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IN THE

Supreme Court of Arkansas

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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

JOSEPH M. HILL,	CHIEF JUSTICE.
BURRILL B. BATTLE,	ASSOCIATE JUSTICES.
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TABLE

OF CASES REPORTED

A

Aetna Life Insurance Co. *v.* Ricks 38
Altheimer *v.* Board of Directors of Plum Bayou Levee District 229
Andrews (St. Louis, I. M. & S. Ry. Co. *v.*) 437
Archer-Foster Construction Co. *v.* Vaughan 20
Arkadelphia Lumber Co. *v.* Asman 284
Arkansas & Louisiana Ry. Co. *v.* Lee 448
Arkansas & Texas Grain Co. *v.* Young & Fresch Grain Co. 603
Ark-Mo Zinc Co. *v.* Patterson. 506
Asman (Arkadelphia Lumber Co. *v.*) 284
Atwood (Bromley *v.*) 357

B

Beard *v.* State 292
Beene *v.* State 460
Beidler (Foster *v.*) 418
Bennett (Wheeler *v.*) 210
Berman *v.* McBride 62
——— (McBride *v.*) 62
Betts *v.* Ward 146
Billingsley (St. Louis, I. M. & S. Ry. Co. *v.*) 335
Birch *v.* Walworth 580
Block (St. Louis, I. M. & S. Ry. Co. *v.*) 179
Blount (Merryman *v.*) 1
Board of Directors of Plum Bayou Levee District (Altheimer *v.*) 229
——— (Leonard *v.*) 42
Board of Directors of St. Francis Levee Dist. (Crawford *v.*) 606
——— *v.* Meyers 14
——— *v.* Redditt 154
Bodcaw Lumber Co. (Strange *v.*) 490
Bohannan (Mason *v.*) 435
Bourland *v.* McKnight 427
Boyd (South Omaha National Bank *v.*) 215
Bracey *v.* St. Louis, S. F. & N. O. Rd. Co. 124
Bromley *v.* Atwood 357
Brown *v.* Haselman 213
Buckner *v.* Sugg 442
Bunch Grain Co. *v.* Law 375
Butterfield *v.* Butterfield 164

C

Cain (St. Louis, I. M. & S. Ry. Co. *v.*) 225

Calhoun *v.* Moore..... 109
Carter *v.* Gray..... 273
Castevens *v.* State..... 453
Choctaw, O. & G. Rd. Co. *v.* Craig 53
Clay *v.* Penzel..... 5
Cohn (Walnut Ridge Mercantile Co. *v.*) 338
Collier *v.* Trice..... 414
Corney *v.* Corney..... 289
Craig (Choctaw, O. & G. Rd. Co. *v.*)..... 53
Crawford *v.* Board of Directors of St. Francis Levee District..... 606

D

Dickinson *v.* Hardie..... 364
Dixie Coton Oil Co. *v.* Morris 113
Dobbins *v.* Little Rock Ry. & Elec. Co..... 85
Doyle (Little Rock Ry. & Elec. Co. *v.*) 378
Drake (Stone *v.*)..... 384
Dunn (Griffiin *v.*)..... 408

E

Eagle (Fellheimer *v.*)..... 201
Edwards (Wilson *v.*)..... 69
Enoch (Hartford Fire Ins. Co. *v.*) 475
Equitable Mfg. Co. (Templeton *v.*) 456
Estes (Marion County *v.*) ... 504

F

Fayetteville Grocery Co. (Hoskins *v.*) 399
Fellheimer *v.* Eagle..... 201
Fletcher *v.* Verser..... 271
Fordyce (Woman's Christian Nat'l Lib. Ass'n *v.*) 532
——— *v.* Woman's Christian Nat'l Lib. Ass'n..... 550
Ft. Smith Light & Trac. Co. *v.* Soard..... 388
Foster *v.* Beidler..... 418
Franklin *v.* Triplett..... 82

G

Garner *v.* St. Louis, I. M. & S. Ry. Co..... 353
Giberson *v.* Wilson..... 581
Gorham (People's Fire Ins. Ass'n of Ark. *v.*)..... 160
Goyne (People's Fire Ins. Ass'n of Ark. *v.*)..... 315
Gray (Carter *v.*) 273
Greenwood Dist. of Sebastian County *v.* Heartstill..... 167
Griffin *v.* Dunn..... 408
Grooms *v.* Neff Harness Co.... 401
Gunter *v.* State..... 432

H

Hamilton (Vaughan *v.*) 584
Hardie (Dickinson *v.*) 364
Harper *v.* State..... 594
Harris *v.* Umsted..... 499
Hartford Fire Ins. Co. *v.* Enoch 475
Haselman (Brown *v.*)..... 213
Heartsill (Greenwood Dist. of Sebastian County *v.*)..... 167
Hempstead Co. *v.* Phillips... 263
Henderson (Stainback *v.*)... 176
——— *v.* State..... 333

Hicks (Little Rock Traction & Electric Co. *v.*) 248
Hill (St. Louis & San Francisco Rd. Co. *v.*) 76
Hogue (Western Union Telegraph Co. *v.*) 33
Hollingsworth *v.* McAndrew... 185
Hoskins *v.* Fayetteville Grocery Co. 399
Houck Music Co. (Martin v. 95
Hutchison (St. Louis S. W. Ry. Co. *v.*) 247

I

International Harvester Co. (State *v.*) 517

J

Jones (Phillips *v.*) 100
——— *v.* Pond & Decker Mfg. Co. 194

K

Kendall (Vaughan *v.*) 584
Knisel (Waters-Pierce Oil Co. *v.*) 608

L

Law (Bunch Grain Co. *v.*) ... 375
Leatherwood (Ozark Ins. Co. *v.*) 252
Leder (St. Louis S. W. Ry. Co. *v.*) 59
Lee (Arkansas & Louisiana Ry. Co. *v.*) 448
Leonard *v.* Board of Directors of Plum Bayou Levee District 42
Little Rock Ry. & Electric Co. (Dobbins *v.*) 85
——— *v.* Doyle 378
Little Rock Traction & Electric Co. *v.* Hicks 248
Long (National Surety Co. *v.*) 523
Love *v.* Peel 366
Lovell *v.* Sneed 204

M

McAndrew (Hollingsworth *v.*) 185
McBride (Berman *v.*) 62
——— *v.* Berman 62
McKnight (Bourland *v.*) 427
——— (Nunn *v.*) 393
McNeil (St. Louis S. W. Ry. Co. *v.*) 470
Marcy (Old National Bank of Ft. Wayne *v.*) 149
Marion County *v.* Estes 504
Martin *v.* Houck Music Co... 95
——— *v.* State 236
Mason *v.* Bohannan 435
Matthews *v.* Taylor 577
Mayo *v.* Mayo 570
Merryman *v.* Blount 1
Montgomery (Storm *v.*) 172
Moore (Calhoun *v.*) 109
——— (Vaughan *v.*) 584
Morris (Dixie Cotton Oil Co. *v.*) 113
Myar *v.* Poe 465
Myers (Board of Directors of St. Francis Levee Dist. *v.*) .. 14

N

Nash *v.* State 120

National Surety Co. *v.* Long.. 523
Neff Harness Co. (Grooms *v.*)..... 401
Nunn *v.* McKnight..... 393

O

Old National Bank of Ft. Wayne *v.* Marcy..... 149
Ozark Insurance Company *v.* Leatherwood..... 252

P

Patterson (Ark-Mo Zinc Co. *v.*)..... 506
Peel (Love *v.*)..... 366
Penzel (Clay *v.*)..... 5
People's Fire Ins. Ass'n of Ark. *v.* Gorhan..... 160
——— *v.* Goyne..... 315
Pewett *v.* Richardson..... 66
Phillips (Hempstead Co. *v.*)... 263
——— *v.* Jones..... 100
Poe (Myar *v.*)..... 465
Pond & Decker Mfg. Co. (Jones *v.*)..... 194

R

Ray (Stinson *v.*)..... 592
Reagan (St. Louis S. W. Ry. Co. *v.*)..... 484
Redditt (Board of Directors of St. Francis Levee Dist. *v.*)..... 154
Richardson (Pewett *v.*)..... 66
Ricks (Aetna Life Insurance Co. *v.*)..... 38

S

St. Louis, & San Francisco Rd. Co. *v.* Hill..... 76
——— *v.* Wyatt..... 241
St. Louis, I. M. & S. Ry. Co. *v.* Andrews..... 437
——— *v.* Billingsley..... 335
——— *v.* Block..... 179
——— *v.* Cain..... 225
——— (Garner *v.*)..... 353
——— (Scott *v.*)..... 137
——— *v.* Thompson-Hailey Co..... 12
St Louis, S. F. & N. O. Rd. Co. (Bracey *v.*)..... 124
St. Louis S. W. Ry. Co. *v.* Hutchison..... 247
——— *v.* Leder..... 59
——— *v.* McNeil..... 470
——— *v.* Reagan..... 484
Scott *v.* St. Louis, I. M. & S. Ry. Co..... 137
Security Mutual Insurance Co. *v.* Woodson..... 266
Shaddock (White Sewing Machine Co. *v.*)..... 220
Shirey *v.* Shirey..... 473
Smith *v.* State..... 25
Sneed (Lovell *v.*)..... 204
Soard (Ft. Smith Light & Traction Co. *v.*)..... 388
South Omaha National Bank *v.* Boyd..... 215
Stainback *v.* Henderson..... 176
State (Beard *v.*) 292
——— (Beene *v.*)..... 460
———(Calstevens *v.*)..... 453
——— (Gunter *v.*)..... 432
——— (Harper *v.*)..... 594

State (Henderson *v.*) 333
——— *v.* International Harvester Co. 517
——— (Martin *v.*) 236
——— (Nash *v.*) 120
——— (Smith *v.*) 25
——— (Sullins *v.*) 127
——— (Thrash *v.*) 347
——— (Wells Fargo & Co. Express *v.*) 349
Stiewel *v.* Webb Press Co. 45
Stinson *v.* Ray 592
Stone *v.* Drake 384
Storm *v.* Montgomery 172
Strange *v.* Bodcaw Lumber Co. 490
Sugg (Buckner *v.*) 442
Sullins *v.* State 127

T

Taenzer (Waldron *v.*) 16
Taylor (Matthews *v.*) 577
Templeton *v.* Equitable Mfg. Co. 456
Thompson-Hailey Co. (St. Louis, I. M. & S. Ry. Co. *v.*) 12
Thrash *v.* State 347
Tillar *v.* Wilson 256
Trice (Collier *v.*) 414
Triplett (Franklin *v.*) 82

U

Umsted (Harris *v.*) 499

V

Vaughan (Archer-Foster Construction Co. *v.*) 20
Vaughan *v.* Hamilton 584
——— *v.* Kendall 584
——— *v.* Moore 584
Verser (Fletcher *v.*) 271

W

Waldron *v.* Taenzer 16
Walnut Ridge Mercantile Co. *v.* Cohn 338
Walworth (Birch *v*) 580
Ward (Betts *v.*) 146
Waters-Pierce Oil Co. *v.* Knisel 608
Webb Press Co. (Stiewel *v*) .. 45
Wells Fargo & Co. Express *v.* State 349
Western Union Telegraph Co. *v.* Hogue 33
Wheeler *v.* Bennett 210
White Sewing Machine Co. *v.* Shaddock 220
Wilson *v.* Edwards 69
——— (Giberson *v.*) 581
——— (Tillar *v.*) 256
Woman's Christian National Lib. Ass'n *v.* Fordyce 532
——— (Fordyce *v.*) 550
Woodson (Security Mutual Insurance Co. *v.*) 266
Wyatt (St. Louis & S. F. Rd. Co. v.) 241

Y

Young & Fresch Grain Co. *v.*) 603
(Ark. & Texas Grain Co.

TABLE OF CASES
CITED BY THE COURT

A

Accident Insurance Co. *v.* Crandal, 120 U. S. 527..... 407
Aitkin *v.* Young, 12 Pa. St. 15.... 107
Alabama & V. R. Co. *v.* Summers, 68 Miss. 566..... 142
Allison *v.* State, 74 Ark. 444..... 600
Ammant *v.* Turnpike Road, 13 S. & R. 210..... 567
Anderson *v.* Seamans, 49 Ark. 478.. 568
Arial *v.* Western Union Telegraph Co. 50 S. E. 6..... 37
Arkadelphia *v.* Windham, 74 Ark. 546..... 560
Arkadelphia Lumber Co. *v.* Asman, 68 Ark. 526.....286, 287
Arkansas & La. Ry. Co. *v.* Stroude, 77 Ark. 109..... 228
Armstrong *v.* Kattenhorn, 11 Ohio, 265..... 107
Artz *v.* Railroad Co., 34 Iowa, 153. 625
Atkinson *v.* Ward, 47 Ark. 533.... 75
Attorney General *v.* Bucknall, 2 Atk. 328..... 559
——— *v.* Jackson, 11 Ves. 367..... 559
——— *v.* Jeanes, 1 Atk. 355..... 559
——— *v.* Stamford, 2 Swanst. 591. 550
——— *v.* Whiteley, 11 Ves. 246.... 559

B

Baker *v.* Railway Co., 122 Mo. 533.. 142
Baldwin *v.* Burrows, 47 N. Y. 199. 502
Ballard *v.* Hunter, 74 Ark. 174..... 19
Bank of Holly Springs *v.* Pinsen, 58 Miss. 421..... 469
Barnes *v.* Boston & Maine R. Co., 130 Mass. 388..... 107
——— *v.* Ward, 9 C. B. 392..... 495
Barnett *v.* Meacham, 62 Ark. 313.. 412
Barton *v.* State, 29 Ark. 68..... 314
Beck *v.* Carter, 68 N. Y. 283..... 495
Beharrell *v.* Quimby, 162 Mass. 571. 516
Belknap *v.* Schild, 161 U. S. 17 .....560, 561
Benjamin *v.* Birmingham, 50 Ark. 439..... 240
——— *v.* Ins. Co., 80 N. Y. 256.... 330
Benson *v.* Hartwell, 103 Cal. 163.. 479
Bentley *v.* Davidson, 74 Wis. 420.. 513
Benton *v.* Hospital, 140 Mass. 13 .....539, 559, 562
——— *v.* State, 78 Ark. 284..... 603
Berry *v.* American Central Ins. Co., 132 N. Y. 49..... 482
Billingsley *v.* Ward, 33 Md. 48..... 107
Bird *v.* Jones, 37 Ark. 195..... 418
Biscoe *v* .Thweatt, 74 Ark. 545..555, 560
Black *v.* Robinson, 70 Ark. 185.... 575
Blackburn *v.* Portland Gold Mining Co., 175 N. S. 571..... 583
Blanton *v.* Rose, 70 Ark. 418..... 199
Block *v.* Smith, 61 Ark. 266..... 52
Blunt *v.* Williams, 27 Ark. 374..... 178
Bodwell *v.* Nutter, 63 N. H. 446.... 167
Bogan *v.* Cleveland, 52 Ark. 101.219, 400
Bond *v.* Montgomery, 56 Ark. 563.. 410
Bonnell *v.* D., L. & W. R. Co., 39 N. J. L. 189..... 141
Bowen *v.* Chicago, B. & K. C. Ry. Co., 95 Mo. 268..... 81
——— *v.* N. Y. Central, etc., R. Co., 89 Hun, 596..... 142
Boyd *v.* Roane, 49 Ark. 397..... 19
Bozeman *v.* Browning, 31 Ark. 364. 418
Bradlaugh *v.* Reg., 3 Q. B. Div. 607..... 298

Braun *v.* Craven, 51 N. E. 657..... 616
Brennan *v.* People, 110 Ill. 535.... 298
Brogan *v.* Brogan, 63 Ark. 405.... 575
Brooker *v.* Carlile, 77 Ky. 154..... 542
Brown *v.* Bocquin, 57 Ark. 105..... 112
——— *v.* Hanauer, 48 Ark. 277... 575
——— *v.* Haselman, 79 Ark. 213.. 521
——— *v.* Meeting Street Baptist Soc., 9 R. I. 186..... 560
——— *v.* State, 55 Ark. 593..... 601
Brownell Imp. Co. *v.* Critchfield, 197 Ill. 61..... 516
Buffington *v.* Chase, 152 Mass. 534.. 397
Burlington Ins. Co. *v.* Lowery, 61 Ark. 108..... 482
Burnham *v.* Fond du Lac, 15 Wis. 193..... 566
Burks' Heirs *v.* Osborne, 9 B. Mon. 579..... 412
Burton *v.* Baird, 44 Ark. 556..... 357
Bussell *v.* Steuben, 57 Ill. 35..... 566

C

Caldwell *v.* State, 69 Ark. 322..... 132
Calvert *v.* London Dock Co., 2 Keen, 644..... 529
Camden *v.* Bennett, 64 Ark. 156.... 425
Cannon *v.* State, 60 Ark. 564..... 464
Carlisle *v.* Brennan, 67 Ind. 12..... 108
Carnall *v.* Wilson, 21 Ark. 62..... 412
Carpenter *v.* Dressler, 76 Ark. 400.. 289
——— *v.* Hammer, 75 Ark. 347.... 68
——— *v.* Smith, 76 Ark. 447..... 199
Carthaus *v.* State, 78 Ark. 560..... 134
Casey *v.* State, 53 Ark. 334..... 521
Catlett *v.* Railway Co., 57 Ark. 466. 622
Chase *v.* Carney, 60 Ark. 491..... 396
Chestnut *v.* Harris, 64 Ark. 580.... 447
Chicago & E. I. Rd. Co. *v.* Hedges, 105 Ind. 404..... 142
Chicago, Rock Island & Pac. Ry. Co. *v.* Sturm, 174 U. S. 710..387, 388
Chicago, St. P., M. & O. Ry. Co. *v.* Elliott, 5 C. C. A. 349..... 617
Chicago, S. F. & C. R. Co. *v.* Price, 138 U. S. 185..... 513
Childs *v.* State, 15 Ark. 204..... 314
Choctaw, O. & G. Rd. Co. *v.* Jones, 77 Ark. 367.....56, 57
Christy *v.* Barnhart, 14 Pa. St. 260. 107
Church *v.* Gallic, 76 Ark. 423..... 194
City of Davenport *v.* Peoria Ins. Co., 27 Ia. 277..... 542
Clay *v.* Bilby, 72 Ark. 101..... 19
Clore *v.* Robinson, 38 S. W. 607... 606
Coates *v.* State, 50 Ark. 330..... 310
Cole *v.* Green, 21 Ill. 104.....542
Coleman *v.* Hill, 44 Ark. 452.....104
Collier *v.* Ft. Smith, 73 Ark. 447... 561
Collins *v.* Hospital, 69 N. Y. Supp. 106..... 539
Coleman *v.* West. Va. Oil, etc., Co., 25 W. Va., 148..... 468
Colonial & U. S. M't'ge. Co. *v.* Jeter, 71 Ark. 185..... 262
Commissioners *v.* Martin, 4 Mich. 557..... 565
Commonwealth *v.* Burke, 105 Mass. 376.....305
——— *v.* Fogerty, 8 Gray, 489..311, 314
Continental Ins. Co. *v.* Thomasson, 84 S. W. 546.....331
Continental Life Ins. Co. *v.* Young, 3 Am. St. 630..... 624
Cooper *v.* Holmes, 71 Md. 20..... 446
Corey Library *v.* Bliss, 151 Mass. 365.....538
Cornish-Curtis-Green Co. *v.* Dairy Association, 82 Minn. 215..... 516
Cottman *v.* Grace, 41 Hun, 345... 556
Countz *v.* Countz, 30 Ark. 73..... 475
Crerar *v.* Williams, 145 Ill. 625.... 538
Cribbs *v.* Walker, 74 Ark. 104..... 502
Crill *v.* Hudson, 71 Ark. 447..... 199
Crittenden *v.* Woodruff, 11 Ark. 82..... 425
Crow *v.* Watkins, 48 Ark. 169..... 425
Curtis *v.* Des Jardins, 55 Ark. 126.. 266
Cutbush *v.* Gilbert, 4 S. & R. 555 .....342, 346

D

Dansby *v.* Beard, 39 Ark. 254...287, 288
Datz *v.* Chambers, 3 Pa. Dist. Rep. 353..... 387
Davenport, City of, *v.* Peoria Ins. Co., 27 Ia. 277..... 542
Davis *v.* Central Congregational Soc., 129 Mass. 372..... 557
——— *v.* State, 45 Ark. 470..... 314
——— *v.* Texas, 42 Tex. 226..... 312
Davis Shoe Co. *v.* Kittanning Ins. Co., 138 Pa. St. 73..... 482
Day *v.* Ferguson, 70 Ark. 298..... 59
——— *v.* Mayo, 154 Mass. 472..... 397
Derr *v.* Ackerman, 182 Pa. St. 596.. 104
Derry *v.* Flitner, 118 Mass. 131..... 616
Dodson *v.* Ft. Smith, 33 Ark. 508.. 505
Donohugh's Appeal, 86 Pa. St. 306. 538
Dowell *v.* Schisler, 76 Ark. 482... 341
Downes *v.* Harper Hospital, 101 Mch. 556.....539, 564
Driggers *v.* Cassady, 71 Ala. 529... 446
Drury *v.* Natick, 10 Allen 169.... 556
Duame *v.* Chicago & N. W. Ry. Co., 72 Wis. 523.....142, 143
Duggan *v.* Slocum, 83 Fed. 244..556, 559
Duncan *v.* Friedlater, 6 Clark & F. 894..... 539
Dunn *v.* State, 2 Ark. 230..... 297
Dunnington *v.* Frick Company, 60 Ark. 250..... 341
——— *v.* Kirk, 57 Ark. 595..... 397
Duplex Boiler Co. *v.* Garden, 101 N. Y. 387..... 514
DuVal *v.* Marshall, 30 Ark. 230... 167

E

Earle *v.* Washburn, 89 Mass. 95.. 542
East Ala.Ry. Co. *v.* Doe, 114 U. S. 340..... 565
Eckert *v.* Brinkley, 134 Ind. 614... 479
Electric Lighting Co. *v.* Elder, 115 Ala. 138..... 514
Emmel *v.* Hayes, 102 Mo. 186... 107
English *v.* Anderson, 75 Ark. 577.. 59
Estes *v.* German National Bank, 62 Ark. 20..... 51
Exhaust Ventilator Co. *v.* C., M. & P. R. Co., 66 Wis. 218..... 514

F

Fadness *v.* Braundborg, 43 Wis. 257 549
Fairbanks *v.* Lawson, 99 Mass. 533. 556
Fagg *v.* Martin, 53 Ark. 453...544, 545
Falconer *v.* Shores, 37 Ark. 386... 591
Ferguson *v.* Ehrenberg, 39 Ark. 420 178
——— *v.* Josey, 70 Ark. 98..... 148
——— *v.* Wisconsin Cent. Ry. Co., 63 Wis. 152..... 142
Ferris *v.* Boxell, 34 Minn. 262..... 346
Fidelity Mutual Life Ins. Co. *v.* Bussell, 75 Ark. 25.....326
Fifth Ward Bank *v.* First Nat. Bank, 48 N. J. L. 518..... 52
Fire Asso. *v.* Yeagley, 72 N. E. 1035.....331
Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624 .....539, 562, 564
Fithian *v.* New York & E. R. Co., 31 Pa. 114..... 387
Fletcher *v.* State, 12 Ark. 170..... 314
Fordyce *v.* Key, 74 Ark. 19..... 440
Fort Smith *v.* York, 52 Ark. 84.... 561
Fort Smith Oil Co. *v.* Glover, 58 Ark. 168.....23, 24
Foster *v.* Ins. Assoc., 79 Pac. 798. 331
Francestown *v.* Deering, 41 N. H. 438..... 167
Frank *v.* Dungan, 76 Ark. 599..... 176
——— *v.* Taunton Branch Railroad,
Freeman *v.* Lazarus, 61 Ark. 247.. 505
French *v.* Patterson, 61 Me. 203... 446
——— *v.* Taunton Branch Railroad, 116 Mass. 537.....141, 142

G

Gainus *v.* Cannon, 12 Ark. 511..... 75
Gaither *v.* Wasson, 42 Ark. 126.287, 288

Galveston, H. & S. A. Ry. Co. *v.* Daniels, 20 S. W. 955..... 81
Garibaldi *v.* Jones, 48 Ark. 230..411, 412
Garner *v.* St. Louis, I. M. & S. Ry. Co., 79 Ark. 353.....459, 460
Geer *v.* Connecticut, 161 N. S. 519. 352
German-American Ins. Co. *v.* Yeagley, 71 N. E. 332..... 332
——— *v.* Yellow Poplar Lumber Co., 84 S. W. 551..... 329
German Bank *v.* American Fire Ins. Co., 83 Ia. 491..... 387
Germania Ins. Co. *v.* Bromwell, 62 Ark. 43,..... 270
German Ins. Co. *v.* Gibson, 53 Ark. 494..... 483
——— *v.* Humphrey, 62 Ark. 348.. 483
Gibson *v.* Barrett, 75 Ark. 205... 219
——— *v.* State, 17 Tex. App. 574... 312
Gilliam *v.* Brown, 43 Miss. 641.... 363
Gillock *v.* People, 171 Ill. 307..... 434
Girard *v.* Philadelphia, 7 Wall. 15.. 565
Glavin *v.* Rhode Island, 12 R. I. 411.....540, 550, 558
Glenn *v.* Glenn, 44 Ark. 46..... 475
Godfrey *v.* Valentine, 45 Minn. 502 446
Gottlieb *v.* Rinaldo, 78 Ark. 123, ...262, 426, 459, 594
Goodman *v.* Simonds, 20 How. 343. 154
Gouglemann *v.* People, 3 Parker, Cr. Rep. 15..... 311
Gould *v.* Dwellinghouse Ins. Co., 134 Pa. St. 570..... 482
Grace *v.* State, 40 Ark. 97..... 521
Grand Trunk Ry. Co. *v.* Cummings, 106 U. S. 700..... 407
Grand View Bldg. Assoc. *v.* Northern Assurance Co., 102 N. W. 246, 330
Granger *v.* Pulaski County, 26 Ark. 36..... 561
Graves *v.* Pinchback, 47 Ark. 475.. 575
Green *v.* Groves, 109 Ind. 519..... 107
——— *v.* Marks, 25 Ill. 221..... 542
Greenlee *v.* Greenlee, 22 Pa. St. 235 .....104, 107
Grissom *v.* Hill, 17 Ark. 483..538, ...539, 543, 547, 567, 569, 570
G. V. B. Mining Co. *v.* First Nat. Bank, 95 Fed. 23..... 51

H

Hudley *v.* Taylor, L. R. 1 C. P. 53. 495
Hall *v.* Memphis & C. R. Co., 15 Fed. 57..... 488
——— *v.* Roulston, 70 Ark. 343.... 400
Halliday *v.* St. Leonard's Vestry, 11 C. B. N. S. 192..... 539
Hamilton *v.* McLaughlin, 145 Mass. 20..... 98
——— *v.* Rhodes, 72 Ark. 625..... 4
Hammock *v.* Creekmore, 48 Ark. 263..... 431
Hancock *v.* Brinker, 6 Ky. 247..... 542
Hardin *v.* State, 66 Ark. 53...132, 133
Harmon *v.* Com., 12 S. & R. 69 .....311, 312, 313
Harrington *v.* State, 77 Ark. 480.. 308
Harris *v.* Howard, 56 Vt. 695..... 397
Harrison *v.* Trader, 29 Ark. 85.... 480
Hartford Fire Ins. Co. *v.* Enoch, 72 Ark. 47..... 476
——— *v.* Keating, 86 Md. 130..... 483
Harvey *v.* Great Northern Ry. Co., 50 Minn. 405..... 387
Heard *v.* Ewan, 73 Ark. 513..... 480
Hearns *v.* Waterbury Hospital, 31 L. R. A. 224.....539, 558
Hecht *v.* Hecht, 28 Ark. 92..... 475
Heriot's Hospital *v.* Ross, 12 Cl. & F. 507..... 563
——— *v.* Ross, 12 Clark & F. 507.. 540
Hershy *v.* Baer, 45 Ark. 240..... 266
Heymann *v.* Reg, 8 L. R. Q. B. 102 298
Hill *v.* Boston, 122 Mass. 352..... 566
——— *v.* Draper, 63 Ark. 141..... 480
——— *v.* New River, 9 B. & S. 303 497
Hitchcock *v.* Galveston, 96 U. S. 341..... 233
Hoadley *v.* Northern Transportation Co., 115 Mass. 304..... 616

Hoag *v.* Railroad Co., 85 Pa. St. 293 617
Holbrook *v.* Ins. Co., 25 Minn. 229. 482
Holland *v.* Rea, 48 Mich. 218..... 606
Hollis *v.* State, 59 Ark. 211..... 400
Home Mut. Ins. Co. *v.* Nichols, 72 S. W. 440..... 330
Hopkins *v.* Young, 15 R. I. 48..... 446
Hot Springs Ry. Co. *v.* Deloney, 65 Ark. 177..... 488
——— *v.* Mobher, 48 Ark. 522..... 513
Hot Springs St. Rd. Co. *v.* Hildreth, 72 Ark. 572.....89, 622
Howard *v.* Smedly, 140 Pa. St. 81. 514
——— *v.* State, 58 Ark. 229..... 302
Howland *v.* Chicago, R. I. & P. R. Co., 134 Mo. 474..... 387
Hughes *v.* Johnson, 38 Ark. 285... 397
——— *v.* Johnson, 38 Ark. 285.... 397
——— *v.* State, 6 Ark. 131..... 521
——— *v.* Western Union Tel. Co., 50 S. E. 6..... 37
Humphry *v.* Sadler, 40 Ark. 100... 591
Humphreys *v.* Butler, 51 Ark. 351.. 75
Hunt *v.* Gardner, 74 Ark. 583..... 581
Hutton *v.* Doxsee, 116 Iowa 25.... 107

I

Illick *v.* Flint & P. M. R. Co., 35 N. W. 708..... 81
Inglis *v.* Trustees, 3 Pet. 99..... 560
Insurance Company *v.* Brodie, 52 Ark. 11 .....323, 483
——— *v.* Wilkinson, 13 Wall. 222, ...322, 323, 324, 326
Insurance Co. of North America *v.* McDowell, 50 Ill. 120..... 482

J

Jackson *v.* State, 114 Ga. 861..... 313
James *v.* Gibson, 73 Ark. 440..... 575
Johnson *v.* Aetna Fire Ins. Co., 51 S. E. 339..... 331
——— *v.* Craig, 21 Ark. 533..... 108
——— *v.* Lesser, 76 Ark. 465..... 19
——— *v.* Lewis, 47 Ark. 66..... 11
Johnson *v.* Richardson, 44 Ark. 365. 425
——— *v.* State, 36 Ark. 242..... 308
Johnston *v.* Glancy, 4 Blackf. 98 .....104, 107
Jones *v.* Habersham, 107 U. S. 189. 556

K

Kansas City, P. & G. Ry. Co. *v.* Parker, 69 Ark. 401..... 386
Kansas City Southern Ry. Co. *v.* Murphy, 74 Ark. 256.....33, 59
Kaufman *v.* Cook, 114 Ill. 14..... 107
Keely *v.* Sanders, 99 U. S. 441..... 446
Kelly *v.* Carter, 55 Ark. 112..... 263
——— *v.* Salinger, 53 Ark. 114.... 446
Kelsay *v.* Missouri Pac. Ry. Co., 30 S. W. 339..... 624
Kessinger *v.* Wilson, 53 Ark. 400 .....411, 413
Kihlberg *v.* U. S., 97 U. S. 398.... 513
Killeam *v.* Carter, 65 Ark. 68..... 411
Killough *v.* Hinton, 54 Ark. 65.... 575
Kirkland *v.* State, 72 Ark. 171..... 148
Knoll *v.* Harvey, 19 Wis. 99..... 107
Knox *v.* Hellums, 38 Ark. 413..... 178
Koch *v.* Kimberling, 55 Ark. 547, 68 179
Koontz *v.* Chicago, Rock Island & Pac. Ry. Co., 65 Iowa 224..... 81
Krauth *v.* Thiele, 45 N. J. Eq. 407.. 167

L

Lake Erie & W. Rd. Co. *v.* Stick, 143 Ind. 449..... 624
Lancashire Ins. Co. *v.* Corbetts, 165 Ill. 592..... 387
Lane *v.* State, 67 Ark. 293..... 600
Langan *v.* State, 27 Tex. App. 498. 313
Lawhon *v.* Toors, 73 Ark. 476..... 529
Lawrence *v.* La Cade, 46 Ark. 378. 418
Leoni *v.* State, 44 Ala. 110..... 313
Leslie *v.* Bell, 73 Ark. 339..... 75
Less *v.* Arndt, 68 Ark. 399..... 397
Lester *v.* State, 106 Ga. 371..... 434
Levy, *Ex parte,* 43 Ark. 42..... 505
Lewis *v.* Greider, 51 N. Y. 237.... 606

Little Rock & Ft. S. Ry. Co. *v.* Greer, 77 Ark. 387..... 122
——— *v.* Hunter, 42 Ark. 200..... 356
——— *v.* Oppenheimer, 64 Ark. 211..... 521
Little Rock Ry. & El. Co. *v.* Dobbins, 78 Ark. 553.....87, 94
——— *v.* Newman, 77 Ark. 599.... 252
Little Rock Traction & Electric Co. *v.* Nelson, 66 Ark. 501..... 89
——— *v.* Walker, 65 Ark. 109..... 95
Lockwood *v.* Mechanics' Nat. Bank, 11 Am. Rep. 253..... 469
Lonergan *v.* Baber, 50 Ark. 15..... 446
Louisville & N. R. Co. *v.* Spink, 104 Ga. 692.....488, 489
Lovewell *v.* Bowen, 75 Ark. 452.... 480
Lowe *v.* Walker, 77 Ark. 103..... 52

M

McAndrew *v.* Hollingsworth, 72 Ark. 446.....186, 193, 411
McCloy *v.* Arnett, 47 Ark. 445.... 410
McConnell *v.* Day, 61 Ark. 464.... 112
McDonald *v.* Hospital, 120 Mass. 432.....539, 546, 556, 559
McDonogh *v.* Murdoch, 15 How. 367..... 567
McGhee *v.* White, 66 Fed. 502.... 141
McGuigan *v.* Gaines, 71 Ark. 614 .....262, 426, 594
McKinney *v.* Demby, 44 Ark. 74.. 266
McNeil *v.* Jones, 21 Ark. 278..... 104
McRae *v.* Holcomb, 46 Ark. 306.. 418
Madden *v.* Pheonix Ins. Co., 70 S. C. 295..... 331
Madisonville Traction Co. *v.* St. Bernard Mining Co., 196 U. S. 239 61
Magee *v.* People, 139 Ill. 138..... 434
Mahana *v.* Blunt, 20 Iowa, 142.107, 108
Malachi *v.* State, 89 Ala. 134..... 434
Marland *v.* Pittsburg & L. E. R. Co., 123 Pa. St. 487..... 624
Marsh *v.* Nelson, 101 Pa. St. 51... 446
Martinsburg & Potomac Ry. Co. *v.* March, 114 U. S. 549..... 513
Maupin *v.* Insurance Co., 53 W. Va. 557..... 331
Mays *v.* Rogers, 37 Ark. 155..... 575
Mears *v.* Com., 2 Grant's Cases, 385 313
Medley *v.* Ins. Co., 55 W. Va. 344.. 331
Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505.... 233
Merritt *v.* Farmers Ins. Co., 42 Ia. 13 482
Mersey Docks *v.* Gibbs, 11 H. of L. 686 .....541, 558, 564
Milner *v.* Freeman, 40 Ark. 62.... 167
Miss., etc., Rd. Co. *v.* Gaster, 20 Ark. 458..... 240
Missouri Pacific R. Co. *v.* Flannigan, 47 Ill. App. 322..... 387
Mooney *v.* Buford & Mfg. Co., 72 Fed. 32..... 387
Moore *v.* Gordon, 44 Ark 334 .....102, 107, 108
——— *v.* Potter, 155 N. Y. 481... 606
——— *v.* Terry, 66 Ark. 393..... 262
Morrison *v.* Lennard, 3 C. & P. 127. 89
Morton *v.* Morton, 112 Ky. 706... 412
Murray *v.* Rapley, 30 Ark. 568..... 567
Murtaugh *v.* St. Louis, 44 Mo. 479 539
Mutual Life Ins. Co. *v.* Parrish, 66 Ark. 615..... 183
Myers *v.* B. & O. R. Co., 150 Pa. 386 624

N

Nash *v.* State, 73 Ark. 399..... 122
National Contracting Co. *v.* Commonwealth, 183 Mass. 89..... 513
National Fire Ins. Co. *v.* Chambers, 53 N. J. Eq. 463..... 387
——— *v.* Ming, 60 Pac. 720..... 387
National Surety Co. *v.* Long, 60 C. C. A. 623..... 528
Neal *v.* Burrows, 34 Ark. 491..... 240
Nebraska Meal Mills *v.* St. Louis S. W. Ry. Co., 64 Ark. 169.... 459
Neufelder *v.* German-American Ins. Co., 6 Wash. 336..... 387

New Orleans *v.* Gaines, 138 U. S. 594 107
Nichols *v.* Shearon, 49 Ark. 75.... 410
Northern Assurance Co. *v.* Grand View Bldg. Assoc., 183 U. S. 308 .....324, 327, 328, 329, 330
Norton *v.* Norton, 94 Ala. 481..... 412
Nunnally *v.* Becker, 52 Ark. 550.... 74
Nute *v.* Hartford Fire Ins. Co., 83 S. W. 83..... 331

O

O'Connell *v.* State, 6 Minn. 279 .....312, 313
Ohio Farmers' Ins. Co. *v.* Vogel, 73 N. E. 612..... 331
Old South Soc. *v.* Crocker, 119 Mass. 1..... 555
O'Neil *v.* Lake Superior Iron Co., 67 Mich. 560..... 134
Organ *v.* State, 56 Ark. 267..... 352
Orient Ins. Co. *v.* McKnight, 64 N. E. 339..... 330
Ould *v.* Washington Hospital, 95 U. S. 303.....555, 559
Overton Bridge Co. *v.* Means, 33 Neb. 857..... 567
Ozan Lumber Co. *v.* Haynes, 68 Ark. 185..... 513

P

Padgett *v.* Norman, 44 Ark. 490... 412
Palmer *v.* Detroit, etc., Rd. Co., 56 Mich. 1..... 142
Palmore *v.* State, 29 Ark. 248..... 601
Parks *v.* Webb, 48 Ark. 293..... 431
——— 48 Ark. 293..... 176
Pattillo *v.* Allen-West Com. Co., 131 Fed. 680..... 398
Patton *v.* Texas & P. Ry. Co., 179 U. S. 658..... 81
Payne *v.* Chicago & A. R. Co., 38 S. W. 308..... 624
Pearson *v.* East, 36 Ind. 27..... 107
Peckham *v.* Balch, 49 Mich. 179... 108
People *v.* Butler Street Foundry, 201 Ill. 236..... 521
——— *v.* Hesterberg, 76 N. E. 1032 353
——— *v.* Leet, 23 Cal. 161..... 446
——— *v.* Roby, 52 Mich. 579..... 352
——— *v.* Schultz, 85 Mich. 114..... 298
——— *v.* Stickman, 34 Cal. 242... 434
———*v.* Swenson, 49 Cal. 388..... 298
People's Mutual Ins. Co. *v.* Goyne, 79 Ark. 315..... 483
Perin *v.* Carey, 24 How. 465..... 567
Perry *v.* Cunningham, 40 Ark. 185.. 266
——— *v.* House of Refuge, 52 Am. Rep. 495.....539, 546
Phillips *v.* Fones, 39 Ark. 17..... 24
——— *v.* Milwaukee & N. Rd. Co., 77 Wis. 349.....142, 144
Phillips County *v.* Lee County, 34 Ark. 240..... 505
Phoenix Ins. Co. *v.* Flemming, 65 Ark. 54..... 483
Pickering *v.* Shotwell, 10 Pa. St. 23 556
Pindall *v.* Trevor, 30 Ark. 249..... 102
Pipkin *v.* Williams, 57 Ark. 242.... 219
Pittsburg, C. C. & St. L. R. Co. *v.* Bartels, 108 Ky. 216..... 387
Planters Ins. Co. *v.* Loyd, 67 Ark. 584 483
Pledger *v.* Garrison, 42 Ark. 246.. 102
Pond *v.* National Mortgage, etc., Co., 6 Kan. App. 718..... 468
Porter *v.* Blood, 5 Pick 54..... 397
Potter *v.* Bank, 102 U. S. 163..... 418
Powers *v.* Mass. Homeopathic Hospital, 109 Fed. 294..... .....540, 546, 549, 556, 558
Presbyterian Congregation *v.* Cole, 2 Grant's Cas. 75.....549, 556
Prescott & N. Ry. Co. *v.* Smith, 70 Ark. 183..... 393
Primrose v. Western Union Telegraph Co., 154 U. S. 1..... 37
Puckett *v.* State, 71 Ark. 62..... 600

Pulaski County *v.* Lincoln, 9 Ark. 326 297

Q

Queen Ins. Co. *v.* Union Bank & Trust Co., 111 Fed. 699..... 329
Quertermous *v.* Hatfield, 54 Ark. 16. 341

R

Ragan *v.* Hill, 72 Ark. 307..... 73
Rahrer, *In re,* 140 U. S. 545..... 352
Railway Co. *v.* Amos, 54 Ark. 159.. 266
——— *v.* Chambliss, 54 Ark. 214.. 248
——— *v.* Murphy, 60 Ark. 333.... 356
——— *v.* Neil, 56 Ark. 279..... 356
——— *v.* Smith, 60 Ark. 240..... 241
——— *v.* Torrey, 58 Ark. 217...23, 24
——— *v.* Triplett, 54 Ark. 289..... 24
Randall *v.* Railroad, 132 Mass. 269.. 142
Rector *v.* Board, 50 Ark. 116..... 240
Reed *v.* Rice, 25 Vt. 171.....342, 345
Reed *v.* Williamsburg City Fire Ins. Co., 74 Me. 537..... 482
Reeve *v.* Attorney General, 3 Hare, 191 560
Regina *v.* Allen, 2 Moody, 179..... 307
——— v. Camplin, 1 Den. C. C. 94 .....304, 310
——— 1 Cox, Cr. Cas. 220..... 304
——— *v.* Dee, 15 Cox, Cr. Cas. 579.. 310
——— *v.* Fletcher, 8 Cox, Cr. Cas. 131 303
——— *v.* Ryan, 2 Cox, Cr. Cas. 115 304
Reilly *v.* Empire Life Ins. Co., 90 N. Y. Sup. 866..... 331
Remington *v.* Fidelity & Dep. Co., 27 Wash. 429..... 530
Richardson *v.* Matthews, 58 Ark. 484 200
Riendeau *v.* Bullock, 147 N. Y. 269 605
Ring *v.* Jamison, 2 Mo. App. 584.. 397
Robertson *v.* Bullions, 11 N. Y. 243 549
——— *v.* State, 40 Fla. 509..... 434
Robinson *v.* Thornton, 46 Pac. 79.. 479
Ross *v.* Royal, 77 Ark. 324..... 366
Roth *v.* Holland, 56 Ark. 633..... 575
Rucker *v.* Dixon, 78 Ark. 99..... 201
Rush *v.* Weaver, 62 Ark. 51..... 112

S

Saint Louis & S. F. Ry. Co. *v.* Brown, 62 Ark. 259..... 89
Saint Louis, I. M. & S. Ry. *v.* Aven, 61 Ark. 141..... 497
——— *v.* Briggs, 47 Ark. 59..... 176
——— *v.* Boyles, 77 Ark. 374..68, 92, 179
——— *v.* Combs, 76 Ark. 132..... 13
——— *v.* Dawson, 77 Ark. 434..... 13
——— *v.* Dillard, 78 Ark. 520..... 245
——— *v.* Gaines, 46 Ark. 555..... 81
——— *v.* Harper, 44 Ark. 527..... 81
——— *v.* Law, 68 Ark. 218..... 473
——— *v.* Luther Hitt, 76 Ark. 224 .....57, 145
——— *v.* Martin, 61 Ark. 549..... 622
——— *v.* Needham, 52 Ark. 371... 65
——— *v.* Power, 67 Ark. 142..... 183
——— *v.* Rice, 51 Ark. 467...81, 440, 622
——— *v.* Robert Hitt, 76 Ark. 224.. 245
Saint Louis S. W. Ry. Co. *v.* Clay County Gin Co., 77 Ark. 357..... 62
——— *v.* Plumlee, 78 Ark. 147.... 393
Sale *v.* McLean, 29 Ark. 612..... 166
School District *v.* Bennett, 52 Ark. 511 240
——— *v.* Williams, 38 Ark. 454... 561
Schuman *v.* Sanderson, 73 Ark. 187 575
Security Mut. Ins. Co. *v.* Woodson, 79 Ark. 266..... 483
Sharp *v.* State, 51 Ark. 155..... 622
Shaul *v.* Duprey, 48 Ark. 331..... 289
Sherman *v.* Crosby, 11 Johns. 70 .....342, 345
Shorter University *v.* Franklin, 75 Ark. 571..... 179
Shoshone Mining Co. *v.* Ritter, 177 U. S. 505..... 583
Silverstein *v.* O'Brien, 165 Mass. 512 346

Sims *v.* Cumby, 53 Ark. 418..... 3
——— *v.* Phillips, 54 Ark. 193.... 400
Singerly *v.* Thayer, 108 Pa. St. 291.. 514
Skaggs *v.* State, 108 Ind. 53..... 90
Smith *v.* McCann, 65 U. S. 298.... 542
——— *v.* James, 53 Ark. 135..... 404
——— *v.* Messer, 17 N. H. 426..... 446
——— *v.* Smith, 62 Ill. 493..... 468
Snyder *v.* Nations, 5 Blackf. 295... 89
Sonfield *v.* Thompson, 42 Ark. 46.. 240
Southern Ins. Co. *v.* White, 58 Ark. 227 483
Southern Pac. Rd. *v.* U. S., 168 U. S. 1..... 542
Spalding *v.* New Hampshire Fire Ins. Co., 52 Atl. 858..... 332
Sparks *v.* Farris, 71 Ark. 117...199, 201
Sprott *v.* Insurance Co., 53 Ark. 215 483
Stafford *v.* Chippewa Valley Elec. Ry. Co., 110 Wis. 331..... 624
Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60..... 45
Stanley *v.* Colt, 5 Wall. 160..... 560
——— *v.* Wilkerson, 63 Ark. 556.. 418
State *v.* Anderson, 1 S. W. 140.... 626
——— *v.* Arkadelphia Lumber Co., 70 Ark. 329..... 521
——— *v.* Babcock, 22 Neb. 618.... 234
——— *v.* Booe, 62 Ark. 512..... 308
——— *v.* Carl, 43 Ark. 353..... 357
——— *v.* Culbreath, 71 Ark. 80... 308
——— *v.* Dale, 141 Mo. 284..... 434
——— *v.* DeWolf, 20 Am. Dec. 90.. 90
——— *v.* Jim, 12 N. C. 142..... 314
——— *v.* Johnson, 67 N. C. 55.... 314
——— *v.* Knowles, 34 Kan. 393.... 298
——— *v.* Lancashire Ins. Co., 66 Ark. 466..... 521
——— *v.* March, 132 N. C. 1000... 314
——— *v.* Nelson, 39 S. Car. 322... 90
——— *v.* Peak, 130 N. C. 711..... 313
——— *v.* Powell, 106 N. C. 635... 314
——— *v.* Redmond, 36 Ark. 58.... 352
——— *v.* Turlington, 15 S. W. 141.. 626
State *v.* Williford, 36 Ark. 155..... 567
——— *v.* Woodbridge, 42 N. J. L. 401 446
State *ex rel.* Ry. Co. *v.* Rowe, 69 Ark. 642..... 159
Stayton *v.* Halpern, 50 Ark. 329... 410
Stephenson *v.* McClintock, 141 Ill. 604 167
Sternaman *v.* Met. Life Ins. Co., 170 N. Y. 13..... 331
Stevens *v.* McKibben, 15 C. C. A. 498 502
Stewart *v.* Colter, 31 Minn. 385... 446
——— *v.* State, 13 Ark. 742..... 134
Stout *v.* State, 43 Ark. 414.....215, 521
Strong *v.* Manufacturers' Ins. Co., 10 Pick. 40..... 482
Stuart *v.* Easton, 170 U. S. 383..548, 557
Sullivant *v.* State, 8 Ark. 400...302, 309
Sutton *v.* Wyrick, 39 Ark. 424..... 107
Sweeden *v.* State, 19 Ark. 205..... 314
Sweeney *v.* United States, 109 U. S. 618 513
Swift *v.* Applebone, 23 Mich. 253.. 90
——— *v.* Smith, 102 U. S. 442..... 154
Swigart *v.* McGee, 19 Ark. 473.... 343

T

Taylor *v.* Beckham, 178 U. S. 548.. 591
Terry *v.* Rosell, 32 Ark. 478..... 104
Texarkana & Ft. Smith Ry. Co. *v.* Bemis, 67 Ark. 542..... 51
Texas, etc., Ry. Co. *v.* Marshall, 136 U. S. 393..... 45
Textor *v.* Shipley, 86 Md. 440..... 446
Thompson *v.* Love, 61 Ark. 81..... 153
——— *v.* Traders Ins. Co., 169 Mo. 124 327
Tiffin *v.* St. Louis, I. M. & S. Ry. Co., 78 Ark. 55..... 141
Tinsley *v.* Craige, 54 Ark. 346.... 431
Topeka Primary Assoc. *v.* Martin, 39 Kan. 750..... 52
Towell *v.* Etter, 69 Ark. 34..... 447
Tucker *v.* Hawkins, 72 Ark. 21..... 266
Turner *v.* Israel, 64 Ark. 244..... 356

Tyler *v.* Aetna Ins. Co., 12 Wend. 507 482

U

Union Pac. Ry. *v.* Artist, 60 Fed. 365 .....539, 558
——— *v.* Daniels, 152 U. S. 684... 407

V

Vance *v.* State, 70 Ark. 272..... 349
Vangindertaelen *v.* Phoenix Ins. Co., 82 Wis. 112..... 482
Van Tassell *v.* Hospital, 15 N. Y. Supp. 620..... 539
Vesey *v.* Com. Union Assoc. Co., 101 N. W. 1074..... 331
Vidal *v.* Girard, 2 How. 195..... 560
Vincenheiler *v.* Reagan, 69 Ark. 460 591
Virginia F. & M. Ins. Co. *v.* Richmond Mica Co., 46 S. E. 462.... 328

W

Walker *v.* Holtzclaw, 57 S. C. 459 ..530
Wall *v.* Looney, 52 Ark. 113..... 287
Wallace *v.* Sisson, 45 Pac. 1000... 479
Wallis *v.* Doe, 2 Sm. & M. 220..... 412
Walsh *v.* London Assurance Corporation, 151 Pa. St. 607..... 482
Waltham *v.* Kemper, 55 Ill. 346.... 566
Walton *v.* State, 29 Tex. App. 163.. 304
Warner *v.* State, 54 Ark. 664...310, 314
Watkins *v.* Griffith, 59 Ark. 344 .....240, 521
Weaver *v.* Fletcher, 27 Ark. 510... 263
——— *v.* Rush, 62 Ark. 51..... 412
Weed *v.* Hamburg, etc., Ins. Co., 133 N. Y. 134..... 482
Western Union Telegraph Co. *v.* Coffin, 30 S. W. 896..... 37
——— *v.* Ford, 77 Ark. 531..... 452
——— *v.* Short, 53 Ark. 434..... 37
West-Winfree Tobacco Co. *v.* Waller, 66 Ark. 445..... 262
Whissen *v.* Furth, 73 Ark. 366..... 158
White *v.* Bond County, 58 Ill. 297.. 566
——— *v.* Chaffin, 32 Ark. 69..... 567
——— *v.* Swann, 68 Ark. 102..... 400
Whitmore *v.* Dwellinghouse Ins. Co., 148 Pa. St. 406..... 482
Whittaker *v.* State, 50 Wis. 523... 310
Williams *v.* Industrial School, 23 L. R. A. 200..... 539
——— *v.* Roger Williams Ins. Co., 107 Mass. 377..... 482
——— *v.* State, 105 Ga. 814..... 434
——— *v.* State, 1 Tex. App. 90..... 312
Williams Co. *v.* Standard Brass Co., 173 Mass. 356..... 514
Williamsport *v.* Commonwealth, 84 Pa. St. 487..... 233
Willis *v.* State, 33 Tex. Cr. App. 168 434
Wills *v.* Stradling, 3 Ves. 378..... 103
Wilmer *v.* Farris, 40 Iowa, 309.... 108
Wilson *v.* Massie, 70 Ark. 25..... 111
——— *v.* United States, 162 U. S. 613 434
Womack *v.* Womack, 73 Ark. 281.. 292
Woman's Christian Nat. Lib. Assoc. *v.* Fordyce, 79 Ark. 532..... 553
Woolfolk *v.* Buckner, 67 Ark. 411.. 199
Woolfork *v.* Buckner, 60 Ark. 165.. 201
Wood *v.* State, 47 Ark. 488..... 308
Wright *v.* Morgan, 191 U. S. 55 .....548, 557

Y

York *v.* Maine Cent. Rd. Co., 84 Me. 117.....142, 144
Young *v.* Stevenson, 75 Ark. 181.. 341

Z

Zeigler *v.* Eckert, 47 Am. Dec. 428.. 363

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

MERRYMAN *v.* BLOUNT.

