had the opportunity. 59 Ark. 136; 40 Ark. 515.

The recommendation of the jury in their verdict was surplusage. It does not vitiate the verdict. 28 Am. & Eng. Enc. Law, 364; 62 Miss. 450.

RIDDICK, J. This is an appeal from a judgment convicting the defendant, John Lewis, of the crime of perjury, and sentencing him to be imprisoned for one year. The grand jury were investigating the question as to whether intoxicating liquors were being sold or had been sold in a certain building in the town of Hope. To solve this question, they called the defendant before them, and asked him whether he had attended or guarded the back door of the building, so as to afford ingress and egress through the back door to persons visiting the building, and also whether he had, since the 1st of January, 1905, conveyed beer or whisky into the building. He answered both of those questions in the negative, and was indicted for perjury in so doing. There was evidence on his trial for perjury that tended to show that these answers were false. There was also evidence to the contrary which tended to show that the witnesses for the State were mistaken in believing that defendant had guarded the door, but it was for the jury to determine which of these witnesses told the truth.

If the testimony of the witnesses for the State was true, the purpose of the defendant in guarding the door was to admit persons to the room who wished to get whisky, and to warn persons in charge of the intoxicating liquor of the approach of officers or other unfriendly visitors. But, even if his occupation in guarding the door was lawful, the grand jury had the matter under investigation, and had the right to ask the question. Whether or not he was there guarding the door was a material question before them, and his false testimony in reference thereto was sufficient to base an indictment for perjury and conviction thereon.

On the whole case we are of the opinion the judgment should be affirmed.

BUTLER v. DODSON.

Opinion delivered April 30, 1906.

SALE OF CHATTEL WITH RESERVATION OF TITLE—ELECTION OF REMEDIES.—A vendor of chattels who has reserved title until the purchase price is paid has, upon default in payment thereof, a right to make an election among two remedies, towit: (1) he may retake the property, and thus in effect cancel the debt; or (2) he may sue to recover the debt, and thus affirm the sale and waive the reservation of title.

Appeal from Ashley Circuit Court; *Zachariah T. Wood,* Judge; reversed.

STATEMENT BY THE COURT.

In November, 1902, T. M. Dodson & Son brought an action in the Ashley Circuit Court against Joseph Meehan to recover a balance due on account held by them against him amounting to $3,121.63, which they alleged was past due and unpaid. They also sued out a writ of attachment against the defendant on the ground that he was a nonresident of the State, and that he had sold and disposed of his property with the fraudulent intent to cheat his creditors. The summons was duly served on the defendant, Meehan, and the writ of attachment was levied by the sheriff upon 25 head of mules, four horses, four wagons, and other personal property belonging to defendant, which property the sheriff took possession of by virtue of the writ. The plaintiff thereupon gave notice and applied to the circuit judge in vacation for an order for the sale of the property, which order was made, and the property sold. At the January term of the court Mrs. Malinda M. Plair filed an intervening petition, in which she alleged that the property attached belonged to her, and asked judgment for the proceeds of the same and for damages.

At the same term of court the death of the defendant, Mehan, was suggested and admitted, and Turner Butler was appointed by the court administrator of his estate *ad litem.* The administrator *ad litem* afterwards filed an answer to the complaint, controverting the grounds of attachment alleged.

The plaintiffs also filed an answer to the intervening petition of Malinda Plair in which they denied that she was the owner of the property attached, and alleged that her only claim to it was by virtue of a mortgage executed to her by Joseph Meehan

and wife conveying the same to her as security for the sum of $2,213, which they pretended to owe her, and for which they executed to her a note and mortgage, dated October 27, 1902. Plaintiffs alleged that this note and mortgage were based on no actual consideration, and that they were fraudulent and void, being intended to shield the property of Meehan against his creditors.

Nothing further seems to have been done in the case until a year later, at the January term, 1904, when plaintiffs filed an amended answer to the intervening petition of Mrs. Plair, in which they alleged that eighteen of the mules, together with two wagons and nine scrapers which were attached and sold by the sheriff under the order of the court as property of Meehan, were at one time the property of plaintiff, and that plaintiffs sold the mules, wagons and scrapers to Meehan for the aggregate sum of $2,442.50, and by agreement with Meehan retained title thereto until the purchase price was paid, and that the price named is included in the account sued on by plaintiff. They alleged that the mortgage under which the intervener claimed the property was fraudulent and void as to plaintiffs, but asked that if the court should be of the opinion that it was valid it be canceled and held for naught so far as the property, the title to which was retained by plaintiffs.

In conclusion they asked that the case be transferred to the court of equity.

No action seems to have been taken on the application to transfer to the equity docket, and the case was tried at law before a jury at the same term of court.

The court, over the objection of the intervener, gave the following among other instructions to the jury, towit:

"The jury are instructed that if they find that T. M. Dodson & Son were the owners of a part of the property attached and sold by the sheriff of Ashley County under and by virtue of a writ of attachment sued out by Dodson & Son against Meehan, and at the time of suing out of said attachment said Meehan had not paid the said T. M. Dodson & Son the contract price of said property, and that the same at said time was past due, your verdict, as to said property in which Dodson & Son had retained title, will be for the plaintiffs, Dodson & Son, notwithstanding

you may believe from the evidence that said deed of trust was free from fraud, and that said property was levied on and sold by the sheriff of Ashley County under said attachment."

The jury returned the following verdict: "We the jury find that the attachment was wrongfully issued. We find for Dodson & Son eighteen head of mules, two wagons and nine scrapers, which they retained title to, of the value of $1,850; and sustain the mortgage given by Meehan to Mrs. Plair, the intervener, for seven mules valued at $700, two horses valued at $75 each, and two colts, one valued at $60, and one valued at $30, as given in evidence, making a total of $940.

"W. W. ETHERIDGE, Foreman."

In reply to special interrogatories by the court the jury answered that Meehan at the time the action was commenced owed plaintiffs $1,840, that plaintiffs sold property to Meehan and retained title thereto as alleged, and that Meehan had not paid for it.

The court thereupon gave judgment in favor of T. M. Dodson & Son against the estate of Joseph Meehan for the sum of $1,840 with costs, and in favor of intervener, Malinda Plair, against the estate of Meehan for $940 and costs, and adjudged that the money in the hands of the sheriff arising from the sale of the attached property be divided between the plaintiffs, T. M. Dodson & Son, and Malinda Plair in proportion to the amounts for which they recovered judgments against Meehan, and credited on their respective judgments accordingly. The court also gave judgment in favor of Mrs. Plair against the plaintiffs, Dodson & Son, for all her costs, and gave judgment in favor of the administrator *ad litem* against the plaintiffs, T. M. Dodson & Son, for all costs of the attachment.

The intervener, Mrs. Plair, and the administrator *ad litem* filed motions for new trial, which being overruled both of these parties appealed. Dodson & Son took an appeal.

George W. Norman and *P. T. Butler,* for appellant.

1. The testimony of Mrs. Mehan was competent. Kirby's Digest, § 3095, par. 4; 1 Greenl. Ev. (12 Ed.), § 254, 338; 29 Ark. 603; 70 *Id.* 54; 43 *Id.* 314, 315.

2. The rejected testimony of Mrs. Plair was also competent. 43 Ark. 307; 46 *Id.* 306; 46 *Id.* 378; 63 *Id.* 556.

3. The court erred in admitting testimony of transactions and statements made by defendant's intestate, not elicited by the opposite party. 32 Ark. 337; 30 *Id.* 285; 48 *Id.* 133; 67 *Id.* 318.

4. Also in admitting hearsay testimony of H. J. Robinson. The books of original entry were the best evidence, and were not produced, and no valid reason shown why not.

5. The court also misdirected the jury, there being no evidence to support same. It was error to refuse the 13th prayer by defendant and intervener. In order to assert title to the property by reason of a sale to defendant and reservation of title in plaintiffs until the purchase money was paid, the relation of vendor and vendee must have subsisted between them and defendant. 39 Ark. 438; 30 *Id.* 402; 48 *Id.* 160; 49 *Id.* 63; 55 *Id.* 642; 47 *Id.* 363; 48 *Id.* 273; 52 *Id.* 164; 61 *Id.* 240; 68 *Id.* 230.

6. By attaching, etc., plaintiffs waived any title they had, and will be deemed to have elected to treat the sale as absolute. 64 Ark. 213; 42 *Id.* 236; 69 *Id.* 271; 26 So. Rep. 136.

7. If the credit had been applied to the mule debt, it would have been paid with a balance over to be applied to other indebtedness. See 39 Ark. 249; 38 *Id.* 167; 52 *Id.* 458; 56 *Id.* 139; 40 *Id.* 102; 55 *Id.* 450; 70 *Id.* 29.

RIDDICK, J., (after stating the facts.) There are in this case two appeals, one by the administrator *ad litem* of the estate of Joseph Meehan, the other by Mrs. Malinda M. Plair. The appeal of the administrator *ad litem* brings before us for review the trial and judgment against the estate of Meehan in favor of plaintiff for $1,840. The testimony tends to show that Meehan was indebted to the plaintiffs for mules, horses and other property sold to him by them for a considerable sum. The complaint alleges this sum to be $3,121.63 and that no part of this debt had been paid.

The plaintiffs introduced at least some competent evidence tending to prove his debt, and this evidence was not contradicted. We see no reason for reversing this judgment in favor of plaintiffs, even if it be conceded that the court admitted incompetent evidence in support thereof, for strike all of that out, and the undisputed evidence remaining not only supports this judgment, but shows that plaintiffs were entitled to a greater sum than that for which they recovered judgment. They did not appeal,

and the administrator *ad litem* of Meehan has no right to complain that the judgment against him is less than the proof shows Meehan owed. The judgment in favor of plaintiffs against the estate of Meehan for $1,840 will therefore be affirmed.

The appeal of both of these defendants presents a number of questions in reference to the rulings of the trial court on admission of evidence tending to show that plaintiffs had reserved title to eighteen mules and to other property attached by them. It will not be necessary to discuss these rulings on the admission and rejection of evidence bearing on this claim of reservation of title for the reason that we are of the opinion that the question of reservation of title can not be considered in this case, for this is not an action to recover the property, but to recover the purchase price thereof. When this debt became due and was unpaid, the vendors, T. M. Dodson & Son, if they had reserved title until the price was paid, had their election to take either of two courses. They could elect to retake the property, and thus in effect cancel the debt, or they could bring their action to recover the debt, and thus affirm the sale and waive the reservation of title. They chose the latter course, brought their action for the debt, and attached the property as belonging to defendant. By doing so they waived the right to claim the property as their own, and all the evidence admitted to show a reservation of title was improperly admitted, and the instructions given on that point were erroneous and prejudicial, because under the pleadings that question was not before the court for decision. *Jones* v. *Daniels,* 67 Ark. 206; *Baker* v. *Brown Shoe Co., ante,* p. 501.

If the action to recover the debt had been brought in ignorance of the fact that the defendant had mortgaged all his property to the intervener, Mrs. Plair, then it is possible that if plaintiffs, on discovery of that fact, had promptly dismissed their action for the debt, and elected to retake the property, the courts might have permitted them to do so. *Jones* v. *Daniels,* 67 Ark. 206. But nothing of that kind was done. The plaintiffs are still claiming their debt, and now have a judgment for the same, and in our opinion their reservation of title has been completely waived, and is no longer a question in the case. Plaintiffs have now only a claim for their debt. The defendant

is dead; and as the attachment levied by plaintiff has been dissolved, and plaintiffs have taken no appeal, plaintiffs have no lien on the property or proceeds thereof. They have only a judgment against the estate of the defendant, upon which no execution can be issued against the property of the estate, and the order of the court directing that a certain proportion of the money arising from the sale of the attached property be turned over to plaintiffs was, under the view we take of the facts, erroneous. This money belongs to the estate of Meehan unless the mortgage to Mrs. Plair is valid; and if that be so, then so much of it as arose from the proceeds of the sale of mortgaged property is subject to the payment of the mortgage debt. But, while the jury sustained this mortgage, they did not determine the amount of the mortgage debt. As the attachment brought by the plaintiffs was dissolved, and as their reservation of title has been waived, the question now as to who is entitled to the money arising from the sale of the attached property is one between the intervener, Mrs. Plair, and the estate of Meehan.

After consideration of the matter, we are of the opinion that the judgment in favor of plaintiffs for $1,840 should be affirmed; that in other respects the judgment should be reversed, and the cause remanded for further proceedings to determine the amount due on the mortgage of Mrs. Plair, that, upon such amount being ascertained, the money in the hands of the court be applied to the payment of the same, and that the balance of the money, if any, be turned over to the administrator or legal representatives of Joseph Meehan, deceased. It is so ordered.

---

78 87 574 96

THOMAS v. JOHNSTON.

Opinion delivered April 30, 1906.

1. CONTRACT—CONSTRUCTION—PROVINCE OF THE COURT.—It is the province of the court to construe contracts. (Page 577.)
2. WRITTEN CONTRACT—PAROL EVIDENCE TO VARY.—Where parties have reduced their contract to writing and signed it, oral evidence is inadmissible to show that they intended to make a different contract. (Page 577.)