Opinion delivered April 30, 1906.

1. REAL MORTGAGE—RIGHT TO REDEEM.—Real property sold under a power contained in a mortgage or deed of trust can, under Kirby's Digest, § 5416, be redeemed by the mortgagor only within one year from date of the sale. (Page 3.)
2. SAME—RIGHT OF BENEFICIARY TO PURCHASE AT TRUSTEE'S SALE.—The beneficiaries in a trust deed may purchase the property at a sale under a power therein contained made by the trustee, though the deed contained no provision authorizing them to buy. (Page 3.)
3. SAME—APPRAISEMENT.—As Kirby's Digest, § 5418, providing that the appraisers shall proceed to view and appraise mortgaged property about to be sold, does not require an actual entry upon the land in order to view it, a complaint which alleges that the persons appointed to appraise did not enter upon and view the land is demurrable. (Page 4.)
4. PLEADING—NEGATIVE REGNANT.—A complaint seeking to redeem land from a mortgage foreclosure which alleges that the appraisers appointed to view and appraise the land did not enter upon and view the land can not be taken to mean that the appraisers did not view the land, but only that they did not enter upon and view it, which is not required by Kirby's Digest, § 5418. (Page 4.)

Appeal from St. Francis Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

J. M. Prewett, for appellant.

1. The sale under the trust deed was void for two reasons:

(*a*) The beneficiaries, unless there was a provision in the deed to that effect, could not purchase at a sale for their benefit. 32 Ill. 13; 8 Fed. Cases, 443; 4 Minn. 32; 58 Mo. 537; 107 N. C. 552; 9 R. I. 225; 23 Ark. 622; 52 Ill. 130; 49 Mo. 389; 76 N. C. 99; 126 N. C. 525; 80 Miss. 31. There is no distinction

between a mortgagee and the beneficiary in law. See cases *supra;* also 121 Ala. 191; 2 Perry, Trusts, 602 D; Jones on Mortg. (4 Ed.), § 1769; 40 Ch. Div. 409.

(*b*) The appraisers did not enter upon and view the land as required by law. Kirby's Digest, § § 5417, 5418; 77 Mich. 273; 48 Kan. 124; 71 Ark. 209; 55 *Id.* 258; 2 Perry, Trusts, § 602; Pingree on Mortg. § 1315; 13 N. Y. 200; 55 Ark. 584.

2. The equity of redemption is descendible by inheritance precisely as if it were an estate of inheritance at common law, and the heir may redeem. 6 Ark. 269; 121 Ala. 191; 85 Mich. 76; 51 Wis. 31; 10 Biss. (U. S.), 240; 2 Root (Conn.), 509; 18 Ark. 25; 12 Tenn. 10; 3 Swanst. (Eng.), 241; 72 Ala. 249; 112 Ill. 568; 2 N. Mex. 318; Jones on Mortg. par. 1055a, 1062, (6 Ed.)

The minor's right to redeem is not barred until majority. 3 Har. & N. 328; 121 Ala. 191; 25 So. 920. Exceptions are made for disabilities in limiting the time for redemption, in analogy to the statute of limitations. 17 Ves. 87; 3 P. Wms. 287; 2 Vent. 340; 2 Root (Conn.), 509; 88 Ala. 487; 7 So. 238; 82 Ala. 622; 121 *Id.* 191; 25 So. 920; 52 Ark. 132; 48 *Id.* 386. Laches not imputable to infants. 33 Ark. 490; 12 S. W. 559.

N. W. Norton, for appellee.

The purpose was to make a statutory redemption, as shown by the complaint and the tender of the sum bid and 10 per cent. interest, and by the prayer. No such tender was made within one year. Kirby's Digest, § 5416. There are no exceptions in favor of infants, married women, etc.; and where the statute makes none, the court can make none. 53 Ark. 418; 14 S. W. 623.

2. Our statute does not require that appraisers shall enter upon the land; their only duty is to "view and appraise." Kirby's Digest, § 5418.

3. Beneficiaries clearly have the right to buy. They are not the sellers. When not a seller, the beneficiary has the same right to buy as any one also. 72 Ark. 625; 83 S. W. 351.

WOOD, J. This suit was begun by appellant to redeem a certain tract of land in St. Francis County from a sale made by a trustee under a deed of trust. The purchasers were the beneficiaries in the deed.

The complaint contains, among others, the following allegations:

"That the beneficiaries in said trust deed, L. and O. B. Rollwage, bought the land involved in this action at the sale made by the trustee, B. R. Shade, January 5, 1895, and there was no provision in the said instrument or agreement that they might become purchasers at their own sale, and that the said sale is for that cause void. That the persons appointed to appraise the land before the sale by the trustee did not enter upon and view it after their appointment as such appraisers and before assessing its value, and that for that reason the sale is void. That plaintiff, on the — day of April, 1903, offered to pay and tendered to the defendant, Fannie B. Blount, the sum of $382.69, being the amount for which the land was sold, under the deed in trust, together with 10 per cent. interest thereon, and all costs of the sale."

The prayer of plaintiff's bill is for redemption of the land, and cancellation of the several deeds, and that the sale under the trust deed be held for naught, and that the defendants be held to be mortgagees in possession, and be required to account as such; and also for a writ of assistance to place him in possession, etc.

A general demurrer to the complaint, which was sustained, presents for our consideration the following questions:

1. Did appellant have the right to redeem? The statute provides that "real property sold thereunder may be redeemed by the mortgagor within one year from the sale." Kirby's Digest, § 5416. The statute contains no exceptions in favor of minors, and the courts can make none. *Sims* v. *Cumby,* 53 Ark. 418. The statutory right of redemption is clearly indicated by the allegations of the complaint. If the sale is void for the reasons alleged in the complaint, appellant could only be barred by laches or the general statute of limitations.

2. So, is the sale void for the reason that the beneficiaries in the trust deed bought at a sale made by the trustee, where the deed of trust contains no provision authorizing the beneficiaries to buy?

The beneficiaries in a deed of trust are not the sellers, as in case of a mortgage to the mortgagee with power of sale. The

trustee in a deed of trust is not under the control of the beneficiaries in the matter of executing his trust. The beneficiaries in such deeds have the same right to buy as any other person. Not having the power of making the sale, they have the right to buy. *Hamilton* v. *Rhodes*, 72 Ark. 625. The chief object in naming a trustee is to enable the beneficiary or mortgagee to buy at the sale, to remove from the beneficiary the power to make a sale and to become a purchaser at his own sale, and thus to remove from him the power to make a sale in his own interest or to perpetrate a fraud upon the mortgagor or grantor in the deed of trust.

3. Must appraisers actually enter upon the land to be sold in order to view and appraise it after they are sworn?

The statute provides that "such appraisers shall proceed to view and appraise such property." Kirby's Digest, § 5418. The object of the appraisement is to ascertain the true value of the land and to insure, as far as possible, the sale of the land at a fair price, to prevent the possibility of the land being sacrificed at a grossly inadequate price. The report of the appraisers is, of course, made after they are sworn, and the presumption is that they will do their duty, and ascertain the value of the land as the law requires, and that this shall be done, not by report or hearsay, but by actually viewing the property. While the statute contemplates an actual view of the property, it does not require an actual entry upon the land in order to view it. A reasonable construction of the statute is that the appraisers must have viewed the property, before they place a value upon it. If this view can be had so as to ascertain the true value of the property without entry upon the land as well as by actually going upon it, then actual entry is not necessary. The complaint does not allege that the appraisers did not view the land after they were sworn, but that they did not enter upon and view it. On demurrer nothing will be taken by intendment. So the question is not presented that the appraisers did not view the land after they were sworn, but only that they did not enter upon and view it.

The demurrer was therefore properly sustained, and the judgment is affirmed.

CLAY v. PENZEL.

Opinion delivered April 30, 1906.

PRIVATE WAY—ADVERSE USE.—A private way over the land of another may be acquired by open, continuous and adverse use for seven years under a claim of right.

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

STATEMENT BY THE COURT.

Terrence O'Dougherty and Harry Mesler are the owners of land on west side of block 353, in the city of Little Rock, while Adam C. Penzel owns land in block 354 west of the land owned by O'Dougherty and Mesler. Between the land of O'Dougherty and Mesler and the land of Penzel is a strip of land fifteen feet wide which they, since 1888 or 1889, have used as public alley separating the two blocks. M. J. Clay was at one time the owner of the whole of block 354. He claims that this fifteen-foot strip is not a public street or alley, but that it is part of block 354, which he has never sold; that its use by the parties named above has been with his permission and in recognition of his right. In 1901 he commenced to erect a building on this strip of ground, and thereupon O'Dougherty, Penzel and Mesler brought this action to enjoin him from obstructing the street in that way.

The defendant, Clay, filed an answer and cross-complaint, in which he alleged that he was the owner of the fifteen-foot strip of land in question; that plaintiffs had without authority taken dirt and gravel from the land in question which he alleged is owned by him, and he alleged that one of the plaintiffs had laid a private sewer across this land, whereupon he prayed that the injunction be dismissed, that plaintiff be required to replace the dirt and gravel, and that he have judgment for his costs.

Both parties took depositions, and on the hearing the chancellor made the following findings of fact, towit:

"The court doth find that the fifteen-foot strip of ground or passway mentioned in plaintiff's complaint and amendments thereto is a part of Izard Street extending between blocks 353 and 354 of the City of Little Rock from North Street to the

Arkansas River, as represented and designated upon a certain plat, made or caused to be made, and intended to be filed in the office of the circuit clerk and ex-officio recorder of Pulaski County, by Chester Ashley and Roswell Beebe, the original owners of the west half of section three, township one north of range 12 west, of said county in which said blocks and street so represented are situated; and that on said plat said west half of section 3 was represented as divided into lots, blocks and streets, including said Izard Street so extended, and that on or about the 30th of November, 1849, by deed duly recorded in said recorder's office, said land was partitioned between said Ashley and Beebe by reference to said plat, and that they, their heirs and assigns, afterwards made many and divers conveyances of lots and blocks of said land by numbers as designated on said plat and in some instances by direct reference to said plat; and that for all that part of the city of Little Rock lying west of State Street, north of Twelfth Street, east of the State Penitentiary ground and south of the Arkansas River no trace has ever been found of any other plat or bill of assurance to which reference could be made. That said west half of section 3 covered by said plat became a part of the city of Little Rock by act of the General Assembly of the State of Arkansas of January 7, 1861, and was ever afterwards recognized and treated by said city as a part thereof. That said strip of ground has never been entirely closed up, unless for a short period of time by defendant Clay in the early sixties, and that the gate he claims to have at one time had at the north entrance of said passway was moved away at or about the time he made his conveyance to R. H. Farquahar of April 13, 1883, and that in said conveyance said defendant left out the fifteen-foot street of ground which lies immediately west of said block 353, which is the situs of said passway, and that it was then intended that said way should remain open, and that all the plaintiffs bought their abutting property with the understanding that it was and would so remain, and that they had a fixed right to its use, and that since then said passway has been entirely open and free from any obstruction and notoriously used without any let or hindrance, license or permission from said Clay, by any person who saw fit, as a passway from said North Street to the Arkansas River; and was so used by many residents of said city

of Little Rock, and that plaintiffs and those under whom they claim have from that time on used the same openly, notoriously, continuously and adversely and under claim of right with the knowledge of said Clay, and not under any license or permission of said defendant, and that said use was never interrupted or disturbed by any act on the part of said defendant or any one else prior to his attempt in September, 1901, to shut up the same by putting up brick piers for the building of a house thereon, as stated in plaintiff's original complaint herein. That said defendant Clay had no right or title in or to said strip to justify his said act of attempting to so shut up said passageway; and that his said attempt was a wrongful act and an unjust invasion of the rights of the plaintiffs as owners of lands and premises in said blocks 353 and 354 abutting on said passway, and threatened special injury and great and irreparable damage to them, for which they had no adequate remedy at law. That the plaintiffs, as such abutting owners, have the right to have said passway open and free from obstruction of any kind, and to have and continue in the free and unobstructed use of the same as a passway from North Street to the river, without let or hindrance of any kind on the part of the defendant."

The chancellor thereupon granted a perpetual injunction against defendant, Clay, enjoining him from obstructing the fifteen foot of ground referred to in any way or in any manner interfering with the free use of the same by plaintiffs as a passway, and gave judgment against him for costs. Clay appealed.

John Hallum, for appellant

The fee in the so-called alley or passway was in Clay. No dedication was ever shown, nor any *record* found of such dedication, by Ashley or Beebe or Crittenden, the original owners. Nor is any subsequent dedication to the public shown in any way. Their only contention is that they have acquired an *easement* by long user. In this they fail. The owner of a fee over which a highway passes retains the fee and all rights not incompatible with the public enjoyment, and when the highway is abandoned or lost he regains his original domain. Angell on Highways, secs. 301-304, 398, 399; 6 Mass. 454; 43 N. H. 356; 31 Vt. 336; 8 Allen (Mass.), 473; 15 Johns. (N. Y.), 448. The use of a private way by the public does not make it a public highway

without proof of *dedication* and acceptance. 147 N. Y. 139; 21 *Id.* 474. The proof by those claiming the easement must be clear and convincing. Bigelow on Estoppel, 556, 557; 71 Iowa, 396, 400; 50 Ark. 716; 41 N. Y. 321; 115 U. S. 22, 26; 51 Mich. 575; 87 Ind. 570; 51 Wis. 232; 54 Vt. 92. Where it is plain that the representation has been acted upon, there is no question that an estoppel arises. Bigelow on Estop. 649; 117 U. S. 96-113; 17 Me. 132; Bigelow on Estop. 651-2. Plats and maps, followed by no dealing with the owner and no acceptance, are not sufficient. 69 Mass. 882; 98 Ala. 274; 8 Ind. 378; 42 N. J. L. 561; Jones on Easements, § 483. The placing of gates is evidence of an intention on the owner's part not to dedicate. 63 Ark. 5; 7 How. U. S. 185; Elliott on Roads, 130. A license to go on the land of another is a personal and revocable privilege, conferring no estate. Jones on Easements, § § 43, 64, 370. Nor can the duration of a way be enlarged by implication. Jones on Easements, § 370. A mere parol agreement, though a consideration be paid, passes no estate. 129 N. Y. 604; Jones on Easements, § 29. See also on the question of easements by user. 66 N. H. 386; Jones on Easements, § § 389, 179, 180, 181, 185, 84, 63, 64, 164; 19 Ark. 23; 144 Mass. 371; 91 Wis. 386; Washburn, Real. Prop. 629; 150 Mass. 19; 107 N. Y. 384. Plaintiffs are estopped. 35 Ark. 376; *Id.* 293; 29 *Id.* 218; 37 *Id.* 47; 50 *Id.* 427; 52 *Id.* 207; 53 *Id.* 196; 55 *Id.* 296; 33 *Id.* 465; 50 *Id.* 116, 125; Bigelow, Estop. pp. 556, 557; 82 Ala. 102; 80 Ala. 331; 71 Iowa, 396. A conveyance to a municipal corporation of land outside the city limits is void. Dillon, Mun. Corp. (4 Ed.), 565. Mere *permissive* right never ripens into a prescriptive right. Jones, Easements, § 428. See also 33 Ark. 468 and 37 *Id.* 47. To establish a highway by prescription, there must be a public use, general, uninterrupted and continuous for seven years, under claim of right. 47 Ark. 431.

W. L. Terry, for appellees.

1. Clay was not the owner of the strip; hence was a trespasser as against the abutting owners, who were in the actual enjoyment of the use of the invaded premises for at least 18 years. 8 Ark. 414; 45 *Id.* 345.

2. The right of way was granted *by implication* in Clay's

deed to Farquahar. Note to 86 Am. Dec. 582; 53 Am. Rep. 554; 4 Kent, Com. 467; 49 L. R. A. 420.

3. (*a*) The strip became a public way by common law dedication. Wash. on Easements, 218; 2 Smith, L. Cas. 209. It may be done by writing, by parol, by acts *in pais,* or even acquiescence in the use. 10 Peters, 712; Washburn on Easements, 205; 6 Pet. U. S. 440; *Ib.* 712; 1 L. R. A. 860; 58 Ark. 150.

The making of a plat and recording same may not bind him, but in selling to others according to said plat he creates an interest beyond his control. 3 L. R. A. 660; 1 *Id.* 859. The rights of a city may remain dormant until the use of the streets has become a necessity. *Id.* p. 860; 10 *Id.* 279; 72 Cal. 174; 4 N. J. Eq. 430; 32 Iowa, 630. An abutting owner necessarily enjoys certain advantages from an open street, which belongs to him. 10 L. R. A. 281; 57 Conn. 31; Angell on Highways, § 149.

(*c*) Dedication does not require the existence of a corporation. 33 N. J. L. 13.

(*d*) No acceptance by the city necessary. 12 N. J. 299; 97 Am. Dec. 702. But there was an acceptance by act of April 28, 1873. 58 Ark. 149; 62 Ark. 418; note 18 L. R. A. 510.

4. It became a public way by prescription and statutory limitation. 58 Ark. 437; 50 *Id.* 61; 60 Md. 74; *Id.* 79; 33 N. Y. Supp. 473; 86 Hun, 374; 37 Ala. 31; 19 Mo. App. 179; 47 Ark. 70; 36 Vt. 510, 511; 71 Miss. 640; 80 S. W. (Ky. Ct. App. April 21, 1904); 33 N. Y. Supp. 473; 86 Hun, 384; 8 Barb. 153; 37 Ala. 31. The burden was on Clay to show that the use was permissive, and not adverse. 22 N. Y. Supp. 990; 60 Md. 74; 37 Pa. St. 44; 42 *Id.* 114; 13 Atl. 81. See also 35 Vt. 514; 43 N. J. L. 621, 62 N. H. 372; 1 Allen, 248; 29 Vt. 44; 33 W. Va. 316, 317.

(*d*) The fact that defendant or other persons besides the plaintiff *also made use of the way* does not preclude their right by prescription. 13 Atl. 81; 13 Gray, 191, 192; 75 Am. Dec. 629.

RIDDICK, J., (after stating the facts.) This is an appeal by M. J. Clay from a judgment of the chancery court of Pulaski County enjoining him from putting a building upon or otherwise obstructing a strip of ground 15 feet wide lying between the land of plaintiff Penzel in block 354 and land owned by plaintiff O'Dougherty and plaintiff Mesler in block 353.

The plaintiffs claim that this strip of ground, which extends

north and south the full length of these two blocks, is a public alley, and constitutes an open public passway between the two blocks, while defendant Clay contends that it is in fact a part of block 354, and owned by him, and that such use as plaintiffs may have made of it was by his consent and permission.

There is some evidence tending to show that when the land covering blocks 353 and 354 was first laid off into blocks and lots a street about fifty or sixty feet wide was laid off between these two blocks, this street being an extension or what is now known as Izard Street. This land was at that time beyond the city limits. The defendant, Clay, afterwards became the owner of block 354, which lies west of block 353, and there is evidence tending to show that he claimed the strip of land in controversy as part of block 354, and that he had it inclosed.

But we think it is unnecessary to determine whether this strip was originally a part of Izard Street, and represents what the encroachments of abutting landowners have left of that street at this place, or whether it was originally a part of block 354, and as such was owned by Clay. We may, so far as this case is concerned, admit that this strip was a part of block 354, and owned by Clay. He in 1883 sold and conveyed to one Farquahar a lot 85 feet wide and extending across block 354 from North to South, leaving this 15 foot strip between the land sold to Farquahar and block 353. As Clay did not own block 353, and as the lot he sold to Farquahar in 354 extended completely across this block, thus separating this fifteen-foot strip from the other part of that block owned by Clay, it is difficult to see why Clay reserved such a narrow strip of the block unless he had doubts of his right to convey it. But, if he owned the entire block, he could subdivide it as he pleased, and we pass that point. He did sell the lot to Farquahar, cutting this narrow strip off from the other part of the block owned by him. Farquahar in 1888 sold to plaintiff Penzel, and he erected a fence along the east side of his lot extending across block 354 and adjoining the strip of land in controversy on the west. The parties who owned the land in block 353 east of this strip had a fence on this land. This left the strip of land in controversy inclosed on its east and west sides; on the north side it extended to the river bluffs; on the south side it opened into North Street, and the evidence

shows that since 1888 or 1889 it has been continuously used by plaintiffs as a passway between the lot owned by plaintiff Penzel in block 354 and the lots in block 353 owned by the other plaintiffs.

Whether these plaintiffs used this strip as a private passway or as a public alley is not very material, so far as this case is concerned; for a private way over the land of another may be acquired by adverse use in the same time that the public may acquire the right to a public highway by adverse user. In either case the use must be under a claim of right, and not permission. The way in either case must be used openly, continuously and adversely under a claim of right for the full period of the statute of limitations, which in this State is 7 years. 14 Cyc. 1145-1149; 22 Am. & Eng. Enc. Law, 1187; 23 *Ib.* 10; *Johnson* v. *Lewis,* 47 Ark. 66.

It is clear from the evidence that this strip has been continuously used by plaintiffs as an alley or passway for 10 or 12 years at least before it was obstructed by the defendant. The only question in dispute is whether that use was permissive, or adverse and under a claim of right so open and notorious as to put defendant on notice thereof.

The decision in this case turns then entirely on a question of fact. There is some conflict in the evidence, but it would serve no useful purpose to set it out or to go into a discussion of the same. Sufficient to say that we have not only read the arguments of learned counsel, but the evidence as set out in the transcript, and that we are of the opinion that it supports the finding of the chancellor that the strip of ground in controversy has for at least 10 or 12 years been used continuously, openly and adversely by the plaintiffs as an alley or passway between their lots, and that it has also been used more or less by the public and that the defendant Clay has now no right to occupy or obstruct the same with buildings or in any other way. The injunction to prevent this was in our opinion properly granted.

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* THOMPSON-HAILEY COMPANY.

Opinion delivered April 30, 1906.

1. RAILROAD—NEGLIGENCE—FIRE.—A verdict that a fire was caused by the negligence of the defendant railway company will be supported by evidence that the fire was communicated by sparks from defendant's engine, and that the emission of sparks was caused by negligence of the company either in failing to provide suitable appliances to prevent the escape of sparks or in the operation of the engine. (Page 13.)
2. SAME—MEASURE OF DUTY IN REGARD TO FIRE.—It was error to instruct the jury that the absolute duty is imposed upon a railway company of supplying its locomotives with the best approved appliances in use and of keeping them in good condition, the measure of its duty being limited to the exercise of reasonable care in providing such appliances and keeping them in good condition. (Page 13.)
3. INSTRUCTION—CONFLICT.—Erroneous instructions are not cured by correct ones, if the instructions were conflicting and calculated to mislead the jury. (Page 13.)

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

B. S. Johnson, for appellant.

1. The court erred in the instructions to the jury as to the duty of the appellant to equip its locomotives with appliances to prevent injury to property upon its right of way. It is chargeable with the duty to exercise only reasonable care in the selection of these appliances. 76 Ark. 132; 14 Fed. 140; 83 Fed. 300; 15 Conn. 124; 73 Pa. St. 121; 44 Ill. 28; 31 Ind. 143; 18 Kan. 261; 41 Wis. 78; 36 N. J. L. 553; 31 Ia. 176; 77 Ark. 434.

J. F. Summers, for appellee.

2. The verdict was contrary to the evidence.

1. The exceptions to the instructions of the court were general, the court's attention was not directed to the features urged here as objectionable, and they are not properly before this court. 73 Ark. 596; 65 Ark. 255; 65 Ark. 54; 66 Ark. 264; *Ib.* 46. If there was error in the instructions complained of, it was cured by others given, and by the court's direction to the jury that all the instructions were to be considered together.

Since it is in proof that appellant's engine was provided with the best spark arrester and contrivances to prevent the escape of fire known and in use in practical railroading, appellant was not prejudiced by the instructions.

2. The testimony warranted the verdict.

McCULLOCH, J. This is an action brought by appellee to recover the value of a lot of cotton destroyed by fire alleged to have been negligently set out by a defective locomotive. The cotton was situated on the platform of the railway company at McCrory, Arkansas. The complaint also alleged that the locomotive was negligently operated so as to emit sparks and cinders.

The plaintiff recovered judgment below for the value of the cotton, and the defendant appealed.

The testimony adduced at the trial was sufficient to bring the case within the principles announced in *St. Louis, I. M. & So. Ry. Co.* v. *Coombs,* 76 Ark. 132, and was ample to warrant the verdict. It was sufficient to justify a finding that the fire was communicated by sparks from the engine, and that the emission of sparks was caused by negligence of the company either in failing to provide suitable appliances to prevent the escape of sparks, or in the operation of the engine.

The court erred, however, in giving instructions which imposed upon the company the absolute duty of supplying its locomotives with the best approved appliances in use, and of keeping them in good condition, instead of requiring only the exercise of reasonable care in providing such appliances and keeping them in good condition. *St. Louis, I. M. & So. Ry. Co.* v. *Dawson,* 77 Ark. 434, and cases cited.

It is contended by counsel for appellee that the erroneous instructions were cured by correct ones given at the instance of the defendant. That did not cure the error. The instructions were not harmonious, but were conflicting and calculated to mislead the jury. *Fletcher* v. *Eagle,* 74 Ark. 585.

For the errors in this respect the judgment is reversed, and cause remanded for a new trial.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT v. MYERS.

Opinion delivered May 7, 1906.

1. DEED—WARRANTY—BREACH.—Where a grantor covenants that he will warrant the title conveyed to the extent of the consideration received for the land, he will be held bound to refund the consideration on failure of the title. (Page 15.)

2. CORPORATION—ULTRA VIRES CONTRACT—ACCEPTANCE OF BENEFIT.—Where the president of a levee board executed a deed in the name of such board, containing a covenant of warranty obligating the board to defend the title to the extent of refunding the consideration paid if the title failed, the levee board was not entitled to retain the consideration on failure of title, whether the president had authority to make the covenant of warranty or not. (Page 15.)

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

H. F. Roleson, for appellant.

The president of the board of directors is limited strictly to the terms of the act. The exercise by him of any powers not expressly conferred by the act is *ultra vires* and void. 67 Ark. 413. Since the act only authorizes him, upon presentation of the treasurer's receipt for the money, to execute a deed, he is not authorized to go further and incorporate a warranty of title. The levee district is designated as a *quasi* public corporation. 59 Ark. 513. But if it were a public corporation, its powers would be limited strictly by the act of creation. Dillon, Mun. Corp. § 443; 21 S. W. 674. See also 122 Fed. 776; 33 N. W. 333; 1 Devlin on Deeds, § § 364-368.

S. H. Mann, for appellees.

1. The word "deed," as used in contracts for the conveyance of land, imports that the conveyance shall give a sufficient title. 14 Ind. 12; 7 Am. Dec. 330.

2. Having received the money of appellee under the agreement that if title fails the money would be refunded, the law will compel restitution. 10 Wall. 676; 102 U. S. 294; 43 Ark. 282; 107 U. S. 348; 17 Fed. 320; 107 U. S. 575.

HILL, C. J. The President of the Board of Directors of the St. Francis Levee District sold a tract of land to the appellees upon the following agreement, incorporated in the deed, towit:

"And the said Board of Directors of St. Francis Levee District hereby agrees and covenants to forever warrant and defend the title to the said lands unto the said grantees, their heirs and assigns, forever against the lawful claims of all persons claiming by, through, or under them, or by reason of insufficiency of title in said Board of Directors at the date hereof, to the extent, however, only of refunding the above-named consideration, or so much thereof as title to which is not in said board of directors."

Title to part of the land failed, and appellee sued to recover the amount paid for said land pursuant to the foregoing clause.

The levee district defends the suit on the ground that the president of the board has simply power to sell land, and not to warrant its title; that the authority vested in him by law to execute deeds does not carry with it the power to bind the district with covenants of warranty.

If the position taken by the appellant be conceded, it does not follow that recovery can be defeated under this deed. Money was paid to the district for certain lands then conveyed by it as if it owned them, under agreement that if it did not own them it would return the money received for them. The payment was conditioned on the district then having title; in event it did own the land, it was to have the money; if it did not own the land, it could not retain the money paid for it. This was not a sale of the right, title and interest of the district, the purchaser taking his chance on getting a good title; nor, on the other hand, was it a simple conveyance of land containing a covenant of warranty, a distinct contract of itself; but it was an agreement to refund any money then paid it for land conveyed by it, should it prove that the land, or any part of it, was not owned by the district. The condition has happened, and it can not retain money received under the agreement to refund on the happening of this contingency.

The judgment is affirmed.

WALDRON v. TAENZER.

Opinion delivered May 7, 1906.

1. JUDGMENT—PARTIES—PRESUMPTION.—A recital in a partition decree that defendant L appeared as guardian of W justifies the presumption on collateral attack that W, who was a necessary party to the suit, was properly made a party thereto. (Page 18.)
2. SAME—JURISDICTION OF PERSON—PRESUMPTION.—When a domestic judgment is attacked collaterally, if it appears that the court had jurisdiction of the subject-matter, but it does not affirmatively appear whether it had jurisdiction of the person of a defendant or not, it will be presumed that such defendant was duly served, and that the court had jurisdiction of his person. (Page 19.)

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

STATEMENT BY THE COURT.

Appellant sues for an undivided one-half interest in a tract of swamp or wild land.

Appellee, Taenzer, admits that appellant inherited a one-half interest in the land, but alleges: "In the year 1880, and on the 8th day of October, in the circuit court of Cross County, Arkansas, in a proceeding for partition brought by Cynthia A. Hood, the owner of one-half, against the plaintiff herein, owner of the other one-half of said tract, and in which proceeding the plaintiff herein was represented by James M. Levesque, his regular guardian, it was adjudged that the property be sold for partition." Taenzer filed, as exhibit to his answer, a copy of a decree directing that the land be equally divided between appellant and the aforesaid Hood. W. M. Block, B. Roleson and S. L. Austell were appointed as commissioners to divide the land. A copy of a decree at a later term was also filed, which recited that the commissioners had reported that the land could not be divided, and that they recommended a sale. This decree also recited that one of the commissioners, S. L. Austell, had bought the interest of Mrs. Hood, the petitioner in that suit. The other commissioners were directed to sell the land for partition. A copy of another decree at a later term is also filed, in which a sale of the land to the erstwhile commissioner, S. L. Austell, is confirmed by the court.

Appellant filed exceptions to the chain of title thus offered, and the exceptions were duly presented to the trial court, and were all overruled.

At the trial appellant offered in evidence the complaint and the deposition of Nettie Johnson. Nettie Johnson swore that appellant was born on February 18, 1879; that his father died on September 1, 1879, and that his mother died on December 30, 1879; that the mother, on her deathbed, gave appellant, then a child ten months old, to his grandmother, Malinda Waldron, who immediately took the child to the State of Tennessee, where she kept him until he was twenty years old. When twenty years old, appellant joined the United States Army, and was sent to the Philippine Islands, where he remained until a few months before this suit was filed.

This was all the evidence offered by appellant. Appellees offered no evidence, except the answer of Taenzer and the exhibits.

The trial court found the issues in favor of appellees, and entered a decree dismissing appellant's suit.

Samuel A. Wilkinson, for appellant.

1. The record of the suit referred to in the answer does not show that appellant was ever made a party to said suit, and he is, therefore, not bound by any judgment rendered therein. There is no allegation nor proof that appellant was named in the petition for partition as a defendant, nor that he was served with process. The statute requires that all persons having an interest shall be made parties to such petition. Sand. & H. Dig. § § 5415-5417.

2. The record of the suit referred to in the answer does not show that appellant was ever served personally or constructively in said cause. The Code provides how an infant may be sued. It also provides that a judgment or decree entered against one without notice is absolutely void. The rights of infants can in no case be judicially affected, except upon proper issues and proof, and upon statutory service when they are defendants. 39 Ark. 235; 40 Ark. 56.

N. W. Norton, for appellee.

1. The decree is not subject to collateral attack. The pre-

sumption is that appellant was duly served. 49 Ark. 397. On the question of collateral attack, see 72 Ark. 101; 74 Ark. 174; 76 Ark. 465. If directly attacked, the decree would stand. It shows the appearance of J. M. Levesque as guardian of Barney Waldron, and that he asks for affirmative relief as such guardian, the effect of which was to join in the petition for partition, as the statute authorized him to do. Kirby's Digest, § 5795. The guardian is a trustee of an express trust, and could sue in his own name, without joining his ward. Kirby's Digest, § 6002; 23 Sup. Ct. Rep. 211.

WOOD, J., (after stating the facts.) Counsel in oral argument and brief urge for reversal the following assignments of error:

"The trial court erred in overruling the following exceptions to the answer of Taenzer:

"1. The record of the suit referred to in said answer does not show that the plaintiff was ever made a party to said suit, and therefore plaintiff is not bound by any judgment rendered therein.

"2. The record of the suit referred to in said answer does not show that this defendant was ever served personally or constructively in said cause, and therefore plaintiff is not bound by any judgment rendered in said cause."

1. This is a collateral attack on a decree of partition rendered by the chancery court of Cross County.

The evidence was sufficient to warrant a finding that appellant was a party defendant in the partition suit. That decree, among other things, recites: "On this day came the parties to this cause, and the defendant, J. M. Levesque, as guardian of Barney Waldron, and says that he, as such guardian, is entitled to one-half of certain taxes paid out by the father of said minor while in his lifetime, which he can not now ascertain, and the court, being fully advised of the remaining right of the defendant," orders partition, and an account taken of sums due defendant. The burden of proof was upon appellant to show he was not a party to the suit in partition. In the absence of some affirmative showing on his part that he was not a party, we are of the opinion that the above recitals in the decree of partition were sufficient to justify the chancery court in finding that he was a party.

Section 5772 of Kirby's Digest provides that in a suit for partition every person having an interest "shall be made a party to such petition" for partition. True, the original petition for partition is not in the record, showing that appellant was named as a party defendant in that suit. But the complaint in this case shows that at the time of the partition suit and the rendition of the decree appellant was the sole owner of an undivided half interest in the lands in controversy, which were partitioned in that suit. They could not have been partitioned legally under the statute without making him a party. Under section 5795 of Kirby's Digest, Levesque, as guardian of appellant, had authority to institute a partition proceeding for his ward, or to join in one already instituted or "any matter or thing respecting the division of any lands or tenements." The fact that he did join in the petition for partition and ask for affirmative relief in the way of taxes paid by the ancestor of his ward had the legal effect of making his ward a party to that proceeding. The style of the suit in partition, and the recitals of the decree in that suit, we think, show clearly that there was at least another party defendant to that suit than Levesque, the guardian. The only other one that could have been properly made a party, according to the facts set up in the complaint, was the appellant. Moreover, the recitals of the partition decree show that Levesque appeared in his representative capacity. Appearing as guardian, it will be conclusively presumed on collateral attack that the ward was a party. All things are presumed to have been rightly done, and the court could not properly have permitted the guardian as such to appear without the ward. The ward was the party, represented, as he had to be, by his guardian.

2. The case of *Boyd* v. *Roane,* 49 Ark. 397, and the more recent cases of *Clay* v. *Bilby,* 72 Ark. 101; *Ballard* v. *Hunter,* 74 Ark. 174, and *Johnson* v. *Lesser,* 76 Ark. 465, determine that when a domestic judgment is attacked collaterally, if it appears that the court had jurisdiction of the subject-matter, even though the whole record, when taken together, does not show that the court had jurisdiction of the person, the presumption will be indulged that the parties were duly served, and that the court rendering the judgment had jurisdiction of the defend-

ants. These are well considered cases, and have become rules of property. We adhere to them.

Affirm.

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ARCHER-FOSTER CONSTRUCTION COMPANY *v.* VAUGHN.

Opinion delivered May 7, 1906.

1. MASTER AND SERVANT—ASSUMED RISKS.—While a servant is held to have assumed all the ordinary risks of his employment, which include the risk from negligence of co-employees, whether vice-principals or not, engaged with him in the common work, he will not be held to have assumed latent dangers of which he was ignorant, and of which the master either knew or ought to have known. (Page 23.)
2. SAME—LIABILITY OF MASTER.—A master is liable for the negligence of a vice-principal in failing to warn a servant of latent dangers and to provide him a safe place to work, though such vice principal was also guilty of concurring negligence as a fellow servant. (Page 23.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Styles T. Rowe,* Judge.

J. H. Vaughn, as next friend to Joseph J. Fitzpatrick, sued the Archer-Foster Construction Company to recover damages for personal injuries alleged to have been received in its employment, and recovered judgment, from which defendant appealed. Affirmed.

Ira D. Oglesby, for appellant.

If any negligence is shown, it was that of a fellow-servant. If a foreman or one who in some respects is a vice-principal performs an act of labor in common with the labor of the plaintiff, he is a fellow-servant. 58 Ark. 217.

Read & McDonough, for appellee.

A foreman having power to employ, control and discharge laborers in his department is a vice-principal as regards the duty to warn such laborers of latent risks in their employment. 58 Ark. 168. It is in proof that appellee was working in a drill gang, doing ordinary drilling work in which there was no danger;

that he was under the control of Lynch, and was directed by him to place the drill in a hole containing the dynamite, which latter fact was unknown to appellee, and of which he had no notice or warning. Appellant and Lynch were not fellow-servants. 65 N. W. 914; 73 N. W. 186. Lynch stood in the place of the master, and the latter is liable for his negligence in assigning the servant to work in a dangerous place. 12 Am. & Eng. Enc. Law (2 Ed.), 957; *Ib.* 948; 11 Ind. App. 211; 104 Mo. 114. Appellant owed the absolute duty to appellee to furnish him a safe place in which to work, to warn him of the dangers incident to his duties, especially of latent risks or dangers, unknown to appellee, and known to it, or which by the exercise of ordinary care it could have known. 98 Cal. 19; 146 Ill. 551; 130 Ind. 321; 103 Mich. 196; 41 Minn. 212; 142 N. Y. 416; 76 Tex. 611; 31 S. E. 614; 82 Wis. 307.

WOOD, J. Appellee alleges in his complaint, among other things, the following:

"That on the 18th day of February, 1904, while the said Joseph J. Fitzpatrick was in the lawful employ of the defendant as aforesaid, the defendant did negligently, carelessly and recklessly take the said Joseph J. Fitzpatrick from where he was working in a place of safety, and did negligently, carelessly and recklessly set him to work at a hole which was heavily loaded with dynamite and other strong explosives, and did negligently, carelessly and recklessly fail and neglect to warn or notify the said Joseph J. Fitzpatrick that said hole was loaded, as aforesaid, and did negligently, carelessly and recklessly fail and neglect to furnish and provide a safe, competent and proper man in charge of said dynamite and other strong explosives, and did negligently, carelessly and recklessly fail and neglect to furnish the said Joseph J. Fitzpatrick with a safe, sufficient and proper place in which to perform his duties, and did negligently, carelessly and recklessly fail and neglect to warn or notify the said Joseph J. Fitzpatrick of the dangers of working at said hole, and the dangers and perils incident to said work, by reason whereof, and by reason of the negligence, carelessness and recklessness of the defendant as hereinbefore alleged, and without any fault or want of care on the part of said Joseph J. Fitzpatrick, and without any warning or notice whatever that said hole was loaded as

aforesaid, or that there was any danger whatever in working at said hole, the dynamite and other strong explosives in said hole exploded, and the said Joseph J. Fitzpatrick was thrown a distance of fifteen or twenty feet into the air, and fell with great force and violence to the ground, and was severely and permanently injured, as hereinafter more particularly alleged.

"That all dangers and perils incident to the employment of the said Joseph J. Fitzpatrick at the time of the accident and injuries as hereinbefore alleged were at all times well known to the defendant, but that the said Joseph J. Fitzpatrick then and there did not know, and he could not by the exercise of ordinary care and prudence on his part know, of them, and he had not the means of knowing as to the same."

Appellant in its answer denied each allegation of the complaint, and in addition to these denials set up a plea of contributory negligence, assumed risk, and that the accident was caused by the negligence of appellee's fellow-servant.

Upon the issue as thus made the cause was submitted to the jury.

The appellant was a construction company, and at the time of the injury to appellee was engaged in the work of constructing a roadbed for a railroad. The work being done was excavation work, removal of earth and rock, and was carried on by different squads. Some were engaged in handling steam shovels, others in drilling holes for blasting, and others loading and firing the holes after they were drilled. Appellee was with the crew that was drilling the holes. His account of the injury is as follows: "That, when at work drilling holes about thirty feet ahead of Lynch, he was called by Lynch to bring a drill, and on getting to where Lynch was at work, Lynch told him to put the drill in one of the holes, which he did; and that then he and Lynch took hold of the drill, and about the time they had given two or three licks with the drill the explosion occurred; that he knew it was Lynch's business to load the holes with powder and dynamite, but did not know that there was powder or dynamite in the hole they were drilling. The holes were usually from eight to eleven feet deep and about four inches in diameter; that the drill only went about four feet into the hole, which exploded before striking solid matter."

Without setting out the evidence in detail, it suffices to state that there was evidence tending to prove that Lynch, who was working with appellee at the time of the injury, was superintendent of the drill crew, having power to employ, discharge and direct the laborers in their work; there was evidence to justify the conclusion that Lynch was vice-principal of the appellant, whose duty it was to warn the men under him of the latent dangers and risks in their employment, thus bringing the case in this respect within the rule announced by this court in *Ft. Smith Oil Company* v. *Slover,* 58 Ark. 168.

It appears, then, from the evidence, and the jury might have found, that one Lynch, appellant's vice-principal, who had control over appellee and directed his labor, called appellee from his work of drilling in which there was no danger, and put him at a different kind of work about which there was the greatest danger, viz.: handling dynamite, and loading same into the holes after they were drilled. While it is doubtless true that appellee knew, as well as appellant's vice-principal, that dynamite was a dangerous and powerful explosive, which required the greatest care in the work of loading it in the holes in order to prevent accident, yet appellee did not know that there was dynamite in the hole Lynch and he were drilling out at the time the explosion occurred. He did not know that he was drilling out a hole in which dynamite had been negligently left, or that he was tamping or loading dynamite into a hole that had been already drilled. Now, the labor of drilling and of loading dynamite in the holes and of blasting same was all to a common purpose, and all who were engaged therein were fellow-servants. For in the exercise of ordinary care they might be able to foresee that they might be exposed to the risks of injury from the negligence of any who were engaged in that particular construction work. This would also include Lynch, the vice-principal, while he was doing the labor of drilling or loading the dynamite into the holes, and for an injury which resulted from his negligence in these particulars the master would not be liable. *Railway Company* v. *Torrey,* 58 Ark. 217.

While the servant assumes the ordinary risks incident to his employment, and can not hold the master liable for injuries resulting from obvious defects and dangers, or dangers that he knew and appreciated as well as the master, yet he does not as-

sume latent dangers, such as the master only knew or by the exercise of ordinary care should have known. It is the duty of the master to warn him of these, and to exercise ordinary care to provide him a safe place to work. *Ft. Smith Oil Co.* v. *Slover, supra; Railway Company* v. *Triplett,* 54 Ark. 289; *Railway Company* v. *Torrey,* 58 Ark. 217. These familiar and well-established principles, applied to the facts of this record, make appellant liable. The injury here was the result of the failure to warn appellee that there was dynamite in the hole he was drilling, the failure to exercise ordinary care to provide him a safe place to work. This was negligence for which the master was responsible; and if this negligence also concurred with the negligence of the fellow-servant in using the place assigned him and in handling the means and implements provided for the work in producing the injury, the master is still liable. *Railway Company* v. *Triplett, supra; Railway Company* v. *Torrey, supra.* Such is the case at bar. Lynch was the fellow-servant of appellee in handling the drill and loading the dynamite. But he was the vice-principal, and stood in the place of the master in the duty of warning of latent dangers and providing a safe place. *Phillips* v. *Fones,* 39 Ark. 17; *Fort Smith Oil Co.* v. *Slover, supra; Railway Company* v. *Torrey, supra.* The concurring negligence in failing to handle the drill properly, and in failing to exercise proper care to provide appellee a safe place to work, and to warn him of latent dangers, produced the injury complained of.

We must assume that the law was declared by lower court, as the instructions have not been set out in the abstracts of counsel.

Affirm.

BATTLE, J., dissenting.

SMITH v. STATE.

Opinion delivered May 7, 1906.

1. APPEAL—INVITED ERROR.—When defendant's counsel in a murder case asserted the innocence of a witness introduced by defendant, who had been indicted for the murder of deceased's brother, killed at the same time with deceased, it was not error to permit the prosecuting attorney to make a statement in his argument, in effect, that the witness would be shown to be guilty. (Page 30.)
2. WITNESS—IMPEACHMENT.—Where two brothers were killed in the same rencounter with defendant under precisely the same circumstances and at almost the same time, it would not be improper, in a prosecution of defendant for the murder of one of the brothers, to permit the State to prove that defendant's principal witness was jointly indicted with defendant for the murder of the other brother. (Page 31.)
3. TRIAL—ARGUMENT—EXPRESSION OF OPINION.—It was not prejudicial error to permit the prosecuting attorney to refer to defendant's principal witness, who had been indicted for complicity in the contemporaneous murder of deceased's brother, as the friend and accomplice of defendant, being merely the expression of an opinion, and there being some evidence to support such a conclusion. (Page 32.)

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

STATEMENT BY THE COURT.

Appellant, a negro, and the Gleghorn brothers, John and Count, white men, lived near each other in Nevada County. On the 28th of March, 1905, John and Count Gleghorn were clearing new ground. They had assisting them a negro named Will Preston. On the morning of the above day, a neighbor saw appellant leaving his home running. He looked like he was scared, had a slicker on his arm and a pistol in his right hip pocket. On being asked what was the matter, he replied: "Me and Mr. Count and them got into it." The witness making the inquiry immediately ran to where the Gleghorns were, about a quarter of a mile distant. He found Count Gleghorn dead, and John shot. John said he was shot in the breast, and would not live an hour. The witness asked him "What it came up about," and he said: "Squire Smith accused us of stealing his dog, and swapping it off; but we never did it. He came up with the hand on his pis-

tol, and I struck at and missed it, and he shot me." John lived but a little while after making this statement.

Appellant had lost his dog. He said to a witness on Sunday, before the killing on Tuesday, that: "Count and the Gibson boy got his dog and traded it off. He didn't want them fooling about his dog. He didn't want to do anything. If they would let him alone, he would let them alone. He wasn't going to raise a kick, but they had better let him alone. He wanted to let them know he knew where his dog was and could go to it. He wasn't going to raise a kick, but they had better let him alone. He wasn't married to this country."

Another witness heard him say on Tuesday, a week before the killing, and again on Monday, the day before the killing, "that Count and John Gleghorn got his dog. They were going to keep on until somebody gets killed over this dog."

Another witness heard him say on Sunday before the killing that "Count Gleghorn took his dog down and traded him to a negro, and gave him $2 to boot." The witness said to him: "This is a white folks' government, and you can't afford to accuse them of stealing a dog." He replied: "Well, professor, if they get in my road, I will tell them about it; but, if they don't, I won't." The witness said to him: "Squire, you leave that dog business alone," and he replied: "I ain't married, or tied, to this country." To another witness, a short time before the killing, he said: "He was going to have his dog, or have trouble over it." The physician who examined the dead body of John Gleghorn testified that he found a bullet hole just to the left of the breast bone between the second and third rib. The bullet went straight in, and did not come out. The bullet caused John Gleghorn's death. The physician saw no other marks of violence on John Gleghorn's body.

Appellant was indicted for the killing of John Gleghorn, the indictment in apt terms charging appellant with the crime of murder in the first degree. He was tried, and convicted of the crime charged. On behalf of the State the evidence was substantially as above recited.

On behalf of appellant, witness Will Preston testified substantially as follows: "I was working for John and Count Gleghorn, and saw the difficulty under investigation. Defendant

came to where we were working, and John Gleghorn asked him if he had found his dog. He replied that he had not, but that he had heard that Count Gleghorn and the Gibson boy had swapped his dog off. They denied it, and defendant said that he didn't come there to see them about the dog, but about the timber on the line. John Gleghorn said, 'That is not what you came for,' and he picked up a pine knot and caught defendant in the collar and commenced striking him. After he had struck several licks, Count Gleghorn ran up with an ax, like he was going to make a lick or throw it. Defendant shot John, and then shot Count. Count fell. John fell on the other side, 'on his hunkers like.' Both John and defendant had hold of the pistol, and I started toward them. The pistol was pointed at me, and the defendant snapped it a time or two. When John was down, defendant had his left foot on his breast. John was up on his 'hunkers,' holding the pistol, and I walked up and told him to turn loose, and he did so, and fell back. I caught him, and with my assistance he got on his feet and started toward the house, but after he had walked ten or fifteen feet he gave down, and could go no further. I got some blood on my hands assisting him. I looked back, and defendant was going off with John's hat. I called his attention to it, and he came back and got his own. I then ran to the house and told John's wife, and went for Doctor Waddell, and when I got back John was dead."

On cross-examination the witness testified: "We were all working in the new ground when the defendant came up. Count Gleghorn and I were using the ax, and John was piling brush. Defendant came up from a northerly direction, and stopped about ten or twelve feet from Count. Both Count and John were south from him, Count being a little further away. I do not know whether Count threw the ax, or whether he struck with it. When he made this lick, defendant shot him."

"Q. How far from where John was standing with his hand in defendant's collar to where Count lay after he fell?

"A. About three or four feet, I think.

"Q. How came the defendant on the ground?

"A. I don't know unless John threw him; they all fell when he shot.

"Q. Did Count throw the ax before he fell, or after?

"A. Before defendant shot. When he went to make his lick, or throw the ax, defendant commenced shooting. Defendant and John were standing when Count threw the ax. Defendant shot John first, and shot Count as he ran up with the ax. When defendant fired, they all fell, Count falling across defendant's breast.

"Q. How could he fall across defendant's breast and John have his hand in his collar?

"A. I don't know how he fell, but he fell right across his breast. Defendant fired four times. I saw no blood on defendant from licks given him by John." The witness Preston further testified "that he did not tell Will Cantley, when he was catching the mule, that Squire Smith came up and accused these boys of stealing his dog, and raised a difficulty, and killed Count and shot John." He also testified that four shots were fired.

The State, without objection, introduced, in rebuttal, Will Cantley, who stated that Will Preston told him on the day the shooting occurred, while he was trying to catch the mule to go for the doctor, that "Squire Smith accused them of stealing his dog. He came over there and raised it, and John started on him with a pine knot, and Squire shot Count, and then shot John." He also testified, without objection of appellant, that Will Preston stated that only two shots were fired. Other witnesses were called whose testimony tended to contradict the testimony of Will Preston in several particulars.

There were no objections to the court's instructions. The prosecuting attorney, in his opening statement to the jury, said, in speaking of the witness Will Preston, "that he was a witness for the defendant, and that he was under indictment for the killing of Count Gleghorn."

The attorney for the defendant, in his opening argument to the jury, said: "While it is true that Will Preston has been indicted for the killing of Count Gleghorn, yet the evidence will show that he had nothing to do with the killing, and that he has been indicted for the purpose of discrediting his testimony."

The defendant's attorney, in his argument to the jury, discussing the credibility of the witnesses, their interest in the case, etc., said: "While its witness, Will Preston, is indicted jointly with the defendant for the killing of the other man, Count Gleg-

horn, yet I believe on his trial the proof will show that he had nothing whatever to do with it."

Counsel for the State, in closing his argument, referred to the above argument and statement of the defendant's counsel, and said: "Mr. Bush tells you that he does not believe Will Preston had anything to do with the killing of Count Gleghorn, and that the proof will show it on his trial. I believe when he is tried the proof will show that he is as guilty as the other defendant." To this statement appellant objected and excepted.

Counsel for the State, in his closing argument to the jury, used the following remarks:

"Why, the defendant has taken into his hands the law; he makes himself judge, jury and executioner, and says the people be damned. And who said he struck the defendant? It was his friend and accomplice (meaning Will Preston). And, now, gentlemen, what does your verdict in this case mean to Will Preston? It means the probable punishment that you mete out to this defendant." The prosecuting attorney, further discussing the testimony of the same witness, Will Preston, and the fact that that witness had blood on his hands, said: "No, sir; he will have to account for that blood yet." The same attorney, speaking of the testimony of Will Preston, stated the following: "Will Preston testified that Count Gleghorn struck at the defendant with an ax, and the force of the blow carried the ax out of his hands." Further: "And the proof will show in the trial of Will Preston that the shot that killed Count Gleghorn was not fatal." Further in the same speech the prosecuting attorney said: "I believe that all men who commit murder expect to be hung, and this human vulture and demon expects to be hung for it." Further: "Gentlemen, when you return a verdict of less than murder in the first degree in this case, you throw down the license to everybody in this county to commit the same crime." To these several remarks the appellant objected at the time they were made, and saved his exceptions to the court's ruling in permitting same.

J. O. A. Bush, for appellant.

The prosecuting attorney ought not to have told the jury that the witness Preston was indicted for the murder of Count Gleghorn. In response to this statement it was the duty of appel-

lant's counsel to try to remove the prejudicial impression created thereby. His statement of the innocence of the witness did not justify the prosecuting attorney in declaring that he would prove his guilt. 63 Iowa, 133. It is the duty of the prosecuting attorney to see that the defendant shall have a fair and impartial trial, that he be convicted only by competent evidence, and to secure this he should himself be fair and impartial. 12 Cyc. 571, *et seq.;* 78 Cal. 317; 71 Pac. 608; 64 Mich. 702; 59 Mich. 550; 138 Cal. 467; 67 Ark. 369; 62 Ark. 516; 65 Ark. 475; 70 Ark. 179; 168 U. S. 398; 97 Tenn. 452; 157 Mo. 360; 127 Ind. 494; 86 Iowa, 698; 107 Ky. 354; 99 Ill. 123; Thomp. on Trials, § 963 *et seq.;* 95 Ill. 394; 68 Ala. 476; 103 Ind. 133; 12 Mo. App. 431; 15 Tex. App. 501; 11 *Ib.* 391; 74 Ala. 386; 66 Ala. 48; 68 Ala. 476; 162 N. Y. 520; 55 N. Y. App. Div. 372. The case should be reversed because of other intemperate and prejudicial language used by the prosecuting attorney.

Robert L. Rogers, Attorney General, for appellee.

It was proper for the attorneys on both sides to comment upon the credibility of the witness; and since appellant's counsel did it, he can not complain that the prosecuting attorney did the same thing. 75 Ark. 350. The circumstances of each case must determine how far the prosecuting attorney may go in expressing his opinions and conclusions as to the facts. 71 Ark. 406. As between the witness and the dying man, it was but reasonable that the jury should accept the statement of the latter, rather than that of the former, who was under indictment for the same offense.

WOOD, J., (after stating the facts.) Learned counsel for appellant insists that the cause should be reversed on account of the improper remarks of counsel, but the record presents nothing in this respect, when the remarks of counsel for appellant as well as counsel for the State are all considered, that can be said to be prejudicial.

1. When counsel for the State in his opening statement to the jury asserted that Will Preston was under indictment for the killing of Count Gleghorn, appellant made no objection, and did not ask afterwards to have the remarks withdrawn from the jury, and the jury instructed not to consider them. Appellant chose to concede the fact as stated by the prosecuting attorney, and to

answer same by saying that the evidence will show that Preston had nothing to do with the killing, and that he had been indicted for the purpose of discrediting his testimony, rather than to object to the remark at the time and ask the court to instruct the jury not to consider same. Having taken this method of disposing of the remarks in the trial court, appellant must be held to have waived the error and prejudicial effect, if any, of such remarks before the jury. Likewise, after appellant's counsel had stated in his argument to the jury that "the evidence will show that Will Preston had nothing to do with the killing," appellant could not complain that the counsel for the State answered the argument by saying: "I believe when he is tried the evidence will show that he is as guilty as the other defendant." The same may be said of the remark of the prosecuting attorney that "the proof will show in the trial of Will Preston that the shot that killed Count Gleghorn was not fatal." These latter remarks involved an inconsistency, a contradiction in terms and, literally speaking, really meant nothing. But if the State's counsel meant by them, as seems probable, that Will Preston had something to do with the killing of Count Gleghorn, it was not error of which appellant could complain, because his counsel had invited such argument by stating that "the proof in the trial of Will Preston would show that he had nothing whatever to do with the killing of Count Gleghorn." The counsel for appellant, it appears from the record, made the first reference as to what the proof would show in the trial of Will Preston. Whatever the prosecuting attorney said with reference to that was no more in effect than saying that on the trial of Will Preston for the killing of Count Gleghorn the proof would show that he was guilty. It was improper, of course, to refer to what the proof would show on another trial. But counsel for the State did not state any specific fact that the proof would show in the trial of Will Preston tending to connect him with the murder of Count Gleghorn. He simply answered the general statement of the counsel for appellant that Will Preston would be shown to be innocent by the general statement in effect that he would be shown to be guilty.

But since John and Count Gleghorn were killed in the same rencounter with appellant, under precisely the same circumstances and almost at the same time, we do not think it would have been

improper for the State to prove that Will Preston was jointly indicted with appellant for the murder of Count Gleghorn. It was impossible to develop the circumstances of the killing of one without the other. The two offenses were practically one and the same. The fact that Will Preston was jointly indicted with appellant for the killing of Count Gleghorn, which appellant's counsel conceded to be true, was a matter proper to be considered by the jury in passing upon the credibility of the witness Preston. The fact of such indictment would tend to show that he had an interest in the result of the verdict on the trial of appellant.

2. It was also not improper, we think, for the prosecuting attorney, under the proof disclosed by the record, to refer to Preston as the "friend and accomplice" of appellant. That was only the expression of an opinion upon the part of the prosecuting attorney that such was the fact. There was very little evidence, if any, tending to show that Will Preston was an accomplice of appellant, but the proof was all before the jury, and as intelligent men they could not be prejudiced by the conclusion of the prosecuting attorney that Will Preston was an accomplice, if there was no evidence before them to justify such opinion or conclusion. The mere opinion of counsel in argument, not warranted by proof, is not likely to make an impression upon the mind of an intelligent juror.

The witness Preston gave, it appears, conflicting accounts of how the fatal rencounter began, which was the most vital point of inquiry in the case. In the account he gave to witness Cantley (according to that witness) on the day of the killing and in a very short time thereafter, he made appellant the aggressor, saying that "Squire Smith accused them of stealing his dog. He came over there and raised it," etc. But on the witness stand his testimony tended to exonerate appellant entirely, and to show that the Gleghorns were the aggressors, and that appellant acted only in self-defense. He stated also to another witness shortly after the killing that only two shots were fired, while on the witness stand he stated that there were four. He had blood on his hands, and gave conflicting statements as to the manner of getting same on his hands. These and other seeming contradictions in his testimony doubtless led the prosecuting officer to conclude that he was the "friend and accomplice" of appellant; and while we think

the declaration that Preston was the accomplice of appellant was hardly warranted by the proof, yet we do not consider the expression of such opinion or conclusion on the part of the district attorney in argument as prejudicial error.

We have carefully examined the other remarks complained of, and do not find any of them obnoxious to the rule often announced by this court prescribing the bounds for legitimate argument. See *Kansas City Southern Ry. Co.* v. *Murphy,* 74 Ark. 256, where the cases are collated. While some of them, especially those denunciatory of appellant personally, are in bad taste, yet they do not so far offend in this direction as to indicate that the jury were likely to be prejudiced by them.

3. The jury might have found from the evidence that appellant, full of malevolence towards the Gleghorns on account of a fancied wrong which they had done him, deliberately sought them out on their own premises, where they were at work, provoked them to combat, and shot them to death. His previous ill-tempered declarations in the nature of threats against the Gleghorns, and the dying declaration of John Gleghorn, fully warrant the jury in finding appellant guilty of murder in the first degree.

Judgment affirmed.

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WESTERN UNION TELEGRAPH COMPANY *v.* HOGUE.

Opinion delivered May. 7, 1906.

1. TELEGRAPH COMPANY—NEGLIGENCE—NOTICE OF SPECIAL DAMAGES.—Kirby's Digest, § 7947, providing that telegraph companies "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," does not change the rule that when a plaintiff seeks to recover of a defendant special damages on account of a breach of a contract he must show that at the time defendant entered into the contract he had notice of the special circumstances out of which the special damages might arise. (Page 36.)

2 SAME—FORM OF ACTION.—The rule that a telegraph company is liable for special damages for its negligence in receiving, transmitting or delivering a message only when at the time it undertook to transmit and deliver the message it had notice of the special circumstances out of which the special damages might arise is applicable whether the action to recover such damages is in form *ex contractu* or *ex delicto,* since in either case the cause of action is based upon a contract. (Page 37.)

3. SAME—NOTICE OF SPECIAL DAMAGES.—A telegram from one to his fiancee, apprising her that he would arrive on the evening train, was not sufficient to put the telegraph company on notice that he had been sick, and had written her that he would notify her by telegram on the day set for their marriage whether he could be present or not, and that the failure to deliver the message would cause her annoyance and mental anguish. (Page 37.)

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

STATEMENT BY THE COURT.

Mr. A. E. Hogue, of Lake Village, Arkansas, and Miss Bama Glosup were engaged to be married, and Sunday August 7, 1904, was the day on which the marriage was to take place. A week or two previous to that date he was taken sick with fever. On the 6th of August he sent the following letter to her:

"Lake Village, Ark. 8-6-04.

"Miss Bama Glosup,

"Wilmar, Ark.

"In answer to your letter last night, will say that I will be there Sunday if I am able to come. I will wire you if I come, or if I don't. But you write the liveryman, and tell him to save me the best team he has, and you can call at the office or send, for fear they won't deliver it. Look for me or a telegram.

"Yours as ever,

" A. E. Hogue."

On the morning of the 7th at 9:20 o'clock Hogue delivered the following message to the operator of defendant at Lake Village:

"Miss Bama Glosup,

"Wilmar, Ark.

"I will be there on the evening train.

"A. E. Hogue."

Hogue paid the charges for its transmission, but the message was never delivered at Wilmar. Hogue arrived at Wilmar on the train at 5 o'clock p. m., and was met at the train by Miss Glosup. They were married the same evening.

They afterwards brought this action to recover damages from the company for failure to deliver the telegram. They alleged that they suffered $1.25 pecuniary loss, by reason of the failure to deliver the telegram, and that plaintiff Mrs. Bama Hogue, on account of the failure to receive the telegram, suffered great mental anguish under the belief that some misfortune had overtaken said A. E. Hogue, and that she suffered humiliation in other ways. They therefore asked judgment for the sum of $1.25 pecuniary damages and $1,000 for mental anguish and suffering.

The defendant answered and denied liability. On the trial the jury returned a verdict for $1,75 actual pecuniary loss and for $500 damages for pain and suffering.

Defendant appealed.

George H. Fearons and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. There was nothing in the telegram to indicate that any special damage would result from delay in its delivery—nothing in its language to give notice of such special damages. Damages recoverable in such cases are only those which are incidental to and directly caused by the breach of contract, and may reasonably be presumed to have entered into the contemplation of the parties. 53 Ark. 443; 68 Miss. 307; 54 N. E. 776; 46 N. E. 358. No damages can be recovered for mental suffering unless it is shown that at the time the contract for transmission of the message was made the company had notice that a failure to comply with the contract on its part would cause mental suffering to the party complaining. Authorities *supra,* and 30 S. W. 298; 30 S. W. 896; Croswell on Elec. § § 566, 649 *et seq.;* Joyce on Elec. § 799 *et seq.;* Thompson on Elec. § 311 *et seq.* See also 50 S. E. 6; *Ib.* 198; 51 S. E. 773.

2. There could be no recovery on the part of appellee, Bama, because the failure to deliver the telegram augmented and increased her anxiety as to the health of A. E. It was a

mere continuance and aggravation of existing mental anguish; for which there can be on recovery. 67 S. W. 515; 59 S. W. 1127; 56 S. W. 568; *Ib.* 744; 44 S. W. 538; 12 S. W. 534; 41 S. E. 881; 42 S. W. 549.

3. The damages assessed are excessive, being for a greater amount than claimed in the complaint. 25 Ark. 41; 37 Ark. 599; 45 Ark. 386. Moreover, appellee arrived at Wilmar at the time he intended, appellee met him at the station as she would have done had she received the telegram, and they were married at the hour they expected to be. If there was any mortification in their being united in marriage by a justice of the peace, instead of the minister, that was the result of their own volition. They should have made a reasonable effort to secure the minister's services. 67 S. W. 849; 33 S. W. 728; 3 S. W. 496; 36 So. 188; Joyce on Elec. 972; Gray on Com. Tel. § 100; 83 S. W. 949.

RIDDICK, J., (after stating the facts.) This is an appeal by the defendant telegraph company from a judgment rendered against it for failure to deliver a telegram. In the complaint plaintiffs asked for $1.25 as pecuniary loss and $1,000 damages for pain and mental anguish. The proof tended to show that by reason of the failure to deliver the telegram plaintiffs were compelled to hire a man to get them a conveyance, and that this expense, with the price paid for the telegram, amounted to $1.75. The jury found a verdict for this amount, and also for $500 for mental pain and suffering. The circuit court gave judgment for the amount of the verdict, but we are of the opinion that the evidence is not sufficient to sustain the judgment.

The excess of fifty cents in the verdict for pecuniary loss over the amount asked in the complaint was evidently a mere oversight, which would have been corrected by the circuit judge, had his attention been called to it, and the only matter that we need notice here is the judgment for damages for mental anguish and suffering. Such damages may, under our statute, be recovered in some cases, but the statute does not change the rule that when a plaintiff seeks to recover of a defendant special damages on account of the breach of a contract he must show that at the time the defendant entered into the contract he had notice of the special circumstances out of which the special damages arose, so that it may be reasonably said, as a matter of law, that

such special damages were in contemplation of the parties at the time they made the contract.

"While actions against telegraph companies are not necessarily or usually *ex contractu,* but *ex delicto* for a breach of a public duty, the cause of action is so far dependent upon the original contract of sending as to make the rule just stated controlling, and it has been universally applied in this class of actions without regard to whether the particular action is *ex contractu* or *ex delicto,*" or whether the damages claimed were for mental suffering or for actual pecuniary loss. 27 Am. & Eng. Enc. Law, 1059; *Western Union Telegraph Co.* v. *Short,* 53 Ark. 434; *Primrose* v. *Western Union Telegraph Co.,* 154 U. S. 1; *Hughes* v. *Western Union Telegraph Co.,* 79 Mo. App. 133; *Arial* v. *Western Union Tel. Co.,* 50 S. E. 6; *Western Union Tel. Co.* v. *Coffin,* 30 S. W. 896.

Now, the special circumstances in this case were that the sender, A. E. Hogue, and the party to whom the telegram was sent were engaged to be married. He had been sick, and had written to her that he would notify her by telegraph on the day set for the marriage whether he could be present at the appointed time or not. She had received the letter, and was expecting a telegram. The failure to receive it caused her annoyance and mental anguish for which the jury assessed damages. But the evidence does not show that the telegraph company or its agent had any notice of these special circumstances under which the telegram was sent, or that it ought reasonably to have known that a failure to deliver it would inflict such suffering upon the plaintiffs. The words of the telegram itself, "I will be there on the evening train," were in themselves not sufficient to give notice of these special circumstances, and the evidence does not show that any further notice was given. The facts in proof do not therefore make out a case sufficient to sustain a judgment for damages for mental suffering.

There are other points discussed, but we find it unnecessary to notice them. Unless plaintiffs see proper to enter a remittitur sufficient to cure the excess in the verdict, the judgment will be reversed and cause remanded for a new trial.

AETNA LIFE INSURANCE COMPANY v. RICKS.

Opinion delivered May 7, 1906.

ACCIDENT POLICY—EFFECT OF FAILURE TO PAY PREMIUM.—Where an accident policy taken out by a railway employee stipulated that the premium payments should be payable out of assured's wages, and that no claim for injuries should be valid if sustained during a period in which its respective premium was unpaid, assured was not entitled to recover a claim for injuries where he had left the employment of the railway company after having drawn all of his wages and without paying a premium which was past due when the accident occurred.

Appeal from Pulaski Circuit Court, Second Division; *Edward W. Winfield,* Judge; reversed.

Rose & Coleman, for appellant.

1. This is not a case of forfeiture of a policy. The insurance by the express terms of the contract ceased upon the non-payment of the premium. The payment of the premium was a condition precedent to the continuation of the risk. 85 Ky. 677; 77 Iowa, 233; 6 Ind. 502; 43 S. E. 433; 41 S. E. 227; 4 Ill. App. 145; 212 Ill. 382; 109 Mo. App. 137; 101 Ill. App. 318; 212 Ill. 382; 70 N. E. 1122; Deitch's Ins. Dig. 1903, p. 310; 67 Ark. 147; 109 Mo. App. 137.

2. There is nothing in the contract to justify the contention that the insurer intended to extend a credit for the premium for the second insurance period until the pay day in October, since the application, the order and the policy provide that "the policy shall remain in force after the first insurance period only as continued by the actual payment of premiums for the consecutive periods following," etc. 86 S. W. 813; *Ib.* 814; 187 U. S. 335. The first instruction was erroneous, because by the terms of the contract appellee was not allowed until the pay day in October to pay the second premium; because, if he was allowed until that time the insurance for the second period would not have become effective until the second premium had been actually paid, and because it permitted a recovery in spite of the fact that the premium was not paid, and appellee had earned no wages from the railway company in the month from the wages of which it was to have been paid. It is expressed in the policy that no agent has authority to waive or change any condition or

provision of the policy. The envelope was not a part of the contract.

Marshall & Coffman, for appellee.

1. If Lantz had authority to make the contract and send the policy to appellee, he also had authority to fix the time of premium payment. 62 Ark. 348; 71 Ark. 242. There can be no default in payment until the payment is due. In this case the premium for the second period was not due until the pay day in October.

2. Since appellant claimed an abandonment of the policy, it was not error to permit appellee to testify that he intended to pay the premium. Neither was it error to admit evidence as to the time of the pay day, as that was one method of arriving at it, and defendant made no specific objection below. 89 Ia. 25; Wigmore on Ev. 1668.

RIDDICK, J. This is an action by James Ricks against the Aetna Life Insurance Company to recover the sum of one hundred and twenty dollars. The company on the 24th day of July, 1903, issued to the defendant a policy of insurance against accidents, and on the 20th day of October following the plaintiff was injured by a blast of dynamite that blew off his thumb. He claims that under the terms of the policy he is entitled to recover of the company $10 per week for twelve weeks, the time lost by reason of said accident. The company admits that it issued the policy, but alleges that the policy by its terms had lapsed for nonpayment of premiums by defendant, and was void at the time of the accident.

At the time the policy was issued Ricks was in the employ of the St. Louis, Iron Mountain & Southern Railway Company as assistant track foreman, with wages of $1.50 per day and board. Ricks at that time was working for the company in the Indian Territory, and his wages were paid monthly at Fort Gibson. The agent of the company who issued the policy testified that Ricks made an application for the policy on a printed form used by the company, and that he at the same time delivered to the agent an order for, or assignment of, a part of his wages for certain months. This order was also made on a printed form used by the insurance company. It authorized the insurance company to collect $4.25 from the railway company of the wages of Ricks

earned by him in each of the months of August, September, October and November, 1903, amounting in all to $17.

Ricks tesitfied that he did not sign any application for the policy, or give any order or make any assignment of wages to the company; that he received the policy through the mail, and that there was an indorsement on the envelope in which it was sent showing that Ricks had until the pay day in September to pay the first premium, and until the pay day in October to make the second payment. But, whether Ricks made a formal application for the policy or not, it is certain that he consented to accept it, and to pay the premiums referred to in the policy, for otherwise he would have no contract with the company. It must also have been understood that the insurance company should collect the premiums from the railway company, and that they should be deducted from Ricks's wages, for the first premium was so deducted and paid, and he does not deny that it was done with his consent. The policy itself clearly indicates that there was an agreement to that effect, and otherwise would be unintelligible.

The policy recites that it was issued "in consideration of the warranties made in the application, * * * and of an order of assignment for moneys therein specified on the St. Louis, Iron Mountain & Southern Railway," and contains the following provision:

"This policy is issued and accepted subject to the following conditions: 1. The payments specified in said order are premiums for separate and consecutive periods of two, three and five months, and each shall apply only to its corresponding insurance period. No claim for injuries sustained during any period for which its respective premium has not been actually paid in full shall be valid under this policy, except in case of just claim for injuries sustained before the end of the week or month from the wages of which the first premium is to be deducted, as provided in said order; but no claims shall be valid in any such case if the insured shall have left the employment of the employer named in the order without having earned in the week or month designated therein sufficient wages to pay said first premium, nor if he shall have collected or disposed of the wages earned in said week or month, so that there shall not remain sufficient for the payment of said premium."

The premium for the first insurance period of two months was deducted from the August wages due plaintiff by the railway company, and paid to the insurance company. But the plaintiff left the employment of the railway company before the end of that month. He earned no wages in September, and the premium which was to have been paid from the wages of that month was not paid at the time of his injury on the 20th of October. Plaintiff made the change in his occupation without notice to the insurance company, and at the time of his injury was in the employ of the street railway company at Little Rock. He testified that he knew the premium was unpaid, and that he had intended to pay it on the 25th of October, but the accident happened before that time.

As the policy was issued on the 24th day of July, the first insurance period of two months the premium for which was paid expired on the 24th day of September, and no other premium was paid. It will be noticed that the policy expressly stipulates that "no claim for injuries sustained during any period for which its respective premium has not been actually paid in full shall be valid under this policy." The policy makes an exception in the case of injuries received during the first period of insurance, but even that exception does not apply when the insured has left the employment of the employer named in the order without having earned in the month designated sufficient wages to pay the premium. If Ricks had remained in the service of the Iron Mountain Railway Company, and had earned wages during the month of September sufficient to pay the premium that was to be paid from the wages of that month, then there might be reason for holding that the policy had not lapsed, even though the insurance company had not, at the time of the injury, actually received payment of the premium. But he left the employ of the railway company before the month of September, and collected all wages due him, leaving nothing to pay the premium. Under these circumstances we think the circuit court erred in instructing the jury that "the plaintiff was allowed till the pay day on the Iron Mountain Railway at Fort Gibson to make the second payment of premium."

But, if we should concede, that, under the peculiar facts of this case, that instruction was correct, still the time of making

the payment certainly did not extend beyond the usual pay day of the railway company at the place named, which, according to the testimony of plaintiff himself, was about the 18th or 19th of the month. As the plaintiff was not injured until the 20th of October, we are of the opinion that, taking the view of the facts most favorable to the plaintiff, it is still clear that the policy had lapsed before the date of the injury. The judgment will therefore be reversed, and cause dismissed. It is so ordered.

LEONARD v. BOARD OF DIRECTORS OF PLUM BAYOU LEVEE DISTRICT.

Opinion delivered May 7, 1906.

SPECIFIC PERFORMANCE—INABILITY TO ENFORCE REMEDY.—Equity will not decree specific performance of an executory contract to do ordinary work, as to build a levee, for the reason that there is no method by which its decree could be enforced.

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; reversed.

STATEMENT BY THE COURT.

The General Assembly of 1905 enacted a statute establishing the Plum Bayou Levee District, embracing certain lands in Pulaski, Lonoke and Jefferson counties, for the purpose of constructing and maintaining a levee along the bank of the Arkansas River in said district. The statute in question authorized the board of directors to borrow money and to issue therefor bonds of the district in the sum of $300,000 to expend in constructing and maintaining the levee, which was done. The levee being incomplete after the expenditure of said sum, the board of directors entered into a contract with the defendant, R. L. Leonard, whereby the latter agreed to construct a certain portion of the levee, and to accept in payment of the agreed price for said work certificates of indebtedness to be issued to him by the board of directors due in one, two and three years respectively, all bearing

interest at seven per cent. per annum from date until paid. Defendant entered upon the performance of said contract, but subsequently abandoned the work, and refused to complete the contract on the grounds that the board of directors was without legal authority to issue such certificates.

The board of directors then commenced this suit in equity against the defendant, setting forth in the complaint the foregoing facts, and praying that he be enjoined from removing his teams from the work, and that he be compelled to accept said certificates, as agreed upon, and proceed with the work.

Defendant filed his answer, admitting the facts set forth in the complaint, but pleaded by way of defense that there was no legal authority for the issuance of the certificates.

The court sustained the demurrer to the answer, and rendered a decree in favor of plaintiff in accordance with the prayer of the complaint, and the defendant appealed to this court.

Bridges & Wooldridge, for appellant.

The general act prohibits the issuance of bonds, notes or other evidences of indebtedness. Kirby's Digest, § 4963. This prohibition is not repealed by the special act, unless there be some provision in the latter expressly or impliedly doing so. The two are to be construed together. 73 Ark. 541; 71 Ark. 137. By the terms of the special act, the directors "may do all other acts and things not inconsistent with the laws of this State." Acts 1905, p. 86, § 2. The general act therefore controls except where the special act makes contrary provisions. The special act authorizes the issuance of bonds to the extent of $300,000, but makes no provision for raising an additional amount for further expenditures, and the act pledges the whole revenue and resources of the district for the payment of this sum. Acts 1905, p. 104, § 26. All taxes authorizing additional burdens must be strictly construed. 59 Ark. 356; 71 Ark. 561. The courts can not construe statutes to subserve convenience or relieve from hardship. 59 Ark. 244. See also Endlich on Int. Stat. 4, 7, 8; 56 Ark. 110; 59 Ark. 243; 46 Ark. 159; 36 Ark. 330; 65 Ark. 532.

White & Altheimer, for appellee.

1. Plum Bayou Levee District, although created by an act of the Legislature, is in the same class with a private corporation. 59 Ark. 513. Corporations have such powers as are con-

ferred upon them by their articles of incorporation, and such implied powers as are necessary to carry out the purposes and objects of the powers expressly conferred by the articles of incorporation. Cook on Corp. (5 Ed.), § 3; 173 U. S. 111. Sec. 3 of the act defines the object and purposes of the levee district. Sec. 2 authorizes the directors to do all other acts and things, not inconsistent with the laws of the State, which may be proper to carry into effect the purposes and objects of the act. To carry out the express purposes of the act, it was necessary to borrow money. This it had a right to do. Cook on Corp. (5 Ed.), § 760. Sections 26 and 16 of the act, taken together, both expressly and impliedly confer upon the corporation the power to borrow such sums of money as become necessary to carry out the purposes for which it was incorporated. The act amendatory of the Plum Bayou District act, clearly shows that the bonds were merely intended to be fixed as a first lien, and that other debts were contemplated. Acts 1905, p. 296, § 1. If the act limits the general power of the corporation to borrowing the $300,000, still as the contract had been made and the debt incurred for the purpose of carrying out the object and intention of the act, the district was nevertheless liable for such sum as might be expended in excess of that sum, and the same would be a valid indebtedness against the district. 173 U. S. 11.

McCULLOCH, J., (after stating the facts.) The manifest object of this suit is to obtain a decision by this court of the question of the authority of the board of directors to issue certificates of indebtedness for the construction of the levee in excess of the authorized bond issue. Learned counsel on both sides waive all other questions in the case, and ask that we decide that one. They have failed, however, to present the question in appropriate proceedings. This suit is no more nor less than one to require of appellant the specific performance of his executory contract to construct the levee. The remedy at law is complete and adequate, and a court of equity is without jurisdiction of the subject-matter. Equity will not decree specific performance of an executory contract to do work, for the obvious reason that there is no method by which its decree could be enforced

The jurisdiction of equity will not be exercised to decree a specific performance, however inadequate may be the remedy

for damages, where the contract is of such a nature that obedience to the decree could not be compelled by the ordinary processes of the court. An interesting and instructive discussion of this question may be found in the note to *Standard Fashion Co.* v. *Siegel-Cooper Co.,* 157 N. Y. 60, 68 Am. St. Rep. 753-762. where the authorities are collated. This rule is applied to contracts for construction of buildings, etc., as well as to contracts for personal services. See also 6 Pom. Eq. Jur. § § 759, 760, 761; *Tex. etc., Ry. Co.* v. *Marshall,* 136 U. S. 393.

Exceptional cases may be found where courts of equity will afford equivalent relief by enjoining the doing of any act inconsistent with performance of the contract, thus in a negative way enforcing specific performance. This exception is found, however, in cases dealing with contracts of a special, unique or extraordinary nature, such as that of an actor or singer, which bear no analogy to a contract for constructing a levee. There is nothing either extraordinary or unique about that sort of work, which does not involve personal service.

The complaint in this case states no cause of action, and a decision of the question as to the power of the board of directors to issue certificates of indebtedness would be mere *dictum.*

Reversed and dismissed.

STIEWEL v. WEBB PRESS COMPANY.

79 45
185 187

79 45
89 446

Opinion delivered May 14, 1906.

1. CORPORATION—DIRECTORS' MEETING—VALIDITY.—As the rule that corporate acts required to be done or authorized by the directors must be at a meeting at which all are present or have an opportunity to be present is for the protection of the stockholders, acts done by three of the directors of a corporation at a time when the fourth director was absent and not notified of the meeting is binding on the corporation if the three directors held all of the stock of the corporation save a merely nominal interest held by the fourth director. (Page 51.)

2. EQUITY—ENFORCEMENT OF CONTRACT.—Under the maxim that "equity treats that as done which ought to be done," where a corporation accepted and retained the benefits of a contract which called for the execution of a mortgage and notes, but the mortgage and notes which were executed in pursuance of the contract were invalid for informality, equity will require the corporation to execute the mortgage and notes in a proper manner. (Page 52.)

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

STATEMENT BY THE COURT.

This is a suit in equity to dissolve a domestic corporation, the El Dorado Compress Company, having its principal place of business at the city of Little Rock in Pulaski County, and to dispose of its assets and distribute the proceeds among its creditors and shareholders.

The suit was originally instituted by a receiver appointed by the Pulaski Chancery Court to take charge of the assets of the Bank of Little Rock, that concern being a creditor and the holder of shares of the capital stock of the compress company, but during the progress of the suit appellant, Abe Stiewel, was substituted as plaintiff, he having succeeded to the rights of the bank. It is alleged that the compress company is insolvent, and no longer performing its corporate functions.

Appellees, Webb Press Company, Limited, of Minden, Louisiana, a foreign corporation, and R. L. Floyd, as trustee, were also made defendants, to prevent by injunction the foreclosure of a deed of trust, with power of sale, executed by the compress company upon its compress plant at El Dorado, Arkansas, to secure a debt of $15,000 due to the press company. It is alleged in the complaint that said trustee was about to sell said property, under the power contained in the deed, at public outcry in El Dorado, and that a sale for cash on short notice at that place would result in a sacrifice of the property. A writ of temporary injunction was issued, as prayed, preventing the sale by the trustee, and a receiver was appointed by the court to take charge of and protect the property pending the suit. Subsequently the property was sold under order of the court, and the proceeds of sale were ordered to be paid into court.

The press company filed its answer and cross-complaint, setting forth the contracts and trust deed executed by the com-

press company, and asking that its lien thereunder be foreclosed. The plaintiff, by answer to the cross-complaint, attacked the validity of the trust deed on the alleged ground that said deed had been executed by the president and secretary of the compress company without authority from the board of directors, one of the directors not having been present at nor received notice of the meeting at which the pretended authority was voted.

The facts established by the pleadings and proof are as follows:

On May 28, 1902, the El Dorado Compress Company was incorporated by E. H. Lake, J. S. Alphin, E. H. Smith and C. T. Walker; the capital stock specified in the articles of incorporation being 1600 shares of $25 each, subscribed, 780 shares by Lake, 580 shares by Alphin, 200 shares by Smith, and 40 shares by Walker. The four shareholders were named in the articles of incorporation as directors. Walker was named as stockholder and director only for the purpose of completing the organization. No stock was ever in fact issued to him, nor did he ever pay anything. He never in fact acted as director, never attended a meeting of directors, or was notified of such meeting, or was consulted about the business of the corporation. He was cashier of the Bank of Little Rock.

On June 7, 1902, a written contract was entered into between the compress company and the press company, whereby the latter agreed to furnish and erect for the former at El Dorado, not later than September 1 of that year, a press of the kind and quality described, for the sum and price of $21,000, to be paid by the compress company in three installments of $2,000 each ending when the press should be ready for operation, and the remainder of $15,000 in six equal installments.

The contract contained the following stipulation with reference to these payments:

"Six notes are to be given for these six time payments, falling due respectively on the dates above mentioned, all said notes to bear interest at the rate of 6 per cent. per annum from September 1, 1902, and all accrued interest to be paid annually on May 1. Said notes to be secured by deed of trust to the entire compress plant in which this compress is to be erected, and are to be the first claim against said plant. Said notes are to be further

secured by first insurance policies taken in standard companies and written 'Loss, if any, payable to the Webb Press Company, limited, as its interest may appear.' During the first thirty days after this press is erected, it is to be tested, and, if found to meet the guaranty herein given, it is to be at once accepted by the party of the second part, and the said six first-mortgage notes and the deed of trust securing same are to be at once properly executed and delivered to the party of the first part by the party of the second part."

Pursuant to this contract the press company delivered and erected the press, the payment of $6,000 was made, and the notes for $15,000 and trust deed or mortgage were duly executed on October 20, 1902, by the president and secretary of the compress company. A resolution of the board of directors authorizing the execution of the notes and deed of trust by the president and secretary was adopted at an informal meeting of the directors attended by Lake, Alphin and Smith, but Walker was not notified thereof, and did not attend.

On final hearing of the case the chancellor rendered a decree in favor of the press company, declaring a superior lien in its favor for the amount of its debt, and ordering the same to be paid out of the proceeds of sale of the property.

The plaintiff appealed.

J. M. Moore, W. B. Smith and *J. M. Moore, Jr.*, for appellant.

1. If it is assumed that Walker was not a stockholder, yet until the first annual election of directors he was eligible, since it is the rule under statutes like ours that directors selected at the organization are not required to be stockholders. Assuming that one can be a subscriber in the articles of incorporation without being a stockholder, he may still be a director and hold over until the regular annual election, and it is not material whether he takes his stock out or not. 2 N. E. 892; 163 N. Y. 425; 47 Ark. 269, 281; 33 Atl. 480. But Walker, having permitted his name to appear in the articles as a subscriber, and signed the same, became a stockholder. 54 Ia. 424; 67 N. Y. 249. 1 Cook on Corp. 161; 77 Md. 341; 1 Morawetz on Corp. § 56. If he was not a stockholder, still he was a *de facto* director. 2 Cook

on Corp. 1479, 1480; *Ib.* 1196; 12 N. H. 205; 25 Wis. 447; 25 Mich. 449; 4 N. Y. Supp. 174; 8 Am. & Eng. Enc. Law, 823; 49 Ark. 442. No act binding upon a corporation can be done by the directors at a special meeting of which one of the directors had no notice, and therefore no opportunity to be present; and a corporate mortgage or deed of trust can only be authorized by a resolution where all the directors are present, or where all were notified, and a majority are present. 55 Ark. 473; 5 Thompson on Corp. § 6176; 54 Ark. 58; 16 Kan. 309; 26 Am. Dec. 75; 52 N. J. Eq. 78-82; 21 Am. & Eng. Enc. Law, 867 and note 5.

2. The corporation, under the circumstances of this case, is not estopped to deny the validity of the mortgage. It was an unauthorized act on the part of three directors, and there was none of the elements of ratification existing in this case. 26 Am. Dec. 75, 77.

3. If, as between the stockholders and appellee, the latter would be entitled to reformation for the purpose of establishing a lien by the action of the court, still, since the rights of creditors have supervened, the right of reformation does not exist as against them.

4. Appellee, having elected to dispense with the property and proceed to a foreclosure and sale to make the purchase price, can not afterwards change its attitude and insist upon retaking the property, dispensing with the purchase price. A person can not ratify and then repudiate the same transaction. 53 Ark. 515; 57 Ark. 632; 135 Mass. 172; 48 Ark. 160.

Ratcliffe & Fletcher, for appellee.

1. Since Walker had no interest in the company or duties to perform in reference to its affairs, and did not regard himself as a director, and since Lake, Alphin and Smith, the only stockholders, did not consider him a factor in the company, neither he nor they can complain that he was not notified, and was not present. The reasons for the rule requiring notice to every director is in this case inapplicable. See 54 Ark. 58; 62 Ark. 20; 67 Ark. 542; 71 Ark. 438; 57 Fed. 821; 91 Fed. 630.

2. The contract of Lake on behalf of the compress company with appellee was valid and binding, the latter was permitted to carry out its part of the contract, and the compress company accepted the benefits of it, and made the cash payment.

The receiver, stockholders and creditors are estopped to assert that, because Walker was not notified to take part in the meeting of directors to authorize the execution of the mortgage pursuant to the contract, the mortgage was without authority. 73 Fed. 951; 10 Wall. 604; 51 Fed. 1; 36 Ark. 577; 47 Ark. 270; 32 Ark. 346; 48 Ark. 254; 68 Ark. 306; 63 Ark. 268; 96 U. S. 258; 11 Wall. 459; 5 Thompson on Corp. § § 6159-6160; 121 Fed. 343. The corporation and all its directors are charged with notice of the contract and mortgage, and of the acts of Lake and Smith. 110 U. S. 7; 75 Fed. 769; 38 Ark. 17; 86 N. Y. 200. Neither the compress company, its receiver nor its creditors can accept the benefits of the contract and at the same time reject its provisions. 30 Ark. 453; 91 N. W. 376; 65 Ark. 383; 56 Ark. 464; 131 U. S. 371; 40 N. Y. 200; 67 Ark. 542.

3. If no mortgage had been executed or signed, still, since the compress had accepted the benefits under the contract and had made the cash payments, and it only remained to execute the mortgage in accordance with the contract, equity will treat that as done which ought to have been done, and hold the appellee to be an equitable mortgagee, and enforce the contract as an equitable mortgage. 33 Ark. 237; 37 Ark. 511; 163 N. Y. 425; 7 Hun, 488; 51 Hun, 164; 43 N. Y. 34; 61 Ark. 271; 26 Ark. 72; 30 Ark. 120; *Ib.* 56; 60 Ark. 595; 144 N. Y. 112; 43 Ark. 464; 60 Ind. 64.

4. The doctrine of election does not apply. Appellee had the right to treat the mortgage as valid. If in this it was mistaken, it has neither waived nor surrendered any of its rights. 56 Ark. 461; 55 Ark. 146; 67 Ark. 206; 48 Ark. 160.

McCULLOCH, J., (after stating the facts.) 1. Waiving the question of Walker's eligibility as a director, and treating him as a *de facto* officer of the corporation, did the failure to notify him of the meeting or to consult him about the execution of the mortgage invalidate its execution?

It is undisputed that Walker was a shareholder and director in name only. He had no interest in the corporation, did not claim any, and did not assume to act as director. He testified that he took no part in the management of the affairs of the concern, and knew that they were looked after by Lake and the other parties interested.

It is well settled that corporate acts required to be done or authorized by the directors must be at a meeting at which all are present or have an opportunity to be present. The separate, individual approval of the directors will not suffice. This court, in discussing the reasons of this requirement, said in *Estes* v. *German National Bank,* 62 Ark. 20: "The object of this rule is the benefit and protection of the shareholders of the corporation. The duties of the board are imposed upon more than one member in order that they may be discharged with that wisdom derived from a conference discussion, and a comparing of views upon business affairs; and for this purpose they are required to meet and take counsel of each other. As all this is for the benefit of the shareholders, who constitute the corporation, they may waive the necessity of the meeting of the board for the transaction of the business within their corporate powers. They can do so by permitting the directors to establish a habit or usage of assenting separately to the making and performance of contracts by their agents. By permitting such usages or habits to be formed by a long course of business, they adopt and become bound by them, so long as they acquiesce. If this were not so, great injustice might be done to parties contracting with them in their usual way."

In *Texarkana & Ft. Smith Ry. Co.* v. *Bemis,* 67 Ark. 542, it was held that where the president had been in the habit of executing promissory notes in the name of the corporation without express authority of the board of directors, of which custom the board was cognizant, the corporation would be bound by a note so signed, the same as though express power had been conferred. The court there said: "The board of directors must be held, under the circumstances, to have acquiesced, and the corporation was bound for the same, as though the board of directors had, by formal action, conferred upon the president express authority to make the note."

In *G. V. B. Mining Co.* v. *First Nat. Bank,* 95 Fed. 23, the Circuit Court of Appeals for the Ninth Circuit, said: "Where the president of a corporation is given full power and authority to conduct and manage the business, and deal with the property and affairs of the corporation in such a manner, and for such a length of time, as to justify others with whom he transacts busi-

ness in believing that he had authority to do the acts in the manner and in the way performed by him, the people with whom he transacts business have the right to deal with him upon the assumption that he has such authority; and the corporation, having knowledge of the exercise of such acts, and of the manner in which the corporate business was transacted, can not thereafter, to the injury and prejudice of such parties, deny his authority or disaffirm or set aside his acts. See also *Fifth Ward Bank* v. *First Nat. Bank,* 48 N. J. L. 513; *Topeka Primary Association, etc.,* v. *Martin,* 39 Kan. 750.

The case at bar lacks the element of long acquiescence by the corporation in the acts of the board of directors without consulting Walker, but the principle is the same where all the real parties in interest had knowledge of such acts and consented thereto. The only persons interested in the corporation were Lake, Alphin and Smith and they were present at the meeting and authorized the execution of the notes and mortgage. Walker knew that the other three directors were managing the affairs of the corporation without consulting him, and he made no objection.

The rule requiring that all the directors should have an opportunity to participate in the transactions of the corporation, being for the benefit of the shareholders, there was no one else to complain, as Walker had no real interest to protect.

2. The superior lien of the press company must be upheld upon still another ground. The contract calls for a mortgage to secure payment of the notes, the corporation accepted and retained the benefits of the contract, and equity would, under the familiar maxim that "equity treats that as done which ought to have been done," require performance of that part of the contract if the officers had not already executed the mortgage and notes. *Lowe* v. *Walker,* 77 Ark. 103; *Block* v. *Smith,* 61 Ark. 266.

The decree of the chancellor was right, and must be affirmed. It is so ordered.

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY *v.* CRAIG.

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Opinion delivered May 14, 1906.

1. RAILROAD—DANGEROUS COUPLING—NEGLIGENCE.—Where a brakeman was injured while endeavoring to make a coupling of an engine to a car, which was unusually dangerous, owing to the difference in their height, a finding that the railway company was negligent in not providing a safe method of making the coupling will be sustained. (Page 56.)
2. MASTER AND SERVANT—ASSUMED RISK—QUESTION FOR JURY.—Where a risk incurred by a servant was not one of the ordinary risks of the employment, but arose from the master's negligence, to establish that the risk was one assumed by the servant it must appear affirmatively that the latter subjected himself to the extraordinary danger with a full knowledge and appreciation; and where the minds of intelligent men might draw different conclusions, the question whether the risk was assumed was properly left to the jury to determine. (Page 56.)
3. SAME—CONTRIBUTORY NEGLIGENCE.—A finding of the jury that a brakeman was not guilty of contributory negligence in attempting to make a coupling in a certain manner will be sustained by proof that he was working under the direction of a vice-principal, and that the coupling had twice on the same day been successfully made in the same manner. (Page 57.)
4. TRIAL—GIVING ADDITIONAL INSTRUCTION.—Where the jury came into court, and asked that the instructions be re-read, the giving of an additional and more complete instruction on the subject of contributory negligence is not an abuse of discretion, as unduly emphasizing that phase of the case. (Page 57.)
5. PERSONAL INJURIES—EXCESSIVENESS OF DAMAGES.—For the loss of two fingers on the right hand of a brakeman, who was 23 years of age, a verdict of $2,500 damages is not excessive. (Page 58.)
6. TRIAL—ARGUMENT—OBJECTION.—In an action against a railroad company to recover for personal injuries a statement by plaintiff's attorney that the defendant is a railroad corporation owning enough miles of railroad to reach across the government, and that it is able to lay a line of silver dollars as long as the road, edge to edge; that "this sum was not made by the president or secretary, sitting in their offices and private car, but was made by the sweat and blood of your sons and my sons," is not ground for new trial, if no timely objection was made to it. (Page 58.)

Appeal from Logan Circuit Court, Southern District; *Jeptha H. Evans,* Judge; affirmed.

E. B. Peirce and *T. S. Buzbee,* for appellant.

1. Under the rules established by this court, the evidence is insufficient to prove negligence on the part of appellant. 44 Ark. 529; 46 Ark. 567; 51 Ark. 467; 54 Ark. 395; 74 Ark. 19; 67 Ark. 295. Appellee assumed the risk. One who, knowing and appreciating the danger, enters upon a perilous work, even though he does so by order of his superior, must bear the risk. It is his duty to inform himself of the danger; and if he negligently fails to do so, he will still be held to have assumed them. 77 Ark. 367; 67 Ark. 306.

2. It was error on the part of the court, after the jury returned and requested that the instructions be repeated to them, to give them an additional instruction, on the subject of contributory negligence. Being given at a time when counsel could not explain it in argument, it had the effect of a final summing up of the law of the case, and of eliminating the question of assumed risk.

3. The verdict is excessive. It is in proof that appellee's earning capacity was not decreased, and that since the accident he has advanced to a higher position, and is receiving a higher salary than before.

4. The cause should be reversed because of improper argument of counsel, the effect of which was to arouse the passion and prejudice of the jury, and to lead them to award an excessive amount of damages. 74 Ark. 256; 74 Ark. 298.

Randell & Wood, Wilkins, Beatty & Vinson and *Robert J. White,* for appellee.

1. Appellee assumed only such risks as were ordinarily incident to the service in which he was engaged, and did not assume any risk caused by the negligence of appellant. 80 S. W. 79 and 1073. He was not bound to inspect, but had the right to assume that appellant had performed his duty, and that the coupling apparatus was reasonably safe, unless the danger was obvious. He must not only have known or observed the defect that caused the injury, but also have appreciated the danger. 81 S. W. 72; Wood on Master and Servant, § 376; 80 Tex. 85. See also 30 S. W. 758; 103 Fed. 265. The question of assumed risk was for the jury. 47 S. W. 311. If appellee did not discover the danger until at the very

time of his injury, he did not assume the risk. 50 S. W. 417; 91 Tex. 437.

2. The court's charge on the subject of contributory negligence, at appellee's request, was in response to the issues raised by appellant, and the latter can not complain.

3. Unless the verdict is so excessive as to show that it is the result of passion and prejudice, corruption or failure on the part of the jury to appreciate the law and the facts, it will not be disturbed. 58 Ark. 136 and cases cited.

4. Appellant will not be heard to object here to argument of counsel, without having objected at the time the language complained of was used. 85 S. W. 428; 2 S. W. 505; 32 S. W. 497.

E. B. Peirce and *T. S. Buzbee,* for appellant in reply.

There is evidence that appellee did know of the existence of the particular defect, and of the danger arising therefrom; but if he did not, still the company was not bound to give him specific notice of defects: 78 Ark. 213, and cases cited.

HILL, C. J. Craig was a brakeman in appellant's service on a freight train running from Hailyville to Ardmore, Indian Territory. His train hauled a "dead engine," that is, one carried by the train, not by its own steam, and the engine was put in the train after 16 cars and was followed by eight cars. There was difficulty with this engine at several stations. This was known to Craig in a general way. When the station of Olney was reached, the conductor told Craig that the engine had broken loose again, and told him to come and help to couple it, as he expected further trouble with it. The engine and car to which it was coupled were equipped with automatic couplers, which were coupled by a lever at the side, so that the brakeman does not have to go between the cars to make a coupling. The difficulty in this instance was that the coupler on the engine was about seven inches lower than the coupler on the car to which it must be attached, thereby preventing the knuckles of the couplers fastening. This necessitated a link and pin coupling, and, owing to the difference in height of the couplers and the presence of the pilot of the engine in the space where the brakeman had to go to make the coupling, it was more dangerous than the usual pin and link coupling.

The other two brakemen of the train were placed between the engine and car with an iron bar to lift the lower coupler to

the height of the higher one, and Craig was directed by the conductor to then make a link and pin coupling. He attempted to do so, and in straining on the link to try to bring it to the level of the coupler the impact came, the coupling failed, and he was unable to get his hand out in time, and his fingers were cut off. A jury at Booneville gave him $2,500 damages.

The chief contention on the appeal is as to the sufficiency of the evidence.

1. As to the negligence of the company: The court, under proper instructions, left to the jury the determination of the question whether the company had used care and prudence in furnishing its employees a reasonably safe place to work and safe means and instruments to carry on its service. The engine was placed in this train at Hailyville, where it was made up, and where common prudence called for an inspection of the train and its condition before starting on the journey. Even a casual examination would have shown that the automatic coupler could not be used with this engine, and the link and pin coupler had to be resorted to. That these link and pin couplers are dangerous is a matter of common knowledge. Their thousands of victims moved Congress to forbid their use in interstate traffic. This was more dangerous than the usual link and pin coupler, owing to the difference in height of the couplers and the presence of the pilot in the space to be used by the brakeman in making this coupling. The jury were fully warranted in finding negligence in not providing a safe method of coupling the engine to the car and in placing the engine in a train where its coupler did not fit to the car next to it.

2. Does the evidence show this was a risk assumed by Craig? In the recent case of *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367, the subject of assumed risk was fully considered by the court. As therein shown, where the risk is not one of the ordinary risks of the employment, but is brought about by the negligence of the master, then there is no presumption that the risk is assumed. "The plea of the master that the servant assumed the risk is met in such a case by the answer that the danger arose from the master's own negligence, which is not one of the risks assumed by the servant. This being so, the master, to make good his defense of assumed risk, must go further, and show that the servant voluntarily subjected himself to the new danger

with a full knowledge and appreciation thereof, for such risk constitutes an addition to those ordinarily incident to the same, and there is no presumption that he had knowledge of or assumed it." This phase of the subject was the one pertinent here, and it was properly submitted to the jury under instructions in accord with the principles above quoted. The fact that the coupling had been made twice before on that trip, and the further fact that when Craig was ordered in to make the coupling the other two brakemen were prizing up the lower coupler to bring it to the proper level, presented an appearance to Craig that he was only assuming the danger which would be incident to such link and pin coupling when brought to a level. But the injury may fairly be inferred to have arisen, not from the mere fact of the nature of the coupling, but from the defect in not having the couplers of proper height, a defect not overcome by the efforts of the brakemen with the crowbar.