3. LANDLORD AND TENANT—VALIDITY OF CONTRACT.—A landowner may agree with another that the relation of landlord and tenant shall subsist between them until it shall be changed into the relation of vendor and vendee by payment in full of certain amounts named. (Page 579.)

Appeal from Columbia Circuit Court; *Charles W. Smith,* Judge; reversed.

Stevens & Stevens, for appellant.

1. Foster was in possession under a lease, and not as a purchaser, and the first three instructions should not have been given. The first two because all the evidence shows Foster a tenant. The contract is a lease in form; there is no ambiguity in it, and parol evidence was not admissible to show a purchase. 40 Ark. 237; 3 L. R. A. 308; 5 *Id.* 672; 15 *Id.* 543; 29 *Id.* 544; 45 *Id.* 177. The rule applies to Boyd, a party to the lease. 22 L. R. A. 391; 31 Ark. 411; 45 *Id.* 449; 7 U. S. (Law Ed.), 761; 22 *Id.* 783.

2. The court should have ruled on the question whether it was a lease or sale, and not have left it to the jury. 20 Ark. 583; 1 Elliott on Ev. § 30; 66 Ark. 445; Thompson on Trials, § § 1067-8. See also 54 Ark. 16; 69 Ark. 306.

Smead & Powell and *C. W. McKay,* for appellees.

1. The written contract is conclusive that the parties intended a sale. 54 Ark. 16; 39 *Id.* 560; 51 *Id.* 218. The case of *Ish* v. *Morgan,* 48 Ark. 413, is unlike this.

2. Boyd and Johnston were strangers to the contract, and it was competent to introduce parol testimony to explain, vary or contradict its terms. 45 Ark. 447; Greenl. Ev. § 189; 11 Am. & Eng. Enc. Law (2 Ed.), 394; 52 Ark. 93.

3. Appellees not being privies to the contract, the construction of same was a question for the jury to consider, with other evidence in the case. 35 Ark. 156.

McCULLOCH, J. This is an action of replevin for two bales of cotton, the plaintiffs claiming title to the property under a crop mortgage executed by Bob Foster, one of the defendants, and defendant, Thomas, claiming a lien on the cotton as landlord of Foster. Thomas owned the land, and placed Foster in possession under a written contract. Foster mortgaged the crop on the land to plaintiffs. The contract is as follows:

"Articles of rent contract made and entered into by and between J. A. Thomas, party of the first part, and Bob Foster, party of the second part.

"I, J. A. Thomas, party of the first part, do agree for my part to rent the second party, Bob Foster, the following-described land, towit:

"The west half of northeast ¼ and (10) ten acres in the S. E. corner of the southeast ¼ of northwest ¼, all of sec. (26) twenty-six, township (17) seventeen, range (21) twenty-one, ninety acres more or less, for his three notes as follows: One note for $150 due October the 1st, 1901, rent for the place described above for the year 1901; one note for $150, due October the 1st, 1902, rent for the place for the year 1902; one note for $150, due October the 1st, 1903, rent for the place for the year 1903. These three notes draw interest from December 20, 1900, at ten per cent. until paid. Now, I further agree, in addition hereto, that if the second party, Bob Foster, promptly pays these notes with all interest as they become due, and any other amount due me by note or account that we may make by our own wish or will, when this amount or amounts are fully paid as they become due, then and for these amounts I bind myself and heirs to make the second party a deed to the land described; but if a failure upon the part of the second party to make any one of these payments at maturity, time being the essence of this contract, if a failure is made, the first party shall have the right to declare this contract null and void, after notifying the second party that the amount due is unpaid; and if the second party fails to make satisfactory arrangements at once, then the first party can null and void this entire contract, or by written instrument carry any amount agreed upon, and it stated in the writing drawn up. Should failure upon the second party be made, no remuneration or pay for any kind of work or labor done during this term of contract and so clearly agreed. The second party takes the place as it stands, and does such improvements as he may choose at his own expense and cost. The second party will counsel and be principally governed by my directions in the cultivation of the crop. I am acknowledged to be the true landlord in all these transactions under any and all circumstances, if necessary to take any steps in carrying out justice as a landlord.

The second party is now on said place, and if he remains on said place, and works said land continuously, all will be favorable; but if at any time the second party vacates or fails to work said land in a good farm-like manner, should he do either of the above, just so soon as this is done, this contract is null and void. A failure upon the part of the party of the second part is then made and so agreed; but if the second party, Bob Foster, manages his business successfully, and pays these amounts as they become due, which I think he can and will do, and when they are paid, I will promptly make this deed as set forth in the above.

"I, Bob Foster, party of the second part, do, after helping to bring about this contract and fully understanding every proposition or stipulation in the above, this day execute my three notes for the amount named above, and in doing this I do so in good faith, feeling determined to pay this amount of rent yearly and secure me a home, and I shall do every thing in my power to pay each note or any other amount when due, and, if I fail, I will do all I can to give satisfaction, and, should I fail, I cheerfully accept the purport of the contract without any opposition or redress, and when I pay this amount to the first party, which I expect to do, I shall demand a deed.

"In earnest undertaking, we sign this to carry out this contract. If any timber can be sold of any kind and in any way, the money or proceeds must go to the credit of these notes, so agreed and clearly understood."

Notes were executed pursuant to the terms of the contract, which recited that they were given for rent of the land described.

The defendant asked the court to construe the contract to be a lease, and not a sale, and to so instruct the jury, which the court refused to do. The court also permitted the plaintiffs to introduce oral testimony tending to show that the parties intended the contract to be a sale of the land.

The court should have construed the contract and instructed the jury as to its meaning. It was error to admit oral evidence as to the intention of the parties. *Smith* v. *Caldwell, ante,* p. 333; *Carpenter* v. *Thornburn,* 76 Ark. 578; *Colonial & U. S. Mortg. Co.* v. *Jeter,* 71 Ark. 185.

It is contended that an inspection of the whole contract reveals the fact that the real intention of the parties was to make a

sale of the land, though that intention was disguised in the garb of a rent contract. In other words, that the parties really intended a sale, and that the court should construe it as a contract for sale, and not for lease. The intention of the parties must, however, be gathered from the language of the contract, and it is manifest that, while they intended that the contract should eventually result in a sale of the premises, yet they elected to make it a contract for lease, and to create the relation of landlord and tenant, and to stipulate that that relation should continue to subsist between the parties until it should be changed into the relation of vendor and vendee by payment in full of the amounts named. They had a right to make such a contract. There is nothing unlawful about it. In *Quertermous* v. *Hatfield,* 54 Ark. 16, Chief Justice COCKRILL, speaking for the court, said: "If the parol agreement between the appellant, who was the plaintiff below, and the appellee's intestate was for the sale and purchase of the land, upon the condition that, on default in payment of the first installment of purchase money, the contract of purchase should end *ipso facto,* and the relation of landlord and tenant should subsist as though no sale had been contemplated, then plaintiff was entitled to judgment for the rent agreed upon and to the enforcement of his landlord's lien upon the crop. *Ish* v. *Morgan,* 48 Ark. 213; *Watson* v. *Pugh,* 51 Ark. 218; *Cheney* v. *Libbey,* 134 U. S. 68. Or, if the agreement was in effect a lease of the land with an option to the lessee to purchase and treat the rent money as the first installment of the purchase price, dependent upon the prompt payment of the amount when due, the failure to pay at the time fixed by the parties terminated the right to purchase, the relation of landlord and tenant remained, and the plaintiff was entitled to his recovery. But if the agreement contemplated an absolute sale, the fact that the first installment of purchase money was called rent by the parties would not import into the contract a condition such as that first mentioned above, and thereby change the relation of vendor and vendee into that of landlord and tenant. Calling the purchase money rent would not make it such, nor create a lien on the crops for its payment."

The rule is, we think, correctly stated in 18 Am. & Eng. Enc. Law, pp. 168, 169, and the same is abundantly sustained by the

numerous authorities there cited. It is stated thus: "The parties to an agreement for the sale of land may also contract with the right, at the election of either party in the future, upon the performance or nonperformance of certain conditions, to treat the transaction either as a purchase-and-sale contract, or a lease; and if the election is made to treat it as a tenancy, it relates to the time of making the contract, and the relation of landlord and tenant, with all the incidents and liabilities, will be regarded as having begun at that time. So, also, a lease may give to the lessee an option to become a purchaser without preventing the creation of the relation of landlord and tenant prior to the proper exercise of such option, though the payments made as rent are to be credited upon the purchase price in case of the exercise of such option. Where it is stipulated in the contract of sale that the tenant shall pay rent during his occupation, and until the conveyance is made, the relation of landlord and tenant is created."

Now, it is plain that the parties to this contract intended to create the relation of landlord and tenant, and to continue that relation until both of the stipulated payments should be made, and time was declared to be of the essence of the contract. They executed a rent contract with an option to purchase, the relation of vendor and vendee to arise when the last payment should be made.

The case of *Carpenter* v. *Thornburn, supra,* is similar to this, except that the contract in that case provided for further payments after the exercise of the option to purchase. There is, however, no difference in principle between a contract with an option to purchase after certain number of rent payments have been made, and one with an option to become a purchaser after rent in sufficient amount has been paid to make up the agreed purchase price. In either event it falls within the power of the parties to contract, and there is nothing in the law to prevent them from making such a contract. There is nothing to prevent them from stipulating when the relation of landlord and tenant shall end and the relation of vendor and vendee shall arise.

The facts in *Blanchard* v. *Raines,* 20 Fla. 467, were almost identical with the facts of the case at bar. There two rent notes had been executed for successive years, containing a stipulation that if both notes should be paid promptly the landlords should

convey the land to the tenant. The court said: "It does not change the character of the agreement to pay rent that the tenant may at the end of the time claim a conveyance of the land, having made prompt payment of the notes as per contract."

The case of *Houston* v. *Smythe,* 66 Miss. 118, is also very similar, there being a lease for two years with a stipulation that a conveyance should be made to the tenant upon payment of the last sum being made. The court, by Judge Campbell, said: "It was admissible for the parties to create the relation of landlord and tenant as they did. The purpose of it is obvious, and, after expressly creating this relation for purposes of their own, it is not allowable afterwards to recede from it or complain of its legal consequences."

The court erred in refusing to declare the contract to be a lease and to instruct the jury as asked by defendants.

Reversed and remanded for a new trial.

BATTLE, J., dissents.

---

78 580
84 202

78 580
80 464
81 84
81 86

RITTER v. DRAINAGE DISTRICT NO. 1, POINSETT COUNTY.

Opinion delivered April 30, 1906.

1. PUBLIC DITCH—ASSESSMENT OF PROPERTY.—Kirby's Digest, § § 1414-1450, providing for the establishment of drainage districts, is not unconstitutional in failing to limit the assessment upon the lands to the value of the benefits conferred by the improvement. (Page 584.)
2. SAME—SUFFICIENCY OF NOTICE.—Kirby's Digest, § 1417, providing that the county court shall cause a notice of the pendency of a petition for the establishment of a drainage district and of the appointment of viewers, etc., to be published by one insertion in a newspaper of general circulation published in said county, is not invalid in prescribing an unreasonable and insufficient notice. (Page 584.)
3. SAME—BENEFIT—CONCLUSIVENESS OF FINDING.—A finding of the county court that a proposed ditch will benefit certain lands raises a *prima facie* presumption of benefit thereto, and such finding will not be set aside when there is evidence to support it, even though it is against the preponderance of the evidence. (Page 584.)
4. SAME—ASSESSMENT OF SWAMP LAND.—Where the State's title to swamp and overflowed land has passed to private ownership, the land becomes

subject to assessment for local improvement, the same as any other lands. (Page 585.)

5. SAME—VALIDITY OF ASSESSMENT.—An assessment for a public ditch can not be avoided as a whole because the reports and schedules of the viewers failed to make any showing as to floodgates, waterways, farm crossings, or bridges or as to the number of feet in length of the proposed ditch through each tract of land. (Page 585.)

Appeal from Poinsett Circuit Court; *Allen Hughes,* Judge; affirmed.

L. C. Going, for appellant.

1. The act is unconstitutional, in that it provides for the taking of property without just compensation or due process of law. Under the act of Congress of September 28, 1850, the State took the lands as trustee for the reclamation of the lands by the construction of levees and drains. The object of the act was not that these lands should be used as a means of revenue to the State.

2. It is also unconstitutional because it does not restrict the assessment to the value of the benefit conferred upon the landowner. 9 Am. Dec. 634; 6 Vroom (N. J.), 497.

3. The act is also defective in that it does not provide for sufficient notice to the landowner. 74 N. Y. 234; 95 U. S. 733; 92 U. S. 480; 102 U. S. 586; 7 Neb. 258; 16 Pac. 549.

4. The petition does not comply with the act in that it fails to show where the ditch is to begin.

5. The act is further not complied with in that the schedule filed by the viewers with their report makes no showing as to floodgates, waterways, farm crossings, bridges and dimensions thereof, nor the number of feet in length of the proposed ditch through each tract of land.

6. The viewers overestimated the benefits to be derived by appellant, and the assessment is therefore, as to his lands, excessive. 34 Ill. 203; 51 Ill. 130.