It can not be said, as a matter of law, that this situation presented to Craig "a full knowledge and appreciation" of the superadded risk. The situation then presented was one where the minds of intelligent men drew different conclusions, and such questions must be determined by a jury under appropriate instructions. *St. Louis, I. M. & S. Ry. Co.* v. *Luther Hitt,* 76 Ark. 224.

3. Was Craig guilty of contributory negligence? The difference between assumed risks and contributory negligence was fully explained in *Choctaw, O. & G. Rd. Co.* v. *Jones, supra;* and the court in this case submitted the question under proper instructions to the jury, and their finding is not without evidence to sustain it. The success of prior coupling presumably made in the same way would naturally lead Craig to rely upon the ability of his fellow workmen to overcome the defect by the use of the crowbar, and the master's direction to do the work would lend color to this belief; so that, under all the circumstances, the jury were fully justified in saying it was not contributory negligence to undertake to make this coupling.

4. After the jury had deliberated for a time, it returned into court, and asked that the instructions be read again. This was done, and then, at the request of plaintiff's counsel the court gave an additional instruction on the subject of contributory negligence. It is not contended that the instruction is *per se* erroneous,

but that, coming at the time it did, it caused emphasis to be laid upon a minor phase of the case, and led the jury away from the main defense of assumed risk. Such matters are mere speculation, and not subject to review here. The discretion of the trial judge must determine when additional instructions are needed to facilitate the jury in arriving at a proper verdict; and unless an abuse of such discretion, manifestly working prejudice, is shown, there is no cause for reversal. The question of contributory negligence was in the case, it was pleaded as a defense, an instruction asked upon it by the appellant, and in general terms instructed upon in the former instructions. Of course, it would have been better to have had the instructions complete, but the giving of a correct instruction at a later time is not of itself error.

5. The appellant alleges the verdict is excessive. The appellee lost two fingers of the right hand. He was engaged in work requiring the use of his hands, and he was a young man of 23 years of age. That the verdict of $2,500 is not excessive is too plain for further attention.

6. The last error assigned is this: "The case was thereupon argued to the jury, and during the closing argument of Robert J. White, attorney for plaintiff, he stated to the jury that the defendant is a railroad corporation owning enough miles of railroad to reach across the government, and it is able to lay a line of silver dollars as long as the road, laid edge to edge; that 'this money was not made by the president or secretary, sitting in their offices and private car, but was made by the sweat and blood of your sons and my sons.' Defendant did not object to this argument at the time, because an objection would not have removed the effect of it, and by so doing it would have prejudiced the jury against it and its defense."

The court is not reviewing the actions of the attorneys, but of the trial court. While it is primarily the duty of the trial judge to keep the argument within the record, and this he should do on his own initiative, and not wait for an objection, yet he may fairly assume, in the absence of objection, that counsel are acquiescing in an excursion without the record, and probably intending to meet such excursion with a similar trip. The appellant in its exception to the remarks made afterwards gives another reason for not objecting to the argument, but to sustain such practice would

be encouraging "masked batteries" which are opened on the trial judge in this court for the first time. See review of authorities in *Kansas City So. Ry.* v. *Murphy,* 74 Ark. 256; *Day* v. *Ferguson,* 74 Ark. 298; *English* v. *Anderson,* 75 Ark. 577.

The court must presume that, if timely objection had been made, the trial judge would have promptly eliminated the extravaganza of counsel.

The judgment is affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* LEDER. 79 S87 59 301

Opinion delivered May 14, 1906.

CARRIER—DELAY IN THE SHIPMENT OF FREIGHT.—Kirby's Digest, § 6804, requiring all persons or corporations engaged in the transportation of property to furnish without delay sufficient facilities for the receiving, carriage and delivery of freight, does not require that railroads should provide in advance for an unprecedented and unforeseen amount of freight.

Appeal from Prairie Circuit Court, Southern District; *George M. Chapline,* Judge; reversed.

S. H. West and *J. C. Hawthorne,* for appellant.

1. The question as to the amount sued for was controlled by the allegations of the complaint. A judgment by default for $3,000 would have been upheld, if no objection other than the amount were urged against it. If such judgment would have been sustained, the cause was removable, and, petition and bond having been filed, the amendment did not divest the Federal court of jurisdiction. 40 Ark. 170; 60 Ark. 388.

2. Instructions given were misleading and inapplicable, and left the amount of damages to the jury without limitation other than the amount claimed in the complaint. 63 Ark. 477. They were further erroneous, in that they ignore the appellant's contention as to its inability to furnish cars on account of an un-

expected and unforeseen accumulation of freight. 22 Am. & Eng. R. Cas. 441; 141 Ind. 267; 68 Am. Dec. 574; 4 Am. & Eng. R. Cas. 380; 99 Mass. 508; 43 L. R. A. 225; 61 Ark. 560. Appellee's first and second instructions should have been given.

Eugene Lankford, Thomas C. Trimble, Joe T. Robinson and *Thomas C. Trimble, Jr.,* for appellees.

1. The prayer in the complaint was only for $2,000, and that there was no attempt to recover any amount exceeding that sum affirmatively appears in the complaint. The real question is whether on the face of the record the appellant was entitled to removal. 122 U. S. 513; 117 U. S. 483; 118 U. S. 279.

2. Instructions given furnished a proper guide to the jury in arriving at their verdict, and could not have prejudiced the defendant. Instruction No. 2, asked by appellee, was properly refused because the statute is intended to require railroad companies carrying freight to provide sufficient means therefor, and because the evidence does not warrant such instruction.

HILL, C. J. Leder Bros. sued the railroad company for damages for failure to furnish cars on demand.

The first paragraph of the complaint alleged that in the month of December, 1903, they demanded 30 cars for lumber and hay which they had for shipment, and the company only furnished one car to them while furnishing to other shippers cars at the same station, and alleged damage in the sum of $1,000. The second paragraph alleged that in November and December, 1903, they offered the railroad 60 carloads of freight, and demanded cars, and the company failed and refused to furnish them while furnishing others. After alleging matters of damage, this paragraph proceeds: "That on account of the company's refusal to take said freight for shipment, or furnish cars for shipping said hay and lumber, plaintiffs have been damaged in the sum of $1,000, and under the law are entitled to double the amount, or $2,000 damages. Wherefore plaintiff prays judgment against the defendant company in the sum of $2,000 damages and all their costs herein." The first paragraph did not have a specific prayer for judgment, but did allege damages in the sum of $1,000 for the matters therein set forth. The railroad company filed petition and bond for removal to the Federal court, alleging

requisite diversity of citizenship, and that the amount in controversy exceeded $2,000. The appellees thereafter asked leave of the court to amend the complaint by making it more definite and certain in setting forth that only $1,000 was asked. The court permitted this, and refused the removal. The railroad insists that the complaint showed a demand for $1,000 in one paragraph and $2,000 in the other and that the amendment reduced the claim to $2,000 after the petition and bond were filed. The appellees contend that the complaint is not susceptible of that construction, and that it only asks for $2,000. The case must be reversed on the instructions, and the court does not consider it necessary to discuss this question, but refers counsel to Moon on Removal of Causes, § 88, and *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, where the authorities touching the question are reviewed.

The case was tried before a jury. The appellees introduced evidence tending to prove its allegations, and the appellant introduced evidence tending to prove that more cars could not be furnished on account of an unusual and unforeseen demand for cars, and that appellees received a fair proportion of cars available. The evidence tended to show sufficient equipment for the usual and ordinary demands of the country. The appellees brought out that many cars of appellant were at the time complained of in the service of other roads, and appellant was receiving a large income from their use. Whether the company was properly equipped to supply the usual demand; whether there was an unprecedented demand at the time in question—one not to be reasonably anticipated; whether the appellant was permitting its cars to be in the service of other roads to obtain rent therefrom, instead of using them to supply its public demands; or whether they were unavoidably out of reach at the time of this alleged unprecedented demand, were all questions properly to be determined, like other questions of fact, before a jury.

The court gave no instruction submitting this question to the jury, but, on the contrary, refused the following instruction asked by appellant:

"2. The jury are instructed that while railway companies are under legal obligations to furnish cars for the transportation

of freight upon their lines of road, they are not bound under the law to provide transportation for unforeseen and unexpected quantities of freight tendered them upon their line of roads. In such cases they are only required to use reasonable diligence in the furnishing of cars without discrimination."

The appellee contends that the statute (section 6804, Kirby's Digest) requires the common carrier to provide sufficient means of transportation, and that an unprecedented demand is not an excuse. This question was otherwise recently determined by this court in *St. Louis S. W. Ry. Co.* v. *Clay County Gin Co.*, 77 Ark. 357. Other questions are discussed, but it is not necessary to express opinions upon them.

For the error in failing to submit the questions above mentioned to the jury the judgment is reversed, and cause is remanded.

McBRIDE v. BERMAN.

BERMAN v. McBRIDE.

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(Two cases.)

Opinion delivered May 14, 1906.

DEATH—ACTION FOR CAUSING—PARTIES.—In an action to recover damages for negligence resulting in death, in default of administration, the widow, if there be one, and the heirs at law of the deceased are necessary parties.

Appeals from Sebastian Circuit Court, Fort Smith District; *Styles T. Rowe,* Judge.

The first case is reversed; the second, affirmed.

Edwin Hiner, for Mrs. McBride.

Mrs. McBride's right of action is based upon the statute, sections 6289, 6290, Kirby's Digest. It is intended to award compensation to the widow and next of kin who suffer damages by reason of the death of the injured party. This action is for such compensation, and not for the benefit of the estate. Every action

must be prosecuted in the name of the real party in interest, except as otherwise provided by statute. Kirby's Digest, § § 5999, 6001, 6002, 6004. In this case, the plaintiff is the widow of the deceased, the only person having a beneficiary interest in his life and the sole party in interest. By the express terms of the statute, she is entitled to bring and maintain this action. 53 Ark 117; 3 C. C. A. 129; 71 Ark. 258.

Read & McDonough, for Mr. and Mrs. Berman.

Plaintiff can not maintain this action without joining the brother and sisters of deceased in the same. In the absence of a personal representative the action must be brought by the heirs at law of the deceased, the amount recovered being for the exclusive benefit of the widow and next of kin, to be distributed to them as provided by law for the distribution of personal property left by persons dying intestate. Kirby's Digest, § § 6289, 6290. The whole estate can not go to plaintiff under the statute (Kirby's Digest, § 2642), notwithstanding she has no children by deceased, because it is shown he left a brother and sisters, who are heirs at law and next of kin within the meaning of the statute. Such being the case, the widow can not maintain the action alone. 52 Fed. Rep. 371. See also 53 Ark. 255.

Ira D. Oglesby, for appellee D. J. Young.

Plaintiff can not maintain the suit because it is shown that deceased left heirs at law, who were not joined as parties in the action.

HILL, C. J. Mrs. Della McBride brought suit in Sebastian Circuit Court, Fort Smith District, against Mrs. P. Berman, P. Berman, her husband, D. J. Young and Al Belt, tenants of Mrs. Berman, for damages for the death of her husband, J. W. McBride, whose death was alleged to have been caused by the negligence of the defendants in failing to keep enclosed a stairway leading from the sidewalk to the basement of a building owned by Mrs. Berman, situated in the city of Fort Smith. The case was tried before a jury on issues raised as to negligence of Mrs. Berman, the owner, and the other defendants in their several relations to the property, and the contributory negligence of McBride, and on a question of necessary parties. At the conclusion of the evidence the court gave a peremptory instruction to find

in favor of defendants, P. Berman, Young and Belt, and Mrs. McBride appeals from that judgment. The jury returned a verdict for $2,000 in favor of Mrs. McBride against Mrs. Berman, and from a judgment entered thereon Mrs. Berman appealed.

At the threshold of the case is the question of parties. The evidence of the plaintiff, Mrs. McBride, showed these facts: That she was the widow of J. W. McBride; that no children had been born to them, and that McBride's next of kin were a sister and two brothers. She further testified that McBride did not contribute to the support of his sister or his brothers. There was no administration upon the estate of McBride. Mrs. Berman, in her appeal, and Berman, Young and Belt in Mrs. McBride's appeal, contend that, in the absence of an administrator, the next of kin are necessary parties, and without them that there is a fatal defect in parties preventing Mrs. McBride maintaining the action. Mrs. McBride contends that, having shown affirmatively, and the testimony being uncontradicted, that McBride did not contribute to the support of his next of kin, they have no cause of action, and she is the real party in interest, and only party in interest, and therefore capacitated to sue alone.

The vice in the latter argument is that it allows the maintenance of the suit on testimony which may be contradicted or rebutted by the next of kin, and yet they are not given the opportunity to do so by being made parties, nor their interests protected by an administrator. The result of such construction would be to allow as many suits for the death of a person as there might be parties mentioned in the statute, who receive contributions from him. In this case, for instance, the evidence here shows that McBride contributed most of his earnings to the support of his wife; but the sister and brothers have not been heard, and in subsequent suits, each suing for himself or herself, evidence might be adduced showing dependence upon him or contributions from him, and thus Mrs. Berman be subjected to a suit by the widow and additional suits by each of the heirs at law for the one negligent act.

Manifestly, these statutes did not intend this splitting of the cause of action, and contemplate this multiplicity of actions for one act of negligence resulting in death. The statute (sections 6239 and 6290, Kirby's Digest), commonly called "Lord Camp-

bell's Act," intends one action to be brought for the death sued on. This action must be brought by the personal representative, if there be administration. If there is no administration, then the action must be brought by the heirs at law of such deceased person. While the wife is not technically an "heir at law," yet she is specifically named in this statute as a beneficiary in such action for the recovery for "pecuniary injuries" resulting from the death of the husband, and the term "heir at law" is used in the broader sense of one receiving a distributive part of the estate and a beneficiary of the action created by these acts. This was the conclusion reached by the United States Circuit Court of Appeals for this (the Eighth) circuit in a case appealed from this State involving this question. *St. Louis, I. M. & S. Ry. Co.* v. *Needham,* 52 Fed. 371, the opinion written by Judge SANBORN. The case was heard before Circuit Judges CALDWELL and SANBORN and District Judge SHIRAS. The deference paid to decisions of that court is increased in this instance by the participation and concurrence in the judgment of Judge CALDWELL, whose long and intimate familiarity with the statutes of Arkansas gives additional weight to the construction placed upon them by the Court of Appeals in this decision. Without following all that is said by Judge SANBORN in deciding this case, the court does follow the conclusion reached; that is, that in default of a personal representative an action brought under Lord Campbell's act must make the widow (if there be one) and the heirs at law parties thereto.

It follows from this conclusion that the case of McBride *v.* Berman must be affirmed, and the case of Berman *v.* McBride must be reversed, and the cause remanded.

PEWETT v. RICHARDSON.

Opinion delivered May 14, 1906.

1. SALE OF CHATTEL—WARRANTY AS TO QUALITY.—The rule that there is no warranty of quality in sales of specific chattels if there was an opportunity for inspection by the buyer has no application where the buyer made only a partial examination upon the seller's representation that the remainder was of the same quality as that examined by the buyer. (Page 67.)
2. APPEAL—ABSTRACT—PRESUMPTION.—Where appellant fails to set out all of the court's instructions in his abstract, it will be presumed that those not set out were correct. (Page 68.)
3. SALE—BREACH OF WARRANTY—REMEDY OF VENDEE.—Where goods were sold with warranty as to quality which was broken, the vendee may retain them and sue for the difference between what he paid and what the goods were worth. (Page 68.)

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

H. L. Ponder, for appellant.

The rule of *caveat emptor* applies, in the absence of fraud, where the purchaser inspects the goods, or where he demands and is afforded an opportunity to inspect and fails to do so. Benj. on Sales, § 851; 4 Camp. 144; 56 Am. Rep. 570. Having examined the peas, and expressed himself as satisfied, and accepted them, it became a completed contract, and plaintiff took the goods, regardless of defects. 21 Iowa, 508; 18 Am. Dec. 323; 122 Pa. St. 7; 14 L. R. A. 157; 10 Am. & Eng. Enc. Law, 91. Receiving and using goods after an opportunity to ascertain whether they conform to the description in the contract constitutes an acceptance which cuts off all right of recovery. 27 L. R. A. 96; 12 L. R. A. 309; 43 Hun, 71; 10 Wall. 383; 110 U. S. 113; 18 Ill. 39. The original contract afforded appellee no opportunity to inspect. When he refused to accept the car and demanded an inspection, the contract was changed, the implied warranty no longer existed. Tiedeman on Sales, § 187; 39 Pa. 88; 91 Wis. 667; 72 Ark. 343. It was his duty to accept or reject upon inspection, and he can not now claim that he bought upon a warranty. Mechem on Sales, 1901 Ed. § 1322; 10 Wall. 383, 19 Law. Ed. 987; 12 Ont. App. 671. Having examined part of the sacks, with opportunity to examine all, this was not a sale by sample, and there was no

warranty, express or implied. 19 Wend. (N. Y.), 159; 32 Am. Dec. 437; 55 Am. Dec. 321.

J. N. Beakley, for appellee.

It was for the jury to determine, from the evidence, whether the peas were accepted with the understanding that the remainder of the car was as good as the samples examined. There was evidence on this point, and their finding will not be disturbed. 2 Crawford's Digest, 905-6; 50 Ark. 484; 37 Ark. 165; 51 Ark. 467.

HILL, C. J. Pewett sold Richardson a carload of whippoorwill peas at the price of $1.95 per bushel f. o. b. Hoxie, Arkansas. Bill of lading was attached to draft drawn on Richardson, but Richardson refused to accept the peas without an opportunity of inspection. Pewett agreed to this, and came personally and opened the car, and he and Richardson examined six sacks at different places on the top of the load. There were 211 sacks.

The evidence leaves in doubt whether Richardson examined until he was satisfied, or whether he was satisfied with the sacks opened, and took the car with the understanding that the balance would be as good as those examined. There was evidence tending to prove that the peas were, with the exception of 30 sacks, of a grade known as clay mixed, worth about 45 or 50 cents less than whippoorwill peas; and there was evidence tending to prove this entire car was a good grade of whippoorwills. Richardson demanded a car of whippoorwills in lieu of this one, and was not willing for this car to be sold at Walnut Ridge (his place of business), as he claimed the market there would not stand two cars of peas. There was testimony as to other differences between the parties as to the disposition of this car and replacing another one, which is not material to the case. Richardson paid the draft, and sued for alleged difference in value between whippoorwill peas at $1.95 and the peas in question, and recovered a judgment for $140.

Appellant contends that an implied warranty is waived where there is an inspection, or an opportunity for inspection is demanded and afforded. It is contended that in such cases the maxim *caveat emptor* applies, and there can be no recovery on the implied warranty which goes with the sale of a specific article by name or sample or grade. The appellant asked several instructions, embodying in different form the principles contended for;

the substance of each being that if Richardson examined the peas or obtained an opportunity of examining them, he could not recover if they did not come up to the grade purchased. Abstractly, the above contention and said instructions are the law, but there was a disputed question of fact rendering such instructions applicable or inapplicable according to the determination of that question; and that question was submitted to the jury in the following instruction:

"You are instructed that if, at the time plaintiff accepted the peas, he did so with the agreement that the whole lot of peas were of the same kind and quality as those which he had examined at the time, and that [if] in fact the whole lot of peas were not of such kind and quality as those examined, and that [if], within a reasonable time after making such discovery, plaintiff informed the defendant, and made a demand for compensation for such difference in kind and quality, if there was such difference, then there would be no waiver on plaintiff's part."

If, in truth, the car was, as contended, "plated" with a few sacks of whippoorwills on top, of an inferior grade, and Richardson's examination only led to these few sacks of good peas, and he then abandoned further examination under an agreement or understanding that the remainder of the car was as good as those examined, there is no reason why the parties were not competent and capacitated to make such agreement, nor any reason why it should not be enforced. The finding of the jury under this instruction necessarily means that such an agreement was made; and, while the evidence is not as satisfactory as it might be on that point, yet there is evidence from which the jury may have fairly arrived at this conclusion. This question of fact being in the case, the court was right in refusing instructions which would have necessarily excluded it from the jury. The appellant has only set out the instruction above quoted in his abstract, and, of course, the court must presume that the other instructions properly instructed the jury on all the issues. *Koch* v. *Kimberling,* 55 Ark. 547; *Carpenter* v. *Hammer,* 75 Ark. 347; *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 77 Ark. 374.

If Richardson had a warranty which was not waived, he was within his rights in keeping this car and suing for difference in value between what he paid and what the car was worth; and

the other matters presented, about Richardson's demands that this car be not sold on the Walnut Ridge market, and wanting guaranty of delivery of another car of whippoorwills before he would turn back these, were mere negotiations for a new contract, and did not affect this one.

Judgment affirmed.

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WILSON v. EDWARDS.

Opinion delivered May 14, 1906.

1. EVIDENCE—STATEMENT OF INTESTATE.—In an action against an administrator to recover certain chattels, testimony of the plaintiff that the intestate handed the chattels to her in his last illness, saying, "These are yours," is within the constitutional inhibition against testifying as to "transactions with or statements of" the intestate in an action against his administrator under Const. 1874, sched., § 2. (Page 73.)
2. GIFT—DEPOSIT OF MONEY.—Where intestate deposited funds in a bank to the credit of plaintiff, and gave the bank written authority to pay it out on plaintiff's or his signature, and thereafter drew out a portion of the funds by checks signed by him as plaintiff's agent, the remainder of the deposit at his death belonged to plaintiff. (Page 74.)
3. TRUST—PURCHASE WITH ANOTHER'S MONEY.—One who purchases land or chattels with another's money and takes title in his own name becomes trustee for the other. (Page 75.)
4. APPEAL—REVERSAL OF JUDGMENT IN EQUITY—REMANDING.—Where a chancery decree involving the title to land is reversed, the practice is to remand with directions to the chancery court to enter a decree in conformity to the opinion of this court. (Page 75.)

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

Whipple & Whipple, for appellants.

1. The deposit in bank was a completed gift, *inter vivos,* of the entire deposit. Having been deposited in the sole name of Mrs. Wilson, she being always thereafter, in the mode of drawing

checks, recognized as being the sole depositor, Payne acting as her agent, the money was absolutely hers. 1 Parsons, Cont. ch. 15, § 1; 1 Ark. 83; 14 Ark. 505; 43 Ark. 307; 68 Ark. 255; 66 Ark. 299; 63 Me. 364; 124 Mass. 472; 36 Conn. 88; 11 R. I. 266; 8 R. I. 536; 1 Daniel, Neg. Inst. (2 Ed.), § 24; 40 Conn. 512; 16 Abbott, Pr. 380; 88 Me. 122; 113 N. Y. 560; 40 Vt. 597; 52 N. H. 238; 11 L. R. A. 686; 3 *Ib.* 230; 40 Fed. 15; 67 N. E. 232; 96 Me. 62; 62 N. E. 1028; 32 Md. 78; 40 Conn. 512.

2. The balance left in bank at the death of Payne was a gift to Mrs. Wilson. 107 U. S. 602; 113 N. Y. 560; 18 L. R. A. 170; 26 R. I. 228; 66 Kan. 466; 88 Me. 511; 51 N. Y. 202; 51 Atl. 71; 50 Atl. 600; 69 N. Y. S. 9; 125 N. Y. 572; 125 Mass. 590; 40 N. Y. S. 340.

3. The lot in Argenta, purchased with the funds on deposit in bank, and the buggies, purchased with funds drawn from the same deposit, became the property of Mrs. Wilson under the law of resulting trust, and also, as to one of the buggies, because it was an absolute gift. 51 Ark. 351, and authorities cited; 47 Ark. 533; 42 Ark. 511; 8 L. R. A. 788; 18 L. R. A. 204; 121 Fed. 620; 59 Ark. 191; 38 Ark. 413.

4. The testimony as to what took place up to the delivery of the notes to Payne on his death bed, and as to what was done by Mrs. Wilson in the sick chamber in receiving them, taking and maintaining absolute control of them thereafter, sufficiently establishes the gift and delivery. 30 Ark. 296; 86 Minn. 497; 10 Bush, 362; 60 Ark. 169; 14 Pickering, 198; 1 P. Wms. 404; 15 Me. 429; 44 S. E. 721; 38 Md. 451; 72 N. Y. S. 1030; 11 Ark. 249; 59 Ark. 93; *Ib.* 191; 38 Ark. 413. Promissory notes, whether indorsed or unindorsed, may be the subject of gift both *causa mortis* and *inter vivos.* 55 Atl. 139; 107 U. S. 602; 71 N. H. 585; 7 L. R. A. 387; 58 Ohio St. 218; 7 Gray, 383; 2 Redfield on Wills, 312, 313; Tiedeman, Com. Paper, 20, 21; Byles on Bills (Sharswood's Ed.), 295, 296; 13 Gray, 418; 14 Pick. 203; 24 Pick. 264; 1 Met. 420; 16 Ala. 221; 18 Conn. 410; 11 Vt. 290; 27 Me. 198; 8 R. I. 536; 124 Mass. 472; 18 L. R. A. 170; 73 Cal. 614. For distinction between gifts *inter vivos* and *causa mortis,* see 60 Ark. 169; 68 Ark. 255.

5. The rule of exclusion laid down in the schedule to the

Constitution operates to shut out no testimony absolutely vital to the case. Although it does exclude the testimony of Mrs. Wilson that Payne, after receiving the notes from Holt, handed them to her, saying, "These are yours," still the legitimate inference from the testimony is that he must have delivered them to her and intended that they should be hers. The proviso in sec. 2, sched., Const., is to be construed strictly and is not designed to exclude absolutely the testimony of the party. 63 Ark. 539; 102 U. S. 163; 26 Ark. 476; Wharton on Ev. § 464; *Ib.* § 467, 468, 269, 473. See also 61 Ark. 329; 139 U. S. 478; 43 Ark. 316; 42 Fed. 448; 89 N. Y. S. 965; 31 So. 77; *Ib.* 454; 59 S. W. 725; 124 Cal. 363; 20 Ind. App. 447; 107 Iowa, 451; 92 Wis. 532; 59 Hun, 628; 58 Hun, 251; 7 Mackey, 311; 30 S. C. 284; 23 N. Y. 496; 30 Hun, 555; 64 N. C. 640; *Ib.* 642; 43 Ark. 307; 46 Ark. 310; 63 Ark. 561.

Geo. W. Williams, for appellees.

1. There was no evidence of delivery of the notes except Mrs. Wilson's, and that was incompetent. Sec. 2, sched., Const.; Kirby's Digest, § 3093.

2. There was no completed delivery. All the evidence as to Payne's intention to give his property to Mrs. Wilson shows that it was to take place at or after his death. This is not a completed gift. 13 S. W. 1101; 43 Ark. 307; 44 Ark. 42; 72 Ark. 307; 15 Ark. 519; 1 Ark. 83. Actual delivery can not be dispensed with or making a will avoided on the ground that it had been placed in other hands in trust. 136 Ill. 388; 144 Ill. 611; 75 N. Y. 134. Where a gift *inter vivos* was not asserted until after death, to sustain it the evidence must be as clear and convincing as the evidence required to sustain a gift *causa mortis.* 17 N. Y. App. 836. See also 153 Pa. St. 14; 10 Am. L. Rep. 403; 8 Ohio St. 239; 43 Ohio St. 462; 35 Ark. 18, 22; 18 Pa. St. 328; 107 U. S. 602; 72 Ark. 307; 114 Mass. 30.

3. Deposits in a bank doing a general banking business can not be transferred by delivery of the pass book. Such delivery gives no dominion and control of the money. 19 L. R. A. 700; 105 Cal. 143; 22 Cent. L. J. 228; 30 Hun, 632. Even in a savings bank the transfer must be complete, without retaining any control by the donor. 185 Pa. St. 41; 48 Mo. 550; 49 Am. Rep. 326; 71

Md. 248; 52 Am. Rep. 602; 142 Mass. 1; 138 Mass. 581; 156 Mass. 309.

HILL, C. J. W. L. Payne lived in Argenta, and was in charge of the postoffice there as a sub-station of the Little Rock office. His family consisted of his wife and her daughter, Mrs. James T. Wilson. Payne had been married to the mother of Mrs. Wilson about 25 years, and she had lived in the family much of her life, and the evidence establishes his affection for her was that of a father for a daughter. He had two sisters living in Massachusetts. He had not seen them for many years, but retained affectionate relations with them, and at one time evidently intended to make a testamentary provision for an invalid niece.

Mrs. Payne, assisted by her daughter, Mrs. Wilson, kept boarders for many years, and made some money therefrom, and Payne was evidently industrious and the earner of a good income. Each of them carried bank accounts. Mrs. Payne was stricken with paralysis, and lingered in a helpless condition for several months before her death. Her mind retained its force, but her power of speech was largely lost. She kept up, in a measure, with affairs, knew when her rents fell due, and in other ways evidenced the retention of mental forces, despite the loss of power to convey her thoughts distinctly. While in this condition, she made certain signs and gave directions which Payne construed as desiring that her money on deposit be given to her daughter. Payne went to the bank, and told the cashier that he had some funds which belonged to his wife, and he wanted them placed in such a way that in case of his death that they should be the property of Mrs. Wilson. The cashier told him to open an account in the name of Mrs. Wilson. This he did, and placed to her credit the amount then in his wife's name and also what was in his name, the amounts being $130 of his and $140.06 of Mrs. Payne's. This account grew until the total deposits were $1,902.06, and at Payne's death there was a balance of $400.06.

At the time of the opening of the account in Mrs. Wilson's name, Mr. Payne carried to her one of the cards of the bank prepared for signature of those authorized to draw on the deposit. Mrs. Wilson signed it, Payne signed it, and Mrs. Wilson signed it again under Payne's signature, and this card was returned to the bank. Payne drew all the money drawn, over $1,400, and all

in checks signed "Mrs. James T. Wilson, per W. L. Payne, agent."

Payne owned several promissory notes, and he had some packages of valuable papers, presumably containing these notes, in a drawer in his postoffice safe. After the death of his wife, he gave a direction, testamentary in character, to his friend, the Little Rock postmaster, to give the valuable papers in this safe to Mrs. Wilson after his death. Payne fell ill, and after a short illness died. His death was unexpected to him and his friends, and there is nothing in the transaction about to be related, even if the evidence was admissible, which would constitute a gift *causa mortis* by him to Mrs. Wilson. See *Ragan* v. *Hill,* 72 Ark. 307. While he was ill, he sent for his friend, Postmaster Holt, and had him to bring him a package of papers from his private box in the postoffice safe. These were delivered to him a few days before his death. After his death the postmaster delivered the other papers to Mrs. Wilson. It is not claimed that the notes or bank book or other evidence of debt or property were in the package delivered after Payne's death. There was much evidence to the effect that Mr. Payne intended giving his property to Mrs. Wilson at his death.

Mrs. Wilson testified that she did not give Payne authority to withdraw the money in bank, nor did she know that he had done so. In fact, she knew little of the affair of the money in the bank in her name. After the death of Payne Mrs. Wilson claimed the money in bank, various notes as having been given to her by Payne and also the title to a lot purchased out of the money in bank and two buggies purchased from the same source. The administrator of Payne and his sisters resisted these claims, and this suit is to determine them.

1. Mrs. Wilson testified that after Mr. Holt had brought Mr. Payne the package, during his last illness, Mr. Payne handed it to her, and said, "These are yours," and told her that he had used some money belonging to her, and to put these notes in bank for collection. This package contained several notes of John and C. Lemmer, one note of Mrs. Lou C. Payne, and one note of W. S. Holt, aggregating about $1,800, and the bank book containing the deposits in her name. A gift *inter vivos* of personal property must be perfected by delivery. *Ragan* v. *Hill,* 72

Ark. 307. The competent evidence here completely fails to establish delivery. The evidence of Mr. Holt merely places a given package into the hands of Mr. Payne. So much of Mrs. Wilson's testimony as is admissible is the evidence that this package contained the notes in question and her possession of it. This is the utmost that her testimony can reach to. All that she said about Payne delivering the package to her, stating it was hers, etc., was clearly within the inhibition of the constitutional provision against testifying as to "transactions with or statements of" intestate, in an action against his administrator. See section 3093, Kirby's Digest. The construction placed on this clause by this court in *Nunnally* v. *Becker,* 52 Ark. 550, eliminates the testimony relied upon to establish the gift and the delivery; and the mere possession of the notes by Mrs. Wilson could not raise any presumption of gift.

The chancellor decided these notes to have been Mrs. Wilson's by virtue of a gift, but in this he erred, and the judgment should have been that these notes belonged to the administrator.

2. The fund in bank presents an entirely different question. It is insisted that Payne's stated intention that this fund should go to Mrs. Wilson when he died and his continued use of it demonstrated that he had not delivered it to her, and he had not parted with dominion over it; that he still exercised control, and the deposit in her name was a mere method to convey the balance to her at his death. Various statements of Payne's gives color to this view, but, taking the actual transaction itself, it stamps itself as a complete delivery of the money to Mrs. Wilson. He put into her name a fund held, up to that time, separately by himself, and his wife. He increases it from time to time by deposits amounting in round numbers to $1,500. He arranges that either Mrs. Wilson or himself might draw every dollar, but he does not draw any on his own account, but all as agent of Mrs. Wilson. He invests Mrs. Wilson with title to the deposit, and gives the bank the written authority to pay it out on Mrs. Wilson's or his signature. Thereby he gave her complete and absolute dominion of every dollar, should she choose to exercise it. The fact that she gave him authority to draw in the same written order can not affect the result; for, if hers by this gift, she could do as she pleased with it. The fact that he did draw as her agent, and not in his own

right, emphasized the fact when he drew each check that the fund was hers, not his. The chancellor divided the balance of the fund by giving to Mrs. Wilson the amount of the original deposit of Mrs. Payne, and to the administrator the amount of Payne's original deposit. This was error. All of the balance should have gone to Mrs. Wilson.

3. The evidence shows that with one check drawn as the others above stated, Payne purchased lot 5, block 18, Argenta. This being purchased with money of another and title taken in his own name created Payne trustee for the person whose money paid for the property. *Gainus* v. *Cannon,* 42 Ark. 511; *Atkinson* v. *Ward,* 47 Ark. 533; *Humphreys* v. *Butler,* 51 Ark. 351; *Leslie* v. *Bell,* 73 Ark. 339. The chancellor quieted the title to this lot in the heirs and administrator, and Mrs. Wilson cross-appealed from that order, and her cross-appeal is sustained.

4. The remaining items were two buggies. One bought and delivered as a gift by Payne to Mrs. Wilson was decreed to her, and this is not contested here. The other was bought from the fund in bank with a check signed by Payne as agent. The buggy was bought for Payne's own use; and if there was any evidence that Mrs. Wilson knew it was bought out of this fund, a gift would be presumed in his favor by reason of the character and use of the property. But she swears that she did not know it was purchased with her funds, and consequently no presumption can be raised, and, however *contra bonos mores* the act may be, the same rule applies to this purchase as to the lot, and the title must be held in trust for the one paying for it. As to this buggy, the chancellor's decree is also reversed. As title to real estate is involved, pursuant to practice in such cases, the cause is remanded with directions to the chancery court to enter a decree in conformity herewith.

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

Opinion delivered May 14, 1906.

1. RAILROAD ACCIDENT—PROXIMATE CAUSE.—In an action against a railroad company for the negligent killing of a brakeman in a wreck alleged to have been caused by the defective condition of a certain bridge, it was error to instruct the jury that if the bridge was in a defective condition, and the wreck would not have occurred but for such defect, then such condition was the proximate cause of the wreck; the evidence tending to show that the wreck was caused by the derailment of the train, and not by the defective condition of the bridge, and that if the train had remained on the track the wreck would not have occurred. (Page 80.)

2. RAILROAD—DUTY TO EMPLOYEES.—A railroad company owes to its employees the duty to use reasonable care and diligence in the construction and maintenance of its bridges solely for the purposes for which they are constructed, towit, the passage of its trains on the track. (Page 80.)

3. NEGLIGENCE—PRESUMPTION.—In the absence of a statute providing that, as between master and servant, the occurrence of an accident shall be *prima facie* evidence of negligence, there can be no presumption of negligence in such case. (Page 81.)

Appeal from Crawford Circuit Court; *Jeptha H. Evans,* Judge; reversed.

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

1. The evidence does not support the verdict. There is no proof that partially undermining one of the mudsills would materially affect the strength of the bridge, or that the undermining of the mudsill caused the train to be wrecked. Under the allegations of the complaint, plaintiff must show that this defect caused the injury. 45 N. W. 1096; 1 Sutherland on Dam. § 30; 2 Labatt, M. & S. § 803; 105 N. Y. 202; 55 Fed. 949; 179 U. S. 658; 166 U. S. 617; 158 N. Y. 73.

2. Appellant was not negligent in failing to provide a bridge that would support a derailed train. It is shown by the proof that the train in this case was off the track before it reached the bridge. 57 N. W. 31; 45 Ark. 318; 38 Atl. 621, and citations *supra* and *postea.* The master is only required to anticipate ordinary and probable consequences, and to provide against

injuries that should be foreseen. 35 Ark. 602; 94 U. S. 469; 153 N. Y. 274; Labatt, M. & S. § 142; *Ib.* § 140; 1 Sutherland on Dam. § 34; 54 Am. Rep. 5. An unexpected strain put upon an appliance is not fairly within the contemplation of the master where he put it in use. Labatt, M. &. S. § 146*a*; 148 Mo. 413; 98 Mich. 128. Appellant had the right to assume that the servants would obey the rules, and not back a train at a dangerous rate of speed. 84 Fed. 944; 51 N. W. 31; Labatt, M. & S. § 142 and note.

3. The proximate cause of the injury was the fast running and derailment of the train, and this the company could not foresee. Watson on Dam. for Pers. Inj. § § 33, 141, 145; 69 Fed. 528; 74 Fed. 155; Black's Law & Pr. in Accident Cas. § 21; 52 N. H. 528; 158 N. Y. 73; 57 Am. Rep. 602. In determining the proximate cause, the rule is the injury must be the natural and probable consequence of the negligence. 13 Am. Rep. 264; 19 *Ib.* 631; 85 Pa. St. 293. The master can not anticipate and provide against disobedience to orders. 128 Fed. 540; Labatt, M. & S. § § 30 b, 590, 608; 37 Atl. 676. If a new and efficient cause intervenes, then the originating cause is a remote cause. 7 Wall. 44; 77 N. Y. 83; Black's Law & Pr. in Acc. Cas. § 280; 105 N. Y. 202. Where the injury may have been the result of two or more causes, one as probable as the other, the party can not recover. 133 N. Y. 657; 166 U. S. 619; 179 U. S. 658; Watson, Dam. for Pers. Inj. § 161; 124 Fed. 113. See also 34 N. E. 233; 8 N. Y. S. 573; 28 Am. Rep. 84; 27 Am. Rep. 653; 56 Ark. 213.

4. There was no presumption, arising from the fact that a wreck had occurred and an employee was injured, that the company had been guilty of negligence, and the court erred in refusing to so instruct the jury. 44 Ark. 527; 46 Ark. 555; 51 Ark. 467; 104 Fed. 746; 135 Fed. 313; 179 U. S. 658.

Sam R. Chew and *Brizzolara & Fitzhugh,* for appellant.

The issue in this case, as made up by the pleadings and proof, is, was the deceased killed on account of a defective bridge which defendant knew, or, by the exercise of ordinary care, should have known, was in an unsafe condition? Appellee declines to be led away from this, the only issue, into a discussion of issues not raised below. They will not be considered by the court. 36 Cal. 404. It was appellant's duty to use ordinary care to see that

the bridge was safe. 2 Labatt, M. & S. § 568, note h and cases cited; 3 Elliott on Railroads, § 1271. A railroad company is liable for the death of an employee caused by the falling of a bridge negligently constructed or maintained by the company as a part of its road. 67 Cal. 607; 95 Mo. 268; 37 Kan. 710; 20 S. W. 955.

BATTLE, J. Wallace H. Hill was a brakeman on the cars of the St. Louis & San Francisco Railroad Company, and was killed on the 9th day of September, 1903, while engaged in that capacity. Z. T. Hill, his father, was appointed his administrator. As such administrator, he brought this action against the railroad company for damages sustained by him as the next of kin of the deceased. He alleged in his complaint that W. H. Hill was a brakeman on a train of the defendant, and while he was on the train, and it was running on a certain bridge of the railroad company, the bridge gave way and wrecked the train, and inflicted upon Hill, the brakeman, injuries which caused his death; and that the bridge was unsafe, and fell down, and caused the injury complained of, because the defendant carelessly and negligently allowed the waters passing under it to undermine the sills upon which the bents supporting it rested.

The defendant denied the allegations of the complaint. A jury was impaneled to try the issues, and upon a trial returned a verdict in favor of the plaintiff for $1,250.

The bridge mentioned in the complaint was over a stream known as Crowder Creek, and was a part of the railroad of the defendant. In September, 1903, a freight train of the company was derailed; and while it was off the track it ran on the bridge, and caused it to fall and wreck the train. W. H. Hill, a brakeman then in the service of the company, was killed in the wreck. Before and about the time of the accident the bridge was out of line; a cavity about four inches deep and seven or eight inches wide was washed under one of the sills; two of its bents had slipped, one about six inches and the other about twelve inches, and both appeared to be "leaning down the creek." The track, being out of line, had been taken up, aligned and respiked, which did not affect the security of the bridge, as trains heavier than the one derailed had thereafter passed over it in safety. There was nothing to indicate that it would have fallen if the cars had

remained on the track. Witnesses differ as to where the train first left the track. Some locate it about one hundred and fifty feet west of the bridge, and another at the west edge of the creek, which we understand to be on the bridge. There was evidence tending to prove that the derailment was caused by the rapid backward movement of the train.

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

"If the bridge under the track at the place where the wreck occurred in its supports was in a defective and unsafe condition for the passage of trains, and defendant knew this, or by the exercise of ordinary care on its part ought to have known it, and such defective and dangerous condition of the bridge as to its support, if such condition existed, caused the wreck, and the wreck produced injury to and the death of W. H. Hill, then the defendant is liable for such injury and death, unless W. H. Hill knew, or by the exercise of ordinary care on his part ought necessarily to have known, of such defective and unsafe condition, if there was such defective and unsafe condition.

"9. If the condition of the bridge over Crowder Creek as to its support was in a defective and unsafe condition, and yet the wreck would have occurred notwithstanding such defective and unsafe condition, then the giving way of the bridge, if it did give way, and consequent wreck of the train, if the giving way of the bridge caused a wreck, can not in law be said to have caused the injury and death of Hill. But if the bridge as to its support was in a defective and unsafe condition, and the tender went off the track before reaching the bridge, and the wreck occurred by reason of said defective and unsafe condition of the bridge in its supports and of the tender being off the track, but would not have occurred but for such unsafe and defective condition of the bridge as to its support aforesaid, then such defective and unsafe condition of the bridge in its support is in law an efficient proximate cause of the wreck and of the consequent injury and death of Hill, if the injury and death ensued to him by reason of said wreck."

The defendant asked the court to instruct the jury, in part, as follows:

"6. If you find from the evidence that the bridge was suf-

ficient to support the trains running upon the track, or steel rails, but was not sufficient to support a train which was running, and off the track of steel rails, and that this strain or a portion of it was off the track when it came upon the bridge, and that the fact that it was off the track caused the bridge to give way, you should find for defendant."

And the court refused to give it as asked, but modified it, over the objections of the defendant, and gave it as follows:

"6. If you find from the evidence that the bridge was sufficient to support trains running upon the track, or steel rails, but was not sufficient to support a train which was running, and off the track of steel rails, and that this train, or a portion of it, was off the track when it came upon the bridge, and that the fact that it was off the track alone caused the bridge to give way, you should find for the defendant."

And refused to instruct the jury, at the request of the defendant, as follows:

"I charge you that there is no presumption that the company has been guilty of any negligence arising from the fact that a wreck has occurred and an employee has been injured."

Instruction 9 given to the jury over the objection of the defendant is obviously wrong. It clearly implies, when read in connection with the instruction numbered 8, given by the court over the objection of the defendant, and instruction numbered 6 as modified, that, although the train would have been safe upon the bridge if it had remained on the track, yet the defendant would have been liable for damages if the bridge was not sufficient to sustain the train in safety when it was derailed; in other words, would have been liable for damages if the bridge had not been sufficient to sustain the train while running off the track over it. The court refused to instruct the jury to find for the defendant if they found from the evidence that the bridge was sufficient to support trains running upon the track, and that the derailment of the train caused the bridge to give way, but amended it so as to conform it to instruction numbered 9, and gave it as amended. These two instructions as given were at least misleading. A railroad company owes to its employees the duty to use reasonable or ordinary care and diligence in the construction and maintenance of its bridges solely for the uses or purposes for which they

are constructed. They must be reasonably sufficient for the purposes intended. *Koontz* v. *Chicago, Rock Island & Pacific Ry. Co.,* 65 Iowa, 224; *Bowen* v. *Chicago, Burlington & Kansas City Ry. Co.,* 95 Mo. 268; *Illick* v. *Flint & P. M. R. Co.* (Mich.), 35 N. W. 708; *Galveston, H. & S. A. Ry. Co.* v. *Daniels* (Texas), 20 S. W. Rep. 955; 20 Am. & Eng. Enc. Law (2 Ed.), pp. 67, 61, and cases cited; 4 Thompson on Negligence, § § 4311, 4251. The bridge in question was constructed solely for the passage of defendant's trains on the track over Crowder Creek. There was evidence tending to prove that it was sufficient for that purpose. There is no evidence to show, and plaintiff does not contend, that the derailment of the train was owing to defects of the bridge. That being true, the derailment did not prove that the defendant was negligent in the construction or maintenance of the same.

The court erred in giving instruction numbered 9 and modifying instruction numbered 6.

The court should have instructed the jury, at the request of the defendant, as follows: "I charge you that there is no presumption that the company has been guilty of any negligence arising from the fact that a wreck has occurred and an employee has been injured." In the absence of a statute providing that, as between master and servant, the occurrence of an accident shall be *prima facie* evidence of negligence, there can be no presumption of negligence in such case; for "a rudimental principle of law and logic is that wrong is not to be presumed." *St. Louis, I. M. & S. Railway* v. *Harper,* 44 Ark. 527-529; *St. Louis, I. M. & S. Railway* v. *Gaines,* 46 Ark. 555; *St. Louis, I. M. & S. Railway* v. *Rice,* 51 Ark. 467-479; *Patton* v. *Texas & P. Ry. Co.,* 179 U. S. 658.

Reverse and remand for a new trial.

HILL, C. J., being disqualified, did not participate.

FRANKLIN v. TRIPLETT.

Opinion delivered May 14, 1906.

LANDLORD AND TENANT—REPAIRS.—Under a contract for the lease of a plantation which obligated the lessees "to build, repair and keep in good condition houses sufficient to accommodate the labor necessary to successfully cultivate" the plantation, and "to build, repair and maintain fences sufficient to amply protect the crop to be grown upon the place," the lessees are bound to add chimneys and whatever else is necessary to put the houses in good tenantable condition, and to make the fences sufficient amply to protect the crops, and to deliver the houses and fences in good condition at the expiration of the lease.

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

Austin & Danaher, for appellants.

The repairs required are limited to the repairs distinctly specified in the contract. In this case the objects specified were, in the case of houses, to accommodate the labor necessary to successfully cultivate the place, and, in the case of fences, to amply protect the crops to be grown upon the place. 18 Am. & Eng. Enc. Law (2 Ed.), 252. Under a general covenant for repairs, the tenant is not required to go further than to take care that the tenement does not suffer more that the usual operations of time and nature will effect. He is only required to keep an old house as an old house; he is not obliged to put in new floors, or the like, but merely to repair the old ones. 1 Taylor, Landlord and Tenant (8 Ed.), § 358; 63 Pa. St. 162; 4 Bing. (N. C.), 451; 33 L. R. A. 614.

It is shown that appellants put and maintained the place in as good condition as such places were usually maintained, and they will be taken to have contracted with reference to the custom of the country. 2 Parsons, Cont. (8 Ed.), * 537.

W. F. Coleman and *Murphy, Coleman & Lewis,* for appellee.

The contract shows that it was not intended to limit the obligation of the tenant to the common law rule, nor to the general covenant to repair. The special covenant in the contract enlarges the duty of the tenant, and the intention is shown to be

that the lessee shall repair and maintain in tenantable condition such houses as are on the place, and it is also shown that the houses were at the time out of repair, and not in good condition. Appellant's first instruction was therefore properly refused. 18 Am. & Eng. Enc. Law. 252; 8 C. & P. 720; Taylor, Landlord and Tenant, § 358.

BATTLE, J. Plaintiff, C. H. Triplett, alleges that he leased to J. P. Franklin and others, for 1903, the "Horton Island Place;" that the lease contained the following covenant:

"That they, the said lessees, should build, repair and keep in good condition houses sufficient to accommodate the labor necessary to successfully cultivate said place, and to build, repair and maintain fences sufficient to amply protect the crop to be grown upon the said place; it being the intention of this clause that the said lessees shall repair and maintain in tenantable condition such houses as are on the place, and if any more houses are needed to accommodate the labor necessary to successfully cultivate the place they will build same, it being understood between the parties that the houses now on the place are in need of repairs and not in good condition."

"That defendants had failed to repair and keep in good condition the houses sufficient to accommodate the labor necessary to successfully cultivate the place, and had failed to repair and maintain fences ample to protect the crop grown upon said place, and failed to repair and maintain in tenantable condition such houses as were on the place.

"The prayer was for damages in the sum of $700.

"The answer denied that defendants had failed in any manner to comply with the conditions of the lease, alleged full performance, and denied that plaintiff had been damaged."

In a trial before a jury the plaintiff adduced evidence tending to prove the allegations in his complaint; and the defendants adduced evidence tending to prove that the condition of the houses on the leased premises were about as good as "other plantation houses" in that vicinity, and were tenantable.

The court instructed the jury as follows:

"Defendants were bound by their contract with plaintiff to repair and maintain in good and tenantable condition all houses on the premises contracted for by the lease in evidence, said con-

tract agreeing in terms that the houses then on the place were not in good condition and were in need of repairs. So, if the jury believe from the evidence that the houses on the place were not in a good and tenantable condition when the place was surrendered at the expiration of the lease in suit, then plaintiff is entitled to recover of defendants damages in such sum as may be shown by the evidence to be required to repair and place the houses mentioned in such condition. Defendants were also bound under their contract to build, if necessary, fences sufficient to amply protect the crops to be grown on the said place, and maintain the fences in good state of repairs. So, if the jury find from the evidence that the fences were not in the condition contracted for at the time of the surrender of the place by defendants, they will find damages in such further sum as may be shown by the evidence to be required to place such fences in said condition."

And refused to instruct, at the request of the defendants, as follows:

"You are instructed that under the lease in controversy the defendants were not bound to build any new chimneys, where there were none before, replace doors, windows or floors worn out by time or to make other similar substantial and lasting repairs, such as are usually called general repairs. All that could be required of them was that they should make such repairs on the houses and fences on the place as were necessary to protect the crops grown upon said place and to accommodate the labor necessary to work said crops during the term of said lease; and if you find from the evidence that the defendants did repair the fences to the extent necessary to protect the crops grown upon said place during the year 1903, and the houses to the extent necessary to accommodate a sufficient number of laborers to cultivate said crops, then your verdict must be for the defendants."

The jury returned a verdict in favor of the plaintiff for $492.64; and defendants appealed.

The appellants' obligations in this case are measured by the terms of their lease. They undertook "to build, repair and *keep* in good condition houses sufficient to accommodate the labor necessary to successfully cultivate said place," the leased premises, and "to build, repair and *maintain* fences sufficient to amply protect the crop to be grown upon the place, * * * it being un-

derstood between the parties that the houses now on the place are in need of repair, and not in good condition." They were bound by their contract to add chimneys or whatever was necessary to put the houses in good and tenantable condition, and to make the fences sufficient to amply protect the crops grown on the place; and not only this, but they were bound to *maintain* such houses and fences in good condition during the entire term of their lease. This bound them to deliver the same in like condition to the lessor at the expiration of the lease; and, failing to do so, they are bound to compensate him in damages for the nonperformance of their contract.