7. The proof is insufficient to show the necessity of the construction of the ditch.

R. L. Cowan, Benj. Harris and *J. J. Mardis,* for appellee.

1. The act is the same as the act of April 23, 1891, with slight modifications. Its constitutionality has been sustained by this court. 64 Ark. 555. Courts generally have sustained the

constitutionality of such acts. 96 U. S. (L. Ed.), 617; 47 Cal. 222; 158 Ind. 159; 28 Wash. 38; 164 U. S. 112, 163. The act is directed to the drainage of low and marshy lands as a menace to public health, etc., and is within the police power of the State. 152 U. S. 133; 151 U. S. (38 L. Ed.), 269. Its validity can not be attacked on the theory that it impairs the obligation of a contract. 111 U. S. (28 L. Ed.), 573. As to the contention that under the act property is taken without just compensation, the public good is to be considered rather than private interests. Cooley on Tax. (2 Ed.), 617.

2. The act requires a general description of the ditch or drain, stating the starting point, route and terminus. This does not mean an exact and accurate description thereof in the petition. 64 Ark. *supra;* 66 Ind. 178; 42 N. E. 207; 36 N. E. 672; 65 Cal. 635; 47 N. E. 679; 45 N. W. 345.

3. The necessity for floodgates, waterways, etc., is not shown to exist. Inasmuch as the viewers recommended that the construction of the ditch and laterals be let to contract, it was of no moment to report the exact distance in feet through the separate holdings of owners.

4. The benefits to be derived from the construction of the ditch is fully shown by the evidence. The court's finding on this point is conclusive.

5. As to the necessity for the construction of the ditch, it is sufficient to allege in the petition that the drain will benefit the public health or be of public utility. It is unnecessary to show how these objects will be attained. 93 Ind. 360. Moreover, the question of the necessity for the proposed improvement and whether the public health and convenience requires it, is for the lower court to decide, and, in the absence of an allegation of fraud, such questions are not subject to review on appeal. 66 Ark. 302. See also 44 L. Ed. Sup. Ct. Rep. 636.

McCULLOCH, J. This is a proceeding commenced in the county court of Poinsett County to establish a drainage district under the act of April 23, 1903 (Kirby's Digest, § § 1414-1450), for the purpose of constructing a ditch or drain along a certain route through lands described into the St. Francis River.

The petition for the establishment of the district was signed by eight landowners whose lands were to be affected by the pro-

posed improvement, in accordance with the requirements of the statute, and was duly filed and presented to the county court, and the petitioners gave bond as provided by the statute.

The court made an order appointing viewers and a civil engineer to make examination and survey of the lands to be affected, and caused notice to be published of the hearing of the report thereof. The report was made and approved, and the court made an order establishing the district, and directed the viewers and engineer to make a survey and plat of lands to be benefited by the proposed ditch, and an estimate of the cost of improvement and assessment on the lands. The report and assessments of the viewers were filed, notice thereof to landowners was duly served and published, and upon hearing the said final report and assessments were approved and confirmed by the court. Appellant, Ritter, the owner of land affected by the improvement, appeared and filed his exceptions to the judgment of the court in establishing the district and in approving the assessments, and appealed to the circuit court, where the same judgment was rendered, and he appealed to this court.

He attacks the validity of the statute, and the proceedings pursuant thereto, upon the following grounds:

1. That the terms of the statute impose an improper and illegal burden upon the owner of "swamp and overflowed lands," which were granted to the State of Arkansas by the United States, under the act of Congress of September 28, 1850.

2. That the statute is unconstitutional and void because it does not limit the assessment upon the lands to the value of the benefits conferred by the improvement.

3. That the statute is void because the notice required thereby to landowners of the establishment of the district and assessment of lands is unreasonable and insufficient, so that the effect of the assessment is a taking of property "without due process of law."

4. That the petition and notice fail to sufficiently describe the proposed beginning and route of the ditch, so as to give the court jurisdiction and put the landowners upon notice of the proceedings.

5. That the report and schedules of the viewers were insufficient because they failed to make any showing as to flood-

gates, waterways, farms or crossings, bridges and dimensions, or the number of feet in length of the proposed ditch through each tract of land.

6. That the necessity for the proposed improvement was not made to appear by sufficient proof in the proceedings.

He also attacks the assessment upon his own lands, on the ground that, according to the proof, as he alleges, they will not be benefited by the ditch, and that the viewers overestimated the value of the benefits to his lands.

The second, third and fourth grounds of attack are settled adversely to appellant's contention in the case of *Cribbs* v. *Benedict,* 64 Ark. 555. Those questions were fully considered by the court, and discussed at length in the opinion in that case, and the reasons for upholding the statute need not be reiterated. Suffice it to say that we have no reason to doubt the correctness of that decision and the principle announced in the opinion, and the same are again approved. That decision construed the act of 1891, which has been repealed and superseded by the later statute now in force. There is no material difference between the two statutes, so far as they affect the questions involved in this case. The language of the two statutes is slightly different with respect to the requirement of notice of the point of beginning of the proposed route of the ditch, but the difference is not sufficiently material to prevent the application to the present statute of the rule announced in *Cribbs* v. *Benedict.* The following authorities, not cited in the Cribbs case, are instructive on the question, and fully sustain the principles announced by this court. *Stiewel* v. *Fencing District,* 71 Ark. 17; *Fallbrook Levee District* v. *Bradley,* 164 U. S. 112; *N. Y. & N. E. Railroad Co.* v. *Bristol,* 151 U. S. 556; *Pittsburg, etc., Ry Co.* v. *Machler,* 158 Ind. 159.

Appellant's sixth ground of objection to the proceeding, that it does not appear from the evidence that the improvement is necessary, or will result in benefit to the lands included in the district, is settled by the decision in *Stiewel* v. *Fencing District,* 71 Ark. 17. The findings and conclusions of the county court raise at least a *prima facie* presumption of benefit to the lands, and the finding of the trial court will not be set aside when there is evidence to support it, even though against the preponderance

of the evidence. The report of the viewers is sufficient evidence to support the finding of the court as to probable benefits.

The contention of appellant set forth in his first ground of attack is untenable. The State's title to the swamp and overflowed lands having passed to the present owners, it falls within the taxing power of the State, regardless of the origin of the title, and is subject to assessment for local improvement, the same as any other lands. No exemption is found in the donation act of Congress, and none can be supplied by the courts under the pretext that contractual rights of the owner are impaired by an assessment thereof for local improvements.

The grounds of the fifth assignment are not well founded, and the validity of the proceedings establishing the district and making the assignment can not be avoided for that reason. Appellant does not complain at the failure of the viewers to specify the number of floodgates, waterways, crossings, etc., so far as they might substantially affect any of the rights of the landowners, but sets forth this omission as ground for avoiding the whole proceedings. The omission can not be made to serve that purpose. If the attention of the court had been called to the omission as affecting substantial rights, doubtless the court would have referred the matter back to the viewers for estimates and report on that subject. The viewers reported in favor of a contract for construction of the improvement as a whole, without allotment to the several tracts, and the court, therefore, did not order an allotment. The statute leaves this in the discretion of the county court as to whether or not it shall order an allotment when the viewers report in favor of a contract for construction as a whole.

This brings us to a consideration of appellant's contention that his lands will receive no benefits from the proposed ditch, and that the viewers overestimated the resultant benefits to his land. The findings of the trial court upon these questions being supported by legally sufficient evidence, we are concluded by them.

Upon the whole, we find no grounds upon which the judgment of the court establishing the drainage district and approving the assessment should be disturbed, and the same is in all things affirmed.

78 586
188 385

BARTON-PARKER MANUFACTURING COMPANY v. TAYLOR.

Opinion delivered April 30, 1906.

CONTRACT—MEETING OF MINDS—PAROL EVIDENCE.—An order for merchandise was signed by the purchaser in duplicate, upon an express agreement that it was subject to the vendor's approval, and with the understanding that the vendor's agent would attach a certain printed slip to the copy forwarded to the vendor, so as to make it the same as that retained by the purchaser, which the agent failed to do, and the contract, without the printed slip, was approved by the vendor *Held,* (1) that there was no contract, as the parties' minds never met; (2) that parol evidence was admissible to prove that the copy which the vendor approved was not to become the purchaser's contract until the printed slip was attached.

Appeal from Marion Circuit Court; *Elbridge G. Mitchell,* Judge; affirmed.

G. H. Perry, for appellant.

1. It is in proof that the contract sued on is the identical contract executed by the appellee. It was therefore error to admit testimony to vary or contradict its terms. 1 Greenleaf on Ev. § § 86, 87, 88; 24 Ark. 210; 50 Ark. 20; *Ib.* 393; 66 Ark. 393; 64 Ark. 650; 67 Ark. 62. See also 39 S. W. 328; 28 Tex. 553; 29 Tex. 395; 54 Tex. 294. Where a merchant at the solicitation of a salesman signs a contract for goods, the court will presume the writing to be final result of their dealings, and will refuse to hear him say that it is not the contract. 27 S. W. 210; 26 S. W. 267; *Ib.* 246; 25 S. W. 444; 57 Tex. 17; 32 Tex. 383; 28 S. W. 937; 9 S. W. 665; 5 S. W. 613; 18 Tex. 243. See also 24 S. W. 574. Where the intent of parties can be gathered from the writing itself, testimony is not admissible to show how one of the parties construed it. 36 S. W. 813; 85 Tex. 187; 45 Tex. 383; 41 Tex. 240; 34 S. W. 781. If there is nothing in the writing indicating that it was not the entire contract of the parties, the writing will not admit of other contemporaneous agreements not embraced therein. 36 S. W. 479; 34 Tex. 643; 29 Tex. 49; 25 Tex. Supp. 246; 8 Tex. 196; 21 Tex. 219; 52 Tex. 139.

2. If appellee and the agent of appellant agreed to make a change in the contract, the former made the latter his agent for that purpose, and appellee is estopped from setting up fraud

on the part of the agent. Lawson, Rights & Rem. § 7, and footnotes.

Woods Brothers, for appellee.

The contract entered into by appellee was reduced to writing and delivered to him, with the agreement that the order signed by him in blank should be filled out by the agent and made to conform to the contract delivered to appellee. Since the agent failed therein, the contract sent to the appellant was not the contract of appellee, and the latter is not liable. Bishop on Cont. 372, 382, 424, 638; 3 Am. & Eng. Enc. Law (1 Ed.), 841, 868; 9 Cyc. 299, 580, 582; 2 *Ib.* 193, 209, 179 *et seq.*; 3 Enc. of Ev. 526; 1 Enc. of Ev. 774; 27 Ark. 109; 49 Ark. 40; 57 Ark. 277. The contract delivered to appellee would at least be regarded as contemporaneous writing relating to the same subject-matter, and admissible in evidence along with others in ascertaining the terms of the contract. It would be sufficient to show, in view of the circumstances of its execution and of the other, that the writing relied on by appellant was obtained by fraud of the agent. 1 Greenleaf, Ev. § 283.

McCULLOCH, J. This is an action brought before a justice of the peace upon written contract to recover the price of a lot of merchandise (jewelry) alleged to have been sold by the plaintiff (appellant) to defendant, and shipped to him at his place of business in Marion County. Judgment was rendered in favor of the defendant before the justice of the peace, and also in the circuit court on appeal, and the plaintiff appealed to this court.

In the circuit court the cause was tried before the court, sitting as a jury. No declarations of law were made by the court, none were requested by the parties, and we have only before us the question of the legal sufficiency of the evidence to support the findings of the court and judgment.

The facts are undisputed. Defendant was a merchant at Rush, Arkansas, his railroad shipping point at that time being Buffalo, Arkansas. Plaintiff's place of business was at Cedar Rapids, Iowa, and the alleged sale was made by its traveling agent, who procured a written order from defendant for the goods. The order contained the following clause:

"This order is subject to approval at Cedar Rapids, Iowa,

and can not be countermanded. Salesmen have no authority to make any agreement not written or printed hereon."

The order was received by plaintiff and approved, and the goods shipped, but were never received by defendant, the shipment, though properly consigned, having been erroneously carried to another place.

The defendant testified that when he gave the written order to plaintiff's traveling salesman a printed slip containing the following clause was pinned to the printed order blank as a part of the contract:

"PROFITS GUARANTY.

"We guaranty that the gross profits to the purchaser from the sales of the jewelry purchased hereunder, and the jewelry hereafter purchased as hereinafter provided, will average thirty-three and one-third (33 1-3) per cent. upon the amount of the order, for the term of one year from the date of shipment; and if the gross profits do not average thirty-three and one-third per cent. for one year, as above, we will pay by draft, to the purchaser, an amount sufficient to make up the deficiency."

He testified that the copy of the order left with him (defendant) had this slip pinned to it, and made the following further statement of the facts:

"I told him I would take the goods under the contract as changed, and we started to change and fill another contract and make it just like the one we had first made out; but before we got it done Jackson's horses got restless, and he had to go to see about them, and I went with him to his buggy, and after he got his horses straightened out he said he was in a hurry to get to Yellville, and for me to sign the contract that he had, and he would make it just like the one that I kept, when he got to Yellville; and I signed it with that understanding that he pin a slip on the top of the one that he took with him, and strike out the clause referring to the notes, just as the one I kept."

It appears that the salesman failed to attach the slip to the contract sent to and accepted by the plaintiff. In other words, the defendant intended to give and did give an order to contain this clause, and the plaintiff received and accepted an order omitting the clause. Did the minds of the contracting parties meet upon the same form of contract? We think not. Plainly the

defendant entered into one form of contract, and the plaintiff approved one of totally different effect. There was no contract, because the minds of the parties never met upon the same terms.

Appellant contends that the court erred in admitting proof establishing the oral agreement concerning the added clause in the order blank. It is urged that the effect of this testimony was to vary or contradict the terms of the written contract. Not so. The purpose of the evidence was not to vary or contradict the terms of the contract, but to identify the particular contract which defendant in fact executed. The paper signed by the defendant did not in fact become his contract until the salesman attached the slip containing the clause as agreed upon between them, and it was competent for him to prove this by parol testimony. *Graham* v. *Remmel,* 76 Ark. 140; *State* v. *Wallis,* 57 Ark. 64; *Burke* v. *Dulaney,* 153 U. S. 228.

The defendant had in his possession at the time of the trial one writing purporting to represent the contract between the parties, and the plaintiff had another of different import, which it sued on as the contract between them. Their minds did not meet, and there was, therefore, no contract at all upon which defendant was liable.

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

78 589
p85 114

Opinion delivered April 30, 1906.

RAILROAD—LIABILITY FOR OVERFLOW—EVIDENCE.—A verdict against a railroad company for damages for injury to a growing crop is sustained by proof that in time of overflow the water was from 18 inches to 2 feet higher above than below defendants' roadbed, that by reason of insufficient openings in the roadbed the water was held on plaintiff's farm several days longer than it otherwise would, and also that the character of the water was changed from running to eddy water which was more injurious than running water.

Appeal from Clark Circuit Court; *Joel D. Conway*, Judge; affirmed.

B. S. Johnson, for appellant.

1. The verdict is contrary to the evidence, and not justified by the facts. Over 13 per cent. of the length of the dump is shown by undisputed evidence to be devoted to bridges, trestles and openings for the passage of water. There is no testimony that the openings were not amply sufficient to pass off the water that annually and usually fell, nor that the embankment held water up to the injury of the upper lands. On the contrary, the evidence is positive that the openings were wider and larger than the rule of experience required.

2. The evidence is undisputed that the creek overflowed in the same manner long before the construction of the dump.

3. The rainfall in June and July, 1902, was extraordinary and unprecedented, for which the appellant is not responsible.

4. The court erred in its instructions. The fifth was error because it was not based upon any evidence before the jury. It was error to deny the fourteenth prayer of defendant, because it was in evidence that the creek overflowed its bottoms long before the dump was built, and it was incumbent upon plaintiff to show, not only that he was damaged by reason of a defective embankment, but also what part of the damage was due to the embankment apart from that would have occurred without regard to the embankment. 56 Ark. 581.

5. The court erred in its sixth instruction, given at request of plaintiff, same being on the measure of damages. 56 Ark. 581.

John E. Bradley, for appellee.

1. If appellant's road was so constructed as to materially obstruct, retard or divert the waters of the stream in times of overflow, to appellee's injury, appellant is liable. As to rights of riparian owners, see Gould on Waters (2 Ed.), § 204. The proof is that in times of overflow the water stood from 18 inches to 2 feet higher on the upper side of the dump than on the lower side. It is also in proof that the overflows are longer both in coming on and flowing off than before the road was built. An injured proprietor is equally entitled to redress whether the damage is caused by a diversion of the water, by backwater, by inundation

from above his land, or by the percolation of water through the banks. He is entitled to enjoy the natural fall and current of the stream. Gould on Waters (2 Ed.), § 209, and cases cited.

2. Appellant's contention that the rainfall in June and July, 1902, was extraordinary and unprecedented is without proof to support it. It is in proof that in previous years the overflow had been higher than in 1902, had at one time washed away appellant's roadbed in the bottoms of this creek, and at another over the roadbed in many places. By its previous experience appellant was admonished of the necessity to exercise diligence, prudence and care, and to use proper means and appliances to avoid a congestion of floods which it might reasonably have anticipated. Gould on Waters, § 298 and notes. Freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years, although at no regular intervals. *Ib.* § 211 c.

3. There was competent evidence on which to base the instruction on the measure of damages. 56 Ark. 612. See also for rule as to measure of damages: 11 S. W. 526; 25 S. W. 54; 23 S. W. 546; 7 S. W. 353; 39 S. W. 204. In arriving at the measure of damages, great liberality in making proof is allowed, and even the opinion of a witness qualified by experience is admissible—stating all facts upon which his opinion is based. 60 Tex. 204. See also 69 N. Y. 61; 50 Mo. 348; 85 Ill. 594; 38 Iowa, 518.

HILL, C. J. Saunders owned a large and fertile farm on Terre Noir Creek in Clark County. Approximately speaking, the railroad track ran north and south, crossing Terre Noir at right angles. The general course of this stream was west to east. The distance between the foothills of the Terre Noir valley was 8400 feet, according to Saunders' evidence, and 6500 feet according to the railroad's evidence. The difference is immaterial, and only affects the percentage of the openings in the railroad embankment. There is practically no conflict of evidence as to the extent of the openings, and, averaging the estimates given, it may be assumed that 13 per cent. of the length of the embankment, or dump, as it is called, was open space for the passage of water. The dump was four to five feet high. Terre Noir was a very tortuous stream, and it was a neighborhood saying that it overflowed every time it thundered. The railroad was constructed in

1873. In 1882 the high water washed away the roadbed in the bottoms of Terre Noir, and in 1892 water ran over the dump in 18 places, and in 1902 the water came up almost up to the track. The dump had been raised some 18 inches since the 1882 overflow. There was some evidence that the 1882 overflow was the highest, and some that the 1902 was the highest.

Saunders sued the railroad, alleging injury to his crops in 1902 by reason of the unskillful and negligent construction of the railroad dump, in that it was so high that it obstructed and retarded the passage of water in times of overflow, and in not leaving sufficient openings in the dump to let the water in times of overflow pass off and flow as it naturally would do but for such obstruction and insufficient openings. The action was not for causing the overflow, but for hindering the natural drainage in time of overflow. Saunders recovered a verdict for $1,500, and the railroad appealed.

1. The principal contention of the appellee is that the verdict is contrary to the evidence, and was not sustained by the facts.

That this creek was subject to overflow as far back as the memory of man runneth is plain from the evidence; that much destruction was wrought by it before the railroad was built is established; and that since the railroad was built frequently there has been much destruction of crops, both above and below the railroad dump, is fully proved. But the appellee has established by an overwhelming weight of evidence that in times of overflow the water is from 18 inches to 2 feet higher on the upper than the lower side of the dump. While some of this testimony must be discounted, for the difficulty of making such estimates with the eye, yet in one overflow a witness put it to the test of the level, and found it 12 inches higher at one place and 15 inches at another. The effect of this damming the water was to cause it to stay on the Saunders farm several days longer than it otherwise would, and change the character of the water from running water to back or eddy water with no apparent current. Farmers experienced in observing overflows testify that still water causes more damage than running water.

An engineer of appellant company testified that the difference in the height of the water on the two sides of the dump

was only two inches; but his only data to base his calculations upon were the watermarks on the trees. It was also shown by this witness that the open space in the dump was about 1000 feet more than the experience of this road in North Arkansas, where the streams run more rapid, demonstrated was necessary to carry off the water. Whatever may have been the experience with watercourses elsewhere, there can be no doubt that in times of overflow the water on the upper side of this dump stood from one to two feet higher than on the lower side; and this fact was sufficient evidence to go to the jury on the issue as to whether the roadbed was negligently constructed, in that it did not allow sufficient space for the drainage of the natural flow of the water. The company, from having its roadbed washed away in 1882 and having the water running over it in 1892, was fully informed of the volume of water to be naturally expected to be carried by this creek which "overflowed whenever it thundered."

2. It is contended that the undisputed evidence shows that the creek overflowed in the same manner before the construction of the road. That there were disastrous overflows before the road was built, there can be no doubt, but that does not establish the fact that the dump had nothing to do with the damage to appellee's crop. There was abundant evidence tending to prove that the dump causes the water to stay longer and retard its flow and force it back onto the farm, instead of draining off naturally.

3. The appellant contends that the rainfall in June and July, 1902, was extraordinary and unprecedented, and it is not responsible for failing to provide against it.

The evidence fails to sustain this contention. The evidence of the rainfall at nearby towns was introduced, and also of witnesses that the season was extremely wet; but other evidence tended to show higher overflows at other times. The history of this creek and its treatment of appellant's roadbed was sufficient to bring the everflow in question within the things reasonably to be expected in constructing a dump across the valley.

4. Questions are raised as to the instructions, and the court has gone over them carefully, and fails to find error in them. The court gave 11 instructions requested by appellant, and these instructions fairly presented every phase of the law which the

appellant was entitled to have submitted to the jury. Four instructions were refused. So much of them as appellant was entitled to were covered in other instructions.

5. The instruction on measure of damages is attacked, as is also the evidence on this issue. The instruction is in accord with *Railway Company* v. *Yarborough,* 56 Ark. 612, where this subject is fully discussed by Mr. Justice MANSFIELD. There was some evidence adduced on this subject which offended against the rule in the Yarborough case, but it was not objected to, and there was sufficient evidence within the rule to support the verdict.

The unsatisfactory part of the case is the difficulty of determining what damage was caused by the overflow for which the railroad was not responsible and what was caused by the detention and backing of the waters for which the railroad was responsible. There is evidence on this point, and a jury from the body of Clark County, which would naturally be composed largely of farmers, is a much better tribunal to determine this question than any other.

If the jury were authorized to find the railroad responsible for all the injury to the crops, there was evidence which would have sustained a verdict of $3,500 or more. The jury were fully instructed on this point in instructions prepared by the appellant, and from the fact that their verdict is only $1,500 the court must infer that they have carefully eliminated all injury not the result of this obstruction. Certainly, their verdict is not without evidence to support it, and that is as far as this court can consider it.

Judgment affirmed.

Mr. Justice BATTLE dissents.

BROOKS v. HORNBERGER.

78 595
83 374

78 595
185 215

78 595
89 441

Opinion delivered April 30, 1906.

COURTS—JURISDICTIONAL AMOUNT.—Where ten notes for $50 each were executed, secured by chattel mortgage, which provided that, upon default in payment of any one, all should, at the holder's option, become due, and default was made on one of the notes, jurisdiction of an action to recover on all the notes is in a justice's court, and not in the circuit court, as the amount of each separate demand, and not the aggregate of several demands, determines the jurisdictional amount.

Appeal from Pope Circuit Court; *William L. Moose,* Judge; reversed.

U. L. Meade, for appellants.

1. There were ten of the notes, each for an amount within the jurisdiction of the justice of the peace. They were separate causes of action. The amount of each separate claim or contract which one person holds against another, and not the aggregate amount, determines the jurisdiction. 1 Ark. 252; *Ib.* 275; 3 Ark. 494; 5 Ark. 34; 9 Ark. 463; 35 Ark. 287; 17 Ark. 385; 18 Ark. 249; 24 Ark. 177; 34 Ark. 188; 57 Ark. 531.

J. T. Bullock and *Robt. J. White,* for appellees.

1. The notes and mortgage, taken together, constitute the contract, and are each a part, and explanatory, of the contract. 49 Ark. 320; 28 Ark. 391; 26 Ark. 249; 18 Ark. 65. The mortgage recites an indebtedness of $500 payable in ten equal installments of $50. Of the notes it recites that it is agreed therein that in case of default in payment of any one or of any part of any of said notes, all of them, at the option of the holder, to become due and payable at once, and this mortgage be enforced." This clause appears in each of the notes. The notes and mortgage are, therefore, an entire and indivisible contract. 4 Ark. 251; 9 Ark. 501; 19 Ark. 326; 43 Ark. 275. The debt being an entirety, only covenant would lie for installments falling due until the whole debt becomes due. When the installments due exceed $300, only the circuit court has jurisdiction. 19 Ark. 326; 43 Ark. 275. Exercising the option to declare all installments due took the case out of the jurisdiction of the justice of the peace. The judgment and execution were void, and the stay bond a

nullity. 29 Ark. 472. And the circuit court had power to quash the proceedings. *Ib.;* Kirby's Digest, § § 3224 to 3226.

HILL, C. J. Hornberger was indebted to Brooks, and evidenced the same by ten promissory notes, each for the sum of $50. The first one fell due December 1, 1903, and one fell due each month thereafter. Each note recited that it was one of a series of ten notes, and that, upon default in payment of any one on the option of the holder, all became due and payable; and the notes further recited that in case of default the mortgage securing the notes should become enforceable. A chattel mortgage secured the notes.

In January, 1904, default having been made on two of the notes, suit was filed before a justice of the peace, in Pope County, on all of the notes. The justice's record shows that the ten notes were filed as the original causes of action, and that the debtor was duly summoned, appeared and the cause was tried, resulting in a judgment for the aggregate of the notes and interest, amounting to $513.88.