The jury were properly instructed; the verdict is sustained by the evidence.

Judgment affirmed.

DOBBINS v. LITTLE ROCK RAILWAY & ELECTRIC COMPANY.

Opinion delivered May 14, 1906.

1. EVIDENCE—RES GESTAE.—Where a complaint against a street railway company alleged an illegal ejection of plaintiff at a certain place, it was not error to refuse to permit a witness to testify as to the subsequent language and conduct of defendant's conductor, as indicating his temper and frame of mind at the time of the expulsion; nor was it error to refuse to permit such witness to prove that shortly after plaintiff was ejected the conductor acted in a rude and overbearing manner toward other passengers on his car. (Page 88.)
2. WITNESS—DEAF MUTE.—It was not an abuse of discretion to permit the testimony of a deaf mute to be given by means of the sign language through an interpreter, instead of through written questions and answers, where there was nothing to show that the latter was the best method. (Page 89.)
3. TRIAL—VIEW.—Where it was a material question whether the moving of the controller of a street car of a certain class by plaintiff on a certain occasion was accidental or intentional, it was not error to permit the jury to inspect a car and the controller thereon, it being shown that the controllers on all the cars of that class were alike. (Page 90.)

4. APPEAL—PRESUMPTION.—Where the evidence is not set forth in appellant's abstract, it will be presumed on appeal that the court's instructions were based on the evidence. (Page 91.)
5. SAME.—Where only part of the court's instructions are set forth in appellant's abstract, it will be presumed that the instructions objected to were cured by others which were given, unless those set out were so radically defective that they could not be corrected by others. (Page 91.)
6. STREET RAILWAYS—REASONABLENESS OF RULES.—A rule of a street railway company prohibiting passengers from standing upon the front platform of a car is a reasonable one. (Page 93.)
7. SAME—CONTROL OVER PASSENGERS.—Where several street cars are standing at a depot waiting for passengers from an incoming railway train, a passenger had no right to complain because he was directed to take passage in one car, instead of another, so long as there was no arbitrary, capricious or unreasonable discrimination shown. (Page 93.)
8. SAME—EJECTION OF PASSENGER—DAMAGES.—Where a complaint against a street railway company sought recovery for an unlawful ejection, and there was evidence tending to show that on the occasion complained of the defendant's conductor used insulting and abusive language toward plaintiff, it was not improper to charge the jury that the plaintiff was not entitled to recover unless he was ejected. (Page 94.)
9. SAME—AUTHORITY OF CONDUCTOR.—A street car conductor, in prosecuting a passenger for disorderly conduct on his car, is acting beyond the scope of his employment. (Page 95.)

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

STATEMENT BY THE COURT.

The pleadings and so much of the evidence as has been abstracted shows that this is the same case as *Little Rock Ry. & Electric Co.* v. *Dobbins,* decided a few days ago, and this appeal is in fact but a cross-appeal from the rulings of the trial court against Dobbins (appellant here) in that case. There was a full abstract of the evidence in that case. In this record the appellant has his bill of exceptions to show that "the plaintiff, to sustain the causes of action severally set forth on the first, second and third paragraphs of his complaint and the issues in his behalf, introduced the following witnesses, towit: Arthur Pulliam, policeman; T. M. Clifton, sergeant of police; D. F. Dobbins, plaintiff; W. H. Blevins, I. T. Smith A. Ray, and W. E. Berthe."

The testimony of the witnesses is not set out *in extenso;* but this statement is made: "By the testimony of said witnesses the plaintiff produced evidence tending to prove the material allegations of the first, second and third paragraphs of his complaint. Appellant then sets forth certain specific things which he offered to prove, which the court refused to permit, to which ruling he excepted. These will be set forth and discussed in the opinion. The bill of exceptions then contains the statement that "defendant, to sustain the issues on its part, introduced a number of witnesses, by whose testimony it produced evidence tending to sustain the denials and allegations of its answer to the first, second and third paragraphs of plaintiff's complaint."

Only the instructions of the giving of which appellant complains are set out in appellant's abstract. For a statement of the issues, see *Little Rock Railway & Electric Company* v. *Dobbins,* 78 Ark. 553. Such other facts as deemed necessary are set forth in the opinion.

W. L. Terry, for appellant; *Walter J. Terry* of counsel.

1. It was error not to allow plaintiff to prove the temper of the conductor shortly after ejecting plaintiff from the car. 62 Ark. 259.

2. The testimony of the deaf mute witness should have been taken in writing, and not by means of sign language. 3 C. & P. 127.

3. It was error to send the jury to inspect the car and the operation of the lever, without proof that it was the same car from which plaintiff was expelled, or of its having the same mechanism except as to controller.

4. The court's instructions 4, 5, 6, 8 and 9 were erroneous. 26 L. R. A. 222; 65 Ark. 182.

5. The court erred in sustaining demurrer to third and fourth paragraphs of complaint. The case relied on by appellee, 65 Ark. 145, was an action for malicious prosecution, and is not in point. A common carrier is liable for illegal arrest and false imprisonment in a case like this. 35 W. Va. 588; 16 L. R. A. 137; 28 L. R. A. 691; 29 L. R. A. 467; 12 A. & E. Ry. Cas (N. S.) 263; 67 Ark. 55; *Ib.* 402. The same reasons that render a corporation liable for any torts by its agents

will render it liable for a malicious prosecution. 74 Ala. 89; 57 Miss. 759; 130 Mass. 443; 32 N. J. L. 334. An agent who violates the duty which his principal owes to the passenger is to be deemed to have done so while acting in the course of his employment. Mechem on Agency, 583.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1. The evidence as to the temper of the conductor shortly after ejecting plaintiff from the car was not admissible because it was not a part of the *res gestae.* 51 Ark. 513; 52 Ark. 80; 43 Ark. 103; 48 Ark. 338; 58 Ark. 180; 66 Ark. 501; 72 Ark. 581.

2. In the absence of a statute upon the taking of deaf mutes' testimony, the common-law rule prevails. It is proper to have an interpreter for mutes. 17 Am. & Eng. Enc. Law (2 Ed.), 29; 20 Am. Dec. 90; 5 Blackf. 295; 108 Ind. 53; 78 N. W. 681; 39 S. C. 322. This rule prevails, though the mute be able to read and write. 5 Am. & Eng. Enc. Law (1 Ed.), 122, note 1; Chamberlayne's Best on Ev. 131. The court in its sound discretion must decide upon the necessity for an interpreter. 17 Am. & Eng. Enc. Law (2 Ed.), 29; 23 Mich. 253, and cases *supra.*

3. There was no error in permitting the jury to inspect the controller of the car. The controllers on all the summer cars were shown to be exactly alike. That on the particular car in question could not be shown because that car's number was not known. 11 Am. & Eng. Enc. Law (2 Ed.), 539; 109 Ill. 9.

4. There was no error in giving instructions 4, 5, 6, 8 and 9. 37 Ark. 591; 44 and 59 Ark. *supra;* 66 Ark. 46; 71 Ark. 317; Booth, Street Railways, § 357.

5. The demurrer was properly sustained to the third and fourth paragraphs of the complaint. Having no express authority from the company to cause an arrest and imprisonment, and no such authority being conferred by any rule of the company, the conductor in causing such arrest was acting without the scope of his real or apparent authority. 65 Ark. 149; 78 Md. 394; 34 Am. Rep. 311; 15 Fed. 200; 39 N. Y. 381; 43 La. Ann. 34; 56 Tex. 162; 6 Exch. 314; 7 *Ib.* 36; 2 L. R. Q. B. Cas. 534; L. R. 6 Q. B. 65; 1 Biddle on Ins. § 118.

WOOD, J., (after stating the facts.) 1. Appellant complains

because the court refused to permit the witness Ray to answer the following question asked him by plaintiff's counsel: "Q. Well, after you passed Main and Markham, if you saw anything in the language or conduct of the conductor, Mr. Barger, that would indicate his temper or frame of mind, state what it was." And because the court also refused to permit plaintiff to prove by said witness Ray that, shortly after the plaintiff was ejected from defendant's car at the Choctaw depot, about three or four blocks from the depot, coming towards Main and Markham, the conductor acted in a rude and overbearing manner towards other passengers on the car, and especially towards this witness, indicating that he was in a very bad temper and disposition.

There was no error in this. It was not only after the alleged expulsion had taken place, but it is not pretended that the conduct of the conductor sought to be proved was directed toward appellant. We do not think that it in any manner tended to illustrate the conduct of the conductor towards appellant a short while before at the depot, a few blocks away. The alleged expulsion at the Choctaw depot was ended. The transaction was over. This testimony was no part of the *res gestae*. *Hot Springs St. Rd. Co.* v. *Hildreth,* 72 Ark. 572; *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 501, and authorities cited. Had the alleged conduct been manifested toward appellant, and not towards other passengers, perhaps the case would have been different. *St. Louis & S. F. Ry. Co.* v. *Brown,* 62 Ark. 259, is not in point. There the transaction was not over. The conductor was re-entering the car, having just taken the passenger off. His temper toward the plaintiff (not another) was still in evidence.

2. It was not error to take the testimony of the deaf mutes through an interpreter by signs, instead of through written questions and answers. Having no statute upon the subject, the common-law rule prevails that such persons are competent witnesses where they have sufficient knowledge to understand and appreciate the sanctity of an oath. 1 Greenl. Ev. § 366; Starkie, Ev. 4, p. 393; *Snyder* v. *Nations,* 5 Blackf. 295; Chamberlayne's Best on Ev. p. 131.

Chief Justice Best, in *Morrison* v. *Lennard,* 3 C. & P. 127, in commenting upon the testimony of a deaf mute witness taken

through an interpreter by signs, said: "I have been doubting whether, as this lad can write, we ought not to make him write his answers. We are bound to adopt the best mode." But he continues: "I should certainly receive the present mode of interpreting, even in a capital case; but I think, when the witness can write, that it is a more certain mode."

Where a witness, on account of defective speech and hearing, is unable to communicate the facts within his knowledge to the jury in the ordinary way that can be understood by them, and where such knowledge may be imparted to the jury by means of sign language through an interpreter, it is proper to have such interpreter. The court should adopt the best method of having the facts in the knowledge of such witness imparted to the jury. Where the witness is a deaf mute, and can read and write, the trial court should have his knowledge of facts conveyed to the jury by means of written questions and answers, if it appears that this is the best method of eliciting the facts from the witness. But, if not, then by signs and oral interpretation. The matter is within the sound discretion of the trial court, who must determine, in the first place, as to the necessity for an interpreter, and, in the next place, the best method of arriving at the knowledge of the witness, and of imparting that knowledge to the jury. The discretion of the trial judge, however, is not to be exercised arbitrarily. It will be controlled and corrected, when abused to the injury of litigants. *Skaggs* v. *State,* 108 Ind. 53; 17 Am. & Eng. Enc. Law (2 Ed.), p 29; 5 Am. & Eng. Enc. Law (1 Ed.), 122, note 1; *State* v. *DeWolf,* 20 Am. Dec. 90; *State* v. *Nelson,* 39 S. Car. 322; *Swift* v. *Applebone,* 23 Mich. 253; Wigmore on Ev. § 811; Chamberlayne's Best on Ev. p. 131.

While the objection of appellant stated that the evidence of the deaf mutes "could be written," there was nothing to show that this would have been the best method; nothing to show how well the witness could write, or that an oral interpretation by means of sign language was not a better method than by written questions and answers. In the absence of some such showing, it will be presumed that the court adopted the best method.

3. There was no error in permitting the inspection of a car and the controller thereon, since the testimony shows that all the controllers on the summer cars were "built exactly alike," that

the "controllers were the same, the same mechanism." The court adopted the best method of giving the jury an idea of the working of the controller. It would not have been improper to have had the controller itself, or one "exactly like it," exhibited before the jury, and to have explained to them the effect of moving same. *A fortiori,* was it not improper to have such controller examined on the car. This was practicable, and certainly gave the jury the clearest idea obtainable as to how the controller could be moved and the effect thereof on the movement of the car. 11 Am. & Eng. Enc. Law, 539, and authorities cited. It would the better enable the jury to determine a pertinent question in the case, viz.: as to whether or not the moving of the controller was accidental as claimed by appellant or intentional as claimed by appellee.

We find no error in the giving of instructions for defendant. (Reporter set out in note numbers 4, 5, 6, 8 and 9).* None of

*The instructions given for defendant were as follows:

"4. You are instructed that it is the duty of one who becomes a passenger on a street car to conduct himself in an orderly manner, and to refrain from interfering with the apparatus or machinery of the car; and if you find from the evidence that plaintiff knowingly and willfully failed to perform his duty in this respect, then the conductor or employee in charge of the car was authorized to eject him from it.

"5. If you find from the evidence that plaintiff, at the time he entered defendant's car at Choctaw station, knowingly or willfully interfered with the apparatus or machinery on said car, or conducted himself in a disorderly manner, and because of such conduct the conductor ejected him from the car at said station, he can not recover damages for such ejection.

"6. A regulation forbidding passengers to stand upon the front platform is a reasonable and proper one. It is the duty of a passenger who is standing on the platform to go inside the car, when requested so to do by a person having charge of the car, if there is standing room inside, although there are no vacant seats; and if a passenger refuses to comply with such request when there is room inside the car which can conveniently be reached, the servants of the company may lawfully eject him from the car. If, therefore, you find from the evidence that when at the Choctaw station the conductor requested the plaintiff to go inside of the car, and there was standing room therein, and the plaintiff refused to comply with said request, then the conductor was justified in ejecting plaintiff from the car, and he can not recover damages for such ejection.

"8. If you find from the evidence that several of defendant's cars were standing at Choctaw station, waiting to be loaded with passengers

the evidence in favor of the appellee upon which these instructions might have been grounded is abstracted, and there is no statement in the record to indicate that there was no evidence to warrant such instructions. We must therefore assume that the instructions were not abstract. And, since the appellant has not abstracted the other instructions that were given on behalf of appellee and those that were given in his own behalf, we must assume that the instructions given, in the particulars of which appellant complains, were cured by others, unless the instructions as given were so radically defective that they could not be corrected by others. *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 77 Ark. 374, and authorities there cited.

Instructions four and five told the jury, in substance, that it was the duty of one who becomes a passenger on a street car to conduct himself in an orderly manner, and to refrain from interfering with the apparatus and machinery of the car; and that, if appellant willfully and knowingly interfered with the apparatus and machinery of the car, and conducted himself in a disorderly manner, appellee's conductor was justified in ejecting him from the car. The instructions are faulty in that they do not more specifically and clearly define what would be disorderly conduct in a passenger justifying his expulsion from a car. What the conductor might consider disorderly conduct might not in law be such as to warrant him in ejecting a passenger for such conduct. Likewise, the instructions should have been

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returning from the picnic, and that while so waiting plaintiff entered the car of which Barger was the conductor, and after he had entered the car became involved in a controversy with Barger and voluntarily left the car without having paid fare thereon, and went upon the street where Barger was standing, in order to maintain his contention, and, while thus standing in the street, he was informed by Barger that he could not ride on Barger's car, and was directed to take passage on another car, such conduct of Barger did not constitute an ejection of plaintiff from the car, and he is not entitled to recover damages on account thereof.

"9. If you find from the evidence that plaintiff was not ejected from the car while at the Choctaw station, then he can not recover any damages from the defendant company for humiliation or feelings injured because of insulting and abusive language uttered against him by the conductor, if you should find from the evidence that plaintiff used insulting or abusive language to him." (Reporter.)

more specific in defining the extent and character of interference by a passenger with the apparatus and machinery of a car that would call for his ejection therefrom.

But these were mere verbal omissions which the evidence or other instructions might have supplied, rendering the instructions proper, or, if not, harmless. For instance, suppose the proof showed that appellant had taken hold upon the controller and was undertaking to run the car, or that he became "indignant" and used "harsh and offensive language" toward appellee's conductor, and "of his own motion," as the answer alleges, "took another car." If such was the evidence, it is clear that the instructions would not have been erroneous—much less prejudicial. Then, too, the court may have defined in other instructions the kind of disorderly conduct and the extent of interference with furniture and apparatus by a passenger that would warrant his expulsion from the car.

Instructions six and eight are not sufficiently abstracted by appellant to enable us to intelligently pass upon them. Appellee, however, supplies this omission to abstract by setting out the instructions in full. Assuming that there was evidence upon which to base them, they were correct declarations of law.

Assuming, as we must, that the evidence showed that the appellee had a rule prohibiting passengers from standing upon the front platform, such a regulation was a reasonable one. The presence of passengers upon the front platform might greatly interfere with the motorman in the discharge of his duties, and greatly endanger the lives of the passengers as well as the property of the company. Booth, Street Railways, § 357.

If the facts assumed in the eighth instruction existed, appellant was not denied the right to ride upon appellee's car, and was not therefore ejected therefrom. Where there is a train of cars for passengers, all of equal and sufficient accommodation, a passenger has no right to insist upon riding upon any particular car. The disposal of passengers upon the cars (conforming with statute as to separate races) must rest with the company, and, so long as its conduct in this respect is not arbitrary, capricious, unreasonable and discriminatory, it incurs no liability to a passenger who refuses to conform to its requirements.

The ninth instruction was not erroneous. As we construe the first count of appellant's complaint, the cause of action is the ejection of appellant from appellee's car. That was the physical injury alleged to have been suffered by appellant, and the rehearsal of the abusive and insulting language used by appellee's conductor was for the purpose of showing the aggravating circumstances under which the expulsion took place. The purpose of this was to show that the conduct of the conductor in making the alleged ejection was wilful, wanton and malicious, and thus to furnish the basis for punitive damages. If we are correct in our interpretation of this count, the ninth instruction but confined the right of recovery to the cause of action stated. The complaint is certainly susceptible of that construction. It is manifest from the instruction that the court so treated it, and here again it is impossible, in the absence of an abstract of the instructions that were given for appellant, to determine whether or not the giving of this instruction was error, even if the court erred in treating the first count of the complaint as a cause of action solely for wrongful ejection. For it may be that the instructions which appellant asked, and which the court gave, would show that appellant himself went before the jury on the first count only upon the theory of an unlawful ejection. If so, then there could be no error prejudicial to appellant in the court telling the jury that if there was no ejection there could be no recovery for insulting and abusive language.

5. In *Little Rock Railway & Electric Company* v. *Dobbins,* 78 Ark. 553, we said: "The court properly sustained the demurrer to the third and fourth paragraphs of the complaint, which sought to hold appellant liable for the prosecution instigated by its conductor against appellee for breach of the peace." This was said in disposing of the contention of appellant railway in that case that the court erred in permitting evidence of the arrest and prosecution of Dobbins (appellee in that case) to go before the jury. We further said: "The evidence, so far as it related to the arrest of the appellee on the car by the policeman at the request of and by the 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." This disposes of the contention of appellant here that the court erred in sustaining the demurrer to the third and fourth paragraphs of the complaint.

Appellant was permitted to get the benefit of the fact that he was arrested on the car, in the consideration of the second count of his complaint, and it is evident that the jury took such arrest into consideration, for otherwise there was no semblance of justification for the amount of compensatory, much less punitive, damages which the jury assessed. But for the fact that the arrest was proper for them to consider, and that they evidently did consider same in returning their verdict, we should not have sustained the same for the amount rendered.

In sustaining the demurrer to the third and fourth paragraphs of the complaint the court below treated them as setting up a cause of action for the false imprisonment and malicious prosecution of Dobbins instigated by the railway company's conductor, whch was beyond the scope of his employment, not authorized or ratified by the company, and for which it is therefore not liable. This is in accord with *Little Rock Traction & Electric Company* v. *Walker,* 65 Ark. 149. See also authorities cited in appellee's briefs on the question.

Finding no prejudicial error, the judgment is affirmed.

MARTIN v. HOUCK MUSIC COMPANY.

Opinion delivered May 14, 1906.

1. BAILMENT FOR REPAIR—LIEN.—One who undertakes to repair a piano for an agreed sum, without stipulation as to when the repairs shall be paid for, is entitled to hold the piano until payment therefor is made. (Page 98.)
2. APPEAL—INVITED ERROR.—One can not on appeal complain of a judgment which he concedes in his brief was rendered by his consent, though such fact does not appear on the face of the decree. (Page 99.)

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

STATEMENT BY THE COURT.

Mrs. Ida E. Martin was the owner of a piano which the Houck Music Company undertook to repair for the sum of $135. The work on the piano was finished in September, 1901, and Mrs. Martin was notified. Mrs. Martin desired to make the payment in monthly installments, and she offered to pay $25 in cash and the remainder in monthly installments. The company declined to accept this, and insisted that the amount charged should be paid in cash. As Mrs. Martin was under the impression that she should be allowed to make the payment in installments so as not to inconvenience her husband, she declined to make the payment *in solido,* and the Piano Company held the piano. It was kept on the second floor of the building occupied by the company with other pianos which it owned or had in charge. The roof of this building was covered with tin. This tin was put on in strips or sections about 16 inches wide, the edges of these strips being turned up and tacked together. The connecting edges were turned over, so that rain falling on the roof could not enter. These connecting edges of tin stood about an inch above the level of the roof. In January, 1902, while plaintiff's piano was still in the building, a heavy storm of sleet swept over the city. The storm lasted from about 10:40 a. m. to 10 p. m. of the 28th of that month. This fall of sleet was followed by a rise in temperature. The sleet in some way dammed up the water from rain and melting sleet on the roof and caused it to rise above the seams and to enter the building, where a number of pianos were kept. Many of them were seriously injured, among them the one owned by plaintiff. It was rendered practically worthless.

Plaintiffs afterwards brought this action against the Piano Company to recover for the value of the piano.

The Piano Company denied that it had been guilty of negligence, alleged that the plaintiff owed it $135 for repairs on her piano which she had neglected to pay, and asked that it have judgment against the plaintiff for that sum, and that a lien be declared on the piano, and that it be sold and proceeds applied to the payment of the judgment.

The plaintiff filed an answer, denying allegations of cross-complaint. The case was transferred to the chancery court.

On the hearing the chancellor held in effect that neither party was entitled to recover anything from the other, but he taxed the costs against the defendant. Both sides appealed.

George W. Williams, for appellant.

1. After demand for the delivery of the piano, defendant holding it under another claim for which he had no right of lien, he will be held to have waived his lien and to have converted it. 145 Mass. 20; 95 Pa. St. 246. The Jurist, vol. 2, 892; 13 Ark. 447. After the request for delivery by the plaintiff, the defendant held for his own benefit, and not for the owner. 1 Jones on Liens, § 972. Being a wrongdoer constitutes him a converter of the property, and renders him absolutely liable. Cases *supra;* 61 Ark. 307; Van Zile on Bailments, 103; Story on Bail. § 237; *Ib.* § 341; *Ib.* § 122; 8 Wall. 641, 650.

2. Appellant was under no obligation to tender the amount claimed by appellee for which it had no right of lien. 1 Camp. 410 n.; 13 Ark. 437; 9 M. & W. 675; 2 Blackf. (Ind.), 465.

3. The burden was upon appellee to show that it exercised the reasonable care necessary to prevent injury. Tyler on Usury, 627; 1 Smith's Lead. Cas. 300.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1. When a payment is to be made, and no time specified, it is payable immediately, or, at any rate, in a reasonable time. 1 Pet. 455; 22 Am. & Eng. Enc. Law, 529, and cases cited.

2. Appellee was either a bailee in a bailment for mutual benefit, or a gratuitous bailee. If he was a bailee for mutual benefit, he would be held only to ordinary care to prevent damage. Schouler's Bail & Car. § 101; Lawson on Bail, § 43; 32 Ark. 223. Unavoidable accident will excuse a bailee where the bailment is for mutual benefit. 42 Ark. 200; 6 Cent. Dig. § 49; 5 Cyc. 199. But, under the facts in this case, appellee was only a gratuitous bailee, and as such would be liable only in case of gross neglect or bad faith. 11 Ark. 189; 23 Ark. 61; 6 Cent. Digest, § 38.

RIDDICK, J., (after stating the facts.) This is an action to recover damages for injury to and conversion of a piano. The facts in short are that plaintiff was the owner of a piano which

defendant undertook to repair, and for which defendant was to be paid $135. But there was a misunderstanding as to the manner in which this sum was to be paid. The plaintiff, Mrs. Martin, understood that it was to be paid in monthly installments, and she offered to pay it in that way, and asked that the piano be returned to her on those terms. But the company insisted that the full amount was due, and it exercised the right to hold the piano until the full amount charged for the repairs was paid. While the piano was thus held by it, a heavy storm of sleet came, and, as explained in the statement of facts, the piano was injured.

The plaintiff contends that the defendant not only claimed the right to hold the piano for the payment of the price of the repairs made on it, but that it held it for an unlawful claim for rent of another piano, and also for a charge for storage which plaintiff did not owe; that in this way it was guilty of an unlawful conversion of the piano. Counsel for plaintiff has filed an admirable brief, discussing the law as applied to that state of facts. His argument would be unanswerable if the facts in the case were as he assumes them to be.

We admit, to quote the language of a decision cited by counsel for appellant, that "a claim to hold the possession of the property and a refusal to deliver it on demand, under and in assertion of a right other than that given by the lien, would be evidence of a conversion." *Hamilton* v. *McLaughlin,* 145 Mass. 20. But after a careful reading of the transcript in this case we do not find that there was any such claim. It is true that the defendant did make a claim against plaintiff for the rent of another piano, and also notified her that, unless the piano was removed by the first of January, storage would be charged. But the evidence does not show that the company held or claimed the right to hold the piano for such charges. The company, as we see the evidence, was holding it for the price of the repairs, and the evidence convinces us that plaintiff could have obtained her piano at any time by paying the $135 due for repairs. The evidence shows that the company was anxious to return it on those terms. But she declined to make this payment on the ground that her contract with the defendant was for a payment by installments. We do not find from the evidence that there was any such contract, though we are satisfied that plaintiff acted in good faith;

for it seems to us that there was a mutual misunderstanding between the parties as to whether the price of the repairs was to be paid in installments or not. Out of that misunderstanding came the refusal to pay by plaintiff, the retention of the piano by defendant, and this lawsuit. Subsequent events show that it would probably have been better for the defendant, in view of this misunderstanding to have yielded a point, and allowed plaintiff to retake her piano and pay for the repairs in installments as she offered to do, but the company was under no legal compulsion to do this. It had the right to hold the piano until the repairs were paid for, and in our opinion it was guilty of no conversion. As plaintiff bases her right to recover on an alleged conversion, we need not discuss the question of whether the injury to the piano was due to the negligence of defendant, though we are of the opinion that no negligence was shown. It results from what we have said that, in our opinion, the plaintiff is not entitled to recover.

The defendant has taken a cross-appeal from the judgment of the chancellor, but we conclude from the statements in the brief of his counsel that the defendant does not insist on that very seriously. According to the statements of counsel for defendant, the decree of the chancellor in this case was in substance, though not in form, a decree by consent—at least so far as defendant is concerned. That being so, defendant has no right to ask us to reverse that decree. If there was error in that decree, it was error invited by defendant. We are therefore of the opinion that the decree of the chancellor, which in effect refused any relief to either party and taxed the costs against the defendant, should be affirmed. The costs of this appeal must be taxed against plaintiff. It is so ordered.

PHILLIPS v. JONES.

Opinion delivered May 14, 1906.

1. STATUTE OF FRAUDS—PART PERFORMANCE.—A bill for specific performance which alleges that plaintiff occupied and formerly owned the land as mortgagor in possession, that while she remained in possession after foreclosure defendant agreed to resell her the land for a stated sum, and that she continued in possession, paid the taxes, made valuable improvements, and paid part of the agreed price, states such part performance as takes the case out of the statute of frauds. (Page 102.)
2. STATUTE OF LIMITATIONS—JUDICIAL SALES.—Where a mortgagee purchased at foreclosure sale, and subsequently contracted to resell the land to the mortgagor, a suit to enforce specific performance of the latter contract is not a suit to recover land sold at judicial sale, within the five years statute of limitation (Kirby's Digest, § 5060). (Page 104.)
3. SAME—PERSON IN POSSESSION.—The five years statute of limitation (Kirby's Digest, § 5060) does not run against one in possession of the land in controversy. (Page 104.)
4. PLEADING—INDEFINITENESS—REMEDY.—A defect in a bill for the specific performance of a verbal sale of land consisting of a failure to allege the time which was agreed upon within which the contract should be performed may be reached by a motion to make the complaint more definite and certain, and not by demurrer. (Page 104.)

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; reversed.

John Hallum, for appellant.

Where the purchaser of lands under a parol agreement has been put in possession, under a part performance of contract, it need not be in writing. Receipt of purchase money in part performance takes the case out of the statute of frauds. 19 Ark. 23; *Ib.* 48; Tiedeman on Eq. Jur. § 296, and authorities cited; *Ib.* § 309. Letters, indorsements, receipts, verbal acknowledgments and admissions are sufficient to take the case out of the statute of frauds. 3 Gratt. 339; 43 Pa. St. 170; 1 John. Ch. 131; 34 N. Y. 312; Washburn, Real Prop. 215. Receipt of part payment creates an implied trust as between the vendor and vendee. 3 Vesey, 707; 1 P. Williams, 322; 33 Beavan, 540; 5 John. Ch. 1; 6 Cowen, 706; 65 Me. 500; 1 John. Ch. 339; 14 Mo. 281; 2

Pick. 29; 16 Mass. 221; 15 Vt. 525; 2 Sumner, 468; 1 Strob. Eq. 363. Neither can avoid the resulting trust. 5 Ark. 497; *Ib.* 419.

W. D. Jones, pro se.

No resulting trust arises in opposition to the clear intention of the parties. It is a question of intention. 10 Am. & Eng. Enc. Law, 13, 14; Perry on Tr. 130; Underhill on Tr. 164 and note 5; 27 Ark. 177; 47 Ark. 111; 40 Ark. 62; 54 Ark. 499. A writing must be of such nature that the party must be believed to have intended to create a trust before it will be construed as such. 9 Am. Dec. 256; 26 Ark. 240. See also 57 Am. Dec. 607. The writing on which the complaint is based is not sufficiently definite to indicate the intention of the parties, and parol proof would not be admissible to aid it. The contract to enforce such demand must be definite as to the purpose for which it is given, the consideration and the description of the property to be conveyed. 51 Ark. 483; 56 Ark. 131; 11 L. R. A. 143.

McCULLOCH, J. This is a suit in equity brought by appellant against appellee to require specific performance of an alleged verbal contract to convey certain real estate, a lot in the city of Pine Bluff. Appellant owned and occupied the real estate in question, and mortgaged it to certain persons as security for a debt of $250, who foreclosed the mortgage in chancery, and appellee purchased the lot for $190 at a sale made by the commissioner of the court. His purchase was confirmed, and a deed was executed by the commissioner and approved by the court. The sale to appellee was confirmed, and deed made on October 12, 1897. Appellant alleges in her complaint herein that appellee, shortly after the conveyance to him of the property by the commissioner, entered into an oral contract with appellant, whereby he agreed that if she "would pay him the amount he had paid out he would cancel the mortgage and reconvey the property to her." That she paid him the sum of $60 on said purchase price, and that he executed to her in writing a receipt for the same, which receipt, bearing date May 16, 1898, is exhibited with the complaint, and that he agreed with her that he would thereafter receive the balance of the principal and interest on the amount paid for the property. That she remained in possession of the property, and made improvements thereon to the value of $25,

paid some of the taxes, and thereafter offered to pay appellee the full amount of said agreed purchase price, but that appellee had refused to accept said sum or to perform his contract. She further alleged that appellee had wrongfully caused her to be ejected from said premises under a writ of unlawful detainer against one Eliza Denny.

The court sustained a demurrer to the complaint, and the plaintiff appealed.

The first and main question presented is: Does the complaint state facts, with reference to the alleged contract of sale of land, sufficient to satisfy the statute of frauds? It is stated, in substance, that appellant occupied and formerly owned the land as mortgagor in possession, that while she remained in possession after foreclosure appellee agreed to sell her the land for a stated sum, and that she continued in possession, made valuable improvements, and paid a part of the agreed price.

It has been held by this court that delivery of possession of land to the vendee under a parol contract of purchase takes the case out of the operation of the statute of frauds. *Pindall* v. *Trevor,* 30 Ark. 249; *Pledger* v. *Garrison,* 42 Ark. 246. It seems to be well settled by the authorities generally that possession alone, without payment or other acts of ownership, is sufficient part performance of an oral contract for the sale of land to sustain a decree for specific performance. Browne, Stat. Frauds, § 467, and cases there cited. But possession alone, in order to be sufficient, must be taken pursuant to the contract and with reference thereto. Where the alleged purchaser is already in possession as tenant or otherwise, and merely continues in possession after making the contract, that alone is not sufficient to take the case out of the operation of the statute. Under those circumstances the possession is referable to the original holding as tenant or otherwise. Browne, Stat. Frauds, § 476.

Consequently, this court held in *Moore* v. *Gordon,* 44 Ark. 334, that where the husband of one of the tenants in common, who purchased the interest of his wife's cotenant under parol contract, had been in possession by virtue of his wife's interest in the land, his continued possession alone was not sufficient to warrant a court of equity in decreeing specific performance, but that the making of substantial improvements on the land was sufficient

to take the contract out of the statute of frauds. The court there said that "possession, to have that effect, must have been taken under the contract, and with a view to it, and in pursuance of its provisions."

While the continued possession, because of the fact that it may be referable to the antecedent right and not necessarily to the new right or estate created by the contract, alone, is insufficient to prevent the operation of the statute, yet, when accompanied by some further acts, such as payment of part of the purchase price or making substantial and valuable improvements which characterize the continued possession and make it referable to the new relation created by the contract, the two together are sufficient to satisfy the statute.

In the recent edition of Pomeroy on Equity Jurisprudence, vol. 6, § 820, it is said that, "as possession must be taken in pursuance of a contract, a mere holding over by a tenant after the expiration of his lease is not sufficient part performance to take the case out of the statute. Where, however, there is a change in the terms of the tenancy, as, for instance, in the amount of rent paid, or where the tenant makes substantial repairs or improvements, such circumstance, in connection with the possession, is sufficient to warrant relief."

Prof. Pomeroy, in his work on the subject of specific performance of contracts (section 124), says: "It is, therefore, now settled, after some expressions of doubt, and with a few conflicting decisions, that possession by a tenant after the expiration of his former term, and payment by him of an increased rate of rent, are together a part performance of a verbal contract for a renewal of the lease. In the like manner, such possession, either before or after the end of the term, and a payment which could not be referred to the old rent, but could be explained on the supposition of a contract, should be part performance of a contract by the lessor to sell and convey the land"—citing Lord Loughborough in *Wills* v. *Stradling,* 3 Ves. 378, and other English cases.

The complaint in this case alleges that the plaintiff remained in possession of land, paid part of the purchase price and a portion of the taxes, and made valuable improvements. These acts, taken together, constituted such part performance as took the case out of the statute of frauds.

It is contended by appellee that the cause of action in the complaint was barred by the five years statute of limitations. This contention can not, for two reasons, be upheld: In the first place, this is not a suit to recover land held under a judicial sale. Appellant is not contesting the validity of the sale. She expressly recognizes its validity and the strength of appellee's title thereunder, but she seeks a performance of appellee's alleged agreement to convey that title to her. In the next place, it is alleged that appellant remained in possession, which prevented the running of the statute against her. The statute of limitation does not run against one in possession of land. *Coleman* v. *Hill,* 44 Ark. 452.

The complaint is defective in failing to allege the time agreed upon within which the contract was to have been performed, but the defect should have been met with a motion to make the complaint more definite and certain. It could not be reached by demurrer, as it was a cause of action defectively stated, and not a failure to state facts sufficient to constitute a cause of action. In the absence of an allegation of a definite time, the law presumes that the contract was to be performed within a reasonable time.

The chancellor erred in sustaining the demurrer, and the decree is reversed, and cause remanded with directions to overrule the same, and for further proceedings.

BATTLE, J., (dissenting.) Section 3654 of Kirby's Digest provides, in part, as follows: "No action shall be brought * * * to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, * * * unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." Courts of equity will, however, enforce a specific performance of a contract within this statute where the parol agreement has been performed by a party to an extent which will place him in a situation which is a fraud upon him, unless the agreement is fully performed. They will not permit the statute, which was designed to prevent frauds, to be made the instrument of fraud. *McNeil* v. *Jones,* 21 Ark. 278; *Terry* v. *Rosell,* 32 Ark. 478; *Johnston* v. *Glancy,* 4 Blackf. 98; *Greenlee*

v. *Greenlee,* 22 Pa. St. 235; 2 Story's Equity Jurisprudence, § § 759, 761; Browne, Statute of Frauds (5 Ed.), § 448; Wood, Statute of Frauds, § § 483, 496.

Judge Story says: "But a more general ground, and that which ought to be the governing rule in cases of this sort, is that nothing is to be considered as a part performance which does not put the party into a situation which is fraud upon him unless the agreement is fully performed." 2 Story's Equity Jurisprudence, § 761.

In *Derr* v. *Ackerman,* 182 Pa. St. 596, the court said: "In order to take a parol contract for the sale of land out of the operation of the statute of frauds, its terms must be shown by full, complete, satisfactory and indubitable proof. The evidence must define the boundaries, and indicate the quantity of the land. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract and at or immediately after the time it was made, the fact that the change of possession was notorious, and the fact that it has been exclusive, continuous and maintained. Also it must show performance or part performance by the vendee which could not be compensated in damages, and such as would make a rescission inequitable and unjust."

Pomeroy on Contracts says: "The acts of part performance must be done in pursuance of the agreement; must unequivocally refer to and result from the agreement; or, in other words, clearly showing that there exists some contract between the parties, they must be exclusively referable thereto; it must appear that they would not have been done except on account thereof, and they must be consistent with the contract alleged. When parol evidence has been admitted to prove the agreement in suit, the acts of part performance must be clearly and exclusively referable to and in pursuance of its terms. Undoubtedly much of the general language found in the case is intended to describe the necessary correspondence between the acts of part performance and the agreement alleged, after it has thus been established by the evidence directly introduced for that purpose. The theory upon which equity proceeds in this branch of its jurisdiction is well established, and, if rightly understood, it will harmonize all the cases and remove all occasion of doubt or confusion. A plaintiff can not,

in the face of the statute, prove a verbal contract by parol evidence, and then show that it has been partly performed. This course of proceeding would be a virtual repeal of the statute. He must first prove acts done by himself, or on his behalf, which point unmistakably to a contract between himself and the defendant, which can not, in the ordinary course of human conduct, be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; and although these acts of part performance can not, *of themselves,* indicate all the terms of the agreement sought to be enforced, they must be consistent with it and in conformity with its provisions when these shall have been shown by the subsequent parol evidence. It follows, from this invariable rule, that acts which do not unmistakably point to a contract existing between the parties, or which can be reasonably accounted for in some other manner than as having been done in pursuance of such a contract, do not constitute a part performance sufficient in any case to take it out of the operation of the statute, even though a verbal agreement has actually been made between the parties. It is for this reason, among others, that payment of the purchase price, in whole or in part, is not of itself a sufficient performance to obviate the statute, because the mere payment of money by one man to another does not, in the ordinary course of human conduct, indicate the existence of a contract between them; the fact of such payment is reasonably explicable in many other ways than as having been done in pursuance of a contract. For a like reason, the mere possession of the premises by a tenant, continued after the expiration of his term, is not a sufficient part performance of a verbal contract to renew the lease or to convey the land, because such possession may be as reasonably and naturally explained by his holding over as by an agreement to renew or to convey; in other words, it does not unequivocally point to the existence of a contract between the parties, but is referable to another cause. The rule is general in its application and fundamental in principle, that acts which are referable to something else than a verbal agreement, and which may be ordinarily otherwise accounted for, do not constitute a sufficient part performance of it." Section 108; Browne, Statute of Frauds (5 Ed.), § 454;

Waterman, Specific Performance, § 261; *Billingslea* v. *Ward,* 33 Md. 48.

"Possession alone of land, under a verbal contract, when delivered to the vendee or lessee, or taken by him with the consent of the vendor or lessor, or with the knowledge which implies such consent, is an act of part performance which takes the case out of the statute of frauds, even without the additional circumstances of the payment of consideration, or the making of improvements. Such possession must be taken and held with the intent of carrying out and executing the agreement; it must be actual, definite and exclusive, in pursuance and consequence of, and exclusively referable to, the contract; must be subsequent in point of time to the contract; and, with the probable exception of a new agreement between a tenant and his landlord, the act of taking possession must be performed after, or at all events simultaneously with, the conclusion of the contract between the parties." Pomeroy on Contracts, § § 115-125; *Moore* v. *Gordon,* 44 Ark. 334; *Sutton* v. *Myrick,* 39 Ark. 424; *Aitkin* v. *Young,* 12 Pa. St. 15; *Christy* v. *Barnhart,* 14 Pa. St. 260; *Pearson* v. *East,* 36 Ind. 27; *Emmel* v. *Hayes,* 102 Mo. 186; *Hutton* v. *Doxsee,* 116 Iowa, 25; *Knoll* v. *Harvey,* 19 Wis. 99; *Mahana* v. *Blunt,* 20 Iowa, 142; *Armstrong* v. *Kattenhorn,* 11 Ohio, 265; *Johnston* v. *Glancy,* 4 Blackf. 98, 99; *Greenlee* v. *Greenlee,* 22 Pa. St. 225-237; *Kaufman* v. *Cook,* 114 Ill. 14; *Barnes* v. *Boston & Maine R. Co.,* 130 Mass. 388; Browne, Statute of Frauds (5 Ed.), § § 472, 476, 477, 478, 480.

In *New Orleans* v. *Gaines,* 138 U. S. 594, the court, in speaking of the possession that is a sufficient part performance of a verbal agreement for the sale of land, and will take it out of the statute of frauds, said: "In short, it must be a new possession *under the contract,* and not merely the continuance of a former possession claimed under a different right of title."

In *Green* v. *Groves,* 109 Ind. 519, the court held that "a verbal contract by a creditor with the wife of his debtor that in consideration that she shall join her husband in a mortgage of real estate belonging to the latter, thus releasing her inchoate interest, he will, upon acquiring title through foreclosure and sale, convey to her a certain part of the property, is a parol contract for the sale of the land within the meaning of the statute of frauds;" and that neither the possession of the wife of the land at and be-

fore the agreement and continued thereafter until and after the complete performance of the contract on her part and the foreclosure of the mortgage, nor the payment of the consideration would take the contract out of the statute of frauds, and entitle her to a specific performance. *Carlisle* v. *Brennan,* 67 Ind. 12, is to the same effect.

In *Peckham* v. *Balch,* 49 Mich. 179, it was held that "a verbal agreement to convey land being void under the statute of frauds, a bill against a wife to compel a conveyance, even though her husband made the agreement and received the consideration with her full knowledge and consent, can not be maintained where there is no such part performance as will take the case out of the statute;" and that, "the complainant being a tenant in common of the property, his continued possession would not be sufficient." See *Mahana* v. *Blunt,* 20 Iowa, 142. In *Wilmer* v. *Farris,* 40 Iowa, 309, it was held that "specific performance will not be enforced of a parol contract for the sale of real estate by one partner to another, where the only change of possession is the withdrawal of the vendor and the continuance of the vendee in possession."

Courts of equity enforce the performance of a verbal contract to sell land, where there has been a part performance, in order to prevent fraud. They interfere only where the contract has been the means of leading a party into a situation which is a fraud upon him, unless the agreement is fully performed. When the vendee was in possession of the land at the time the contract was made, and that possession has been unchanged, he has not been injured or affected by the contract in that respect. Neither would his situation be so changed by the payment of the purchase money as to make the enforcement of the contract by a court of equity necessary to prevent fraud, for he could recover the purchase money and interest (*Johnson* v. *Craig,* 21 Ark. 533); nor would his situation be so changed by making improvements of so little value as to be compensated by the temporary enjoyment of the land (*Moore* v. *Gordon,* 44 Ark. 341). In such cases there is no occasion for the interposition of a court of equity for the protection of the parties or either of them.

Possession by a purchaser, under a verbal contract to sell or convey land, does not, of course, relieve him from the performance of the conditions he is bound to do by the terms of his con-

tract before he will be entitled to a conveyance. It takes his contract out of the operation of the statute of frauds, and no more.

In the case at bar there was a verbal agreement to sell land. The vendee was in possession at the time, and remained in possession; there was no change of possession. She paid a part of the purchase money and a part of the taxes, and made improvements of little value, which were a small compensation for her temporary enjoyment of the land. There was not enough done to take the agreement out of the operation of the statute of frauds.

I think that the decree of the chancery court should be affirmed.

RIDDICK, J., concurs in the dissenting opinion of Judge BATTLE.

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CALHOUN v. MOORE.

Opinion delivered May 14, 1906.

1. ADMINISTRATION—VESTING ESTATE IN WIDOW.—Mansf. Digest, § 3, providing that a decedent's entire estate, not exceeding $300 in value, shall be vested in his widow and children, was repealed by the act of April 1, 1887, providing for an allowance out of decedent's personal estate only. *Wilson* v. *Massie*, 70 Ark. 25, followed. (Page 111.)
2. SAME—An order of the probate court vesting land of a decedent, of value less than $300, in the widow is void. (Page 112.)
2. DEED—CONVEYANCE OF UNASSIGNED DOWER.—A deed of a widow purporting to convey the fee in land in which she holds merely an unassigned right of dower will be taken in equity to convey the latter interest. (Page 112.)
4. STATUTE OF LIMITATIONS—BURDEN OF PROOF.—The burden of proof is on a defendant who pleads the statute of limitations. (Page 112.)

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

L. P. Berry, A. B. Shafer and *Driver & Harrison*, for appellant.

1. Unless upon inspection the decree vesting title discloses on its face want of jurisdiction, it is not subject to collateral attack. 27 Gratt. (Va.), 624, 629; Mitford on Pl. 240.

2. Though the probate court decree were erroneous and voidable, yet it is not void when collaterally called in question. 31 Ind. 444; 30 Mich. 502; 6 Cal. 685; 37 N. Y. 511; 4 Mass. 282; 51 N. W. 261; 5 Ark. 424; 3 Vt. 114; 128 N. Y. 229; 65 Ark. 355; 19 Ark. 499; 87 Mo. 533; 62 Ala. 416; 39 Tex. 579; 107 Ind. 410; 56 Pa. St. 44; 64 Tex. 477; 72 Cal. 53; 26 Fed. 471; 1 Kan. 106.

3. Repeals by implication are not favored. A later act will not operate as a repeal of an earlier one, if by any reasonable construction they can be reconciled. 26 Am. & Eng. Enc. Law (2 Ed.), 720, 721, 726.

4. Appellees' suit having been brought nearly eight years after the deed to appellees, during which time appellant has been left in possession, and nearly thirteen years after the probate decree vesting title in the widow, they are barred. 1 Stew. (Ala.), 81. Appellant was a *bona fide* purchaser for value without notice. 49 Ark. 207.

D. F. Taylor and *J. T. Coston,* for appellee.

1. The statute empowering the probate court to vest in the widow the estate of her deceased husband was amended in 1887 so as to apply to personal estate only. Since this was prior to the vesting order in issue, the decree of the probate court pleaded was a nullity. 70 Ark. 27.

2. On the plea of adverse possession, appellees were all under the disability of coverture or minority, except Mrs. Williams, and as to her the proof fails. The burden of proving adverse possession is upon him who asserts it. 61 Ark. 464; 21 Wall. 487; 57 Ark. 105. Appellant's acts of possession consisted in putting a sawmill on the land and cutting the timber. This is not sufficient to constitute adverse possession and put in motion the statute of limitation. 88 S. W. 567; 68 Ark. 553; 17 Minn. 361; 46 Ala. 335; 92 Ga. 591; 73 Ill. 491; 34 Ky. 634; 62 N. H. 517; 44 N. J. L. 525; 49 N. C. 295; 58 Pa. St. 313; 77 Tenn. 491; 28 W. Va. 34.

McCULLOCH, J. The lands in controversy were owned by

John O. Blackwood, now deceased, and on January 10, 1889, the probate court of Mississippi County made an order reciting that said lands were of less value than $300 and constituted all the estate left by said decedent, and vesting title to the same in Nannie E. Blackwood, the widow of said decedent.

The widow sold, and by deed with full covenants of warranty of title conveyed, the lands to the defendant Calhoun. This suit was commenced in the chancery court of Mississippi County on February 8, 1902, by some of the minor children and heirs of John O. Blackwood against Calhoun to cancel said order of the probate court and the deed executed by Nannie E. Blackwood to defendant as clouds upon their title. Subsequently, on March 6, 1902, Mrs. Sallie Williams, another child of John O. Blackwood, appeared, and upon her own application was joined as a party plaintiff. The defendant answered, asserting the validity of the order of the probate court vesting the title to the lands in his grantor, Mrs. Blackwood, and that defendant had purchased the lands from her in good faith without any knowledge of imperfections in the probate order, and had made valuable improvements, and he also pleaded adverse possession for seven years.

It was admitted at the hearing that all of appellees were under the disability of infancy or coverture. The chancellor decreed one-third of the lands to defendant for the lifetime of the widow, Nannie E. Blackwood, the same being her dower interest which passed under her deed to him, and appointed commissioners to lay the same off, and also decreed to the appellees each one-ninth interest in the lands, and directed said commissioners to lay the same off to them in severalty. The decree was in favor of the defendant upon the plea of adverse possession as to the ninth interest of Mrs. Williams and another of the heirs, Chas. Blackwood, and as to the interest of another heir which defendant had purchased. After confirmation of the report of commissioners allotting the lands in severalty in accordance with the decree, the defendant Calhoun appealed to this court. Mrs. Williams obtained, and has prosecuted here, a cross-appeal from that part of the decree denying her right to recover.

Wilson v. *Massie,* 70 Ark. 25, is decisive of the question that the act of April 1, 1887, repealed the former statute impowering

the probate court to vest the estate of decedent in the widow or children, if the same should be less than the aggregate value of $300, and that the act of 1887, which was in force when the probate order was made, applied only to personal property, and not to real estate left by a decedent. It follows that the probate court was wholly without jurisdiction to render the judgment vesting the property in the widow, and the same was void and of no effect. The judgment being absolutely void, the title remained in the widow and heirs of John O. Blackwood, and the deed subsequently executed by the widow to appellant Calhoun conveyed nothing except, in equity, her unassigned dower. *Rush* v. *Weaver,* 62 Ark. 51. The chancellor was therefore right in so holding, and in canceling both the order of the probate court and the deed from Mrs. Blackwood, in so far as they affected the several interests of appellees.

The chancellor erred, however, in denying the same relief to Mrs. Williams on the ground that her rights were barred by limitation. The proof does not sustain appellant's plea of adverse possession. There is almost a total failure of proof on that subject. The burden was on the defendant to sustain his plea of adverse possession. *Brown* v. *Bocquin,* 57 Ark. 105; *McConnell* v. *Day,* 61 Ark. 464.

The testimony, in its most favorable light to the defendant, only shows that he took some sort of possession as early as the fall of 1895, which was less than seven years before Mrs. Williams asserted her claim by being made a party to the suit. The possession since then is not shown to have been sufficiently definite and notorious to set the statute of limitations in motion.

The decree is reversed and remanded, as to Mrs. Williams, with directions to enter a decree in her favor against the defendant for her one-ninth interest in the land, timber and rents, less improvements, etc., subject to the dower right of the widow, the same as the decree in favor of appellees; the decree in favor of appellees, Emma Moore, Lula Boyles, Wm. W. Blackwood, Belva Blackwood, Dwight Blackwood and John Blackwood is affirmed.

DIXIE COTTON OIL COMPANY *v.* MORRIS.

Opinion delivered May 14, 1906.