After a *nulla bona* return a transcript of the judgment was filed with the circuit clerk, and docketed as a circuit court judgment pursuant to statute.

An execution was issued by the circuit clerk, and while in the hands of the sheriff a stay bond was given with G. G. Dandridge as surety, which was approved. After expiration of stay, execution was sued out against the principal and surety on the stay bond, and thereupon the said principal and surety instituted proceedings to quash the execution on the ground that the judgment of the justice of the peace was void. The circuit court quashed the execution, and Brooks appealed.

In *Berry* v. *Linton,* 1 Ark. 252, it was settled that the amount of each separate demand or cause of action, and not the aggregate of various causes which may be joined in an action, determines the jurisdictional amount. The last reiteration of this rule was in *Paris Mercantile Co.* v. *Hunter,* 74 Ark. 615, April 1, 1905, and between those cases is an unbroken line of decisions applying this principle in many ways. It is idle to repeat them. The leading ones are cited in appellant's brief. The fact that the notes were of a series secured by chattel mortgage, and that all were due on default of one at the election of the holder, does not change

the rule in the least. The basis of the rule is that each note is a separate cause of action, and the mere fact that several notes may be joined into one suit, instead of a separate suit for each, does not change the nature of the cause of action, or in any way affect anything except the mere procedure.

The judgment is reversed, and cause remanded.

LITTLE ROCK TRACTION & ELECTRIC COMPANY v. HICKS.

Opinion delivered April 30, 1906.

APPEAL—PRAYER—AMENDMENT.—Where two defendants sought to appeal from a joint judgment against them, but their attorney inadvertently signed the name of only one of them, and the clerk treated the prayer as if on behalf of both and issued summons accordingly, the appeal will not be dismissed as to the defendant whose name was not signed, but the record will be amended to show that both defendants appealed.

Appeal from Pulaski Circuit Court; *Edward W. Winfield,* Judge; motion to amend record granted.

Cantrell & Loughborough, for appellants.

W. C. Adamson, for appellee.

HILL, C. J. Judgment was rendered jointly against the Little Rock Traction & Electric Company and the Little Rock Railway & Electric Company. The same attorneys represented the two defendant corporations, and one of the attorneys applied to the clerk of this court for an appeal. He inadvertently signed the name of only one of the defendants, and wrote the prayer of the appeal as follows: "Comes the defendant, and prays an appeal from the judgment rendered herein." The clerk discovered that there were two defendants, and called the attorney's attention to it, and the attorney or the clerk then and in the presence of the other, added the letter "s" to the word defendant, making it read that the defendants pray an appeal. The singular number of the verb "comes" was not corrected, and the other defendant's name was not signed. It was, however, treated by the clerk as a proper prayer for appeal by both parties, the attorney intended it as such,

and the clerk issued summons; inserting both defendants as appellants, and service of summons was acknowledged.

Now, appellee desires to have the appeal as to the defendant not named in the prayer dismissed, and appellants desire to amend the record to make it expressly state that both defendants appealed. The object of the appeal was to lodge the case in this court, and to summon the prevailing party here as appellee. In this irregular way this object is fully attained; no one was misled; no mistake occurred, except an omission to sign name of both defendants, when both attorney and clerk understood the insertion of the defendants for defendant to be a prayer on behalf of both. To sustain the contention of appellee and dismiss the appeal would be putting form before substance, the letter before the spirit. The motion to dismiss the appeal is denied, and to amend the record is granted.

BRECKINRIDGE v. BRECKINRIDGE.

Opinion delivered May 7, 1906.

1. JUDGMENT—ORDER SETTING ASIDE—PRESUMPTION.—Where an order in a divorce suit allowing alimony and attorney's fees was set aside at a subsequent term as being void, but the evidence taken at the hearing was not preserved, it will be presumed in a collateral proceeding that the order was properly set aside for one of the grounds mentioned in Kirby's Digest, § 4431. (Page 599.)
2. DIVORCE—CUSTODY OF CHILDREN—EVIDENCE.—In a suit by a husband for a divorce on the ground of the wife's cruelty, evidence as to adultery committed by the wife was properly considered by the chancellor in determining whether the wife was a proper person to have custody of children of tender years. (Page 600.)
3. SAME—CUSTODY OF CHILDREN.—In granting a divorce to a husband, the court will not remove the infant children of tender age from the custody of the mother's parents, notwithstanding the mother's character is bad, if the grandparents offer the children a home and proper care, which the father is unable to supply them. (Page 600.)

Appeal from Garland Chancery Court; *Leland Leatherman*, Chancellor.

James H. Breckinridge brought suit for divorce against his wife, Mary Breckinridge, alleging cruelty as ground. He recovered a decree, and was awarded custody of their two infant children. Mrs. Breckinridge has appealed. Reversed in part.

Greaves & Martin and *Gustave Jones,* for appellant.

1. After the expiration of the term, a judgment can be set aside only in the way and for the reasons specified by the statute, Kirby's Digest, § 4431, or by bill of review. 33 Ark. 434; 52 Ark. 316; 53 Ark. 110.

2. The complaint does not charge the defendant with adultery, and evidence tending to show it was irrelevant and inadmissible. But if it had been charged, and if it were true, appellee by his conduct will be held to have condoned the offense. 65 Ark. 87; 73 Ark. 280. Having condoned the offense, he can not retract it. 23 Ark. 615.

3. It was error to award the custody of the children to appellee. The proof shows that he is not a proper person to have their custody, that he has no home and has never contributed to their support. On the other hand, they have a good home with the mother at the home of her parents, and because of their tender age she should have their present custody. 64 Ark. 518.

Wood & Henderson, for appellee.

1. Appellee had dismissed the Lawrence County suit, before appellant had appeared therein or filed any plea or answer as provided by statute. Kirby's Digest, § 6168. The order of the Lawrence Chancery Court, upon which is based the plea in abatement, was made after the suit was dismissed, without notice to appellee, and it was therefore void. *Ib.* § 4424. That court was authorized to set the order aside after the expiration of the term. Kirby's Digest, § 4431, subdiv. 4.

2. The doctrine of condonation does not apply where the ground relied on is acts and conduct on the part of the defendant rendering the condition of the plaintiff in life intolerable. 56 S. W. 861; 2 Bishop, Mar., Div. and Sep. § 306. Evidence as to the moral character of appellant was admissible for consideration in determining the question as to the custody of the children.

HILL, C. J. 1. Breckinridge brought a divorce suit against his wife in Lawrence County on the ground of adultery. On the 27th of February, 1905, he paid the costs and dismissed the ac-

tion. Subsequently his wife filed answer and cross-complaint, upon which an order for alimony and attorney's fees was made in her favor. At a subsequent term Breckinridge moved to set aside said order, and on hearing before the court, both sides represented, oral testimony was taken, and the court set aside the order as void. The evidence taken at that hearing is not preserved, and the court must presume that the evidence brought the cause within some of the causes mentioned in section 4431, Kirby's Digest, authorizing the court to set aside judgments and orders after the term. Breckinridge brought this suit in Garland County, where he was residing after he had dismissed in Lawrence County, and to the Garland County suit the Lawrence County proceeding was pleaded; but, as it was properly set aside by the court rendering it, of course it could not avail.

2. The counsel for appellant frankly admits that the evidence adduced, if believed, was sufficient to entitle appellee to a decree for divorce. This evidence comes here accredited by the chancellor, and in the main it is uncontradicted save by the appellant. It sustains the allegation of cruel treatment, and also sustains the charge of adultery which was made in the Lawrence County court, but not in this suit. Objection is raised to this evidence as to adultery having been admitted; but as each party was seeking the custody of the children, it was entirely proper to show the character of each, in order that the court could determine the best interests of the children. The main question in the case is over the custody of the children, one a girl of 4 and a boy of 3. The husband intended having his sister take care of and rear them, and the evidence shows that would have been a good and fitting home for them, but the sister died before the case went to trial. The evidence establishes that the father is not the kind of man that should have the care and control of these little children. He can offer no home for them, and his character is shown to be such that his rearing of them does not promise anything for their good. The mother's character is proved to be bad, and at times she was shown to be unkind to the children. Mrs. Breckinridge and the children, after the separation of these parties, went to the parents of Mrs. Breckinridge, Mr. and Mrs. R. E. Jones, at Alicia, Lawrence County. These grandparents are caring for the children, and offer to care and provide for them, to

see that they are treated kindly and properly reared. Unfortunately, these grandparents do not escape the fate of other parties in this record, and there is considerable testimony to show that their home is not suitable for the children, and among other things a bill for divorce brought by Mr. Jones against his wife in which he makes serious charges against her. But that suit was dismissed. Mr. Jones says he was misinformed, and has become reconciled to his wife.

The court is satisfied that the children will be better off with their grandparents and their mother than with the father during their tender years at least. There they have a home and a mother's and grandparents' care. The evidence leaves hope that the mother's conduct, when in the home of her parents, will not be as when living alone.

The chancellor found that the children were under the control of Mr. Jones at Alicia, and ordered that a writ be issued to the sheriff of Lawrence County to take the children from the grandparents and deliver them to Breckinridge. In this there is error, and so much of the decree is reversed, and the cause remanded for proper orders for visitation and support to be made in the premises which the chancellor may find proper and not inconsistent herewith. The decree, in so far as it divorces this couple and in all other things except the custody of the children, is affirmed.

APPENDIX

I

OPINIONS NOT REPORTED.

Macrae *v.* Johnson; appeal from Lee Chancery Court; Edward D. Robertson, chancellor; reversed February 24, 1906; *per* Riddick, J.

Reeder *v.* Ford, Same *v.* Sissell, Same *v.* Click; appeals from Howard Chancery Court; James D. Shaver, chancellor; affirmed March 3, 1906; *per* Wood, J.

Waldrop *v.* Vaught; appeal from Montgomery Chancery Court; Leland Leatherman, chancellor; affirmed April 16, 1906; *per* Hill, C. J.

Russell *v.* Stewart; appeal from Lafayette Circuit Court; Charles W. Smith, Judge; affirmed April 16, 1906; *per* Wood, J.

Husted *v.* Insley; appeal from Drew Chancery Court; Marcus L. Hawkins, chancellor; reversed April 30, 1906; *per* Hill, C. J.

Mobb *v.* Stotts; appeal from Garland Circuit Court; Alexander M. Duffie, judge; affirmed May 7, 1906; *per* Hill, C. J.

II

CASES DISPOSED OF ON MOTION.

Mollie S. Battle *v.* Glennie S. Atkinson by next friend W. F. Coleman, et al.; Lincoln Chancery Court, Star City District; Henry M. Armistead, special chancellor; consent decree, February 19, 1906; *per curiam.*

Scott County *v.* H. J. Hall; Scott Circuit Court; Styles T. Rowe, judge; appeal dismissed for non-compliance with rule nine, February 26, 1906; *per curiam.*

Scott County *v.* G. M. Grandstaff; Scott Circuit Court; Styles T. Rowe, judge; appeal dismissed for non-compliance with rule nine, February 26, 1906; *per curiam.*

B. M. Barmington *v.* F. D. Barmington; Cleburne Chancery Court; George T. Humphries, chancellor; appeal dismissed for non-compliance with rule nine, February 26, 1906; *per curiam.*

I. N. Newell, J. M. Gates and J. A. Foreland *v.* Jennie Kidney and Ada Fearing; Green Chancery Court; Edward D. Robertson, chancellor; reversed and remanded by agreement, March 10, 1906; *per curiam.*

W. N. Trulock, Ex parte, *v.* Jno. M. Elliott, chancellor; mandamus to Jefferson Chancery Court; John M. Elliott, chancellor; dismissed by consent, March 10, 1906; *per curiam.*

W. D. Raynor by next friend L. D. Raynor *v.* Kenefick-Hammond Company; Boone Circuit Court; E. G. Mitchell, judge; settled and dismissed March 10, 1906; *per curiam.*

D. G. McBride *v.* J. W. Shephard; Lawrence Circuit Court; Allen Hughes, judge; appeal dismissed for non-compliance with rule nine, April 2, 1906; *per curiam.*

J. J. Haynes *v.* Western Union Telegraph Company; Clark Circuit Court; J. D. Conway, judge, appeal dismissed for non-compliance with rule nine, April 2, 1906; *per curiam.*

Jonesboro, Lake City & Eastern Railroad Company *v.* I. A. Eddings; Craighead Circuit Court, Lake City District; Allen Hughes, judge; appeal dismissed for non-compliance with rule nine, April 16, 1906; *per curiam.*

J. W. Burton and Carrie Gray *v.* Zula Mantle; Phillips Circuit Court; Hance N. Hutton, judge; affirmed for non-compliance with rule nine, April 23, 1906; *per curiam.*

St Louis, Iron Mountain & Southern Railroad Company *v.* O. O. Ellis; Bradley Circuit Court; Zachariah T. Wood, judge; settled and appeal dismissed April 23, 1906; *per curiam.*

Lewis Sachs *v.* I. Lang; Craighead Circuit Court, Jonesboro District; Allen Hughes, judge; affirmed April 30, 1906, for non-compliance with rule nine; *per curiam.*

James Liston *v.* Godfrey Frank & Company; Mississippi Chancery Court, Osceola District; E. D. Robertson, chancellor; affirmed for non-compliance with rule nine, April 30, 1906; *per curiam.*

Mrs. J. F. Ward and J. F. Ward *v.* Mrs. C. W. Smith and Mrs. C. E. Simpson; Woodruff Chancery Court; Edward D. Robertson, chancellor; appeal dismissed for non-compliance with rule nine, February 19, 1906; *per curiam.*

INDEX

ACCORD AND SATISFACTION:

accord unexecuted as defense. *Grimmett* v. *Ousley*, 304.

ACCOUNT:

trustee not required to account for profits when. *Reeder* v. *Meredith*, 111.

several items of, added to give circuit court jurisdiction. *St. Louis S. W. Ry. Co.* v. *James*, 490.

ACTIONS:

when proper to transfer cause from equity to law court. *Ward* v. *Goza*, 7.

when cause of action to recover attorney's fee accrues. *Weil* v. *Fineran*, 87.

when improper to transfer cause from law to equity. *Equitable Mfg. Co.* v. *Thomasson*, 240.

action held not to misjoin causes. *Ft. Smith Suburban Ry. Co.* v. *Maledon*, 366.

plaintiff bound by election of remedies. *Baker* v. *Brown Shoe Co.*, 501.

burden of proof that election was made by mistake. *Id.*

how plaintiff may show that election was made by mistake. *Id.*

election of remedies when vendor of chattel reserves title. *Butler* v. *Dodson*, 569.

ADMINISTRATION:

administrator held a trustee for all interested. *Reeder* v. *Meredith*, 111.

land of intestate's estate sold subject to dower. *Shell* v. *Young*, 479.

validity on collateral attack of sale to pay debts. *Id.*

when creditors may follow lands descended to collect claim. *Scoggin* v. *Hudgins*, 531.

ADVERSE POSSESSION:

seven years statute as to constructive possession of law by payment of taxes upheld. *Cottonwood Lumber Co.* v. *Hardin*, 95.

constructive possession of tax purchaser occupying part of land. *Rucker* v. *Dixon*, 99.

AGENCY: SEE REAL ESTATE BROKER; FACTORS AND BROKERS; CORPORATIONS.

right of setoff against agent of undisclosed principal. *Frazier* v. *Poindexter*, 241.

rule where principal is disclosed or ascertainable. *Id.*

when right of setoff waived. *Id.*

not proved by agent's declaration. *St. Louis, I. M. & S. Ry. Co.*

AGENCY—*Continued.*

v. *Stone,* 318.
when agent's acts ratified. *Id.*

AMENDMENT: See PLEADING.

of constitution, see CONSTITUTIONAL LAW.

ANIMALS:

for stock killing cases, see RAILROADS.

APPEAL AND ERROR:

questions conceded below not decided on appeal. *St. Louis S. W. Ry. Co.* v. *White Sew. Mach. Co.,* 1.
presumption in favor of judge's finding. *Id.*
admission of incompetent evidence to prove uncontroverted fact. *Wade* v. *Goza,* 7.
admission of secondary evidence without objection not error. *Id.*
general objection to several instructions bad. *Id.*
questions raised by cross appeal. *Id.*
ground of motion for new trial should respond to court's ruling. *Lewis* v. *State,* 40.
question not raised below not considered. *Cook* v. *Bagnell Timber Co.,* 47.
admission of incompetent evidence to prove undisputed fact. *Lee* v. *State,* 77.
immaterial that exceptions to instructions were not saved if same questions were raised on the record proper. *Alexander* v. *Beekman Lumber Co.,* 169
presumption in favor of court's findings in absence of bill of exceptions. *Swing* v. *Brinkley Car Works & Mfg. Co.,* 198.
appeal lies to circuit court from justice of peace. *Chicago, R. I. & P. Ry. Co.* v. *Langley,* 207.
right to appeal from part of judgment. *Id.*
presumption that chancellor considered only competent evidence. *Strayhorn* v. *McCall,* 209.
act of May 6, 1899, held not to extend right of appeal. *Ex parte Butt,* 262.
contempt proceedings not reviewed on appeal. *Id.*
chancellor's finding not disturbed unless against weight of testimony. *Arnold* v. *McBride,* 275.
appellant can not complain because appellee's relief stopped short of what he was entitled to. *Id.*
when error in instruction cured. *Ft. Smith Light & Traction Co.* v. *Carr,* 279.
incompetent evidence admitted held harmless. *Benton* v. *State,* 284.
exception to evidence held too general and indefinite. *Id.*

APPEAL AND ERROR—*Continued.*

time for taking exception. *Id.*
presumption from insufficiency of appellant's abstract. *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 374.
error in admission of incompetent evidence harmless when. *Id.*
exception to incompetent evidence must be preserved in motion for new trial. *Id.*
effect of failure of abstract to set out all the instructions. *Id.*
right to prosecute appeal precluded by former adjudication when. *Jenkins* v. *Jenkins,* 388.
rule requiring appellant to abstract testimony construed. *Jacks* v. *Reeves,* 426.
presumption from failure to abstract instructions. *Id.*
presumption that paper read in evidence was read to jury. *Arkansas So. Ry. Co.* v. *Dickinson,* 483.
error in giving instruction waived by failure to accept. *St. Louis S. W. Ry. Co.* v. *James,* 490.
error not considered if not raised below. *Little Rock Ry. & El. Co.* v. *Dobbins,* 553.
record amended to show that both defendants appealed when. *Little Rock Traction & Electric Co.* v. *Hicks,* 597.

ASSESSOR. See OFFICES AND OFFICERS.

construction of statute as to special bond and oath of office. *Boyett* v. *Cowling,* 494.

ATTORNEY AND CLIENT:

attorney may sue for fee on revocation of power of attorney when. *Weil* v. *Fineran,* 87.
good faith required of attorneys in dealings with clients. *Id.*
damages recoverable by attorney on breach of contract of employment. *Id.*

BAILMENT:

effect of shipping goods with option in consignee to purchase. *Gottlieb* v. *Rinaldo,* 123.
effect of reshipment to such consignor. *Id.*

BANKRUPTCY:

reversion of surplus to bankrupt. *Wade* v. *Goza,* 7.

BILLS AND NOTES:

how payment of note shown. *Dawson* v. *Owen,* 93.
mere neglect or failure to return bill not acceptance. *St. Louis S. W. Ry. Co.* v. *James,* 490.

BROKERS: See REAL ESTATE BROKERS; FACTORS AND BROKERS.

BURDEN OF PROOF:

on defendant to establish fraud. *Wiel* v. *Fineran,* 87.
on plaintiff to prove that action was brought in time. *Swing* v. *St. Louis Ref. & W. G. Co.,* 246.
to show mistake in making election of remedy. *Baker* v. *Brown Shoe Co.,* 501.

CARRIERS:

delivery of goods to responsible carrier held a delivery to consignee when. *Gottlieb* v. *Rinaldo,* 123.
interstate shipment not interrupted within State to evade interstate rate. *Porter* v. *St. Louis S. W. Ry. Co.,* 182.
possession of baggage check as evidence of ownership. *St. Louis, I. M. & S. Ry. Co.* v. *Stone,* 318.
when authorized to recheck baggage. *Id.*
owner of baggage held to have ratified act of agent in rechecking baggage. *Id.*
not liable for exemplary damages for failure to transport passenger when. *Choctaw, O. & G. Rd. Co.* v. *Cantwell,* 331.

CERTIORARI:

contempt procedings reviewable on certiorari. *Ex parte Butt,* 262.

CIRCUIT COURT:

several item of account added to give jurisdiction. *St. Louis S. W. Ry. Co.* v. *James,* 490.
several notes, each below jurisdictional limit, not added to give circuit court jurisdiction. *Brooks* v. *Hornberger,* 595.

CONSTITUTIONAL LAW:

Kirby's Digest, § 5057, held not an arbitrary divestiture of vested rights. *Cottonwood Lumber Co.* v. *Hardin,* 95.
school district not prohibited from interest-bearing evidences of indebtedness. *Schmutz* v. *Special School District of Little Rock,* 118.
constitutional right of witness not to incriminate himself discussed. *Ex parte Butt,* 262.
act calling in state bonds held not unconstitutional. *Tipton* v. *Smythe,* 392.
period of limitation held reasonable. *Id.*
act held not to impair obligation of contract. *Id.*
adoption of amendment to Constitution not concluded by Speaker's action in declaring it adopted. *Rice* v. *Palmer,* 432.
power of Speaker to declare result of election as to adoption of amendment. *Id.*
majority required to adopt constitutional amendment. *Id.*
evidence to be considered by Speaker of House in determining whether

CONSTITUTIONAL LAW—*Continued.*

constitutional amendment has been adopted. *St. Louis S. W. Ry.* v. *Kavanaugh,* 468.
test of majority of electors voting at election. *Id.*
power of Legislature to adopt rule of evidence as to adoption of constitutional amendment. *Id.*

CONTEMPT:

proceedings reviewable on certiorari. *Ex parte Butt,* 262.
witness may not refuse to answer irrelevant or improper question. *Id.*
when witness protected against self-incrimination. *Id.*

CONTINUANCE:

motion should state whether attendance of absent witness could be procured. *Weatherford* v. *State,* 36.
motion should show diligence. *Id.*
discretion of trial court to deny. *Goddard* v. *State,* 226; *Gallaher* v. *State,* 299.
no continuance for absence of witness whose testimony would be cumulative. *Gallaher* v. *State,* 299.
right to continuance where amendment changes issue. *Hall & Brown, etc.; Co.* v. *Louisiana & N. W. Rd. Co.,* 536.

CONTRACTS: See BAILMENT; CONSTITUTIONAL LAW.

drunkenness of contracting party's agent as ground for rescission. *Cook* v. *Bagnell Timber Co.,* 47.
inadequacy or excessiveness of consideration as affecting validity. *Id.*
distinction between dealing with sober and intoxicated person. *Id.*
in suit on contract no recovery on *quantum meruit.* *Weil* v. *Fineran,* 87.
cause of action accrues on breach of contract when. *Id.*
contract construed not to work forfeiture. *Singer Mfg. Co.* v. *Brewer,* 202.
construed to avoid hardship to either party. *Id.*
contract of employment construed. *Id.*
admissibility of custom in aid of construction. *Id.*
right of party to sue upon breach by the other party. *Spencer Med. Co.* v. *Hall,* 336.
right of employees to recover future commissions on termination of employment. *Id.*
province of courts to construe contracts. *Thomas* v. *Johnston,* 574.
agreement that lease may be converted into sale upheld. *Id.*
no contract without meeting of minds. *Barton-Parker Mfg. Co.* v. *Taylor,* 586.

CORPORATIONS:

capital stock of domestic business corporation is assessable, but not the property acquired therewith. *Harris Lumber Co.* v. *Grandstaff,* 187.
place of assessment. *Id.*
liability for malicious acts of agent. *Little Rock Ry. & El. Co.* v. *Dobbins,* 553.

COURTS:

decision held to be rule of property. *Cottonwood Lumber Co.* v. *Hardin,* 95.

COVENANTS:

agreement to pay part of party wall held a covenant running with land. *Rugg* v. *Lemley,* 65.
constructive eviction held to entitle covenantee to action on covenant when. *Scoggin* v. *Hudgins,* 531.

CRIMINAL LAW:

admonition to jury held sufficient. *Lee* v. *State,* 77.
failure to admonish jury waived when. *Id.*

CUSTOM AND USAGE:

custom in aid of construction of contract. *Singer Mfg. Co.* v. *Brewer,* 202.

DAMAGES: See TELEGRAPHS AND TELEPHONES.

for right of way taken. *Pine Bluff & W. Ry. Co.* v. *Kelly,* 83.
what recoverable where condemnation proceeding is abandoned. *Id.*
in suit on contract no recovery on *quantum meruit. Weil* v. *Fineran,* 87.
for breach of contract of employment of attorney. *Id.*
for personal injuries held not excessive. *Little Rock & H. S. W. Rd. Co.* v. *Cross,* 220; *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson,* 251.
right of employee to recover prospective profits on termination of employment. *Spencer Medicine Co.* v. *Hall,* 336.
damages for death of husband and father held not excessive. *Choctaw, O. & G. Rd. Co.* v. *Baskins,* 335.

DECISION:

rule of *stare decisis* applied. *Cottonwood Lumber Co.* v. *Hardin,* 95.

DEEDS:

deed avoidable in part not apportionable. *Reeder* v. *Meredith,* 111.
effect of conveyance of sawmill and machinery. *Alexander* v. *Beekman Lumber Co.,* 169.

DEEDS—*Continued.*

when rule as to repugnancy between granting and habendum clauses applied. *Whetstone* v. *Hunt,* 230.
effect of deed conveying grantor's entire interest *habendum* for life. *Id.*
when set aside for undue influence. *Boggianna* v. *Anderson,* 420.