1. CORPORATION—FORMATION OF PARTNERSHIP—EVIDENCE.—If a corporation can enter into partnership with individuals for the operation of a business other than named in its charter, where such a venture is foreign to the scope of its ordinary charter powers and to its established business policy, those who assert that such a contract was made by the president of the corporation must be held to prove either express authority from the board of directors or acquiescence in or ratification of the contract sued on, or of similar contracts made by him, on the part of the board of directors or shareholders. (Page 117.)
2. PARTNERSHIP DEBTS—LIABILITY OF RETIRING MEMBER.—Where, upon the retirement of a member of a firm, the name of the firm was changed, and a creditor corporation, through its president, was notified of the change, the retiring member will not be liable for subsequent advances made by the creditor to the firm. (Page 119.)

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

STATEMENT BY THE COURT.

The plaintiff, Dixie Cotton Oil Company, was a Tennessee corporation engaged in the cotton seed oil business, as its name implies, and operated a mill near Little Rock, of which defendant Conley was manager during the period covering the transaction out of which this litigation grew. This action was commenced at law against the defendants, W. N. Morris, G. W. Morris, J. M. Nix and L. H. Conley, as partners, to recover the sum of $4,344.45 alleged to be due on account.

The complaint alleged that W. N. Morris, Nix and Conley were partners under the name of the Morris-Nix Gin Company, and as such became indebted to the plaintiff on open account in the sum of $3,651.65. That in 1901, G. W. Morris bought out Nix's interest in the firm, assuming Nix's liabilities, and the name of the firm was changed to Morris & Co.; and that the latter concern became indebted to the plaintiff in the sum of $692.80 on open account. That Nix was never released from his liability, and, having given no notice of withdrawal from the firm, he is liable for the entire indebtedness.

Nix answered, denying the partnership, denying the indebtedness, and alleging that the plaintiff was a partner in the Mor-

ris-Nix Gin Company and also in the firm of Morris & Company, its interest therein being held in the name of the defendant Conley, who was manager of plaintiff's mill; that the plaintiff and the defendant W. N. Morris purchased all of defendant's interest in the partnership, and assumed the debts. He made his answer a counterclaim, and alleged that the Morris-Nix Gin Company owed him personally the sum of $600 due for an old gin, and for this he prays judgment.

The plaintiff replied, denying the allegations of Nix's counterclaim.

Conley answered, denying that he was a member of the partnership, alleging that he became a member of the Morris-Nix Gin Company and of Morris & Company only as a representative of the plaintiff, and that the planitiff was really the partner.

W. N. Morris answered, denying that he, Nix and Conley were partners under the firm name of the Morris-Nix Gin Company, denying the indebtedness of that company to plaintiff, alleging that the real partner with this defendant and Nix was the Dixie Cotton Oil Company, represented by said Conley by direction of E. S. Proudfit, president of plaintiff.

G. W. Morris answered, setting up the same facts.

On motion of plaintiff the cause was transferred to equity, where a trial upon the pleadings and proof resulted in a decree dismissing the complaint for want of equity as to defendants W. N. Morris, G. W. Morris and J. M. Nix, and in favor of the plaintiff against defendant Conley for recovery of the sum of $4,940.25, from which decree the plaintiff and defendant Conley appealed to this court.

Marshall & Coffman and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. The decree of the chancellor is not sustained, either by the pleading or the proof. This court has held that allegations and proof must correspond, and that proof without allegations is as bad as allegations without proof. 25 Ark. 570; 46 Ark. 96; 29 Ark. 500; 41 Ark. 393; 30 Ark. 612; 49 Ark. 94.

2. The president of a corporation has no power to embark the corporation in a partnership venture. 2 Cook on Corp. § 716; 2 Morawetz on Corp. § 580; 62 Ark. 33, 41.

3. By the terms of the company's charter, it could not enter

into a partnership, even by direction of all the directors. It had no power to enter into a partnership, nor to go into the ginning business. 1 Morawetz on Corp. § 421; 10 Gray, 582; 70 Ga. 509; 121 N. Y. 582. While it is true that where all the stockholders of a corporation know that it has entered into an *ultra vires* venture, and yet receive the profits, they will not be allowed to repudiate it, that case is not made out here. No one connected with the corporation knew of it save Proudfit, and the corporation derived no profit from it. 14 Wall. 577; 2 Morawetz on Corp. § 581.

Mehaffy & Armistead, for appellees, W. N. and G. W. Morris.

The facts show that the president of the plaintiff corporation advanced the money represented in the account in suit, out of the corporation's treasury, to Conley for his investment in the partnership. The court properly awarded judgment against the person to whom the money was advanced. In actions against persons jointly and severally liable judgment may be rendered against one or more, according to the proof. 11 N. Y. 294; 15 Barb. 525. As to variance and the power of the court to award such recovery as seems just, see 67 Ill. App. 678; 154 N. Y. 648; 51 N. Y. Sup. 42; Kirby's Digest, § § 6140, 6141. Where no objection is made to evidence, the complaint must be considered as if amended to conform to it. 40 Ark. 352; 62 Ark. 265; 65 Ark. 422; 67 Ark. 426; 43 Ark. 451.

W. E. Atkinson, for appellee, Nix.

McCULLOCH, J., (after stating the facts.) The first and main question presented is whether or not the plaintiff corporation could, as a matter of law, become a copartner with the defendants in the gin business, or did, as a matter of fact, enter into a partnership contract with them.

The evidence on this point is derived almost entirely from the testimony of defendant Conley as to his alleged agreement and transaction with E. S. Proudfit, the president of plaintiff corporation, and certain correspondence between them, which was read in evidence. Proudfit died before the commencement of this action, and Conley's version of the transaction between them is uncontradicted, except by circumstances and by contradictory

statements alleged to have been made by him concerning the transaction. He testified, in substance, that while he was manager of plaintiff's mill and business at Little Rock, defendant W. N. Morris came to him with a proposition to put up a gin at Scott's Station, near Little Rock, and that he (Conley) went to Memphis, and laid the proposition before Proudfit, and advised him to go into the arrangement, so as to control the purchase of seed at that place. That Proudfit acceded to the proposition, and decided to go into partnership with Morris and Nix, taking a third interest, but, in order to conceal from competitors the interest of the plaintiff therein, it was decided to conduct the transaction in his (Conley's) name, and it was accordingly done. Articles of partnership were drawn up and signed by Morris, Nix and Conley, and the gin business was operated through two seasons, the first season being profitable, but they lost money the last season.

The advances of money made by plaintiff were through the Little Rock office, and were charged on the books of the Morris-Nix Gin Company and Morris & Company, the two accounts on the books aggregating $12,246.18. After deducting credits, the accounts show debit balances against the defendants in the amounts sued for.

Defendants, in corroboration of Conley's statement that Proudfit agreed to go into the partnership arrangement, introduced in evidence a letter from Proudfit to Conley bearing date a few months prior to date of articles of copartnership between defendants, containing the following sentence:

"If you can get a good ginning point, we would not mind going, say, one-third, provided the managers are responsible people."

On the other hand, Conley admits that he never, until after the commencement of this suit, informed any of the other officers of plaintiff company or persons interested in its affairs, or even the bookkeeper in the Little Rock office of the company, of this partnership arrangement between the plaintiff company and the defendants.

Mr. Falls, the owner of about half of the capital stock of plaintiff company, who succeeded Proudfit as president during the pendency of the alleged partnership, testified that he frequently talked with Conley about the indebtedness of Morris-

Nix Gin Company to plaintiff, and had a great deal of correspondence with him concerning the same subject, and that the latter never spoke or wrote any intimation that plaintiff was interested as partner in the gin business. He further testified that neither Proudfit nor Conley were authorized by the board of directors to enter into any partnership or to embark in the gin business.

J. A. Austin, Jr., secretary of plaintiff company, testified that he occupied the same office with Proudfit during business hours, and was generally present during conferences between Proudfit and Conley concerning the affairs of the company, but never heard anything said about a partnership in the gin business. On the contrary, he testified that Conley told him that he owned an interest in this gin, and "considered it very foolish to have gone into it to help the affairs of the Dixie Cotton Oil Company, and assumed the responsibility himself."

Mr. Manire, the bookkeeper in the Little Rock office of plaintiff, testified that he kept the account against Morris-Nix Gin Company under Conley's direction, and that the latter never informed him that plaintiff was interested in the gin business, otherwise than as creditor, but frequently discussed the gin business as a personal venture of his own.

Waiving a discussion of the power of the plaintiff corporation to enter into a contract of copartnership with individuals for the operation of a business other than that named in its charter, it can safely be said in this case that such a venture is so foreign to the scope of its ordinary charter powers and to its established business policy, as shown by the evidence, that those who assert the existence of such a contract made by Proudfit, the president of the company, must be held to some proof of his authority to enter into such contract, either by express direction of the board of directors or by acquiescence in or ratification of this or similar contracts made by him on the part of the directors or shareholders. No such proof appears in the record. No authority was ever given by the board of directors, no similar contract was ever made by the corporation or its officers in its name, and the existence of this alleged contract was never brought to the attention of the directors or stockholders during its pendency. Therefore there could have been no ratification of such contract, if it was ever made by Proudfit.

It does appear, however, that Proudfit was given the fullest latitude in making advances of money directly and indirectly in order to procure seed for the mill. It is shown, in the first place, that getting seed to crush was the life of the mill business. Mr. Falls testified that the stock in plaintiff corporation was held by members of the Proudfit and Falls families, Proudfit controlling about one-half and he (Falls) the other half, and that the affairs of the company were managed as a partnership; that he and Proudfit conferred with each other about the operation of the business, but never questioned the acts of each other. Whatever one did the other acquiesced in. He testified further that both Proudfit as president of the corporation and Conley as manager had authority to advance money to ginners and others for the purpose of getting seed, and that his understanding was that Proudfit advanced money to Conley to go into this gin business. It is true he stated further that he considered it an individual loan made by Proudfit, but it was nevertheless a fact that the loan was made with funds of the corporation, and the defendants Morris and Nix can not be held responsible for money loaned by Proudfit to Conley because funds of the corporation were used for that purpose.

It follows, therefore, that Morris and Nix were not liable to plaintiff for money loaned or advanced to Conley. They did not borrow the money nor agree to repay it. They went into the partnership agreement with Conley in good faith, and are not liable for the amount of his (Conley's) contribution to the capital stock of the copartnership, regardless of the source whence the money came. Conley alone was responsible to plaintiff for that, and the chancellor was right in so holding. Nor does the fact that the money was charged to the copartnership on the books of plaintiff make them liable. They were not cognizant of the way in which the account was kept on plaintiff's books, and were not chargeable with knowledge of that fact. But this only applies to the amount advanced to Conley and contributed by him to the capital stock of the copartnership. All amounts advanced in excess of such contributions were made to the copartnership as advances on seed, and must be so treated. The account shows that a large part of the same was for money ad-

vanced on seed. The partners are each and all liable to plaintiff for that part of the account.

The result works out as follows: Of the sum of $3,651.65 claimed by the plaintiff against the Morris-Nix Gin Company the sum of $2,493.83 represents the contribution of Conley to the capital stock of the copartnership. Conley alone is liable for that, and the other members of the firm are entitled to credit for that sum. W. N. Morris testified that that was the amount contributed to the capital of the firm by each partner, and his testimony is not contradicted.

The sum of $150 charged to the firm on the account as paid to Nix as part of the price of his interest on retirement from the firm also represents a part of Conley's contribution to the capital, and the other members are entitled to credit for that. Conley testified that the purchase of the Nix interest was agreed to by Proudfit. It is true, he says, that Proudfit was not then president of plaintiff corporation, but he also says that he was referred to Proudfit by Falls, who was then president. We think that his testimony, with that of Falls, is sufficient to establish Proudfit's authority still to make contracts for advances, notwithstanding he was not president.

Conley testified that he delivered to plaintiff, to cover the amount paid to Nix, notes of G. W. Morris, to whom the Nix interest was subsequently sold. The sum of $1,000 charged on the account is shown to have been drawn by Conley individually, and for which the firm was not liable. It was improperly charged to the firm, and must be deducted. This makes a total of $3,643.83 for which the defendants are entitled to credit, and leaves a balance of $7.82, for which the firm composed of W. N. Morris, Nix and Conley are liable to plaintiff.

The firm of W. N. Morris & Company, composed of W. N. Morris, G. W. Morris and Conley, are liable to plaintiff for the account against that firm, amounting to the sum of $692.80, with interest at 6 per cent. per annum from date of the commencement of this suit, and for which plaintiff should have had a decree. Nix had retired from the copartnership before this debt was contracted. The name of the firm was changed, and Conley, the manager of plaintiff's

business who made the advances, as well as Proudfit, was informed of his retirement.

The chancellor, therefore, erred in dismissing the complaint as to defendants W. N. Morris, G. W. Morris and Nix; and the decree, to that extent, must be reversed.

The finding of the chancellor that Conley's copartnership contract was an individual venture, and not merely as a representative of the plaintiff, and that the advances made to him by plaintiff were to be repaid, is sustained by a preponderance of the testimony, and the decree against Conley is affirmed.

The decree dismissing the complaint against W. N. Morris, W. G. Morris and J. M. Nix is reversed, and the cause remanded with directions to enter a decree against them in accordance with this opinion. But the amount found to be due by Nix is relatively too small, considering the amount of the account sued on and the involved nature of the demand, to justify a decree against him for costs. The costs below, as well as the costs of appeal, will be adjudged against the other defendants.

HILL, C. J., concurs in both the judgment and opinion in all matters except affirmance of the decree against Conley. As to that he concurs in the judgment for the reason that Conley has not prosecuted his appeal.

NASH v. STATE.

Opinion delivered May 28, 1906.

1. INDICTMENT—IMPEACHMENT BY GRAND JURY.—To admit the testimony of the grand jurors who presented an indictment to show that only eleven of their number voted in favor of finding a true bill contravenes the statute requiring secrecy in grand jury proceedings. (Page 122.)
2. SAME—PRESENTMENT.—The presentment of an indictment by the grand jury in open court is evidence of their concurrence which can not be overcome by evidence from the members of that body. (Page 122.)
3. TRIAL—INSTRUCTION—ASSUMING FACTS.—An instruction in a murder case that defendant could not justify the killing by evidence that,

after he fired the fatal shot, the friends and relatives of deceased fired upon him, and that the acts of deceased which would give defendant the right to kill his assailant in self-defense must have occurred before he fired the fatal shot, was not objectionable as assuming facts, instead of stating them hypothetically. (Page 122.)

Appeal from Desha Circuit Court; *Antonio B. Grace,* Judge; affirmed.

X. O. Pindall and *Campbell & Stevenson,* for appellant.

1. The court erred in excluding testimony of members of the grand jury to show that the finding of the indictment was concurred in by only eleven of their number. Notwithstanding the former decision, appellant again presses this question, and urges that since it is a question purely of practice and of criminal procedure, the court is not bound by the rule of *stare decisis.* 10 Ark. 289. The statute definitely fixes the number of grand jurors who must concur in the finding of an indictment. Kirby's Digest, § § 2223, 2224. The concurrence of twelve members of the grand jury is a condition precedent to the existence of any indictment. The prohibition of the statute (Kirby's Digest, § 2207) extends only to prevent jurors from disclosing who voted yea or nay on an indictment, but it is competent to testify as to what *number* voted for and against an indictment, though it would not be competent to go further and show how any one voted. 4 Gr. (Me.), 380; 36 Me. 128; 14 Pac. 768; 6 Abb. N. Cas. 33; 53 Ala. 481; 83 N. C. 595; 1 Greenleaf, Ev. § 252. The statute prohibits any person whatever, except the members of the grand jury, being present when they are deliberating or voting on a charge. The former opinion is therefor inconsistent in recognizing the right to disprove the concurrence of twelve in finding an indictment, but says that this may not be done by the evidence of a member of the grand jury. 73 Ark. 399, 406.

2. The court erred in giving instruction numbered 15. This instruction, abstractly correct, ignores defendant's plea of justification. It makes him out the aggressor, whereas the whole theory of his evidence was that he was first attacked.

3. The evidence does not sustain a verdict of guilty of murder in the first degree.

This court should reduce the sentence to a lesser degree of homicide. 70 Ark. 610; 71 Ark. 459.

Robert L. Rogers, Attorney General, and G. W. Hendricks, for appellee.

1. This court has already decided appellant's objection to the finding of the indictment. 73 Ark. 399.

2. It was the province of the jury to pass upon the weight of the testimony. They have done so adversely to the appellant, and the evidence sustains the verdict.

HILL, C. J. This is an appeal from a second conviction of Martin Nash for murder in the first degree, the first conviction having been reversed by this court on December 24, 1904. The opinion may be found in 73 Ark. 399 (*Nash* v. *State*). The facts of the killing of James C. Cross, Jr., by appellant are therein set forth, and substantially the same evidence was adduced on this trial.

1. The first error assigned by appellant is the refusal of the court to allow the appellant to introduce as witnesses members of the grand jury which found the indictment, in order to show by them that the finding of the indictment was concurred in by only eleven of their members. In somewhat different form, but in essentials, the same question was passed upon when the case was first here. There is a conflict in the authorities on this subject. This court adopted the view that the admission of such evidence contravenes the statutes requiring secrecy of grand jury proceedings, and that the presentment of the indictment by the grand jury in open court is evidence of their concurrence, which can not be overcome by evidence from the members of that body, if at all. The court finds no reason to change that holding.

2. The appellant contends that the following instruction is erroneous:

"The jury are instructed that the defendant can not justify the killing of J. C. Cross, Jr., by evidence showing that, after he had fired the fatal shot and had killed J. C. Cross, Jr., others, the friends or relatives of J. C. Cross, Jr., did fire upon and wound him. The acts of the deceased, or other persons, which would give the defendant the right to kill his assailant in self defense must have occurred or existed before he fired the fatal shot, and not afterwards." The objections urged are that the instruction assumes facts, instead of stating them hypothetically, and ex-

cludes the appellant's theory of justification. While the instruction is not happily worded, yet it is reasonably clear that no facts are assumed nor proper defenses excluded. The court in this and several other instructions was presenting various phases of the testimony hypothetically, in order to advise the jury of the effect of each. This happened to be one presenting a phase against appellant. In similar hypothetical statements he presented phases favoring appellant. There is no error in this instruction.

3. The last and chief contention of appellant is that the evidence does not sustain a conviction for murder in the first degree.

The State's evidence shows these facts: The appellant had a previous difficulty with Col. Cross, the father of the victim; and he (appellant) came to the steamboat landing to meet the steamboat at the Cross landing armed with a shotgun. Col. Cross assumed from his manner and carrying the shotgun that Nash was seeking trouble with him or his sons, and evidently became worked up over it. Nash was leaving the landing, but going a route which Col. Cross and his sons would take when they returned home, and not the route directly to his own home. Col. Cross called to him when he was near the gate going out of the landing inclosure: "Hold on there, Martin Nash. What did you bring that shotgun for?" Nash immediately wheeled, and said: "I did not bring it for you," and fired before he finished the sentence. The shot instantly killed young Cross, who was near by his father. Col. Cross's testimony is strongly corrobated. While, on the other hand, appellant testified that Col. Cross and his party opened fire first and wounded him, and he shot only after several shots were fired at him. His testimony was also strongly corroborated, and this conflict has gone to the jury, and been settled against appellant. The evidence which comes here accredited by the verdict is sufficient to sustain the conviction of murder in the first degree, and the judgment is affirmed.

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BRACEY v. ST. LOUIS, SAN FRANCISCO & NEW ORLEANS RAILROAD COMPANY.

Opinion delivered May 28, 1906.

EMINENT DOMAIN—DAMAGES.—In a suit by a railroad company to condemn a right of way along a street abutting alongside of defendant's home, defendant is not entitled to prove that another railroad, which had previously been built in front of such home, by reason of the construction of the plaintiff's road, would be compelled to stop all of its trains in front of defendant's home, and to ring bells and sound whistles, as all present and future damages to flow from the operation of such railroad were compensated at the time the right of way in front of defendant's home was acquired.

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

Scott & Head, for appellant.

1. Whether a verdict be so excessively large or excessively small as to shock one's sense of justice, it ought to be set aside. 10 Ark. 491; 2 Ark. 360; 5 Ark. 407; 6 Ark. 86; 10 Ark. 638; 39 Ark. 491; 9 Ark. 394.

2. The court erred in its first instruction given at request of appellee as to the measure of damages. 54 Ark. 140. Its second instruction given for appellee was erroneous in withdrawing from consideration any damages suffered by appellant in common with other property owners on Vine Street. 73 Ark. 1.

3. The court erred in excluding testimony as to what effect the building of appellee's road across that of the Iron Mountain Railway had upon the latter in the way of causing more noise, etc.

T. C. Jobe and *Glass, Estes & King,* for appellee.

1. If a verdict is either so excessively large or small as to shock the sense of justice, it ought to be set aside; but in this case, aside from the damages done to some trees, the weight of testimony is that appellant's property, for use as a home, has not been damaged, but improved. The jury have determined this question, and their verdict will not be disturbed. 42 Ark. 528; 41 Ark. 435.

2. There was no error in appellee's first instruction. 39

Ark. 170; 41 Ark. 435; 21 Ark. 357; 23 Ark. 115; 48 Ark. 396; 16 Ark. 628. Nor in the second instruction for appellee. *Supra;* 24 Ark. 264; 66 S. W. 324; *Ib.* 1090.

3. There was no error in excluding testimony as to what effect the building of appellee's road across that of the Iron Mountain had upon the latter in the way of causing noise, etc.

HILL, C. J. Mrs. Bracey owned a handsome and comfortable home in the town of Hope, which had been erected a few years ago by her late husband. The St. Louis, Iron Mountain & Southern Railway main and side tracks were laid in the street just in front of her home. The appellee road brought suit against Mrs. Bracey to condemn her rights as abutting owner in Vine Street, which was east of her residence and at right angles to the street upon which the Iron Mountain tracks were already laid. This is an appeal by Mrs. Bracey from a judgment assessing her damages at $100.

The first question urged is that the verdict is so shockingly against the evidence that it ought to be set aside. The appellee company, when it constructed its road in Vine Street, was compelled to and did grade and gravel the street and build concrete walks and, where necessary, retaining walls.

There was substantial testimony that the construction of the railroad in Vine Street had not damaged the property. Mrs. Bracey showed an expense item of $59.82 for replacing a fence caused by the excavation for the railroad, and showed the destruction of three shade trees. The jury evidently by their verdict intended to compensate her for these items, and find against her on the other questions. It is true that the evidence on behalf of Mrs. Bracey showed very marked depreciation of value in the property on account of this road. The evidence is apparently candid, is reasonable of itself, and it is strange that it did not commend itself to the jury; but it did not, and the jury accepted the other evidence, part of which was from citizens obligated to pay the railroad company for the money it had to expend for right of way through the town. The evidence of the railroad company's witnesses and these interested parties is sufficient, if believed, to sustain the verdict, and the jury has said it does believe them, and that is the end of it.

The appellant offered to show that, by reason of the con-

struction of this road along Vine Street, the Iron Mountain road in front of her house had become an added nuisance in this way: it was compelled to stop all of its numerous trains right in front of her house, was compelled to ring bells and blow whistles, which it did not do prior to this crossing of another road, which compelled this additional action on its part. This additional inconvenience and annoyance (and evidently it is no inconsiderable matter) is caused solely by the statute of the State requiring such stoppage and signals at the point of intersection of another road. The appellee road is responsible for all such damage which its operation may occasion, but is not responsible for that of the other road. When the Iron Mountain's right of way was acquired in front of this house, then compensation was made, or an opportunity had for compensation to be made, for all present and future damages to flow from the operation of the road in the due course of its business. It is part of the due course of a road's operation to make such stops and give such signals as the law or good railroading may require, and all annoyance, inconvenience and injury from such an incident of railroad operation can be and should be compensated at the time of the acquisition of the right of way. When once acquired, then the railroad may lawfully use it in any way which good service and proper conduct of its affairs require, and for such conduct there is no resulting damage to the abutting property owner. See Lewis on Eminent Domain, § 151a; *Little Rock & Ft. S. Ry. Co.* v. *Greer,* 77 Ark. 387.

The court was right in excluding evidence of the increased damages from the Iron Mountain road. Some other matters are presented, but none of moment, and, finding no error, the judgment is affirmed.

BATTLE, J., being related to Mrs. Bracey, was disqualified, and did not participate.

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SULLINS v. STATE.

Opinion delivered May 28, 1906.

1. GRAND JURY—CHALLENGE.—It is not a ground of challenge of a member of the grand jury, in favor of one confined in jail on a charge of murder, that such member served on the coroner's jury which investigated the killing of deceased, or that his name was indorsed on the indictment as a witness for the State, unless he has been "summoned or bound in a recognizance" as a witness for the State, as required by Kirby's Digest, § 2220. (Page 130.)
2. INDICTMENT—COMPETENCY OF GRAND JURY—CHALLENGE.—An indictment will not be quashed because the defendant was confined in jail when the grand jury was impaneled, and was given no opportunity to object to the competency of any member thereof, if he fails to show wherein the lack of such opportunity worked to his prejudice. (Page 130.)
3. JUROR—DISQUALIFICATION BY OPINION.—A juror is not disqualified because he entertains an opinion, based on rumor or from reading newspapers, which it would take evidence to remove, if, notwithstanding such opinion, he is able to try the case on the evidence only. (Page 131.)
4. SAME.—While great weight is attached to the finding of the trial judge that a juror is competent, it was error to find that a juror in a murder case was not disqualified who stated that he had formed an opinion from reading a report of the homicide in a newspaper written by his brother-in-law, who was a witness for the State, and in whom he had confidence, and that it would take evidence to remove such opinion. (Page 133.)
5. SAME—OVERRULING OF CHALLENGE—PREJUDICE.—Where a challenge to a particular juror was improperly overruled, and defendant was compelled to exhaust his peremptory challenges before the panel was completed, there arises a *prima facie* presumption of prejudice which may be removed by showing that under the undisputed facts the verdict could not have been different from what it was. (Page 133.)
6. APPEAL—PREJUDICIAL ERROR—REDUCTION OF PUNISHMENT.—Where the only possible prejudice caused by an error of the court can be removed on appeal by reducing the punishment from murder in the second degree to manslaughter, an order to that effect, with the assent of the Attorney General, will be entered. (Page 135.)

Appeal from Pope Circuit Court; *William L. Moose,* Judge; affirmed.

STATEMENT OF FACTS.

In September, 1905, Jesse Sullins killed Sam Ratcliff in Pope

County, Arkansas, by stabbing him with a knife. Sullins was indicted for murder in the first degree. In selecting the jury to try the case M. P. Hanks was called for examination concerning his qualifications to serve on the jury, and gave answers to questions propounded to him as follows:

"Q. Have you formed an opinion as to the guilt or innocence of the defendant?"

"A. I suppose I have."

"Q. That is not such an opinion as would prevent you from going into the jury box and rendering a verdict by what the testimony shows?"

"A. No, I think not."

"Q. You would be governed by the law and the testimony, would you not?"

"A. Yes, I think so."

"Q. You have not talked with any of the witnesses about it, have you?"

"A. No, sir; I don't think so. All I saw was in the paper and what came from rumor. I am a brother-in-law of Will Turner, a State's witness, and Mr. Turner is a man I have confidence in and rely on his statements, and he wrote the statement of the killing in the *Chronicle*. Mr. Turner is my brother-in-law, and is the editor of the *Atkins Chronicle*, and the statement in that paper created an impression in my mind, and I have that opinion now, and it would take testimony to remove it."

The defendant exhausted all his challenges before the jury was complete. The other facts are sufficiently stated in the opinion.

The defendant was convicted of murder in the second degree, and sentenced to 21 years in the State penitentiary. His motion for new trial being overruled, he appealed.

Brooks & Hays, for appellant.

1. Appellant, being confined in the county jail, was entitled to be present when the grand jury was impaneled and before they were sworn. Kirby's Digest, § 2220. The record must affirmatively show the presence of the defendant at every substantial step. 24 Ark. 620; 44 Ark. 331; 69 Ark. 189.

2. It is error to hold as qualified jurors who on their *voir*

dire state that they have formed an opinion, even though they state that they can give the defendant a fair and impartial trial. 45 Ark. 165; 56 Ark. 402. The modification of this rule in 69 Ark. 322 is but slight, and, when applied to the facts in this case, the defendant is entitled to a new trial. See 69 S. W. 774. After eleven jurors had been accepted, and defendant had exhausted nineteen of his challenges, when the court of his own motion excused a juror, it was error to deny appellant another challenge for the juror excused. 1 Thomp. on Trials, § 90.

3. When in his opening statement the prosecuting attorney, speaking of the defendant, said: "The defendant, with blood in his eye and murder in his heart, took the life of a fellow citizen, and the defendant is now interposing an *imaginary defense,*" the defendant objected, but the court refused to reprimand counsel. Such language necessarily prejudiced the jury against the defendant and any defense he might interpose. 65 Ark. 389; 65 Ark. 475; 67 Ark. 365; 66 Ark. 16; 60 S. W. 557.

4. No sufficient showing was made of diligence to procure the attendance of the witness Warner. Neither was it shown that the witness was dead or out of the jurisdiction of the court. It was error to permit his statement to be read. Art. 2, sec. 10, Const.; 47 Ark. 180; 38 Ark. 304; 40 Ark. 454; 29 Ark. 17.

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

1. Each juror answered that, although he had an opinion as to defendant's guilt or innocence, he would be governed by the law and evidence, except one, to whom the question was not propounded. If defendant desired to have him excused for cause, he should have asked the question himself. He can not complain now, if he preferred to challenge the juror peremptorily. 40 Ark. 515; 20 Ark. 36; 59 Ark. 132. Jurors are competent, notwithstanding they may have formed opinions from rumors or newspaper reports, if they say on *voir dire* that they can give the defendant a fair trial, based on the law and the evidence. 40 Ark. 451; 47 Ark. 180.

2. There was no error in overruling the motion to quash the indictment. 73 Ark. 399. Having expressed an opinion that the defendant is guilty does not disqualify one from serv-

ing on the grand jury. Clark's Crim. Proc. 120; 157 Mass. 516.

3. Warner's statement was properly admitted. It was shown that he had disappeared, and his whereabouts were unknown, and also that the statement was taken down, read to, and signed by the witness in the presence of defendant and his attorneys. 33 Ark. 540; 40 Ark. 461; 47 Ark. 185.

4. The prosecuting attorney's argument could not have prejudiced the jury, since they returned a verdict for murder in the second degree, whereas there was evidence to support a verdict for the higher crime. 71 Ark. 406.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment of murder in the second degree, sentencing the defendant to 21 years confinement in the State penitentiary.

The first question presented was raised by the motion to quash the indictment, which was overruled by the circuit court. The motion set up that defendant was confined in the jail while the grand jury which found the indictment was being impaneled, and that he was given no opportunity to object to the competency of any member thereof. He further alleged that W. F. Turner, the foreman of the grand jury, had previously served on the coroner's jury to investigate the cause of the death of Sam Ratcliff, and that the coroner's jury had returned a verdict holding the defendant for the murder of Ratcliff; that Turner's name was indorsed on the indictment as a witness for the State, and that for the reasons stated he was not competent to serve on the grand jury, and that defendant would have challenged him had opportunity been given to do so. The statute of this State says that every person held to answer a criminal charge may object to the competency of any one summoned to serve as a grand juror on the ground that "he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been summoned or bound in a recognizance as such; and, if such objection be established, the person so challenged shall be set aside." Kirby's Digest, § 2220. Now, the defendant does not claim that Turner was the prosecutor or complainant against him. His challenge is based on the fact that Turner had served on the coroner's jury which investigated the killing of Ratcliff, and on the further fact

that his name was indorsed on the indictment as a witness for the State. But the fact that he had served on the coroner's jury is not under the statute a ground of challenge to a grand juror, nor is the fact that he was a witness on the part of the State cause for such challenge unless he has been already "summoned or bound in a recognizance" as such witness at the time of such challenge. As it was not shown that Turner had been summoned or entered into recognizance to appear as a witness, it is plain that defendant had, under the statute, no ground of challenge against Turner as a member of the grand jury, and that the failure to give him an opportunity to challenge worked no prejudice to him. The motion to quash was therefore properly overruled.

The next question raised relates to the ruling of the trial judge on questions concerning the conpetency of certain persons to serve as jurors on the trial of the case. A number of the regular jurors and talesmen stated on examination that they had formed opinions concerning the guilt or innocence of defendant that it would take evidence to remove. But on further examination it was shown that the opinions of these jurors were formed from rumor or from reading newspapers only, and were not such as to disqualify them from serving on the jury. We attach little importance to their statements that it would take evidence to remove the opinions held by them; for, if one has an opinion of any kind, it is natural that it should take evidence of some kind to remove it. That would be true of an opinion formed from rumor merely, but our statute expressly provides that such an opinion shall be no ground for challenge. Kirby's Digest, § 2366. "It is a matter of common knowledge that we all form opinions from rumor, and from reading newspapers, which we retain until we hear another version of the matter, or until time, or forgetfulness, or something, has removed them from our minds. If one called for examination as a juror should have an opinion of that kind concerning the case, however slight the importance he attached to it, he yet might truthfully say that, if put on the jury, it would remain on his mind until he heard something to the contrary—in other words, that it would take evidence to remove it. It does not by any means follow that he would, if placed on the jury, be influenced by such opinion, or allow it to take the place

of evidence." *Hardin* v. *State,* 66 Ark. 53. The presumption should be that when one is placed on the jury and hears direct testimony as to the facts of a case, his previous opinion, formed from rumor merely, will be disregarded entirely, and the case tried on the evidence only. If, however, the examination shows that the opinion of the juror is a fixed opinion, and one not likely to yield to the evidence, and of a kind to affect his judgment of the case, he should be discharged, whether his opinion was formed from rumor or not.

In this case the facts brought out on examination were not sufficient to overturn the finding of the circuit judge that these jurors were unbiased and competent to serve on the jury, except as to one of them. The examination of M. P. Hanks convinces us that the opinion held by him was such as to disqualify him from service on the jury. It has been decided by this court that an opinion formed, not from rumor only, but from talking with witnesses who claimed to know the facts disqualifies a juror. *Caldwell* v. *State,* 69 Ark. 322. Now, by reference to the statement of facts, it will be seen that, while Hanks testified that he had not talked with any of the witnesses in the case, he states that his opinion was formed from reading a report of the homicide in a newspaper written by Will Turner, his brother-in-law, who was also a witness for the State. The juror stated that he had confidence in his brother-in-law, and relied on his statement published in the paper, and formed an opinion from reading it, which opinion he still held, and which it would take evidence to remove. It is true that this juror stated that he did not think the opinion entertained by him would prevent him from rendering a verdict in accordance with the evidence, and that he thought he would be governed by the testimony. But, as the juror knew that his brother-in-law was a witness for the State, an opinion formed from reading an article written by him was, in effect, an opinion based on the statement of a witness. Ordinarily, opinions formed from newspaper reports do not disqualify, but when the author of the report is known to the juror as a witness in the case, and is a person in whom he has confidence, then an opinion formed from reading his statement disqualifies, just as an opinion formed from talking with such witness would disqualify. In other words, if an opinion formed from talking with one known

to be a witness disqualifies, then, an opinion formed from reading a written report of the facts of the homicide made by one known to be a witness and in whom the juror has confidence must also disqualify, because in each case the juror knows that the statement on which he bases his opinion is not a mere rumor but a statement of the facts by a witness.

We are aware that great weight should be attached to the finding of the trial judge that a juror is competent, as he has the juror before him, and is therefore better able to judge of his impartiality and freedom from bias than we are. *Hardin* v. *State,* 66 Ark. 53. For that reason we have felt some hesitation in differing with the trial judge as to the competency of this juror, though, after consideration of the question, we are of the opinion that as to him the circuit court erred in refusing to sustain the challenge for cause.

There are other points discussed, but with the exception noticed we find no error in the rulings of the court, and the only other question necessary to determine is whether the refusal of the court to sustain a challenge for cause to a juror requires that the judgment of conviction should be reversed. Now, the record shows that this juror did not sit in the trial of the case, for, on his challenge for cause being overruled, the juror was peremptorily challenged by the defendant. No one shown to have any disqualifying opinion or bias against the defendant was allowed to sit on the case. The only effect of the ruling of the court was to deprive the defendant of one of his 20 peremptory challenges allowed by statute. This error, under our decisions, makes out a *prima facie* case of prejudice. But it was not such a radical disregard of the rights of the defendant as to vitiate the whole trial. For instance, if the trial judge had compelled the defendant to submit to a trial before eleven instead of twelve jurors, then, however clear the guilt of the defendant, it would, in the absence of a plea of guilty on his part, be our duty to reverse the judgment and remand the case for a new trial, even though the defendant had admitted his guilt on the stand, for in that case he would have had no trial by a jury, such as the law recognizes. But in this case, as we have before stated, the defendant challenged the objectionable juror, and had a trial before a duly qualified and impartial jury. Many learned courts hold that in

such case there is no prejudice, and that the error of the court in passing on the qualification of a juror who did not sit on the case is no ground of reversal. *Carthaus* v. *State,* 78 Wis. 560; *O'Neil* v. *Lake Superior Iron Company,* 67 Mich. 560; *Stewart* v. *State,* 13 Ark. 742; 12 Enc. Plead. & Prac. 506-508; 12 Cyc. 866.

It was so held by this court in the case of *Stewart* v. *State,* above cited, but later cases hold that prejudice will be presumed when the defendant exhausts his peremptory challenges before the panel is completed. But we think that, as in the case of other errors, this *prima facie* presumption may be removed by showing that under the undisputed facts the verdict could not have been different from what it was. For instance, if not only the undisputed evidence on the part of the State, but also the testimony of the defendant himself, clearly shows the facts which make out the crime, then we think this court would not be justified in setting the conviction aside for such an error, for under such a state of facts the verdict would have been the same had the case been tried by any other unbiased and impartial jury.

Now, that is the case here, so far as the guilt of the defendant is concerned, for his own testimony shows that the killing of Ratcliff was neither necessary nor excusable on his part. The evidence in the case is very fully stated in the separate opinion of the Chief Justice, and we shall only briefly refer to the facts here.

On the day of the tragedy Ratcliff and one Warner had obtained a jug of whisky through the express company in the town of Atkins. Before leaving the town they opened the jug, and invited the defendant to join them in a drink, and he did so. They took other drinks, and became more or less under the influence of drink. The town marshal then ordered Ratcliff to go home. He and Warner then started for their home in the country, taking with them the jug of whisky. As they left the town, Ratcliff was playing his fiddle and singing, while Warner carried the jug. The defendant probably did not understand the reason for this sudden departure, and on that account, or for some cause, he became offended. He followed them on horseback, and when he overtook them got off his horse, walked up to Ratcliff, and stabbed him several times. The defendant testified that when

he overtook them Ratcliff took his knife from his pocket, and struck him, and that he then struck Ratcliff. He did not say that Ratcliff struck him with a knife, and, as defendant was not cut or hurt in any way, it is evident that he was not cut or hurt by Ratcliff. Ratcliff was cut three times by defendant, and fell to the ground. He asked the defendant to go for a physician, which defendant at once did. But the point of the knife had entered the apex of Ratcliff's heart, and he was soon past all surgery, and dead when the physician arrived. An examination was made, but no weapon was found on or near him except a closed pocket knife in his pocket. According to defendant's own statement, he advanced on Ratcliff when there was no occasion for him to do so. On being asked on the witness stand if he did not kill Ratcliff because Ratcliff insulted his wife, he replied: "Yes, sir; that was the biggest part of the trouble." It is very evident from this testimony of defendant that this is not a case of justifiable homicide, while the other witnesses make out a clear case against him.

The only mitigating circumstance connected with the killing is that these parties were both to some extent under the influence of intoxicants, and it is possible that defendant did not realize the gravity of the assault he was making on Ratcliff. The fact that he immediately went for a physician, and asked him to do what he could for the wounded man, shows that he probably did not intend to kill him. While allowing everything in favor of defendant, there may be some slight evidence to reduce the offense to manslaughter, there is, we think, none to show a justification. It follows therefore that the only possible prejudice that the error of the court could have caused was that another jury might have found defendant guilty of manslaughter, instead of murder. In that view of the case we are of the opinion that the conviction as to murder should for the error named be set aside, but, if the Attorney General prefers, the conviction may be affirmed as to manslaughter, and the cause remanded with an order that the circuit court assess his punishment and give judgment against him for that offense.

BATTLE, and WOOD, JJ., dissented.

HILL, C. J., (concurring.) I concur in the law as stated by Mr. Justice RIDDICK, and think that his opinion demonstrates that

an error was committed in compelling appellant to use a peremptory challenge on a juror who should have been excused by the court as not properly qualified to try the case. But I do not concur in holding that such error is prejudicial, because I think the testimony of the appellant himself proves his guilt of the crime of which he was convicted—murder in the second degree.

The evidence of the State made out a case of murder in the first degree, and to meet it the appellant took the stand and told in substance this story:

That the deceased, Ratcliff, had been visiting his home, and several days before the killing his wife told him that Ratcliff had insulted her, and tried to get her to run away with him. Notwithstanding this information from his wife and its repetition from his son, he was drinking with Ratcliff in Atkins, the town near where they lived, on the day of the tragedy. He left town with Ratcliff and his companion, Warner, who lived together. He was riding, and they were walking, and he carried for them some meat they were taking home. Ratcliff was enlivening the homeward journey with music from his fiddle. When they came to "the double bridges," a point where their roads separated, appellant called to Warner to get his meat, and Warner replied insultingly; and appellant rode on towards them to deliver the meat. Just when he dismounted does not appear. Ratcliff laid down his fiddle, took out his knife and started towards him. He told Ratcliff to let him alone, and continued in this language: "When I got ferninst him, he struck me. When he struck me, I struck him. I was drinking, but remember seeing his knife as he came up to me. I saw Warner coming back to us, apparently trying to open his knife, and I turned and walked back towards my mare." This occurred in the cross-examination: "You killed him, from what I understand from you, for insulting your wife?" "Yes, sir; that was the biggest part of the trouble." It was further developed in the cross-examination that he had been drinking with Ratcliff in town, and that he did not then resent the insult because he "dreaded a racket." He said he was pretty drunk when he killed Ratcliff, but admitted sufficient knowledge of the situation to render a plea of drunkenness futile. This was appellant's version of the affair, and it will be noted that the only variation from the usual "hip pocket story" is that

it was a knife in this instance. The other testimony showed Ratcliff was stabbed three times, two of which wounds were immediately fatal. Ratcliff's knife was found unopened in his pants pocket, and the only thing in his hands was the fiddle.

But test appellant by his own evidence alone, for the purpose of this inquiry. He advanced with open knife on his drunken companions, when one of them shouted an insult to him. Then, instead of retreating from a fray which he says was imminent, he advances to it. It is true, he says Ratcliff struck him first, but he does not say he was struck with a knife or other deadly weapon. He failed to show evidence of the blow, and knives usually leave traces. In fact, the feeble effort at self-defense is abandoned when he admitted the insult to his wife was "the biggest part of the trouble." This insult, if in fact the insult was not a *nunc pro tunc* convenience, had not stricken too deeply to prevent his carousing with the giver and accommodating him and his companion; and yet, forsooth, he grows suddenly indignant over it and advances upon and slays the giver of it. His sensitiveness to the insult came rather late. In my opinion, these facts, developed from the appellant himself, prove his guilt of murder in the second degree at least, and hence render innocuous the error in impaneling the jury. As two judges have voted to reverse the case on account of that error, I find by accommodating my opinion to that of the other two who vote to affirm for manslaughter that my views are more nearly met than by reversing the case, and therefore I concur in the judgment.

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

Opinion delivered May 28, 1906.

1. RAILROAD CROSSINGS—CONTRIBUTORY NEGLIGENCE.—While the general rule is that travelers upon the highways, before going upon railroad crossings, are bound to look and listen for the approach of trains, and that it is deemed negligence *per se* for them to fail to do so, yet if the circumstances in a particular case are such that an

ordinarily prudent person might not have expected a train to pass at that moment, it was a question for the jury to say whether the traveler was guilty of contributory negligence. (Page 139.)

2. CONTRIBUTORY NEGLIGENCE—WHEN A QUESTION FOR JURY.—Where a traveler, approaching the spur track of a railroad along a much frequented path, saw defendant's train standing on the spur track, and then crossed to the main track when he was struck by one of the cars which, without his knowledge, had been detached from the train on the spur track and "kicked" on down the main track, the question whether he was guilty of contributory negligence should have been submitted to the jury. (Page 141.)

Appeal from Crittenden Circuit Court; *Allen Hughes,* Judge; reversed.

Frank Smith and *J. W. & M. House,* for appellant.

It is only where the facts and circumstances are such that all reasonable men must from them draw the same conclusion that the court should determine the question of negligence as a matter of law. 159 U. S. 603. The question whether or not the deceased was guilty of contributory negligence was one for the jury to determine. 21 N. W. 212; 37 N. W. 149; 107 Pa. St. 8; 33 N. W. 161; 18 L. R. A. 60; 9 L. R. A. 521; 73 Me. 591; 21 N. Y. Supp. 159; 20 S. W. 490; 101 N. Y. 419, 426; 88 Am. Dec. 353; 14 Abb's Prac. N. S. 29; 40 N. Y. 11; 89 Hun, 596; 23 N. Y. Supp. 193; 140 N. Y. 639; 147 Mass. 495; 116 Mass. 540; 4 Am. St. Rep. 364; 26 S. W. 20; 68 Miss. 566; 39 N. J. L. 193; 8 Atl. 789; 23 N. W. 123; 55 N. W. 771; 24 N. W. 827; 22 N. W. 88; 105 Ind. 406; 34 Iowa, 158; 20 S. W. 163; 41 Cal. 421; 20 Ont. App. R. 244, and many other authorities.

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

The path in use was not a public crossing, nor any part of a public highway. That it was frequently used by pedestrians did not change its character and convert it into a highway for footmen. 46 Ark. 522. From the evidence, the time of day, and the physical facts, deceased was, as a matter of law, guilty of such contributory negligence as to bar recovery. 65 Ark. 235; 54 Ark. 431; 74 Ark. 372; 69 Ark. 135; *Ib.* 380; 4 Elliott, Railroads, § 1703; 38 S. W. 311; 54 Ia. 57; 63 S. W. 362; 56 Ark. 457; 62 Ark. 156; 61 Ark. 549; 62 Ark. 235; *Ib.* 245; 64 Ark. 368; 65 Ark. 429; 62 N. E. 455; 201 Pa. 124; 63 S. W. 594.

Frank Smith and *J. W. & M. House,* for appellant in reply.

There are exceptions to the rule requiring a person crossing a railroad track to look and listen which are as well established as the rule itself. The case presented by this record falls within the exceptions. Authorities cited in our original brief, as also cases cited by appellee, sustain this doctrine. 65 Ark. 235, 239; 88 S. W. 911 and *Ib.* 98, when considered together; 86 S. W. 282, 284. See also 4 Ark. Law Rep. 531; 5 do. 245.

MCCULLOCH, J. This is an action brought by Lula L. Scott, as administratrix of the estate of her deceased husband, George W. Scott, to recover damages resulting from the death of said George W. Scott, caused by the alleged negligence of the defendant, St. Louis, Iron Mountain & Southern Railway Company. He was run over and killed by defendant's train at Earle, a station in Crittenden County on defendant's road, and negligence of the servants of the company is charged in "kicking" a caboose and several box cars down the main track without keeping a lookout and without giving warning of the approach of the cars. The defendant denied the charge of negligence, and alleged contributory negligence on the part of said decedent in failing to look and listen for approaching cars before going upon the track.

The court directed a verdict in favor of the defendant, and plaintiff appealed. The sole question for our determination, therefore, is whether the testimony, giving it the strongest probative force, was sufficient to warrant a verdict in favor of the plaintiff.

It is not contended that the evidence did not establish negligence on the part of the train operatives in failing to keep a lookout. Witnesses testified that the caboose and box cars were "kicked" down the main track, and that no one was on or near the end of the train keeping lookout. But it is urged that, according to the undisputed evidence, deceased was guilty of negligence in going upon the track in front of the approaching cars without looking and listening.

The facts are substantially as follows: The village of Earle contains about 200 or 250 inhabitants, and lies mainly on the north side of the railroad track, though there is one business

house and several residences on the south side of the track. There is a switch track about 6 feet north of and parallel with the main track, and a spur track called the "Crittenden spur," curving off from the south side of the main track, which runs out to a sawmill. The spur connects with the main track 471 feet west of the point where deceased was run over, and it is 192 feet from the latter point (where deceased was run over) due south to the spur. The main track and sidetrack are upon a dump or embankment about 8 feet high, and across them runs a path which has been generally and frequently used by those residing in the vicinity in crossing the tracks. Deceased was traveling this path, going south, when he was run over and killed. There is a seed house on the dump, and the path crosses the track 3 or 4 feet east of it. When the injury occurred, there were several box cars standing on the switch track within 3 or 4 feet west of the path. The path, after crossing the switch track, diverged slightly towards the east, so that it was 21 feet from the center of the switch track, where the path crossed, to the center of the main track at the crossing.

The injury occurred in the day time. Deceased lived on his farm, a short distance south of the station, and on this occasion had visited the postoffice, which was north of the tracks, and was attempting to recross, going southward. The freight train had come in from the east, passed the station and switches and, backing toward the east, detached the caboose and two or three cars on the rear end of the train, and "kicked" them down the main track, and the balance of the train with the engine attached backed down the Crittenden spur. Deceased walked up the dump, traveling the path and upon the switch track, and about came to a stop in the middle of that track near the end of the line of the line of the stationary cars, and looked toward the right. He could not then, on account of those stationary cars, see down the main track, whence the caboose and cars were approaching, but could see the balance of the backing train on the Crittenden spur, which was then about due south of him about 60 yards distant. He passed over the switch track, following the path which diverged to the left, and was in the act of stepping upon the main track, when the moving caboose struck and instantly killed him. His head was found between the rails of the main track, and his

body between the two tracks. The witnesses say that just as the caboose struck him he looked to the right over his shoulder and threw up his hands. His back was almost squarely toward the approaching cars as he traveled the path between the tracks.

This occurred in broad daylight, and evidently deceased could have seen the approaching cars if he had looked. There was nothing to hinder. The only question is, therefore, whether we shall say that he should have looked, and that, as a matter of law, he was guilty of negligence when he failed to do so.

In the recent case of *Tiffin* v. *St. Louis, I. M. & S. Ry. Co.,* 78 Ark. 55, after announcing the general rule that travelers upon the highway, before going upon railroad crossings, are bound to look and listen for the approach of trains, and that it is deemed negligence *per se* for them to fail to do so, we stated certain exceptions where such omission can not be said to be negligence *per se,* but should be left to the jury to determine whether or not the failure to look and listen was consistent with the exercise of ordinary care. The following, among other exceptions to the general rule, was stated: "Where the circumstances are so unusual that the injured party could not reasonably have expected the approach of the train at the time he went upon the track." Citing *French* v. *Taunton Branch Railroad,* 116 Mass. 537; *McGhee* v. *White,* 66 Fed. 502; *Bonnell* v. *D., L. & W. R. Co.,* 39 N. J. L. 189. We declined to apply this exception in that case because the state of the proof did not warrant it. The evidence established the fact that trains were constantly passing the crossing in each direction.

In *McGhee* v. *White, supra,* a decision by the United States Circuit Court of Appeals for the Sixth Circuit, the facts were that a traveler attempted, at a public crossing, to cross the railroad track where a work train had passed about a minute and a half before, and was struck by another train going in the same direction, and it was held that the case was one for the jury to determine whether or not under those circumstances he was guilty of negligence, as he had reason to believe that another train was not following within so short a time or distance. Judge Taft, speaking for the court, said: "At least, this circumstance prevents us from holding, as a matter of law, that his failure to

look was contributory negligence. It required the submission of the issue to the jury."