DEFINITIONS:

municipality. *Schmutz* v. *Special School District of Little Rock,* 122.
sawmill. *Alexander* v. *Beekman Lumber Co.,* 172.
mill. *Do.,* 172.
option. *Bonanza Mining & Smelting Co.* v. *Ware,* 314.
appear. *Rice* v. *Palmer,* 444.

DITCHES: See DRAINS.

DIVORCE:

construction of statute for restoration of property in divorce decree. *McNutt* v. *McNutt,* 346.
evidence to be considered in awarding custody of children. *Breckinridge* v. *Breckinridge,* 598.
when children awarded to grandparents. *Id.*

DRAINS:

statute held not unconstitutional for failure to limit assessment to benefits conferred. *Ritter* v. *Drainage Dist. etc.,* 580.
sufficiency of notice of pendency of petition for establishment of drainage district. *Id.*
finding of county court held to raise presumption of benefit. *Id.*
swamp land assessable. *Id.*
validiy of assessment as a whole. *Id.*

DRUNKENNESS:

of contracting party's agent as ground for rescission. *Cook* v. *Bagnell Timber Co.,* 47.

ELECTION:

of remedies, see ACTIONS.

EMINENT DOMAIN:

object of proceeding to condemn right of way. *Pine Bluff & W. Ry. Co.* v. *Kelly,* 83.
measure of damages for taking land for right of way. *Id.*
damages recoverable where right of way is abandoned. *Id.*

EQUITABLE ASSIGNMENT:

when enforced. *Block* v. *Shaw,* 511, 514.

EQUITY:

agreement to pay part of cost of party wall enforced in equity. *Rugg* v. *Lemley*, 65.
immaterial that prayer was for legal relief only. *Id.*

ESTOPPEL:

as ground for enjoining cutting of timber. *Hall* v. *Wellman Lumber Co.*, 408.

EVIDENCE: See BURDEN OF PROOF.

use of contemporaneous memorandum to refresh recollection. *St. Louis S. W. Ry. Co.* v. *White Sew. Mach. Co.*, 1.
admission of incompetent evidence to prove uncontroverted fact. *Wade* v. *Goza*, 7; *Lee* v. *State*, 77.
necessity of objection to incompetent evidence. *Wade v. Goza* 7.
prior incestuous acts provable when. *Adams* v. *State*, 16.
hearsay evidence inadmissible when. *Weatherford* v. *State*, 36.
witness should not testify opinion as to safety of railroad crossing. *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.*, 55.
dangerous character of crossing not shown by proof of number of killings. *Id.*
evidence of good faith in sale of goods held irrelevant when. *McCuen* v. *Merchants Grocery Company*, 63.
when communication to attorney privileged. *Fox* v. *Spears*, 71.
exclusion of evidence not prejudicial when. *Id.*
witnesses held to be competent as experts as to operation of hand-car. *St. Louis S. W. Ry. Co.* v. *Plumlee*, 147.
removal of handcar wheels after injury occurred not evidence of defective condition. *St. Louis S. W. Ry. Co.* v. *Plumlee*, 147.
party disqualified only as to transactions with and statements of deceased. *Strayhorn* v. *McCall*, 209.
statement by dying brakeman as to cause of injuries admissible as part of *res gestae*. *Marshall* v. *St. Louis, I. M. & S. Ry. Co.*, 213.
rebutting evidence held competent. *Little Rock & H. S. W. Rd. Co.* v. *Cross*, 220.
hearsay evidence held incompetent. *Id.*
when objection to incompetent evidence waived. *Id.*
mode of proving foreign judgment. *Swing* v. *St. Louis Ref. & W. G. Co.*, 246.
admissibiliy of subsequent declarations of conspirators. *Benton* v. *State*, 284.
written lease not shown by parol to have been a sale. *Smith* v. *Caldwell*, 333.
declaration of servant not admissible as admission against master when. *Stecher Cooperage Co.* v. *Steadman*, 381.
nor as part of *res gestae*. *Id.*

EVIDENCE—*Continued.*

testimony as to noise caused by running of machine admissible when. *Id.*

how market value of cotton ascertained. *Wynne* v. *Schnabaum,* 402.

evidence held not to prove market value. *Id.*

conviction of obstructing railroad track as evidence in suit to recover reward for such conviction. *Arkansas So. Ry. Co.* v. *Dickinson,* 483.

parol evidence admissible to show that absolute assignment was security. *Reynolds* v. *Blanks,* 527.

such proof must be clear and decisive. *Id.*

admission of press copy of letter not admissible when. *Leidigh & Havens Lumber Co.* v. *Clark,* 539.

parol evidence inadmissible to vary contract. *Thomas* v. *Johnston,* 574.

parol evidence admissible to show that writing was signed on condition. *Barton-Parker Mfg. Co.* v. *Taylor,* 586.

FACTORS AND BROKERS: See REAL ESTATE BROKER.

liability of broker for undisclosed principal. *Drake* v. *Pope,* 327.

instruction as to broker's liability disapproved. *Id.*

factor to sell cotton held to exercise of good faith only. *Wynne* v. *Schnabaum,* 402.

evidence held not to prove bad faith. *Id.*

FOREIGN JUDGMENT:

how proved. *Swing* v. *St. Louis Refrigerator & W. G. Co.,* 246.

FORFEITURES:

contract construed not to work forfeiture. *Singer Mfg. Co.* v. *Brewer,* 202.

FRAUD: See TRUSTS.

burden of proving that contract sued on was fraudulent is on defendant. *Weil* v. *Fineran,* 87.

deed set aside for undue influence when. *Boggianna* v. *Anderson,* 420.

HOMESTEAD:

land not impressed with character of homestead when. *Shell* v. *Young,* 479.

authority of court to declare lien on homestead of deceased debtor. *Scoggin* v. *Hudgins,* 531.

HOMICIDE:

sufficiency of evidence to support verdict of murder in second degree. *Lewis* v. *State,* 40.

in prosecution for manslaughter evidence tending to prove malice and premeditation held incompetent. *Lee* v. *State,* 77.

HUSBAND AND WIFE:

stitutional. *Cottonwood Lumber Co.* v. *Hardin,* 95.
constructive possession of tax purchaser based on possession of part. *Rucker* v. *Dixon,* 99.
statute must be pleaded in equity as at law. *Strayhorn* v. *McCall,* 209.
sufficiency of plea. *Id.*
burden of proof on plaintiff to show that suit was in time. *Swing* v. *St. Louis Ref. & W. G. Co.,* 246.
power of married woman to borrow money. *Arnold* v. *McBride,* 275.
statutory liability of married woman as corporate officer. *Arkansas Stables* v. *Samstag,* 517.
effect of nonjoinder of husband as party defendant with wife. *Id.*
effect of failure of judgment to show defendant's coverture. *Id.*

IMPROVEMENTS:

trustee not entitled to credit for, when. *Reeder* v. *Meredith,* 111.
purchaser of trust property not entitled to, when. *Id.*

INCEST:

prior incestuous acts provable when. *Adams* v. *State,* 16.

INFANCY:

discretion of chancery court in awarding custody of infant. *Coulter* v. *Sypert,* 193.
when father not entitled to custody of infant child. *Id.*

INJUNCTION:

when relief granted by injunction against cutting timber. *Hall* v. *Wellman Lumber Company,* 408.
equity will enjoin timber cutting on ground of estoppel when. *Id.*

INSTRUCTIONS:

incomplete instruction cured by another when. *Little Rock & H. S. W. Rd. Co.* v. *McQueeney,* 22.
instruction as to interest of accused in result of trial approved. *Weatherford* v. *State,* 36.
refusal to give additional instruction not error when. *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.,* 55.
failure to instruct not error in absence of request. *Id.*
unnecessary to repeat. *Fox* v. *Spears,* 71.
when erroneous instruction not prejudicial. *Id.*
ambiguity in, must be specifically objected to. *Id.*
instruction held to invade jury's province. *Weil* v. *Fineran,* 87.
generality of instruction not ground of complaint unless specific instruction was asked. *St. Louis, I. M. & S. Ry. Co.* v. *Jackson,* 100.
repetition of instructions unnecessary. *Little Rock Ry. & El. Co.* v. *Green,* 129.

INSTRUCTIONS—*Continued.*

instructions should be construed as a whole. *O'Neal* v. *Richardson,* 132.
instruction telling jury to make concessions held not prejudicial. *Id.*
when required to be reduced to writing. *Id.*
incompleteness of, cured when. *St. Louis S. W. Ry. Co.* v. *Plumlee,* 147.
how objection to instruction defective in form raised. *Id.*
abstract instruction properly refused. *Id.*
abstract instruction should not be given. *Pratt* v. *Metzger,* 177.
general objection to, insufficient when. *Ft. Smith Light & Traction Co.* v. *Carr,* 279.
when error in instruction cured by another. *Id.*
objection to failure of court to disclose contents of note from jury concerning instructions held insufficient. *Benton* v. *State,* 284.
instruction held not to infringe on jury's province. *Id.*
refusal of instruction that certain evidence might be considered as tending to disprove an admitted fact held not error. *Gallaher* v. *State,* 299.
effect of failure to ask instruction. *Drake* v. *Pope,* 327.
duty of appellant to ask. *Choctaw, O. & G. Rd. Co.* v. *Baskins,* 355.
instruction directing attention to amount sued for held not prejudicial. *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 374.
unnecessary to repeat instructions. *St. Louis, I. M. & S. Ry. Co.* v. *Dillard,* 520.
instruction should not admit irrelevant or undisputed mater. *Little Rock Ry. & El. Co.* v. *Dobbins,* 553.

INTERSTATE COMMERCE.

interstate shipment not interrupted within State to evade interstate rate. *Porter* v. *St. Louis S. W. Ry. Co.,* 182.

INSURANCE.

contractual limitation on company's bond. *McCulloch* v. *Mutual Reserve Fund Life Assoc.,* 32.
time limit on policy of accident insurance. *Matthews v. Continental Casualty Co.,* 81.
evidence held not to prove payment of premium of fire insurance policy. *Driver* v. *Planters' Mutual Ins. Assoc. of Ark.,* 127.

JUDGMENTS.

criminal as well as civil judgments are amendable. *Goddard* v. *State,* 226.
how foreign judgment proved. *Swing* v. *St. Louis Ref. & W. G. Co.,* 246.
judgment amendable by parol proof when. *Liddell* v. *Bodenheimer,* 364.

JUDGMENT—*Continued.*

limitation of amendment. *Id.*
authority of court to modify judgment after term. *Id.*
judgment against married woman not void for failure to show her coverture. *Arkansas Stables* v. *Samstag,* 517.
presumption that order setting aside judgment at subsequent term was properly made. *Breckinridge* v. *Breckinridge,* 598.

JURY.

admonition to jury in criminal case held sufficient. *Lee* v. *State,* 77.
objection for failure to admonish jury waived when. *Id.*

JUSTICE OF THE PEACE.

jurisdictional limit in replevin. *Kaufman* v. *Kelley,* 176.
appeal from judgment of, lies to circuit court. *Chicago, R. I. & P. Ry. Co.* v. *Langley,* 207.
right to appeal from part of judgment. *Id.*

LANDLORD AND TENANT.

agreement that lease may be changed to sale upheld. *Thomas* v. *Johnston,* 574.

LIMITATION OF ACTIONS.

two-years statute reckoned from date of tax deed, not from sale. *Wade* v. *Goza,* 7.
contractual limitation on bond of insurance company. *McCulloch* v. *Mutual Reserve Fund Life Assoc.,* 32.
seven-years statute as to payment of taxes on wild land held con-

MASTER AND SERVANT:

liabliity of master for negligence of fellow-servant. *Central Coal & Coke Co.* v. *Gregory,* 43.
degree of care required of servant to avoid danger. *St. Louis, I. M. & S. Ry. Co.* v. *Jackson,* 100.
when question of servant's contributory negligence for jury. *Id.*
master negligent in failing to keep lookout to protect servant when. *Id.*
duty of master to warn inexperienced servant. *St. Louis S. W. Ry. Co.* v. *Plumlee,* 147.
dangers of which servant should be warned. *Id.*
instruction as to servant's contributory negligence held abstract. *Id.*
railroad company's duty as to disabled cars. *Marshall* v. *St. Louis, I. M. & S. Ry. Co.,* 213.
risk of handling disabled car one assumed by servant. *Id.*
risk assumed by brakeman in handling such car. *Id.*
duty of master toward brakeman. *Id.*
right of employee to recover prospective profits on termination of

MASTER AND SERVANTS—*Continued.*

employment. *Spencer Medicine Co.* v. *Hall,* 336.
servant held not to assume risk due to master's negligence when. *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 374.
master liable for negligence of foreman when. *Stecher Cooperage Works* v. *Steadman,* 381.
master not bound by admission of foreman when. *Id.*
statement of foreman as part of *res gestae. Id.*
when master liable for defective machinery. *Id.*
master liable for failure to furnish safe hand car and track to transport servant home. *Arkadelphia Lumber Co.* v. *Smith,* 505.
duty of master to furnish secure logging road. *Id.*
liability of master for structural defect, *Id.*

MISTAKE.

in making election of remedy, see ACTIONS.
party having opportunity to examine written contract before signing cannot be heard to say that he did not know what it contained. *Pratt* v. *Metzger,* 177.

MORTGAGES.

of school land, see *Schmutz* v. *Special School District of Little Rock,* 118.
when held to secure future indebtedness. *Greeson* v. *German National Bank,* 141.
in case of assignment of mortgage by agent presumption that he had authority to assign. *Strayhorn* v. *McCall,* 209.
agreement that mortgage shall not be foreclosed until last payment is due does not prevent bringing of suit to declare lien. *Arnold* v. *McBride,* 275.
absolute assignment of contract held a security when. *Reynolds* v. *Baskins,* 527.

NEGLIGENCE.

see RAILROADS; MASTER AND SERVANT; NOTARY PUBLIC.
duty of one maintaining wire in and along public highway. *Jacks* v. *Reeves,* 426.
presumption of negligence from proof of injury. *Id.*
not contributory negligence for traveler to fail to see wire. *Id.*
nor for infant to drive gentle horse. *Id.*
duty of one called on to act in emergency. *Id.*

NEW TRIAL.

ground of motion for, should respond to court's ruling. *Lewis* v. *State,* 40.
for newly discovered evidence properly refused when. *Tillar* v. *Liebke,* 324.

NOTARY PUBLIC.

negligence of, not proximate cause of injury when. *Coffin* v. *Bruton,* 162.

OFFICES AND OFFICERS.

vacancy in office for failure to file commission and oath. *Boyett* v. *Cowling,* 494.
special bond and oath required of assessor. *Id*
statute requiring filing of commission and oath held valid. *Id.*
power of governor to fill vacancies. *Id.*

PARENT AND CHILD. See INFANCY.

PARTIES.

necessary parties in suit for specific performance. *Arkadelphia Lumber Company* v. *Mann,* 414.
when new parties necessary. *Id.*
effect of failure to raise objection for lack of parties. *Id.*
effect of nonjoinder of defendant's husband as party. *Arkansas Stables* v. *Samstag,* 517.

PARTY WALL.

agreement of adjacent proprietor to pay part of cost of, held a charge on land. *Rugg* v. *Lemley,* 65.
such agreement is covenant which runs with land. *Id.*

PAYMENT.

what may be shown under oral plea of payment. *Dawson* v. *Owen,* 93.

PERJURY.

testimony held material. *Lewis* v. *State,* 567.

PLEADING.

insufficiency of denial of information in answer. *Wade* v. *Goza,* 7.
effect of mistake in prayer of complaint. *Rugg* v. *Lemley,* 65.
defenses held to be inconsistent. *Bonanza Mining & Smelter Co.* v. *Ware,* 306.
objection of inconsistency of defenses may be waived. *Id.*
not error to permit amendment of, to conform to proof when. *McNutt* v. *McNutt,* 346.

PLEDGE AND COLLATERAL SECURITY:

when pledge waived by pledgee. *Greeson* v. *German National Bank,* 141.

RAILROADS:

required to keep lookout in railroad yard. *Little Rock & H. S. W. Rd. Co.* v. *McQueeney,* 22.

RAILROADS—*Continued.*

duty of watchman to keep lookout. *Id.*

duty of traveler to look and listen at crossing. *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.,* 55.

absence of flagman no excuse for failure to look and listen. *Id.*

dangerous character of crossing not proved how. *Id.*

railroad liable for work of subcontractor after acceptance by engineers. *St. Louis, I. M. & S. Ry. Co.* v. *Bogan,* 173.

instruction as to railroad's negligence as to driving one car against another disapproved. *Little Rock, H. S. & W. Rd. Co.* v. *Cross,* 220.

damages for personal injuries held not excessive. *Id.*

when presumption of negligence in stock-killing case rebutted. *Lane* v. *Kansas City So. Ry. Co.,* 234.

duty to signal at crossing. *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson,* 251.

duty of traveler to keep lookout in both directions. *Id.*

whether child negligent is question for jury. *Id.*

effect of traveler giving more attention to one direction than another. *Id.*

damages for physical injuries held not excessive. *Id.*

duty of traveler at railroad crossing. *Choctaw, O. & G. Rd. Co.* v. *Baskins,* 355.

when contributory negligence of traveler at crossing question for jury. *Id.*

instruction as to contributory negligence properly refused when. *Id.*

complaint against railroad and contract for destruction of crop held not to misjoin causes of action. *Ft. Smith Suburban Ry. Co.* v. *Maledon,* 366.

liability of railroad for contractor's tort. *Id.*

lessee of land not guilty of contributory negliegnce in planting crop on right of way when. *Id.*

duty of owner to protect crop on right of way. *Id.*

may offer a reward for arrest and conviction of person obstructing track. *Arkansas Southwestern Ry. Co.* v. *Dickinson,* 483.

power of general manager to offer reward. *Id.*

when act of general manager in offering reward ratified. *Id.*

construction of reward for such arrest and conviction. *Id.*

duty of traveler at crossing to look and listen both ways. *St. Louis, I. M. & S. Ry. Co.* v. *Dillard,* 520.

railroad liable for damages to crop by overflow caused by insufficient openings in roadbed. *St. Louis, I. M. & S. Ry. Co.* v. *Saunders,* 589.

REAL ESTATE BROKER:

implied authority to bind principal by purchasing abstract of title. *Underwood* v. *Banks,* 30.

REWARDS:

power of railroad to offer reward for arrest and conviction of person obstructing track. *Arkansas S. W. Ry. Co.* v. *Dickinson,* 483.
power of general manager of railroad to offer. *Id.*
when act of general manager in offering, ratified. *Id.*
construction of reward for arrest and conviction of person placing obstruction on track. *Id.*
conviction as evidence of having obstructed track. *Id.*

REPLEVIN:

retaining bond held irregular and not to support summary judgment. *Dillard* v. *Nelson,* 237.

RESCISSION: See CONTRACTS.

ROADS AND HIGHWAYS:

roads established principally for benefit of individual held a public road when. *Pippin* v. *May,* 18.
when such road necessary. *Id.*
how necessity determined. *Id.*

SALES OF CHATTELS:

effect of shipping goods with option in consignee to purchase. *Gottlieb* v. *Rinaldo,* 123.
such contract distinguished from "sale or return" contract. *Id.*
no defense that bill of lading was not delivered to vendee. *Main* v. *Garrett,* 137.
warranty in sale of goods by sample waived when. *Pratt* v. *Metzger,* 177.
person signing contract not heard to say that he was ignorant of its terms when. *Id.*
when contract severable. *Id.*
when warranty of suitability of merchandise not implied. *Id.*
right to cancel order for merchandise executed conditionally. *Equitable Mfg. Co.* v. *Thomasson,* 240.
vendor can not both sue for purchase money and rescind. *Baker* v. *Brown Shoe Co.,* 501.
how mistake in making election of remedies shown. *Id.*
when contract of sale an assignment of future interest. *Block* v. *Shaw,* 511.
sale not enforced in equity when. *Id.*
choice of remedies where vendor reserves title. *Butler* v. *Dodson,* 569.

SALES OF LAND: See DEEDS.

distinction between sale and option. *Bonanza Mining & Smelting Co.* v. *Ware,* 306.

SAWMILL:

effect of conveyance of. *Alexander* v. *Beekman Lumber Co.,* 169.

SCHOOLS AND SCHOOL DISTRICTS:

special school district has power to issue interest-bearing bonds when. *Schmutz* v. *Special School District of Little Rock,* 118.
school district not a municipality. *Id.*
power of school district to mortgage land. *Id.*
power to pledge revenues. *Id.*
effect of unauthorized act of school board. *Id.*

SPECIFIC PERFORMANCE:

precise terms of oral contract must be proved. *Fielder* v. *Warner,* 158.
denied on account of laches when. *Id.*
denied where parties have rescinded contract. *Id.*
parties necessary to suit for. *Arkadelphia Lumber Co.* v. *Mann,* 414.
of sale of chattel not decreed when. *Block* v. *Shaw,* 511.

STATE:

act providing for calling in State bonds upheld. *Tipton* v. *Smythe,* 392.

STATUTES:

effect of adopting statute of another State. *McNutt* v. *McNutt,* 346.
Act of 1901, providing for calling in State bonds, upheld. *Tipton* v. *Smythe,* 392.

STATUTES CITED:

SANDELS & HILL'S DIGEST:

§ 2691 501

KIRBY'S DIGEST:

79 114
495 493
500 492
507 492
646 498
647, 648 ..... 498, 500
716 ..... 438, 456, 470
717 ..... 439, 456, 470
718 ..... 439, 444, 456, 470
848 519
859 519

KIRBY'S DIGEST—*Cont.*

1225 15
1414, 1450 582
1999 488
2468 ..... 350, 352
2852 439
2877 439
3087 ..... 266, 271
3095 75
4431 ..... 520, 600
4665 208
4866 ..... 396, 401, 402
5057 98
5061 7
5214 520

KIRBY'S DIGEST—*Cont.*

6011 420
6145 350
6222 291
6595 252
6607 28
6694, 6695, 6697..... 270
6863 239
6870 239
6936 192
6955, 6956 498
6958 ..... 498, 499
7947 549

CONSTITUTION OF 1874:

Art. 7, § 23 137

CONSTITUTION OF 1874—*Cont.*

7, 40 177
7, 42 208
7, 46 500
7, 50 501
9, 3 535
9, 4 482
16, 1 121
19, 22 .... 438, 449, 472
19, 24 455
Sched. § 2 212

OTHER ACTS:

c. 55, 1905 121
Act 3, 1901 ..... 395, 396, 401
881, pp. 73-75 498

STREET RAILROADS:

evidence of speed of car competent to prove negligence. *Little Rock Ry. & El. Co.* v. *Green,* 129.
liability for malicious acts of agent. *Little Rock Ry. & El. Co.* v. *Dobbins,* 553.
damages recoverable for unlawful ejection of passenger. *Id.*
scope of authority of conductor. *Id.*

SWAMP LANDS:

assessable for drainage purposes. *Ritter* v. *Drainage District, etc.,* 580.

TAXATION: See DRAINS.

capital stock of domestic business corporation is assessable. *Harris Lumber Co.* v. *Grandstaff,* 187.
but not the property acquired therewith. *Id.*
place of assessment of such capital stock. *Id.*

TELEGRAPHS AND TELEPHONES:

right to recover damages for mental suffering against telegraph company. *Western Union Telegraph Co.* v. *Raines,* 545.
necessity of notice of such special damages. *Id.*
insufficiency of notice given. *Id.*

TENDER:

of consideration of sale of trust property on rescission not required when. *Reeder* v. *Meredith,* 111.

TIMBER AND TREES:

general rule as to enjoining cutting of timber. *Hall* v. *Wellman Lumber Co.* 408.

TIMBER AND TREES—*Continued.*

estoppel as ground for such injunction. *Id.*
time for removal of timber under contract. *Id.*

TIME: See TIMBER AND TREES.

allowance of reasonable time for assertion of existing rights in limitation act. *Tipton* v. *Smythe,* 392.

TRIAL: See INSTRUCTIONS.

contributory negligence of servant a question for jury when. *St. Louis, I. M. & S. Ry. Co.* v. *Jackson,* 100.
counsel's appeal to sympathy not error when. *Stecher Cooperage Works* v. *Steadman,* 381.
duty of courts to construe contracts. *Thomas* v. *Johnston,* 574.

TRUSTS:

administrator held trustee for those interested in estate. *Reeder* v. *Meredith,* 111.
when purchase by trustee upheld. *Id.*
duty of good faith required of brother in dealing with sister. *Id.*
trustee not entitled to improvements when. *Id.*
purchaser of trust property not entitled to improvements when. *Id.*
beneficiary of trust not required to tender consideration received when. *Id.*
liability of trustee to account for profits. *Id.*

VACANCIES. See OFFICES AND OFFICERS.

VESTED RIGHTS:

not divested by Kirby's Digest, § 5057. *Cottonwood Lumber Co.* v. *Hardin,* 95.

WATERS:

liability of railroad company for damming up water and injuring crop. *St. Louis, I. M. & S. Ry. Co.* v. *Saunders,* 589.

WITNESSES:

attorney not required to disclose privileged communication. *Fox* v. *Spears,* 71.
witness before grand jury may not refuse to answer irrelevant or improper question when. Ex parte *Butt,* 262.
witness committed for contempt for failure to answer questions. *Id.*
Kirby's Digest, § 3087, held a valid statute. *Id.*
when witness entitled to claim privilege of silence. *Id.*
question which may be asked before grand jury. *Id.*
witness not required to testify as to acceptance of free pass. *Id.*
when error to require witness to answer whether he wrote certain

WITNESSES—*Continued.*

letters. *Id.*
witness not protected if answer will probably incriminate another. *Id.*
witness not bolstered by proof of previous consistent statement. *Burks* v. *State,* 271.
witness impeached by proof of inconsistent statement. *Benton* v. *State,* 284.
not impeached by proof of indictment. *Id.*
impeached by proof of past antecedents. *Id.*
witness may be asked if he had contract to testify. *Myers* v. *State,* 302.

Ex. C. No.
9/18/97

7122 067