In *French* v. *Taunton Branch Railroad, supra,* the facts were that the plaintiff, without looking up or down the track, attempted to cross immediately after a train had passed, and was run over by cars following behind it which had been detached from the same train for the purpose of making a running switch, and it was held that the question of contributory negligence was properly submitted to the jury. The court, in disposing of the question, said: "Whether the plaintiff was in the exercise of that due care which persons of common prudence and intelligence would exercise when placed in a similar situation, and whether she was careless in failing to look up the track at the point near the crossing where it was visible, was a question for the jury to determine in the peculiar circumstances of the case." *Ferguson* v. *Wisconsin Cent. Ry. Co.,* 63 Wis. 152; *Phillips* v. *Milwaukee & N. Rd. Co.,* 77 Wis. 349; *Duame* v. *Chicago & N. W. Ry. Co.,* 72 Wis. 523; *Palmer* v. *Detroit, etc., Rd. Co.,* 56 Mich. 1, 22 N. W. 88; *Chicago & E. I. Rd. Co.* v. *Hedges,* 105 Ind. 404; *Baker* v. *Railway Co.,* 122 Mo. 533, 26 S. W. 20; *Bowen* v. *N. Y. Central, etc., Rd. Co.,* 89 Hun, 596; *York* v. *Maine Cent. Rd. Co.,* 84 Me. 117; *Randall* v. *Railroad,* 132 Mass. 269; *Alabama & V. R. Co.* v. *Summers,* 68 Miss. 566.

In all these cases there existed circumstances which the court held to be so unusual that the traveler may reasonably have been deceived by appearances, and on account thereof failed to look and listen when he might have discovered the danger, and the court refused to declare such omission to be negligence *per se.*

In *Ferguson* v. *Wisconsin Cent. R. Co., supra,* the facts were that deceased, before attempting to cross the railroad track, waited for an engine to pass, but immediately went upon the track while he was enveloped with smoke and steam from the passing engine, and was struck by cars which had been detached for the purpose of making a "running switch." He could have seen the approaching detached cars if he had waited for the smoke to clear away; and the court was asked to declare, as a matter of law, that he was guilty of negligence in failing to do so. The court in passing upon this contention said: "No court has applied and enforced the above rule more uniformly and con-

sistently than has this court in numerous cases adjudicated by it. Had the plaintiff gone upon the track in front of the engine and been injured, it would probably have been a case for the application of the rule; but no such case is presented in this record. The plaintiff waited for the engine to pass before he went upon the track, and, having done so, the question we are to determine is, should he have ascertained before going upon the track that a running switch was being made, and a detached car was moving rapidly down the track upon him? We find nothing in the testimony which shows that the plaintiff knew, or ought to have known, the existence of those conditions when he approached the track for the purpose of crossing it. The jury may well have found from the testimony that the noise of the car on the track was drowned by that made by the passing engine; that when he stepped upon the track he was so enveloped in smoke and steam from the engine that he could not see the approaching car; and that he did not know or have reason to suspect that a running switch was being made. Under these circumstances it would manifestly be unjust to apply to the plaintiff the rule above stated in all its rigor."

The same learned court in a later case (*Duame* v. *Railway Co., supra*) in discussing the same question said: "As a general rule, and unaffected by other circumstances, the proposition urged in the brief of the learned counsel of respondent that one approaching a railroad crossing who may, by looking, have a timely view of an approaching train, is bound to look and listen for its approach before attempting to cross the track, and that a failure to do so is negligence, may be correct, and the circuit court most probably applied this strict rule to the plaintiff's case. We do not think that such a rule would be applicable to the case. There is a most important fact in this case that materially modifies this strict rule, and makes it inapplicable, and that is that this train had just passed this crossing, while the deceased was within a few rods of it and driving upon a trot, and had passed on out of his sight, and he had reason to suppose that it would continue on, it being upon the main track, like any other train upon its regular route, and had no reason to suppose that it would immediately return. The presumption was that it would go on and not return. He was thus thrown off his guard."

In *York* v. *Maine Central R. Co., supra,* the Supreme Court of Maine, where the facts were that plaintiff's intestate was struck by cars which had been detached from the engine in making a flying switch, said: "It is true that a traveler upon a highway before crossing a railroad should look and listen for approaching trains. It is usually clear, indisputable negligence in the traveler not to do so, as has been repeatedly held by this court. If nothing indicates to the contrary, trains of some kind, or at least locomotives, are liable to pass at any moment, and the traveler should be continually on his guard against them. But sometimes there may be indications that nothing will pass along the railroad for some minutes at least. * * * In view of the well known and necessary rule requiring considerable space and time between successive trains, the passage of one train may be an indication that no other will pass the same way for some minutes. These and other acts upon the part of the railroad may throw the usually prudent traveler off his guard, and free him from the reproach of negligence in attempting to cross at such a time."

The only distinction between the case at bar and most of the cases cited is that in those cases the succeeding trains of cars passed on the same track whilst in the case at bar they passed upon different tracks.

In the case of *Phillips* v. *M. & N. R. Co.,* 77 Wis. 349, the detached cars were by a running switch sent down a different track from that on which the traveler had just seen them pass, and the court held that the question of contributory negligence was, under the circumstances, one for the jury. The court said: "He (deceased) was thus deceived and thrown off his guard, and had no reason to expect that any of those cars would interfere with his crossing the sidetrack on the sidewalk, or that they would so soon be sent down that track without any one to look after them. The jury might well have excused the deceased from looking for any of these cars on the south track going east at that time, and have found that he was not guilty of any contributory negligence under these peculiar circumstances."

We see no distinction, however, in the fact that the cars follow upon the same track or upon a parallel track. The question is, were the circumstances so unusual that different conclusions

may reasonably have been drawn by men of ordinary prudence as to anticipating the approach of a train at the time the traveler attempted to cross without looking in that direction. If there is nothing in the circumstances to deceive the traveler and throw him off his guard, and he goes upon the track without looking and listening, then he is guilty of an act of negligence, and the court should declare it as a matter of law; but if the circumstances were such that an ordinarily prudent person might not expect a train to pass at that moment, it is then a question to be submitted to the jury to say whether or not he has been guilty of negligence.

Now, applying that rule to the facts of this case as presented by the testimony in the most favorable light to appellant's cause of action, let us see what conclusion the jury might have reached.

Deceased approached the track in broad daylight, and, before he went behind the cars standing on the switch track, could see for considerable distance up and down the track. There was but one train at or near the station, and he saw that train on the main track backing toward the south. When he walked up the dump and passed behind the cars on the switch track, he hesitated, or stopped, and looked to the right as far as he could, and saw what he doubtless thought was the same train of cars with the engine attached backing down the Crittenden spur. He did not know that some of the cars had been detached and "kicked" on down the main track. He was deceived by this circumstance, and with feeling of security walked on down the path to the edge of the main track, where he was struck and killed. Would a reasonably prudent person have so acted under the circumstances? That question should have been submitted to the jury with appropriate instructions, and the court erred in refusing to do so.

Reversed and remanded for a new trial.

HILL, C. J., and BATTLE, J., dissent.

HILL, C. J., (dissenting.) I think the court goes too far in holding that there was a question for a jury in this case. The rule applicable to this case was stated in *St. Louis, I. M. & So. Ry. Co.* v. *Luther Hitt,* 76 Ark. 224, as follows: "But, as explained in the Martin case, the failure to look and listen is not always negligence. There may be circumstances as there instanced,

or where there is an invitation by the railroad, express or implied, which might relieve a prudent person from this duty. But all those matters are exculpatory, and the duty to continue to look and listen should be definitely put upon the plaintiff; and if there is sufficient evidence of exculpatory circumstances, then the whole question should go to the jury, and no part of it be determined by the court."

Charged with the duty of looking and listening when approaching the main track of the railroad, Mr. Scott discharged it by stopping on a sidetrack where his view in one direction was obstructed by cars upon the sidetrack; and, seeing about 200 feet away on a spur track the engine and part of the train which had shortly before arrived at the station, he went ahead across the main track without ever looking to his right, where part of the train was approaching without engine, lookout or signal. The negligence of the company in allowing a detached part of a train to travel without lookout, signals or warning along a much traveled public way was shocking; but the negligence of Mr. Scott in assuming with a hasty glance that all the train was on the spur track and blindly going on to the main track without looking to see what was plain to be seen, was likewise negligence; and I fail to see any exculpatory circumstances justifying submission to the jury.

Mr. Justice BATTLE concurs herein.

BETTS v. WARD.

Opinion delivered May 28, 1906.

LIQUORS—PROCEEDING BEFORE MAYOR TO DESTROY—CHANGE OF VENUE.—Conceding that, in a case where a mayor of a town is acting as *ex officio* justice of the peace, the statute providing for a change of venue from one justice of the peace to another in the same township (Kirby's Digest, § § 4571-4) is applicable, a mayor of a town in a prohibition district who institutes a summary proceeding for the destruction of

liquors kept therein for sale contrary to law is acting as mayor, and not as *ex officio* justice of the peace, and the statute relating to the change of venue is inapplicable.

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

T. C. Jobe and *Jas. H. McCollum,* for appellant.

The proceedings in this case were under Kirby's Digest, § 5137. The motion for change of venue was properly denied, as there is no law authorizing same before a mayor. 73 Ark. 163; 36 *Id.* 305. Betts had no power as mayor to grant a change of venue; it was his duty to hear and determine the matter. His judgment is conclusive, and the only remedy is by appeal.

2. The court should have given instructions 3 and 4, as the statute provides that any individual charged with the destruction of liquors, etc., can justify by showing that the liquors had been shipped into a prohibited district *"to be sold contrary to law."* See act.

3. If Betts made a mistake in refusing to grant the change of venue, he is not liable for damages. He was a judicial officer, and had jurisdiction of the person and property. 6 Am. Rep. 508; 20 U. S. (L. Ed.), 646; 14 L. R. A. 138; 67 Am. St. Rep. 889; 71 *Id.* 254; 34 Ark. 105; 43 *Id.* 17.

J. M. Carter, for appellees.

When appellees complied with the law in regard to taking a change of venue, the mayor or *ex officio* justice (as there was no town ordinance) had no further jurisdiction, and he was a trespasser. Kirby's Digest, § 5586. Section 5137, *Id.* neither enlarged nor curtailed their jurisdiction. For the law on change of venue see Kirby's Digest, § § 4571-4573. On filing the affidavit the law changes the venue, and leaves nothing for the justice to do except to transmit the papers. The parties were entitled to a *fair and legal trial.* 70 Ark. 98; 72 *Id.* 171. See 82 Cal. 284; 105 Mass. 222; 48 Ark. 155; 48 *Id.* 447; 3 N. Y. 547; Rev. St. U. S. § 639; 141 U. S. 590; 63 Mich. 494; 79 Mo. 198; 79 Mo. App. 254; 27 Ark. 480. The filing of the affidavit disqualifies the judge from making any order or further proceeding. Cases *supra.* A judge acting without jurisdiction is liable in damages. 68 Mass. 120; Cooley on Torts, 416-17, 419;

88 Mass. 505; 68 *Id.* 410; 5 Johns, 290; 58 S. W. 959.

HILL, C. J. The appellant, Betts, was mayor of the town of Hope; and the deputy prosecuting attorney filed before him information charging Ward & Key, the appellees, with having liquors in their store in the town of Hope, there to be sold contrary to law. The mayor issued his warrant, pursuant to the duty imposed upon him in such cases by the act of 1899, section 5137, Kirby's Digest. Said act declares: "It is hereby made and declared to be the duty of the chancellors, circuit judges, justices of the peace, mayors and police judges, on information given, or on their own knowledge, or when they have reasonable grounds to believe that alcohol, spirituous liquors, etc., (enumerating various intoxicants) are kept in any prohibited district to be sold contrary to law. * * * that they issue a warrant, directed to some peace officer, directing in such warrant a seizure of such intoxicating liquors, and directing such officer on finding any such liquors in any prohibited district to publicly destroy the same," etc.

This act has been construed in *Ferguson* v. *Josey,* 70 Ark. 98, and *Kirkland* v. *State,* 72 Ark. 171, 105 Am. St. 25.

In pursuance of the warrant some alcohol and wine were seized. The appellees appeared in the mayor's court, and first objected to the style of the proceedings, which was overruled, and they then filed affidavit, duly supported, for a change of venue, which was denied. Thereupon appellees withdrew from the court, and did not further defend.

In pursuance of the terms of the statute, and, after hearing, the mayor issued orders to the marshal for the destruction of the alcohol and wine, and they were destroyed. The appellees then sued the mayor and marshal and numerous other officers for damages for the destruction of their alcohol and wine. On trial the circuit court directed a verdict against the mayor for the value of the alcohol and wine destroyed, and from a judgment thereupon he has appealed.

This is the theory of the appellees upon which they seek to sustain the judgment: that mayors are in everything, except enforcing town ordinances, justices of the peace; that in the enforcement of the criminal laws they are acting under section 5586, Kirby's Digest. This section confers on mayors powers of

justices of the peace and criminal jurisdiction as justices of the peace for crimes committed within their municipal lines. Section 4571-4574, Kirby's Digest, provides for change of venue from one justice to another. The argument is that when appellees presented proper affidavits for change of venue the mayor had no right to refuse to send the case to a justice of the peace, and that he *eo instanti* lost jurisdiction, and his action thereafter was void, and he was a trespasser in ordering the destruction of the liquors. Without going into the question as to whether these would be the consequences if the argument as to the change of venue was sound, suffice it to say that it is not sound. The mayor was not acting under the authority of section 5586, constituting him an *ex-officio* justice of the peace. He was acting entirely under the act of 1899 itself, which names him, with chancellors, circuit judges, police judges and justices of the peace, as a magistrate invested with authority to act in these matters. Other sections of the pre-existing law provide that proceedings before justices of the peace may be changed as therein set forth, but there is no statutory provision for change of venue from police judges, circuit judges or chancellors, and none from a mayor, unless perchance he be acting as *ex officio* justice of the peace, which he was not in this case. Therefore the mayor was exactly right in refusing to grant the petition for change of venue, and, instead of becoming a trespasser in proceeding with the case, he was properly discharging his duty.

It follows that the action against him was wholly unfounded, and the court erred in directing a verdict, and the judgment is reversed, and the action dismissed.

OLD NATIONAL BANK OF FORT WAYNE v. MARCY.

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f86 200
f86 201
79 149
f90 97

Opinion delivered May 28, 1906.

1. BILLS AND NOTES—INNOCENT PURCHASER.—The fact that, at the time a bank purchased the last three of a series of five notes, it had notice that they were a series of notes, and given for an entire consideration, and that the maker had refused payment on the first two notes,

was sufficient evidence to sustain a finding that the bank was not an innocent purchaser. (Page 152.)

2. SAME—INSTRUCTION.—It was not error to instruct the jury that if a bank, as indorsee of certain notes, had actual knowledge of a defense thereto or of such facts indicating the defense that its action in purchasing the notes amounted to bad faith, it was not an innocent purchaser. (Page 153.)

3. SAME—NOTICE.—One who is told, before he purchases a note, that the maker refuses to pay it is not an innocent purchaser. (Page 153.)

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

L. P. Berry and *A. B. Shafer,* for appellant.

1. The notes were executed, indorsed and payable in Indiana. The contractual rights of the parties are governed by the laws of Indiana. Rorer on Interstate Law (2 Ed.), p. 85; 14 Ark. 189; 125 Ind. 375; 25 N. E. 452; 13 Pet. 65. Our courts take judicial notice of the laws of Indiana. Kirby's Digest, § 7823. There being no statute governing the question in Indiana, the general law merchant applies. 118 Ind. 586; 21 N. E. 316; 61 Ark. 81; 32 S. W. 65.

2. The burden was on appellees to show that appellant had actual or constructive notice that the notes were given for a single consideration or that a valid defense existed to said notes. The fact that appellant had actual notice of the dishonor of the first two notes before it purchased the remaining three did not charge it with notice of all defenses, or that the consideration had failed, or that all the notes were given for a single consideration. 52 Fed. 98; 2 C. C. A. 637; 2 U. S. App. 282; 18 L. R. A. 201; 91 Tex. 294; 42 S. W. 1055; 19 Tex. Civ. App. 620; 15 Wis. 260; 45 *Id.* 110; 30 Am. Rep. 697; 64 Wis. 289; 25 N. W. 10; 59 Vt. 569; 10 Atl. 342; 29 Mich. 249. There is only one case to the contrary, 78 Ga. 129, 3 S. E. 5. Fraud is never presumed, but must be established by clear and satisfactory evidence. 22 Ark. 184; 68 *Id.* 391; 120 Ill. 403. Mere circumstances of suspicion not sufficient. 59 S. W. 41. When the evidence tends equally to sustain either of two inconsistent propositions, a verdict in favor of the party bound to maintain one of them against the other is necessarily wrong. 99 Mass. 605; 97 Am. Dec. 59; 57 Ark. 402.

3. It was error to give the fourth instruction. 4 Mass. 370; 3 Am. Dec. 232.

Frank Smith, for appellees.

All the instructions asked by appellant were given, except to find for plaintiff. They were based on 61 Ark. 81, and as favorable as the law warranted. No. 4 was based on 4 Mass. 370, and was applicable. Fraud may be shown from concurrent acts, surrounding circumstances and subsequent conduct of parties. All the facts tend to prove notice to appellant that a valid defense existed to the notes, and that they were given for a single consideration. The case was properly submitted to the jury, and their verdict should be affirmed.

HILL, C. J. Appellee executed five promissory notes to Noble Machine Company, of Fort Wayne, Indiana, each for the sum of $300. The first one was due 97 days after date, and one fell due each month thereafter. The notes were plainly numbered on their face, No. 1, No. 2, etc. The notes were payable at appellant bank. They were assigned to the bank, and suit was brought by it upon them. The bank alleged that it was an innocent purchaser for value before maturity, and that was the only issue in the case. The evidence is uncontradicted that there was a partial failure of consideration, and the Noble Machine Company could not have recovered on the notes. The court directed a verdict as to the first two notes, and that action is not complained of. The jury returned a verdict in favor of the makers as to the last three notes.

1. The chief contention is that there was no evidence to show that the bank had notice, and was not an innocent purchaser. The bank cashier testified positively and circumstantially to the purchase of each of the notes, which was for full value. Noble (who did business as Noble Machine Company) testified also to the sale of the notes in due course of business to the bank, and that the bank was without knowledge of the defense to them.

These facts were developed: All the notes were sold for face value and accrued interest, and indorsed by Noble, and by the bank credited to his account. The first two notes were sold November 24, 1903 (the notes were dated October 6, 1903), the

third was sold March 3, 1904, the fourth April 1, 1904, and the fifth April 7, 1904. On January 15, the bank at appellee's home, the Bank of Crittenden, received from appellant bank for collection the first note, and returned it to appellant on January 16, stating that payment was refused. On February 20, this bank again received this note together with note No. 2, for collection, and returned them to appellant bank, stating payment was refused. On March 8 the Bank of Crittenden received from appellant bank note No. 1 again, this time with directions to turn it over to lawyers for suit; notes 2 and 3 were received with similar instructions on March 17; note No. 4 was received from the appellant bank April 4, and returned April 14.

The cashier of appellant bank evidently saw the serial figures on the notes, and he says he thought the consideration for the notes was a sale of machinery. It will be noted that, after the purchase of the first two notes, and before the purchase of the third note, payment on No. 1 had been twice refused, and on No. 2 had been once refused. Before the fourth note was purchased suit had been directed on Nos. 1, 2 and 3. All of these matters were conducted through appellant bank, and of all of them it had notice of course, and this notice was certainly sufficient evidence to sustain a verdict that the appellant bank was not an innocent purchaser. These facts are strengthened by the conduct of appellant bank. Noble, the indorser, was one of its stockholders, a customer and a man of large means, and naturally would make good his indorsement on demand; and if he did not do so, the bank could have its lawsuit in its home court, instead of going into another State to pursue its remedy. Of course, it was within its rights to elect which party it would sue, but when it elected to leave home to do its suing when it had full and complete redress at home, the jury had a right to take that fact into consideration in weighing its claim of innocent purchase.

2. Was the jury correctly instructed? These were the instructions given:

"1. You will find for the plaintiff the amount of the first two notes.

"2. As to the other notes, the question for you to decide is whether or not the bank purchased them in good faith. The bur-

den of proof is on the defendant to show that the bank had actual knowledge of the defense made here when it bought the notes, or had actual knowledge of such facts indicating the defense that its action in taking the instruments amounted to bad faith. If the bank had such knowledge, you will find for the defendants as to the last three notes. If it had not, you will find for the plaintiff on all the notes.

"3. In order for you to find for the defendant in this cause, you must find that the plaintiff bank knew that all of these notes were given for a single consideration, or that the bank had such notice of that fact as would amount to bad faith on its part in the purchase of the last three notes.

"4. You are instructed that the purchaser of a note who, before purchase, is told that the maker refuses to pay it, is not a *bona fide* purchaser."

The second instruction is supported by *Thompson* v. *Love,* 61 Ark. 81; 4 Am. & Eng. Enc. Law (2 Ed.), 302 *et seq.*; 7 Cyc. 944.

The appellant contends that a purchaser of notes before maturity with notice of dishonor of the first two notes was not charged with notice of defenses against the remaining notes, including the defense that all were for the same consideration, and that it had failed in whole or in part. There is a conflict in the authorities as to the extent of notice of dishonor of one of a series of notes for the same consideration. 7 Cyc. 953, 954. The court took the view most favorable to appellant when he gave the third instruction. There was sufficient evidence to sustain the finding against appellant under this instruction. The cashier knew from the face of the notes that they were of a series, and he knew they were given for machinery, and knew Noble's course of business, and this was sufficient to justify the conclusion reached that the notes were given for a single consideration.

In regard to the fourth instruction, Daniel says: "It is quite clear and well settled that the purchaser need not have notice of the particular fraud or equity or illegality, in order to be affected by it. It is sufficient that there be notice, actual or constructive, that there is some fraud or equity or illegality affecting the original parties. * * * So if he knows the maker denies his liability or refuses to acknowledge it." 1 Daniel, Negotiable

Instruments (5 Ed.), § 799. This statement from the learned author directly sustains this instruction, and the authorities he cites in a general way sustain his deduction therefrom. This view is in consonance with the general principle governing the sufficiency of notice of defects which prevent the purchaser becoming entitled to the aegis of an innocent purchaser, and may be well taken as a sound application of the principle. See 7 Cyc. 944, 947; 1 Am. & Eng. Enc. Law (2 Ed.), 303; 2 Randolph, Com. Paper, 1021; *Goodman* v. *Simonds,* 20 How. 343; *Swift* v. *Smith,* 102 U. S. 442.

Finding no error, the judgment is affirmed.

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84 366

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT *v.* REDDITT.

Opinion delivered May 28, 1906.

1. LEVEES—CONDEMNATION PROCEEDING.—The act creating the St. Francis Levee District, in providing that where the district fails to obtain a relinquishment of the right of way it shall proceed "as provided by law of this State in similar cases" (act February 15, 1893, § 19), contemplates that the district shall proceed as provided by Kirby's Digest, § § 4944, 4945. (Page 157.)
2. SAME—JURISDICTION OF COUNTY COURT.—The statute conferring upon the county court original jurisdiction of a proceeding to condemn a right of way for a levee (Kirby's Digest, § § 4944, 4945) is sustainable under art. 7, § 28, of the Constitution, providing that the county court shall have jurisdiction "in every other case that may be necessary to the internal improvement and local concerns of the respective counties. (Page 158.)
3. CONDEMNATION PROCEEDINGS—VALIDITY.—Condemnation proceedings, not being common-law actions, are valid if they meet the constitutional requirements, although they may not provide for a trial in course of the common law. (Page 159.)
4. SAME—FORMER ACTION PENDING.—An action of trespass by a landowner to recover damages from a levee district for appropriating her land for the construction of a levee will not lie where there is a previous action pending between the same parties for the same cause. (Page 159.)

5. SAME—PREPAYMENT OF DAMAGES.—Although a levee district may not appropriate land for its right of way without first paying therefor, the fact that it has done so will not oust the jurisdiction of the county court, or of the circuit court on appeal, to determine the damages for the taking. (Page 160.)

Appeal from Crittenden Circuit Court; *Allen Hughes,* Judge; reversed.

H. F. Roleson, for appellants.

1. It was error to permit the witness to testify to the value of the lands without first qualifying by showing his knowledge of market values. 51 Ark. 329; Lewis on Em. Dom. § 436. And to permit testimony as to the difference in profit from renting land and hiring the same cultivated. 1 Greenleaf, Ev. (16 Ed.), § § 430 I, 441 B; 59 Ark. 105. It was further error to permit testimony by the witness that the land overflowed three times in 1903, and had never known it to be overflowed three times in one year before the building of the levee. There was no testimony raising a presumption that such overflows would ever recur. 56 Ark. 612. It was a question for expert testimony, and even expert witnesses are not permitted to express mere conjecture. 90 Am. Dec. 181; 21 Atl. 555; 28 Am. St. Rep. 219; 37 Barb. 270; 58 N. Y. Supp. 467.

2. Appellants contend that plaintiff is not entitled to compensation for damages to lands not taken, but left outside the levee. She is not entitled to recover for incidental injuries to her land by reason of it being left outside the levee. 9 Otto, 635 (25 Law. Ed. 336); 62 Miss. 807; 23 N. Y. 42; 12 Mo. 417; 55 Mo. 119; 166 U. S. 269; 160 U. S. 452.

3. The case should have been dismissed because of the appeal from the county court then pending. Kirby's Digest, § § 4944, 4945.

R. G. Brown, for appellee.

1. It requires no technical knowledge to value farming lands with which one is familiar from long use and occupation. A farmer may state the value of farm lands with which he is acquainted. 17 Cyc. 119, and cases cited; 76 Miss. 641; 2 L. R. A. 221; 90 Mass. 348.

2. Under the laws of this State, payment of damages to

the owner of the land, or a deposit of money for him, is a condition precedent to any right to take possession of his land. Art. 2, § 22, Const.; art. 12, § 9, *Ib.*

3. Appellee is entitled to compensation for damages to her land outside of the levee. 52 Ark. 330; 59 Ark. 171; 35 Ark. 353; 43 Ark. 121; 41 Ark. 210; 45 Ark. 436; 1 Ark. 264; 77 Miss. 533; 13 How. 166.

4. Appellee had a right to maintain this action. Kirby's Digest, § 2903. The damages assessed shall be paid to the owner or deposited with the county treasurer for him. Kirby's Digest, § 4945. The complaint alleges this was never done. The statute does not provide within what time this deposit shall be made, but decisions in similar cases uniformly hold that it must be done before possession of the land is taken. A similar statute regarding condemnations by railroads requires the deposit to be made within 30 days after the award. Kirby's Digest, § 2957.

HILL, C. J. This is an appeal from an action brought in Crittenden Circuit Court by Mrs. Redditt, a landowner, against the levee district for appropriating her land for the construction of a levee across it, and for damages, compensatory and punitive, for its actions in the premises. The punitive damages were either not insisted upon or ruled against in the lower court, and nothing appears touching that subject beyond the allegations of the complaint.

The verdict rendered was as follows: "We, the jury, find for the plaintiff, and assess the damage at $3,000 (three thousand dollars), of which $1,787.50 is for peculiar injury to the lands outside the levee caused by the raising of the water on it, lengthening the period of overflow and leaving deposits of sand thereon."

The allegations of the complaint and the evidence show that the remainder of the verdict, $1,212.50, was for actual land taken, houses and crops destroyed and other items of actual damage incident to the construction of the levee.

The complaint alleged that the levee district had filed its petition in the county court of Crittenden County for the condemnation of a right of way over this land, and obtained the appointment of a jury of view, who viewed the land and located

the right of way and assessed damages to plaintiff therefor. The complaint further alleged that the report of the jury of view was confirmed by the county court, and that the levee district, without having tendered to plaintiff or deposited with the county treasurer the amount of the award, appealed from the judgment rendered upon said award, and shortly thereafter entered upon the land illegally and appropriated that which had been condemned by the jury of view, and constructed a high levee thereupon, and for the appropriation and consequent injuries the complaint asked damages, setting forth particularly the elements thereof. The levee district, *inter alia,* pleaded in bar of the maintenance of this action the proceeding begun in the county court which terminated in a judgment therein, and from which the levee district appealed to the circuit court, which was then pending therein. During the trial the levee district offered in evidence a certified copy of the judgment of the county court, the court refused to admit this evidence, and this is one of the errors assigned. The offered evidence showed the proceeding of the jury of view, the description of the land taken and the various items allowed for damages aggregating $1,466, and a judgment was entered thereupon that the levee district have and recover the lands described, and that Mrs. Redditt have and recover the sum found, "and the plaintiff prays an appeal to the circuit court, which is granted." And it was admitted in open court that this order had been duly perfected, and the proceeding was then pending in the circuit court.

The question confronting appellee at the threshold of this hearing is whether her suit could be maintained while the appeal of the levee district from the condemnation proceedings in the county court was pending for hearing in the circuit court.

Appellee seeks to justify the new action upon this theory: that property shall not be appropriated for public purposes until full compensation shall be first made to the owner in money, or first secured to her by a deposit of money, etc. (Const., art. 12, § 9), and that therefore this appropriation of her land, without first paying or securing in money therefor, was a trespass, pure and simple, and she could maintain an action for trespass therefor; and furthermore she contends that section 2957, Kirby's Digest, providing in case of condemnation by railroads and tele-

phone and telegraph lines, where the company does not pay or deposit the amount required to be deposited by the court or judge under section 2955 within thirty days, that it shall forfeit its rights in the premises, applies here, and a failure to deposit the amount of award of the jury of view prior to appropriating the land rendered the proceedings void, and forfeited the rights of the district to take the land under that proceeding. The act creating this levee district provided that where it failed to obtain a relinquishment of right of way it shall proceed "as provided by law of this State in similar cases." Act February 15, 1893, § 19. At that time there was upon the statute books the act of 1879, providing for condemnation proceedings by levee boards, which is sections 4944, 4945, Kirby's Digest. This is evidently the act contemplated, as none of the other eminent domain proceedings are "similar cases." This statute authorizes boards of directors of levee districts to appear in the county court and cause a jury of twelve landowners to view and well and truly assess the damages to the landowner. Provision is made for notice, etc. Under the Constitution, an appeal may be taken by the party aggrieved from the judgment of the county court to the circuit court, where there is a trial *de novo*. *Whissen* v. *Furth,* 73 Ark. 366. Art. 12, § 9, of the Constitution forbids the taking of private property by a corporation until full compensation shall be made to the owner in money, or secured by deposit of money, and the compensation, irrespective of benefits, "shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."

The General Assembly has prescribed by law the method of ascertaining and awarding the compensation when levee boards condemn property for levees, and the question is, does that legislation meet the constitutional requirements?

The Constitution vests in the county court exclusive original jurisdiction in all matters concerning county taxes, roads, bridges, etc., and then this additional jurisdiction: "and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." Const. 1874, art. 7, § 28. Public levees to reclaim overflowed and swamp lands and restrain inundation from the mighty rivers within this State and bordering it are the best types of internal improvement, and are

indisputably within the contemplation of this clause of the Constitution. Therefore it follows that the jurisdiction conferred on the county court in these matters is within the constitutional jurisdiction of that court, and the statutes are not for that reason void.

Condemnation proceedings are not common-law actions, and when they meet the local constitutional requirements, and provide for due notice to the parties affected, they are valid, although they may not provide for a trial in course of the common law. 1 Lewis on Eminent Domain, § § 311-314; *State* ex rel. *Ry. Co.* v. *Rowe,* 69 Ark. 642.

These statutes meet the constitutional requirements of a jury of twelve and due process, and are valid. This being a valid proceeding, can appellee maintain this action while this proceeding is pending? Section 6093, Kirby's Digest, makes this a cause of demurrer to a complaint: "That there is another action pending between the same parties for the same cause." Sec. 6096 provides that where this matter does not appear on the face of the complaint the objection may be taken by answer. The objection was aptly taken by answer in this case, and appellant offered to sustain the allegation of the answer by competent evidence of the other action for the same cause. Therefore the question narrows to whether this action and the one on appeal from the county court were for the same cause. See Bliss on Code Pleading, § 410. This action contains a prayer for punitive damages, but contains no allegations justifying such relief, and therefore that element should have been, as it was, eliminated. This action was technically for a trespass, but the measure of damages was exactly what the measure would be in the condemnation case. The recovery in this case shows nothing recoverable on account of the action being trespass which would not be recoverable in a condemnation proceeding.

The statute of 1893 giving property owners an action against corporations which have taken lands without condemnation, and makes the measure of recovery in such action the same as that governing had the corporation brought action to condemn. Secs. 2903, 2904, Kirby's Digest.

There is a sharp conflict as to whether certain damages to the land outside the levee are recoverable, but there is no differ-

ence in that question, whether presented in the condemnation suit or in this trespass suit.

It is entirely possible for the board by its trespass to incur other damages than those recoverable in a condemnation suit, but none other are shown here, and the evidence of damage was all directed to matters equally recoverable in a condemnation proceeding as in this action.

The appellee insists that the levee board had no authority to take the land without first paying therefor. That is very true; but this wrong of the levee board did not defeat the jurisdiction of the circuit court to hear and determine the appeal from the county court ascertaining the damages for the taking. The appellee had her remedy to restrain the levee district from entering without first paying or depositing the money. She had her remedy to enforce the judgment of the county court, which does not appear to have been superseded in any way; but she did not have the right to ignore a pending suit in which her rights could be ascertained and her wrongs redressed. The Code forbids such unnecessary action, and the courts must enforce this salutary provision.

The court erred in not admitting the evidence of the other suit and its pendency, which should have been admitted, and which barred the further maintenance of this action.

Reversed and remanded.

Mr. Justice WOOD, dissents.

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PEOPLE'S FIRE INSURANCE ASSOCIATION OF ARKANSAS v. GORHAM.

Opinion delivered May 28, 1906.

FIRE INSURANCE—CONDITION AS TO KEEPING BOOKS—SUBSTANTIAL COMPLIANCE.—Under Kirby's Digest, § 4375a, providing that in all actions against any fire insurance company for any claim arising out of any policy on personal property, proof of a substantial compliance with the terms, conditions and warranties of such policy shall be deemed suffi-

cient, evidence that an insured merchant kept a merchandise account, which showed the amount of goods purchased by him and an account of cash sales which showed the goods sold is a substantial compliance with a condition of his policy that he should keep a set of books which present a complete record of business transacted, including purchases, sales and shipments.

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

Dan W. Jones, for appellant.

1. Appellees warranted that the stock was "new stock," of the cash value of $1,600. The evidence shows it was an old bankrupt stock, worth not more than $400. Goods are to be estimated at their market value without reference to their cost, the fair cash value in the market. 2 May on Ins. § 424, and cases cited; 11 L. C. 170; 74 N. C. 89; 71 N. C. 121. Parties are bound by their contract and their warranties. 72 Ark. 484, 490; 2 May on Ins. § 374; 66 N. C. 70. Any wilfully false statement as to value avoids the policy. 75 Ark. 251.

2. Appellees violated the "iron safe clause." 58 Ark. 565, 575; 1 May on Ins. § § 156-7; 61 Ark. 207; 62 *Id.* 43. Conceding that § 4375a Kirby's Digest makes only a *substantial* compliance necessary, yet *no compliance at all* is not a substantial compliance, and the court erred in the first and second instructions for appellees. The fourth should not have been given, as it ignores that provision of the "iron safe clause" which requires all the books, etc., to be kept in an iron safe, or some place secure from fire.

3. The premium was never paid. No presentment, demand or notice was necessary. The payment of the premium was necessary before suit. 2 May on Ins. § 345 F.

Jobe & Eakin, for appellees.

There is no error in the court's instructions. The jury were properly instructed, the evidence is amply sufficient to sustain the verdict. The court followed the law. Kirby's Digest, § 4375a. It left it to the jury to say whether or not there was a *substantial compliance* with the provisions of the policy or not. The jury have settled it. The premium was not due until

after the destruction of the property. The jury deducted the premium, and appellant has received all it is entitled to.

BATTLE, J. Dully Gorham & Company owned a stock of merchandise, on which they held a policy of fire insurance, which was executed to them by "The People's Fire Insurance Association of Arkansas." During the life of the policy, on the 22d day of January, 1904, the stock was destroyed by fire, and this action was brought by the insured against the insurer to recover the promised indemnity of $1,200. The plaintiff, in a trial before a jury, recovered a verdict and judgment against the defendant for $1,166; and the defendant appealed.

Appellant's defenses against the action were, substantially, as follows:

(1) Appellees, in their application for insurance, which was made a part of the policy sued on, warranted that the stock of merchandise insured was "new stock," and of the cash value of $1,600, whereas it was the remnant of an old stock, and was not at the time of the application worth more than $400.

(2) It alleged that appellees executed to it for the premium they agreed to pay for the insurance of the stock of merchandise "their two several promissory notes, due and payable, respectively, thirty and sixty days after date, each for the sum of $16.50; that both of said notes were due and payable before the bringing of this action, and appellees had wholly failed, neglected and refused to pay either of them; by reason whereof said policy, by the express terms thereof, became void before the bringing of this action."

(3) That appellees promised and agreed to keep all of their books and invoices in an iron safe at night, or in some place secure against fire, so that in case of fire they might be submitted to adjusters; but appellees did not keep their books and invoices in such manner, by reason whereof a part of the invoices were destroyed by the fire which consumed the merchandise, and the policy became void.

1. After a careful examination of the policy and the application made a part of it, we fail to find a representation or warranty that the merchandise insured was a "new stock." We find in the application the following question and answer, "When was it last taken?" Answer, "New Stock." But this is not sufficient.

The evidence adduced at the trial was sufficient to show that the merchandise, at the time of the application for insurance and of the fire, was worth $1,600.

2. The second defense was based on the following provision in the policy: "No suit or action on the policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." We fail to find that the payment of the notes for the premium was any part of the "foregoing requirements." And, if it was, appellant expressly waived it by agreement upon record, in consideration of the continuance of the action from one to a succeeding term of court.

3. The third defense was based upon the following provisions in the policy:

"(2.) The assured shall keep a set of books which shall clearly and plainly present a complete record of business transacted in reference to the property herein mentioned, including all purchases, sales and shipments, both for cash and credit, from date of the inventory provided for in the preceding section and during the life of this policy, or this policy shall be null and void.

"(3.) The assured shall keep such books and inventory, and also the last preceding inventory, if such has been taken, and also all books kept in his business since the date of such last preceding inventory, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or shall keep such books and inventories in some secure place not exposed to a fire which would destroy the aforesaid building, and after a fire shall produce all such books and inventories, and deliver the same to this association for examination, or this policy shall be null and void, and no suit or action shall be maintained thereon for any such loss; it being agreed that the receipt of such books and inventories and the examination of the same shall not be an admission of any liability under this policy nor waiver of any defense to the same."

A statute of this State provides: "In all actions against any fire insurance company, individual or corporation, for any claim accruing or arising upon or growing out of any policy upon personal property issued by any such company, individual or corporation, proof of a substantial compliance with the terms, con-

ditions and warranties of such policy, upon the part of the assured, or party, individual, person or corporation to whom it may have been issued, or their assigns, shall be deemed sufficient, and entitle the plaintiff to recover in any such action." Kirby's Digest, § 4375a.

The evidence adduced at the trial tended to show that appellees kept a merchandise account, which showed the amount of goods purchased by them, and an account of cash sales, which showed the goods sold, and the latter deducted from the former showed the amount destroyed by the fire. The books containing these accounts were produced in court. The evidence however, showed that an invoice book was burned, it being on a shelf in the store at the time of the fire. But the proof, nevertheless, showed a substantial compliance with the conditions of the policy, and, under the statute, is sufficient to sustain the verdict.

Judgment affirmed.

BUTTERFIELD v. BUTTERFIELD.

Opinion delivered May 28, 1906.

RESULTING TRUST—LOAN FOR IMPROVEMENT OF LAND.—One who lends money to the owner of land for the purpose of making improvements thereon acquires no interest or lien thereon.

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

Wood & Henderson, for appellant.

Plaintiff demurred to the answer and to each paragraph thereof which sets up the alleged oral agreement as a defense, which should have been sustained. Kirby's Digest, § § 3654, 3664. The effect of the allegations in third and fourth paragraphs is to set up an equitable interest in the land in defendant. Such arrangement could not be binding without being in writing or evidenced by some memorandum in writing signed by deceased

or his agent. Payment of purchase money is not such part performance as to take the case out of the statute. 1 Ark. 391; 18 Ark. 466; 21 Ark. 533. Possession, in order to take the case out of the statute, must be taken solely under the contract, with a view to it, and in pursuance to its provisions. Pomeroy, Spec. Perf. § § 154, 155; 21 Ark. 277; 39 Ark. 424; 44 Ark. 334; 11 L. R. A. 323; 87 N. W. 312. Joint possession with the seller is not sufficient. The doctrine of part performance will not apply to parol contracts of sale between tenants in common. 44 Ark. 82; 85 N. W. 808; 26 Cent. L. J., 342; 6 Atl. 352; 73 N. W. 515; 27 S. E. 325; 40 Pac. 635; 29 Atl. 15; 46 N. W. 632; 63 Ark 100; 33 S. E. 108; 8 Am. & Eng. Enc. Law, 744 and notes.

2. The property being the homestead of deceased at the time of the alleged contract with appellee, no such interest could have been conveyed without a deed in which appellant joined in the execution and acknowledgment. Kirby's Digest, § 3901.

Greaves & Martin, for appellee.

BATTLE, J. Prior to the year 1883, I. L. Butterfield, the husband of Frances I. Butterfield, was the owner of lot numbered 15 in block numbered 152, in the city of Hot Springs, in this State, and in the year 1883 exchanged with Samuel W. Fordyce the said lot for certain parts of lots 3 and 15 in block 151, in said city. I. L. Butterfield then caused the house on lot 5 to be removed to the parts of the lots for which it was exchanged, and added to, remodeled and repaired the same. The addition was let for $1,200. He was much embarrassed, financially, at the time, and applied to his sister, Florence E. Butterfield, who was making her home with him, for aid. She testified: "The house cost about $500 or $600 more than brother expected, and at that time he had very little money. He came home one day very much worried, and said: 'Sis, I want you to put your money in the house. It is going to cost a little more, as we are having a larger house than we expected to. You and mother are always going to live there—it will always be your home.' And he says, 'Sis, you put your money in the house, and it will always make us a home. It is your home, and you will feel that it is by putting your money in the house.' And he said, at any time, if I wanted to take my money out of the house, or any time I wanted

to 'get married' and leave, 'you can take your money out of the place. It will be your home, and you will feel it more and help me by doing so.' "

She let him have $550, which he used by paying for his house, and his sister made her home with him until he died, which occurred on the 16th day of April, 1891.

On the third day of July, 1890, the said Samuel W. Fordyce and wife, at the request of I. L. Butterfield, executed a deed to the parts of lots 3 and 15, in block 151 to Frances I. Butterfield, the first deed being to I. L. Butterfield, the second being executed to correct errors in the description of the property conveyed.

After the death of her brother, Florence E. Butterfield resided with his widow, Frances I. Butterfield, contributing to the payment of their joint expenses, until the latter, Frances I., brought an action to disposess her. She filed a cross-complaint, in which she stated the foregoing facts, and asked, if plaintiff persisted in denying her right to possession of the lot in controversy, that the court require an accounting, and that she be permitted to prove the amount of her advances for the improvement of the property sued for, and that she have a lien for the same, and that the lot in controversy be sold to satisfy the lien.

Upon motion the cause was transferred to the Garland Chancery Court, and it, after hearing the evidence adduced by the parties, which tended to prove the foregoing statement of facts, found that the defendant (plaintiff in the cross-complaint) advanced to her brother the $550, and was entitled to recover the same and interest, and to a lien therefor on the property, and ordered it to be sold to satisfy the lien.

The property in controversy was not acquired in part or whole with the money of Florence E. Butterfield. Her brother, I. L. Butterfield, never sold or agreed to sell or convey her any interest therein, in consideration of money advanced. But, on the contrary, agreed to return her money whenever demanded. This was a loan. "In order to create a trust in favor of one who pays the purchase money for land conveyed to another, the payment must be made at the time of the purchase, so as to make it one transaction." The mere payment of money, subsequently, for lands or improvements thereon creates no lien. *Sale* v.

McLean, 29 Ark. 612; *DuVal* v. *Marshall,* 30 Ark. 230; *Milner* v. *Freeman,* 40 Ark. 62; *Bodwell* v. *Nutter,* 63 N. H. 446; *Francestown* v. *Deering,* 41 N. H. 438; *Krauth* v. *Thiele,* 45 N. J. E. 407; *Stephenson* v. *McClintock,* 141 Ill. 604.

Miss Butterfield had a remedy against her brother for money loaned in his lifetime, and after his death against his estate, until barred by the statute of nonclaim.

Reverse the decree and dismiss the cross-complaint, and remand the cause.

GREENWOOD DISTRICT OF SEBASTIAN COUNTY *v.* HEARTSILL.

Opinion delivered May 28, 1906.

COMMISSIONERS OF ACCOUNTS—LEGALITY OF INVESTIGATION—COMPENSATION.—As the commissioners of accounts can not meet except within three weeks preceding the next session of the circuit court after their appointment, and must make their report on the first day of such session (Kirby's Digest, § § 628, 636), an order of the circuit court directing them to investigate the accounts of a county officer, during its next session after their appointment, is void, and a claim against the county for their services in making such investigation was improperly allowed.

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

STATEMENT BY THE COURT.

This is an appeal from the judgment of the circuit court allowing the claims of appellees for services alleged to have been rendered by them as commissioners of accounts for the Greenwood District of Sebastian County. The claims were presented to the county court, and by it disallowed, and, on appeal by appellees to the circuit court, the claims were allowed, and appellant prosecutes this appeal.

The appellees were duly qualified "commissioners of accounts" for Sebastian County. They entered upon the discharge

of their duties June 15, 1903. The record shows that on or about the 15th or 17th of August the commissioners adjourned to October, 1903. On July 29th there was presented the following petition:

"To the Honorable Commissioners of Accounts for the Greenwood District of Sebastian County:

"Comes J. P. Durden, and would respectfully represent and petition your honorable body as follows: 'That he was circuit clerk of Sebastian County for a period of nearly six years; that during said period of time he complied with the requirements of the law in regard to filing the reports required by Acts of 1893 and as amended by act of 1899. That since the termination of his incumbency in office, which occurred October 31, 1898, there has been claimed that a discrepancy existed in the reports so filed by him; and while a former board of commissioners of accounts began an investigation, said investigation was never concluded by them, and the matter of adjustment or settlement was referred to the county court; that this petitioner often attempted to have a settlement with the county judge (J. M. Spradling), but on account of the arbitrary manner of the said judge a settlement was not had, and a judgment against this petitioner was arbitrarily rendered by said county judge, from which this petitioner appealed to the circuit court; that when this cause came on to be heard in the circuit court, the attorneys representing this petitioner and the said county judge entered into an agreement by which it was agreed that the amount of the judgment so rendered should be considered as the amount which was received by this petitioner as fees for recorder, and which would leave only a question of law, viz., does the act of 1893, as amended by the act of 1899, apply to the recorder? The attorneys for this petitioner were so thoroughly confident that the act did not apply to the recorder, and that it would be the quickest way of disposing of the matter, that this petitioner reluctantly consented to said agreement. That said case is now pending appeal in the Supreme Court, and whereas said agreement was made as aforesaid, and only for the purpose aforesaid (of testing said question), there has been a report industriously circulated to the effect that a discrepancy was found to exist in his reports filed as aforesaid.

"Now, therefore, your petitioner prays that your honorable body institute a thorough investigation of the reports filed by him, regardless of the technical agreement made and entered into by the attorneys of this petitioner and said county judge, to the end that, if there exists a discrepancy, or, if this petitioner is due to the county of which he was clerk any amount, this petitioner may have the opportunity of adjusting it, and that justice and right should be done and had between the county and your petitioner.

"To which end he will ever pray.

"Respectfully submitted,

"J. P. Durden."

This petition was indorsed as follows:

"It is ordered that the commissioners of accounts investigate the matters set forth in the foregoing petition, to the end that justice may be done to all parties concerned. For this purpose the commissioners are authorized to summon all parties concerned and such witnesses as they may need and the right to examine any and all records bearing on the matter.

"Styles T. Rowe, Judge."

The commissioners refused to follow the orders of the circuit judge indorsed upon the petition, and made the following report to the circuit court:

"In the matter of the petition of J. P. Durden, directed to said commissioners of accounts and by them referred to you, and upon which you indorsed an order that we investigate the matters and things set forth in said petition, my co-commissioners deny the right of the circuit judge to make such order, and refuse to obey the same, and have each for himself consented that I should report to you their refusal to act in this matter, as also of other matters reported herein. There are other matters of which I do not feel justified in speaking except through the channel of a regular report, but think it due that you should be advised of the condition existing and the reason for our failure in the prompt discharge of the important duties devolving upon us.

"August 15, 1903.

"Respectfully submitted,

W. B. W. Heartsill, one of commissioners of accounts."

Thereupon the circuit court, after having entered upon its records its reasons for so doing, made the following order:

"It is thereupon ordered by the court that the commissioners of accounts state the account between the Greenwood District of Sebastian County and J. P. Durden as ex-circuit clerk and *ex-officio* recorder, and report whether all moneys due from him as such officer have been paid to the proper person by the law appointed to receive the same and the amount, if any, due the Greenwood District of Sebastian County."

In obedience to this order the commissioners met on August 31st. They spent three days investigating other matters, for which their claim was allowed by the county court. Then it appears that each of the commissioners spent some time working on the matters set forth in the petition of Durden, and which the commissioners had been ordered to do by the circuit court.

The claims filed with the county court are based on this service. Appellee Ferguson filed his claim for $39, thirteen days. Appellee Heartsill presented his claim for eighteen days, $54.

Read & McDonough, for appellant.

1. The circuit court had no power or right to require the commissioners to restate the account, and the district is not liable. Kirby's Digest, § 625, 633-636. Nor had said commissioners any power to examine any other accounts than those filed the year preceding their appointment. Kirby's Digest, § 629. See also § 7162.

2. The county court has the exclusive original jurisdiction to conduct, settle and direct the payment of all demands against the county. The circuit court has no control over it, except upon an appeal. The county court has the right to reject a claim, even after it has been certified down to it by the circuit court. 10 Ark. 467; 50 *Id.* 431; 47 *Id.* 80-84.

3. The claim was not itemized as required by law. 54 Ark. 424.

Holland & Holland, for appellees.

The circuit court has plenary powers in the matter of the appointment and service of commissioners of accounts, and it seems clear that the commissioners have the right under the statute to adjourn from time to time, should their duties require

it, to *such time and place* as may be designated by them. Kirby's Digest, § 630. The statute (*Ib.* § 625) providing for the appointment of commissioners is mandatory, but the context shows that those sections providing for the time of meeting and the manner in which they shall pursue their labors and the number of days allowed for the completion of the work are directory. Kirby's Digest, § § 635, 639, 640. The services inured to the benefit of the county, were not excessive, no more time was devoted to the work than was actually necessary, and the county is liable, even if the strict letter of the law has not been followed in unimportant details. The cases cited from 52 Ark. 36 and 51 *Id.* 424 are not in point. The spirit of the law has not been violated; the services were *bona fide* and of benefit to the county, and it should be held liable.

WOOD, J., (after stating the facts.) The county court was correct in refusing these claims. No such investigation as that set up in Durden's petition is contemplated by the statute authorizing the appointment of commissioners of accounts. The circuit court erred in referring the matter for investigation to them, and in allowing the claims of the commissioners for making such investigation. The whole proceeding was without authority and absolutely void. The duties of the "commissioners of accounts" are defined by the statute authorizing their appointment, and nowhere in this statute can authority be found for the investigation ordered by the circuit court and undertaken by the "commissioners of accounts," as shown by this record. See chap. 22, Kirby's Digest. It will be seen from an examination of the act that the time when the commissioners shall meet is designated, and the length of time they shall be in session is clearly defined. They can not be in session under the law more than three weeks, and they must meet "on the Monday preceding by three weeks the next session of the circuit court" after their appointment. If they fail "from any cause to meet on the day above mentioned, they shall meet on any day within a week thereafter." Section 628, Kirby's Digest. "If the commissioners shall fail to make their report on the first day of the term after their appointment, it shall be the duty of the circuit court to issue proper process, and summon and compel the appearance of the commissioners, and cause the making and filing of such report." Section 636,

Kirby's Digest. The time when the commission is to meet is thus clearly defined, and the time they shall remain in session is limited to three weeks, for their report is due on "the first day of the term after their appointment." The first term of the circuit court for the Greenwood District after these commissioners were appointed began on the 6th day of July, 1903. The commissioners under the order of the circuit court to investigate the account of Durden met August 31, 1903, and continued thereafter from time to time individually and collectively to investigate his account until some time in December, as is shown from dates in one of the substituted accounts filed in the record.

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

HILL, C. J., not participating.

STORM v. MONTGOMERY.

Opinion delivered May 28, 1906.

1. CONTRACT—CONSTRUCTION.—It is the province of the court to construe an unambiguous contract. (Page 175.)
2. JUSTICE OF PEACE—JURISDICTION IN TORTS.—A complaint in a suit before a justice of the peace by a landlord against a tenant, alleging that the tenant had abandoned the leased premises and sold buildings thereon to another, and seeking to recover damages therefor, is based on a tort; and if the sum claimed as damages exceeds $100, the justice of the peace is without jurisdiction, and the circuit court acquires none on appeal. (Page 175.)

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

STATEMENT BY THE COURT.

This action was begun before a justice of the peace by the appellee filing the following complaint, omitting caption:

"The plaintiff, Susan Montgomery, states that she is the owner of the following property, towit:" Here the complaint

describes certain real estate, and continues: "Upon the above described property several buildings were located; that the plaintiff leased said buildings and grounds to the defendants, a copy of said lease being herewith filed and asked to be made a part hereof; that defendants have abandoned said property, and sold said buildings to Chas. Coffin, the garnishee herein, at and for the sum of $150; that said sale was wholly without authority; that said defendants are seeking to convert the sum above mentioned to their own use; that defendants have collected $100 on said sale; that by reason of said sale the defendants are indebted to the plaintiff in the sum of $150; that it is a just claim; that she ought, as she believes, to recover the sum of $150; that the said J. C. & F. J. Storm are non-residents of this State. Wherefore she prays that a warning order issue for the defendants; that a writ of garnishment issue for Chas. Coffin, the garnishee herein; that she have judgment for $150, for costs, and all other proper relief."

No written answer was filed, either in the justice or circuit court. But it appears from the evidence that appellants admitted the sale of certain buildings on the land described in the complaint, but claimed the right "to do so under their contract of lease with appellee."

The lease under which appellants claimed the right to make the sale, after setting out the consideration and describing the land, contained the following recital: "In addition to the foregoing, the terms of rental are as follows, towit: Whereas, the said J. C. Storm and F. J. Storm propose operating a factory on said premises for the manufacture of ax handles and similar products of wood, now, if said factory shall be operated for a period of three years, then this rental shall be valid for that period, but not longer, upon the payment to me of $1.00 per annum. But if the said J. C. & F. J. Storm shall remove the machinery and building from said land, or shall abandon, or fail to operate the same before the expiration of said period, then this contract shall be terminated, and the right of possession shall revert to me or my heirs or assigns, and at the termination of said rental, said J. C. Storm and F. J. Storm shall have the right and privilege of removing from said land such buildings and their contents, as they may at times have located thereon."

Other evidence, documentary and oral, was adduced, but it is unnecessary to set it out, as the right of appellee to maintain this action, if she can maintain it at all, must rest upon the terms of the written lease executed by her to appellants.

The court instructed the jury as follows: "In this case the plaintiff, Montgomery, has sued the defendants, Storm Brothers, for the value of certain buildings which were located on land belonging to plaintiff. The question for you to determine is whether or not defendants had a right to remove this property, or whether it belonged to plaintiff, Mrs. Montgomery. The issues are not many and very simple. If you believe from the evidence in this case that at the time the written contract was made, which states that defendants should have the right and privilege of removing from said land said buildings and their contents as they may at that time have located thereon, or that that was understood between the parties making that contract at the time to mean only such [as] the defendants should put there themselves, then your verdict should be for the plaintiff in this case; but, if the understanding and agreement at that time was that that clause, which I have read to you, was understood to be all the property situated on the lands, including these buildings, then your verdict should be for the defendants, Storm Brothers. The burden of proof is on the plaintiff to show by a preponderance of the evidence these facts. The preponderance of testimony means the greater weight of testimony should be on the part of plaintiff. That [is] it takes a little more evidence in the scale of justice on the side of the plaintiff than it does on the defendant. Weigh the testimony under the rules I have given you so often. If you find them for the plaintiff, the form of your verdict should be," etc.

The jury returned a verdict in favor of appellee for $150. Judgment was entered accordingly, and this appeal prosecuted.

W. E. Beloate, for appellants.

If this is an action for conversion, the justice is without jurisdiction, as the amount is over $100. 47 Ark. 59; 48 *Id.* 293. A destruction of premises by tenant is but a trespass, and the justice is without jurisdiction. 38 Ark. 454; 53 *Id.* 131. The only difference between waste and trespass is that the former is

committed by one rightfully in possession, and the latter by a stranger. 18 Am. Dec. 350. This is not an action *ex contractu,* though attempted to be brought as a contractual action. It is founded simply upon a tort. 8 L. R. A. 189; 48 Ark. 302. It is not necessary to plead want of jurisdiction. 45 Ark. 346. Under the lease appellants had the right to remove the buildings.

H. L. Ponder and *John W. & Joseph M. Stayton,* for appellee.

This is simply an action upon the implied contract of appellants to pay over the price they sold appellee's property for. 4 L. R. A. 22. A building is *prima facie* a fixture. 73 N. E. 595; 91 N. Y. S. 503; 82 S. W. 240. Ewell on Fixtures, p. 22; 66 Ark. 90. Appellants contend that the buildings were trade fixtures and subject to removal. But they recognized the fact that these buildings were fixtures when they accepted a lease which stipulated that the only buildings which they were to have an interest in were those erected by themselves upon the land.

WOOD, J., (after stating the facts.) The contract of lease was unambiguous, and the court should have construed same. No objection, however, was raised to the instruction of the court directing the jury to ascertain whether or not under the contract appellants had the right to remove the buildings, for the price of which the appellee sued. As the verdict of the jury was in accord with the plain terms of the contract, it should stand, provided the court had jurisdiction.

To ascertain whether or not the court had jurisdiction, we must look to the allegations of the complaint. As the complaint alleges an abandoment of the property by appellants, they were thereafter no longer tenants of appellee, and this can not be regarded as a suit for the waste of the property, as appellants sold the buildings on the premises of appellee and authorized another to enter upon same; if appellants had no authority to make the sale, they were joint tort-feasors with the one whom they authorized to enter and who did enter and remove the buildings.

The complaint alleges a sale of the buildings of appellee by appellants and a conversion of the proceeds of such sale to their own use. It will be seen from this allegation that appellants treated appellees' buildings as personalty or trade fixtures,

and sold same as their property. This therefore must be considered a suit for the conversion of property. As the amount claimed exceeds the sum of $100, the justice of the peace was without jurisdiction, and the circuit court acquired none. Const. art. 7, § 40; *St. Louis, I. M. & S. Ry. Co.* v. *Briggs,* 47 Ark. 59; *Parks* v. *Webb,* 48 Ark. 293.

The case of *Frank* v. *Dungan,* 76 Ark. 599, cited by counsel for appellee to sustain the contention that this is a suit upon an implied contract, has no application. In this case the complaint does not show any contract relation between appellants and appellee, either express or implied. On the contrary, it is shown that there was no such relation.

Whether the complaint be treated as a suit for trespass or conversion, the justice of the peace was without jurisdiction. The judgment is therefore reversed, and the cause is dismissed without prejudice.

STAINBACK *v.* HENDERSON.

Opinion delivered May 28, 1906.

1. APPEAL—WAIVER OF EXCEPTIONS.—An exception to the court's ruling in permitting an amended answer to be filed at law is waived where it was not included as one of the grounds for the motion for new trial. (Page 178.)
2. SAME—INSUFFICIENCY OF ABSTRACT.—Assignments of error in refusing certain instructions asked by appellant will not be considered if they are not set forth in his abstract. (Page 179.)

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

Suit by Stainback, Crawford & Company against Graves, Henderson and Cargile. Judgment was for defendants, and plaintiffs appealed. Affirmed.

STATEMENT BY THE COURT.

This action was instituted by appellants to recover of one

W. T. Graves the sum of $178 and interest at six per cent. from November 1, 1901.

The complaint alleged that appellants furnished Graves certain glass for a store front in the town of Junction City. They allege that the glass was furnished and set for Graves in a store which he then owned, under contract to pay appellants therefor the sum of $178. They alleged that they had filed their lien on the building as the law required; that since said glass was furnished, Graves had conveyed the property to O. B. Henderson, who at the time the glass was furnished had a mortgage on same; that Henderson had conveyed the property to C. J. Cargile. They prayed judgment for $178 and interest, and asked that same be declared a lien on the property which is described in the complaint, and for specific execution against the property. Henderson and Cargile were made parties defendant.

Appellees filed an answer October 8, 1902, in which they admit that appellants entered into a contract with Graves as set forth in the complaint, but they allege that, before appellants had performed any part of the contract or incurred any expense or liability on account of same, W. T. Graves countermanded the order for materials and labor to be furnished under the contract, and instructed appellants not to ship the glass. In an amended answer, filed March 25, 1903, appellees deny that Graves entered into the contract as set out in the complaint, but admit that Graves entered into a conditional agreement with appellants by which they were permitted to take the measure and number of the glass necessary for the front of the store mentioned in appellants' complaint, but they allege that it was understood and agreed that appellants should hold the measure and numbers of the glass and should not ship same until notified to do so by Graves; that Graves did not order appellants to ship the glass, but on the contrary directed them not to do so before the glass was shipped.

Appellees admit that appellants placed the glass in the store, but aver that they did so without the consent and over the remonstrance of Graves, and appellees deny that they are indebted to appellants, and pray judgment for their costs, etc.

A separate answer was filed by Cargile, in which he adopts the joint answer, so far as applicable, and sets up that Graves was

a tenant of one Henderson at the time the glass was furnished and the work done; that he (Cargile) knew nothing of the improvements placed on the property, nor did Henderson from whom he bought; that Graves had no right to incumber the property, etc.

Upon the issues thus made the cause was sent to the jury.

There was evidence tending to support the contention of appellants that Graves ordered glass from them for his store front, and that before he countermanded the order appellants had incurred an expense in ordering the plate glass from St. Louis, amounting to $160. There was also evidence tending to support the contention of appellees that the glass was ordered of appellants upon condition that it was not to be shipped to Graves until he notified appellants, and that he notified them in a reasonable time not to ship the glass, and that the glass was put in after it was shipped to Junction City over Graves's protest, and without his consent.

R. G. Harper and *Smead & Powell,* for appellees.

Appellant waived its exceptions to the filing of the amended answer by failing to allege same as a ground for new trial in their motion. 27 Ark. 374; 38 Ark. 413; 39 Ark. 420.

R. L. Floyd, for appellant.

1. It is error to permit an amendment substantially changing the defense. Kirby's Digest, § 6145.

2. The court erred in refusing instructions 7, 8 and 9 requested by appellant. It also erred in giving instructions 1 to 4 inclusive on behalf of appellees.

WOOD, J., (after stating the facts.) 1. There was no error in permitting the amended answer. Under section 6098, Kirby's Digest, a defendant "may set forth in his answer as many grounds of defense * * * as he shall have." But the motion for new trial does not set out the ruling of the court in permitting the amended answer as one of the grounds for new trial. Therefore, even if the court erred in permitting it, appellants must be held to have abandoned their exceptions to the court's ruling in this particular. *Blunt* v. *Williams,* 27 Ark. 374; *Knox* v. *Hellums,* 38 Ark. 413; *Ferguson* v. *Ehrenberg,* 39 Ark. 420.

2. Appellants contend that the court erred in refusing instructions numbered seven, eight and nine asked by them. But these instructions are not set forth in the abstract, and we must assume that the court ruled correctly in refusing them. *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 78 Ark. 274; *Shorter University* v. *Franklin,* 75 Ark. 571; *Koch* v. *Kimberling,* 55 Ark. 547.

Appellant further contends that the court erred in giving instructions numbered one to four on behalf of appellees. These instructions are not set forth in appellant's abstract. Appellees, however, have supplied the omission by setting them out in their brief. We find no error in the giving of these instructions. They present the law applicable to the facts on the theory that Graves had the right to countermand the order for the glass, and that there was to be no shipment until Graves notified appellants to ship same. In other words, they present the law based on the contention that the alleged contract evidenced in part by the order was conditional, and never became a completed contract. There was evidence, which went to the jury without objection, upon which to ground this contention, and to support the verdict.

The judgment is affirmed.

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

Opinion delivered May 28, 1906.

1. PLEADING—AMENDMENT.—Where a suit to recover damages for the negligent killing of a railway employee was brought for the benefit of the widow as next of kin, it was not error, on discovering that the alleged widow was not lawfully married to deceased, to substitute in the complaint the name of his mother as his next of kin. (Page 181.)
2. SAME—AMENDMENT CHANGING ISSUE—CONTINUANCE.—Where, on permitting an amendment to the complaint which changed the issue, the court adjourned the case for five days to enable the defendant

to meet the new issue, at which time defendant went to trial without asking for more time, a motion for new trial on the ground that the time allowed was too short, without showing why further time was necessary, was insufficient. (Page 182.)

3. DAMAGES—EXCESSIVENESS.—A verdict awarding to deceased's mother, as next of kin, the sum of $572 was not excessive where deceased is shown to have contributed as much as $5 per month to her support, and her expectancy of life is 17.40 years. (Page 184.)

4. SAME—PAIN AND SUFFERING.—A verdict awarding to deceased's estate for his pain and suffering the sum of $360 is not excessive where he is shown to have received a severe blow in the stomach from which he died three hours later. (Page 184.)

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

STATEMENT BY THE COURT.

The complaint alleged that "Elijah Horner was on June 24, 1904, employed to work on defendant's plow car; that said plow and machinery thereon was operated by the use of air; that said machinery was in a defective condition, as the defendant well knew, or could have known by the exercise of reasonable diligence; that the said defendant negligently and carelessly permitted said machinery to be in the defective condition, and to be handled by unskilled and untutored workmen, who were in the employ of the defendant in another and different capacity; that said defendant, by such use of defendant's machinery by unskilled employees, negligently and carelessly caused an iron beam of large proportions to strike and injure plaintiff's decedent, so that, after great suffering for ten hours, he died; that said Elijah Horner left surviving him his late widow, Cleopatra Horner, as his next of kin, for whose benefit judgment is prayed for $10,000." There was a second count in the complaint, which contains the same allegations of fact, and in which judgment is prayed in the sum of $5,000 for the estate.

The defendant in its answer, denied all the allegations of the complaint, and also pleaded contributory negligence on the part of the deceased.

Such facts as are deemed necessary are stated in the opinion.

B. S. Johnson, for appellant.

When it was discovered on the trial that Cleopatra was not

the legitimate wife of deceased, and it was proposed to amend the complaint by substituting as plaintiff Ulcie Pinckney as mother and next of kin, the court should not have permitted such amendment, except upon terms. 23 Ark. 543; 67 Ark. 142; 66 Ark. 615; Newman, Pl. & Pr., 704, 705; 22 Barb. 116. As to definition of "surprise," see Cal. Code, § 653; 62 Cal. 443; 77 Mo. 26. The party alleging surprise is entitled to a new trial if he shows that some act prejudicial to him has been done which, with proper inquiry, he could not have anticipated, and against which with due diligence he could not have protected himself. 6 How. 336; 5 Abbott, 203; 52 How. 193; 34 Barb. 291. Since defendant entered its plea of surprise before the amendment was allowed, there was no laches on its part. 39 Cal. 555; 6 Abb. N. C. 378.

Smith & Smith and *Lamb & Caraway,* for appellee.

The amendment was properly allowed. It was allowed on November 4, and then the court adjourned until the ninth. Appellant had the intervening time in which to investigate and prepare to meet the new issue. On the latter date, if it had not had sufficient time, appellant should have asked a further postponement. 55 Ark. 567; 67 Ark. 144; 57 Ark. 60; 66 Ark. 615.

WOOD, J., (after stating the facts.) 1. After the evidence was concluded, the court instructed the jury without objection that appellee could not recover for alleged defective machinery. This left for the determination of the jury only the questions of fact as to whether or not the death of Horner resulted from the negligence of appellant in the operation of the machinery, and as to whether or not there was contributory negligence on the part of Horner.

It was wholly immaterial, under the allegations of the complaint, whether the company was negligent in employing unskilled workmen, unless the negligence of such workmen produced the death of Horner; and if the workmen were skilled, it would not exempt the company from liability under the complaint if such workmen negligently produced the death of Horner. So the only questions, as we have said, are, was the company negligent? and, if so, was Horner guilty of negligence that contributed to his death? Without undertaking to discuss the facts in detail, it is sufficient to say that upon these questions of fact the evi-

dence was conflicting. The jury was properly instructed, and there was evidence to support the verdict.

2. The complaint alleged: "That Elijah Horner left surviving him his widow, Cleopatra Horner, his next of kin." The answer contains this averment: "Defendant, not having sufficient knowledge upon which to found a belief, denies that deceased left surviving him a widow, Cleopatra Horner, as his next of kin." During the progress of the trial, and after two or three witnesses had been examined, Cleopatra Horner testified to facts which justified the conclusion that she had not been the legal wife of Horner. Thereupon appellee asked permission to amend the complaint by inserting the name of the mother of Horner as the next of kin. This leave was granted over appellant's objection. This occurred on November the 4th. The court adjourned on November the 4th till November the 9th. The court suggested that by November the 9th appellant could "probably be ready to meet the new issue." Although leave was granted to thus amend the complaint on November the 4th, the amendment was not in fact made by inserting the words "Ulcie Pinckney, his mother as next of kin" until November the 9th. When these words were inserted, the appellant objected, but it did not ask for further time at the time this amendment was made.

In the motion for new trial it is stated that "the defendant, its officers and attorneys, had never heard of Horner having any mother living or any kin living other than his purported widow until Friday, November 4, after the trial had begun, when plaintiff asked leave to amend his complaint, which was taken under consideration and advisement by the court until Wednesday November 9, 1904, to which time further proceedings in this cause and the session of the court were adjourned, and during this intermission the defendant and its agents and attorneys had not sufficient time to investigate and meet this proposed amendment, and they did not know that the witness Ulcie Pinckney would testify that the deceased had made contributions to her support during his lifetime until she was actually on the witness stand," etc. When Ulcie Pinckney was introduced as a witness, the defendant objected to her examination on the ground that it was new matter, and that the complaint had just been amended, and defendant had not had time or opportunity to meet it, which

objection was overruled by the court, and exceptions duly saved.

In support of the ground of surprise, in the motion for new trial, an affidavit of the attorney is filed, which is as follows:

"S. D. Campbell, being sworn, says that he represented the defendant as its attorney in preparing for the trial of this cause; that he never had any information to the effect, or which would warrant him in believing, that any contributions to Ulcie Pinckney, the mother of deceased, Elijah Horner, were ever made by him until she was put upon the witness stand in this cause; that he had no reason to suppose that the testimony as to such contributions would be introduced on the trial of this cause. On the contrary, all information led him to believe, and he did in fact believe, there would be no such testimony as to such contributions; that the testimony of said Ulcie Pinckney upon this point of contributions from deceased Horner to her was an entire surprise to affiant, and that he knows no way he could have anticipated it, or that he could have met it; that he believes the facts set forth in the last ground of motion for a new trial numbered 30 are true."

The purpose of the amendment requested by appellee was apparent when the request was made. Appellant was by the amendment proposed necessarily advised that it would be a pertinent inquiry as to whether Horner had contributed to his mother's support; and if appellant did not make inquiry and prepare to meet this phase of the case during the interim from November 4 till November 9, it was its own fault. If it endeavored to meet this new matter, and the time was too short, it should have asked the court for further time on the reconvening of the court and the resumption of the trial on the ninth, and it should have shown then to the court the reasons why the time was too short, and why further time was necessary. It should have stated facts from which the court might have determined as to whether or not further time was necessary. Except by general statement by way of conclusion, it does not appear that the time intervening between the 4th and the 9th of November was insufficient to enable appellant to make all the necessary preparation to meet the proposed amendment. No facts are alleged to show that any diligence whatever was exercised to "get ready."

The facts in the cases of *St. Louis, I. M. & S. Ry. Co.* v.

Power, 67 Ark. 142, and *Mut. Life Ins. Co.* v. *Parrish,* 66 Ark. 615, were entirely different from the facts in this case, and those cases do not support appellant's contention here. The amendment was proper, and the court did not abuse its discretion in permitting it in the manner shown.

3. The verdict was not excessive. The amount returned for the next of kin was $572. Horner's mother, Ulcie Pinckney, is shown to have had an expectancy of life of 17.40 years. Horner is shown to have contributed as much as $5.00 per month to her support during two and a half years prior to his death. He had occasionally sent her as much as ten per month. The verdict for pain and suffering for the benefit of the estate was $360. Horner was struck in the lower part of the stomach with a heavy iron beam. He lived three hours, but died from the effects of the blow. In the very nature of the case we know that he must have suffered untold agonies, but the proof shows that he suffered. The verdict was moderate.

4. Appellant contends that the court erred in permitting witness, Cleopatra Horner, over defendant's objection, to answer question, "Tell the jury how you and Horner lived as compared with other colored people in the community; that is, whether you lived well, and he provided for his family liberally, or whether he was stingy in providing for his family," and in giving answer, "Yes, sir; he gave me everything I wanted. He was just as good to me as he could be," and in testifying as to the subject-matter of such question. This testimony was adduced before it was ascertained that Cleopatra Horner was not the wife of Elijah Horner. Appellant did not ask to have it excluded after this discovery was made and its incompetency was disclosed. But no possible prejudice could have resulted to appellant on account of this testimony. Indeed, its tendency was rather to the prejudice of appellee, since it showed that Horner was contributing liberally of his means, thus revealing a diminished ability to contribute all of his surplus earnings to his mother, and, moreover, a disposition not to do so.

Affirm.

HOLLINGSWORTH *v.* MCANDREW.

Opinion delivered May 28, 1906.

1. APPEAL—CONCLUSIVENESS OF FINDING.—A finding of the trial court in an action at law, based upon oral evidence not brought up by bill of exceptions, is conclusive on appeal. (Page 192.)
2. APPEAL—PRESUMPTION AS TO APPOINTMENT OF ADMINISTRATOR.—Where the circuit court made an order directing an administrator to sell land of decedent's estate, it will be presumed on appeal that the court determined *in limine* that the administrator had been duly appointed as such. (Page 192.)
3. SAME—REMAND—NEW DEFENSE.—A finding on a former appeal that a widow abandoned her homestead rights in her husband's land by selling same, and that she then held the land as an independent purchaser, is inconsistent with the defense of adverse possession interposed by her after the cause was remanded. (Page 193.)
4. JUDGMENT—RES JUDICATA.—Where, in a proceeding to subject the homestead of a decedent to the payment of his debts, this court, on a former appeal, held that the land was subject to decedent's debts, and reversed the cause with instructions to render judgment in accordance with its opinion, the judgment was conclusive against all defenses that might have been raised on the former trial. (Page 194.)
5. APPEAL—FILING MANDATE.—Filing the mandate of the Supreme Court with the clerk of the circuit court within a year after a cause is reversed is a compliance with Kirby's Digest, § 1236, providing that when a cause is reversed the mandate must be filed in the trial court within one year from the reversal. (Page 194.)
6. SAME—SUBSEQUENT PROCEEDINGS IN TRIAL COURT—FILING MANDATE.—Rule 14, prescribing that the judgment of this court shall "be entered of record in the circuit court" is merely a direction to the clerk as to the proper method of making up the record, and is not mandatory in the sense of being essential to the jurisdiction of the trial court to proceed with the cause after being remanded. (Page 194.)

Appeal from Benton Circuit Court; *John N. Tillman,* Judge; affirmed.

STATEMENT BY THE COURT.

J. G. McAndrew, as administrator of the estate of Seth Hollingsworth, filed his petition in the probate court of Benton County, asking for an order to sell a certain lot in the town of Siloam Springs, Benton County, Arkansas. The appellant Deborah Hollingsworth, who was the widow, and appellant Minnie

Strange, who was the daughter, of Seth Hollingsworth, were made parties to the petition in the probate court. That cause proceeded to judgment, the probate court making an order to sell the lot to pay debts probated against the estate. Appellants appealed from that judgment to the circuit court. The circuit court reversed the judgment of the probate court, and entered judgment directing a dismissal of appellee's petition for a sale of the lot. From that judgment appellee appealed to this court, and this court reversed the judgment of the circuit court, and remanded the cause "with instructions to the court to render a judgment in accordance with this opinion." That opinion was handed down June 4, 1904. *McAndrew* v. *Hollingsworth,* 72 Ark. 446. The mandate of this court on the former appeal was filed in the clerk's office of Benton County in vacation July 18, 1904. At the September term, 1904, of the Benton Circuit Court the case was docketed and called, whereupon on the 28th day of September, 1904, a day of said term, the appellants filed the following answer to the petition of appellee in this case:

"Come Deborah Hollingsworth and Minnie Strange, who was formerly Minnie Hollingsworth, and state to the court that they were each made parties defendant in the probate court of Benton County, Arkansas, to the petition of J. G. McAndrew, as administrator of the estate of Seth Hollingsworth, deceased, which petition he had filed in said court praying for an order to sell certain city lot belonging to the defendants to pay the debts of his intestate. That from the order and judgment of said probate court ordering the sale of said property belonging to these defendants they appealed to this court, and now ask leave of the court to file this, their answer to plaintiff's petition, and for answer thereto say:

"That on the——day of January, 1904, Seth Hollingsworth was a citizen and resident of Siloam Springs, in Benton County, Arkansas, and was the owner in fee simple of lot No. 5 in block No. 3 in said city of Siloam Springs, Benton County, Arkansas, as described on the plat of said city according to the original survey of said city. That he resided on said lot as his homestead. That the defendant Deborah Hollingsworth, was his wife, and the defendant Minnie Strange, who was then Minnie Hollingsworth, was his daughter. And that the said Seth Hollingsworth,

together with his wife and daughter, Minnie, constituted his family, and they all occupied and resided on said lot as the homestead of said Seth Hollingsworth, deceased. That on said day Seth Hollingsworth executed his last will and testament, in which he devised said lot to this defendant, Deborah Hollingsworth, in fee simple. That on the ——day of January, 1894, said Seth Hollingsworth departed this life in Benton County, Arkansas; that at the time of his death he still occupied said lot as his homestead. That, thereafter, on the —— day of ———— 189 ——, said will was duly probated by the probate court of Benton County, Arkansas, and at this time the said defendant Deborah Hollingsworth is the owner in fee simple of the remainder.

"2. These defendants deny that J. G. McAndrew was ever appointed administrator in succession of the estate of said Seth Hollingsworth, deceased, by the probate court of Benton County, Arkansas, and deny that he was the administrator in succession of said estate at the time he filed said petition to sell said lot described therein.

"3. For further answer these defendants deny that there has ever been a judgment rendered by the probate court of Benton County, Arkansas, in favor of the Philadelphia Construction Company against the estate of Seth Hollingsworth, deceased.

"4. For a further answer these defendants deny that there has been probated in the probate court of Benton County, Arkansas, a claim, debt or demand against the estate of Seth Hollingsworth, deceased, and deny that said court has ever ordered the administrator of said estate to pay any claim, debt or demand probated by said probate court and allowed. That on March 27, 1897, the defendant, Deborah Hollingsworth, sold said lot to said defendant, Minnie Strange, who was then Minnie Hollingsworth, for the expressed consideration of $5,000, and on said day executed to her a warranty deed for the said lot. That said deed was filed and recorded in the recorder's office in Benton County, Arkansas, on March 2, 1898. That on March 30, 1900 the said defendant Minnie Strange and her husband, W. G. Strange, sold and conveyed to the defendant Deborah Hollingsworth an estate for the life of said Deborah in said lot aforesaid, and the appurtenances thereto belonging. That on said date the said defendant was residing upon said lot as her home. That

she has held the actual possession of said lot and house situated thereon, as her homestead, from the date of said deed to this time. That, prior to selling and conveying to said Minnie, she, the said Deborah Hollingsworth, had owned and held the possession of said lot and appurtenances from the date of the death of her husband, Seth Hollingsworth, to the date of the deed to the said Minnie. That she occupied the same during that time as her homestead, and at the time of the filing of the petition of said plaintiff as administrator as aforesaid by him as such administrator against said estate.

"5. For a further answer to said petition, these defendants say that they have been in the actual, open, notorious, adverse possession of said lot, claiming title thereto under and by virtue of the will of said Seth Hollingsworth, deceased, executed as aforesaid, claiming title to said lot thereunder, adverse to the creditors of said Hollingsworth, deceased, and to the administrators of his estate for more than ten years last past, and that any right, or claim, or lien claimed by said administrator or any creditor of said estate is barred by the statute of limitations and laches on the part of said administrator, or any creditor of said estate. And that said lot is not now subject to debts of said deceased."

On October 4, 1904, appellee filed his motion to strike said answer from the files of the court, whereupon the court proceeded to hear said motion, and after hearing the same the court made the following finding on said motion, and rendered the following judgment in the case:

"Now, on this day the plaintiff files motion to strike from the files the answer heretofore filed by the defendants at the present term of this court. And, the same coming on for hearing and both parties announcing ready, the court proceeds to hear the same upon said motion and answer and upon the mandate and opinion and decision of the Supreme Court in this cause, and upon the briefs of attorneys in said court in said cause and upon the judgment of this court originally rendered herein and appealed from, and upon the records and pleadings in the probate court, and at request of defendants upon oral testimony as to an oral answer interposed by defendants in the original trial of the cause in this court and the contents of such oral answer.

Now, after hearing the evidence and argument of counsel, the court doth find and declare:

"1. That at the trial of this cause in this court at its adjourned term, June 4, 1901, defendants interposed an oral answer, in which all of the defenses contained in the answer filed at the present term were set up, except the defense denying that plaintiff had been duly appointed administrator of the estate of Seth Hollingsworth, and the defense of adverse possession for seven years, and that by inadvertence the making of such oral answer was not noted of record.

"2. That every question raised by the answer filed at the present term, except that of adverse possession, was litigated in this court at the former trial.

"3. That the question of adverse possession could have been litigated by defendants in said trial.

"4. That all questions now raised by answer were finally adjudicated by the Supreme Court in its opinion and judgment in this cause.

"5. That the judgment and orders of the Supreme Court herein preclude this court from re-trying this cause upon any issues raised by said answer, and that this court has no authority or discretion to make any judgment or order herein except to enter judgment for plaintiff in accordance with the opinion and judgment of said Supreme Court."

The defendants excepted to each of these findings and declarations except the first.

"1. It is therefore considered, ordered and adjudged by the court that the motion to strike answer from the files be and the same is sustained, and said answer is stricken from the files.

"2. In obedience to the opinion and mandate of the Supreme Court herein, it is further ordered that the petition of plaintiff herein, as administrator in succession of the estate of Seth Hollingsworth, deceased, to sell certain lands of said Hollingsworth to pay debts probated against said estate, towit: lot five (5) in block No. three (3) in the original survey of Siloam Springs, in Benton County, Arkansas, be and the same is granted.

"3. It is further ordered and adjudged by the court that the plaintiff do have and recover of and from the defendants and from R. S. Morris, and W. G. Strange, the sureties on their ap-

peal bond from the probate court, all his costs laid out and expended on account of said appeal from the probate court.

"4. That the judgment of this court be certified by the clerk thereof to the probate court of Benton County, Arkansas, to the end that said probate court may proceed with the administration of the estate in accordance with the judgment of this court, and with the judgment and opinion of the Supreme Court herein.

"To each of these orders and judgments the defendants excepted, and prayed an appeal to the Supreme Court of the State of Arkansas, which appeal is by the court granted. Whereupon the defendants present their bill of exceptions, and ask that the same be signed, filed and made a part of the record of the case, which is accordingly done."

To all of said findings, orders and judgments the appellants at the time excepted and appealed to this court. Whereupon on October 5, 1904, during said term, the appellants presented their bill of exceptions containing their answer which the court had stricken from the files, whereupon said bill of exceptions was signed and filed in open court on October 5, 1904.

E. P. Watson, for appellant.

1. Upon the reversal and remand of a case by this court to the lower court the whole case stands for trial *de novo.* 29 Ark. 98; 13 Ark. 253; 52 Ark. 473; 16 Ark. 181; 70 Ark. 195; 73 Ark. 513; 11 Enc. Pl. & Pr. 865; *Ib.* 771, 772.

2. The question of the jurisdiction of the court in proceedings *in rem* over the parties or subject-matter may be raised at any time. 11 Cyc. 700. A proceeding to sell the lands belonging to a decedent to pay debts is a proceeding *in rem.* 13 Ark. 177; 19 Ark. 499; 47 Ark. 413, and cases cited. Unless the record discloses affirmatively that the testator's will has been probated, there is no jurisdiction to appoint either an executor or administrator with the will annexed; neither is there jurisdiction to take the land that has been devised or descended to heirs as assets held by the administrator. Woerner, Admin. 562; 44 Ark. 496; Kirby's Digest, § 10; 34 Ark. 451; 15 Ark. 26; 38 Ark. 631; Black on Judgments, § 278. An application by one who acts, but has not been legally qualified, as administrator gives

no jurisdiction to the court; and if it order a sale, and approve the same as made, such sale is void. 2 Woerner, Admin. 1023, and note.

3. Lands are assets in the hands of the administrator only for the payment of debts. Kirby's Digest, § 79; 46 Ark. 373. If it be shown that there are no debts due by the estate, then the court loses jurisdiction to order a sale. 1 Black, Judgments, § § 242, 243; 47 S. W. 837. And an order to sell, and any sale thereunder, is void. 2 Woerner, Admin. 1035; 52 Ark. 320. Heirs and devisees may at time show that there are no debts, when the administrator is attempting to sell lands devised to or inherited by them. Black on Judgments, § § 641, 560; 24 Am. & Eng. Enc. Law (2 Ed.), 753. It is shown that the widow is in actual adverse possession under the will, claiming title under the will and by adverse possession. If she holds adversely under the will until evicted, the administrator and the court can not treat the lot as an asset and take jurisdiction over it. 46 Ark. 373; 1 Woerner, Admin. 338.

4. There is no record to show that the mandate was filed in the circuit court, and the record does show that it was not spread on the record of that court. For these reasons the court had no jurisdiction. Kirby's Digest, § 1236; Rule 14 Sup. Court.

5. It was error in the circuit court to order the case to be certified down to the probate court for proceedings there in accordance with the judgment of the circuit court and Supreme Court. Kirby's Digest, § 1351; 38 Ark. 388; 63 Ark. 145. It should have ordered the sale in the manner provided by the statute. Kirby's Digest, § § 186, 191.

McGill & Lindsey, for appellee.

1. Every issue now presented, except adverse possession, was presented in the former appeal and determined. 72 Ark. 446. On reversal, the circuit court is only left free to make such order or direction in the further progress of the case, not inconsistent with the decision of this court, as to any question not presented or settled by such decision. 16 Ark. 181. All questions determined when a cause is before this court on appeal are, and must be

treated, as *res judicata.* 13 Ark. 253; 26 Ark. 17; 44 Ark. 383; 55 Ark. 609; 56 Ark. 170; 60 Ark. 50; 63 Ark. 141.

2. It was appellant's duty on the other trial to set up every defense which existed, of which they had knowledge. If there were any defenses which they failed to plead, they thereby waived them. If appellant's defenses were not litigated, they could have been.. 76 Ark. 423; 24 Am. & Eng. Enc. Law, 782 and notes.

3. While it would have been proper for the circuit court to direct the administrator to make the sale, yet it was not error to direct the probate court to make the order. 48 Ark. 544.

WOOD, J., (after stating the facts.) The bill of exceptions only includes the answer which the lower court struck from the files. The record shows that the circuit court heard the motion to strike "upon said motion and answer and upon the mandate and opinion of the Supreme Court in this cause, and upon the briefs of attorneys in said court in said cause, and upon the judgment of this court originally rendered herein and appealed from, and upon the records and pleadings of the probate court, and, at the request of defendants, *upon oral testimony as to an oral answer interposed by defendants in the original trial of the cause in this court, and the contents of such oral answer.*" In the absence of a bill of exceptions showing what the oral testimony was, the finding of the trial court that "defendants interposed an oral answer, in which all of the defenses contained in the answer filed at the present term were set up, except the defense denying that plaintiff had been duly appointed administrator of the estate of Seth Hollingsworth and the defense of adverse possession," must be taken by us as conclusive. So must the further finding: "That every question raised by the answer filed at the present term except that of adverse possession was litigated in this court at the former trial." While the court found that the defense denying that appellee had been appointed administrator of the estate of Seth Hollingsworth was not set up in the oral answer, yet the court found further that such defense "was litigated." In other words, we must take it that the lower court on the former trial determined that appellee had been duly appointed administrator of the estate of Seth Hollingsworth. Such determination was necessary *in limine,* in order to ascertain whether or not the court had jurisdiction to pass upon his petition, and we

must presume that the court properly determined that fact, in the absence of any showing to the contrary. So every question now presented by appellants except that of adverse possession, and the question as to whether or not the circuit court acquired jurisdiction on the remand of the cause from this court, was presented and determined on the former appeal. In the opinion of this court on the former appeal, *McAndrew* v. *Hollingsworth,* 72 Ark. 446, this court adopted the statement of facts made by appellant in that case (appellee here) as correct. That statement set forth the issues of law and fact which were presented for the court's decision, and was accepted by appellants here (appellees there) as correct, except in a matter of punctuation, which the decision rendered immaterial.

The question in this case from the beginning has been whether or not the lot in controversy could be sold to pay the debts of Seth Hollingsworth. Appellee's application to the probate court for authority to sell presented that question. Appellants were parties to that proceeding, and resisted the application. They should have presented in their answer all the defenses they had. On final judgment they must be held to have litigated all the questions that could have been settled that were necessary for the determination of the issue presented. If the defense of adverse possession had been set up and proved, this court would not have reversed the judgment. If it had been set up, and the lower court had refused or failed to pass upon it, the cause would not have been finally disposed of here, but would have been remanded for new trial. The law does not tolerate the trying of causes by piecemeal. It was settled on the former appeal that the lot in controversy was subject to the debts of Seth Hollingsworth. In that case we said: "The widow, Mrs. Hollingsworth, abandoned the homestead of her deceased husband by selling and conveying the land constituting it after his death. She now claims and holds the land as an independent purchaser under a deed executed to her by Minnie Strange after such abandonment." This holding shows that there was no adverse possession by Deborah Hollingsworth, and precludes the setting up of such defense after the remand of the cause to the lower court. This court also said on the former appeal: "There being no minor children, the lot in controversy has become an asset in the hands of the admin-

istrator of Hollingsworth for the payment of debts." This was an end of the whole matter, and settled against appellants every defense that they might have set up to appellee's petition to sell.

The cause was not reversed and remanded for new trial or further proceedings, but "with instructions to the lower court to render judgment in accordance with the opinion." As there was a final judgment on the issue presented, the doctrine of *res judicata* is applicable to all defenses that might have been raised on the issue joined. *Church* v. *Gallic,* 76 Ark. 423, cases cited, and authorities cited in 24 Am. & Eng. Enc. Law (2 Ed.), 767.

The lower court did not err in its interpretation of the instructions from this court, and its judgment was in conformity therewith. It had nothing further to do than to enter judgment.

The remand of the cause by this court and the filing of the mandate with the clerk of the lower court within the time prescribed by the statute gave the lower court jurisdiction. The filing *with the clerk of the circuit court* was a filing *in the court,* in contemplation of the statute, section 1236, Kirby's Digest. The clerk is the custodian of the papers and records of the court; and when court papers and records are filed with him, they are in law *filed in the court.* Rule 14 of this court prescribing that the judgment of this court "should be entered of record in the circuit court" is merely a direction to the clerk as to the proper method of making up the record for this court. It is not mandatory and peremptory in the sense of being essential to the jurisdiction of the lower court when a cause is remanded to it from this court. It had no reference to that.

The judgment is affirmed.

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JONES v. POND & DECKER MANUFACTURING COMPANY.

Opinion delivered May 28, 1906.

1. INFANCY—SUIT TO VACATE JUDGMENT.—Under Kirby's Digest, § 4431, subdiv. 8, infants have a day in court, within twelve months "after arriving at full age," to show cause why a judgment rendered against them in infancy should be modified or vacated. (Page 198.)

2. SAME—MAJORITY OF FEMALE.—Under Kirby's Digest, § § 4431, subdiv. 8, and 6248, preserving the right of infants to appear within one year after reaching full age and show cause why a judgment against them should be vacated, a female infant, according to Kirby's Digest, § 3756, attains her full age at 18 years. (Page 199.)
3. LIMITATION—POSSESSION OF PART.—One who takes possession of part of a tract of unoccupied land under a tax deed conveying the entire tract acquires title to the entire tract by limitation after the lapse of two years. (Page 199.)
4. JUDGMENT—PERSON UNDER DISABILITY—STATUTORY NEW TRIAL.—To entitle a person under disability of nonage, coverture or unsound mind to set aside a judgment obtained against him or her, as provided by Kirby's Digest, § 4431, subdiv. 5, two elements must concur: (1) the disability of such person must not appear in the record; and (2) the error which should cause the judgment to be vacated must not appear in the proceedings. (Page 200.)

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

STATEMENT BY THE COURT.

The complaint in this case was filed by appellants to review and vacate a decree of the Mississippi Chancery Court, rendered at the March term, 1900, against them, divesting their interest in all of section 14, T. 10 S., R. 8 west, except 2.57 acres, and quieting the title of appellees thereto.

Appellants, except Nannie C. Jones, the widow, were children and heirs at law of B. F. Jones. At the time of the rendition of the decree sought by this suit to be vacated, appellants, except Nannie C. Jones, the widow, were minors. Appellee, in the fall of 1897, filed a complaint in the Mississippi Chancery Court against one B. F. Jones to quiet title to section 14, T. 10 S., R. 8 W., in Mississippi County, Arkansas.

Jones died, and his widow and children, appellants here, answered. They admitted that appellee had derived title from the State through the Arnold heirs, under whom appellee claimed by deed executed to it in 1897. But they claimed that this title had been divested out of appellee, and had been invested in them, by a tax deed duly executed to B. F. Jones in 1882. They set up this deed, and also the two and seven years statutes of limitation. They also set up that their ancestor had paid taxes on the land since 1877, and that appellee was barred by laches.

The court found that the tax title under which appellants claimed was void, but found that appellants had been in adverse possession under their tax deed of 2.57 acres, and quieted the title of appellants to this, but divested their title to the residue of the section, and quieted the title of appellee to same. The court also rendered a decree in favor of appellants for $1,039.80 for taxes and improvements. The tax deed to B. F. Jones was for all of section 14, T. 10, R. 8. The proof showed that 2.57 acres was cleared by him, and had been in cultivation continuously for seven or eight years before suit was brought by appellee to quiet its title.

Appellants seek by their complaint in this case to review and vacate that decree as to all except the 2.57 acres, and to quiet their title to the whole of section 14, T. 10, R. 8, *supra*. In their complaint, after setting up their claim of title under the tax deed to B. F. Jones, and the death of Jones, and their relationship to him, as the widow and heirs, and after reciting, among other things, that appellee claims title under a decree of the chancery court of Mississippi County, rendered in March, 1900, in its favor against them, they allege the minority of appellants, the children of Jones, at the time of the rendition of the decree, and set up various grounds for annulling same, and among them the following: That said B. F. Jones paid all taxes on said land from the date of his purchase until the day of his death; that he took possession of said land in 1884, and continued in the actual, open, notorious, hostile and exclusive possession of the same until the day of his death; and after his death the plaintiffs continued said possession until the rendition of said decree in March, 1900; that as an incident, at the rendition of said decree the defendant refunded to the said Nannie C. Jones, as administratrix, the taxes paid by her and the said B. F. Jones on said land, which sum the plaintiff Nannie C. Jones now brings into court and tenders to defendant.

The prayer was that the decree be vacated, and for general relief.

Appellee denied all the material allegations of the complaint, and its denial of the paragraph of the complaint above set forth is as follows:

Defendant denies that said B. F. Jones, deceased, took pos-

session of said land in the year 1884, or that he held actual, open, hostile, exclusive possession of the same up until the time of his death, or that plaintiffs held possession of the same up until his death, or that plaintiffs held possession of the same until the rendition of the decree mentioned in the complaint; but if the said B. F. Jones ever held actual, open, exclusive and continuous possession of any part of said land for any length of time, his possession covered only two and one-half acres, which were held by mistake, and under the belief that it was a part of a tract lying contiguous to the tracts in question, and defendant denies that plaintiffs' possession or the possession of their ancestor was ever intended to cover any portion of the land in controversy, and denies that said possession extended to the entire section.

This suit was begun January 8, 1903. Appellant Minnie Adkins (nee Jones) was born September 10, 1881. Appellant Minnie Jones was born March 17, 1884, and the other children were younger than she.

The tax deed under which B. F. Jones claimed was executed January 12, 1880. It conveyed section 14, T. 10, R. 8. The proof showed that as early as 1884 the timber on the land on the line between sections 13 and 14 was deadened, and in 1889 three and three-fourths acres were cleared, and put in cultivation in section 14 for B. F. Jones. This land joined other land owned by Jones. In 1887 three hundred acres were deadened by Jones, and thirty acres were put in cultivation in January, 1895. Jones paid taxes on the land, and used firewood from it continuously from the time he bought it until 1897. No one else was in the actual occupancy of the other land in section fourteen. The chancery court refused to vacate the decree, and dismissed appellants' complaint.

J. T. Coston, for appellants.

1. The decree sought to be vacated was void because the court had acquired no jurisdiction of B. F. Jones or his heirs.

The warning order was published November 26, 1897, and Jones died December 15, 1897—before the thirtieth day after the making of the order. Kirby's Digest, § 6058. The death of a defendant pending publication of notice renders it ineffectual. Alderson on Jud. Writ and Proc. 343; 26 Minn. 421. There

was, therefore, nothing to revive against the heirs, and no attorney could enter their appearance and consent to a revivor against them. Kirby's Digest, § § 6308, 6311; 61 Ark. 419; 39 Ark. 106; *Ib.* 237; 98 N. W. 701.

2 Aside from the question of jurisdiction, if the decree upon the merits was erroneous, and deprived the heirs of a substantial right, it was the duty of the court, upon application of the heirs within the time allowed by statute, to vacate the judgment. Kirby's Digest, § 4431, subdiv. 8; *Ib.* § 6248; 8 S. W. 916; 10 Bush, 61; 10 Ky. Law Rep. 317; 65 Pa. 779; 82 N. W. 439; 42 W. Va. 783; 49 Ark. 417; 70 Ark. 418; 15 Ky. 76; Cent. Digest, 27, col. 1387-8; 74 Am. Dec. 298.

3. The plea of *res judicata* is not applicable in this case. 64 S. W. 425. And the minors are not estopped by receipt of money by the administratrix for taxes, interest and improvements. 2 Pomeroy's Eq. Jur. § 815; 101 N. C. 206.

4. On the question of adverse possession, when Jones took possession of a part, with his tax deed on record, his possession extended to the limits of the grant. 74 S. W. 299; 71 S. W. 255; *Ib.* 945; 88 S. W. 977; 6 Col. 265; 25 Me. 472; 85 Am. Dec. 106; 130 Fed. 503; 10 Pet. 190; 48 Ark. 316; 2 Wood on Lim. 633; 88 S. W. 566. See also 142 U. S. 443; 47 Fed. 180; 158 U. S. 384. The act of deadening the timber on a tract of land is an unequivocal assertion of ownership. 34 Ark. 602; 87 Ill. 146; 2 Wood on Lim. 676. To be adverse, possession need not be so open, continuous and notorious as necessarily to be seen and known by the owner if he should casually go upon the land. 111 Ala. 589; 43 Mo. 142.

5. Jones bought the land for taxes due and delinquent thereon for the years 1868 to 1876, inclusive, in the year 1877, and continued to pay the taxes thereon and improve the land until November 26, 1897, when this suit was brought.

"Equity will not permit one whose duty it is to act to wait and let the future determine whether or not the property is sufficiently valuable to assume burdens and rights otherwise discarded." See also 168 U. S. 284; 11 Pet. 333; 98 Fed. 773; 51 Fed. 495.

WOOD, J., (after stating the facts.) This action was brought under sections 6248 and 4431, subdivision 8, of Kirby's Digest.

This court has construed these provisions in *Blanton* v. *Rose,* 70 Ark. 418. According to that case, appellants except Mamie Adkins, the children of B. F. Jones, had the right to bring this suit. The decree which they seek to vacate divested their title in the lands, and was tantamount to ordering a conveyance from them in favor of appellee. They, except Mamie Adkins, were minors when the decree was rendered, and under the above section had a day in court within twelve months "after arriving at full age" to show cause against the decree, and to vacate same for errors therein. Section 4431, subdiv. 8, *supra.*

As to Mamie Adkins, she was over eighteen years of age when the decree sought to be vacated was rendered. The statutes (secs. 4431, subdiv. 8, and 6248, Kirby's Digest, *supra*) preserve the right to appear and show cause why the judgment should be vacated to infants. Sec. 3756, Kirby's Digest, provides: "Males of the age of 21 years and females of the age of 18 years shall be considered of full age for all purposes, and until those ages are attained they shall be considered minors." Under this section, Mamie Adkins could have brought suit in her own name or defended a suit brought against her at the time the decree sought to be canceled was rendered. Under the law she was not an infant. The language of the statute is so plain that there is no room for construction. It follows that Mamie Adkins was not entitled to any relief under the complaint, and the decree, so far as her interest is concerned, must be affirmed.

The other appellants should have been granted the relief prayed. For they show that their ancestor took actual possession of at least three and three-fourths acres of the land described in his tax deed. Indeed, the proof tends to show that he took possession of three hundred acres, for he deadened that amount. Under the decisions of this court in *Carpenter* v. *Smith,* 76 Ark. 447; *Sparks* v. *Farris,* 71 Ark. 117, and *Crill* v. *Hudson,* 71 Ark. 390, when appellant's ancestors took possession of part of the land described in his tax deed, that possession extended to the limit of his grant. There was no one in the actual occupancy of the residue of the land not occupied by B. F. Jones, thus distinguishing the case in that particular from *Woolfolk* v. *Buckner,* 67 Ark. 411.

The decree of the Mississippi Chancery Court dismissing

appellants' complaint is reversed, and the cause is remanded with directions to enter a decree quieting the title of appellants to the land in controversy, except as to Mamie Adkins, and affirming the judgment dismissing the complaint for want of equity as to her.

The court, however, before entering decree quieting the title of appellants to the lands in controversy as indicated, should make an order requiring appellants to make good to appellee the tender with interest.

ON REHEARING.

Opinion filed October 15, 1906.

HILL, C. J. Appellee seeks to have the judgment changed except as to Mrs. Adkins, and appellants seek to have it changed so as to permit her recovery. The court has carefully gone into the case again, and adheres to the decision rendered. It is pointed out that an undenied allegation of the complaint is that Mamie Adkins, *nee* Jones, was a married woman at the time of the rendition of the original decree. It was sought to bring her within the 5th paragraph of section 4431, Kirby's Digest, instead of the 8th paragraph, under which this recovery was sustained for all the Jones heirs who were minors at the time of the rendition of the decree sought to be vacated.

To obtain relief under paragraph 5, two elements must concur: (1) The disabled condition of the moving party must not appear in the record; and (2) the error which should cause the judgment to be vacated must not appear in the proceedings.

It was not intended to give married women, minors and lunatics a remedy cumulative to their existing remedies by appeal, writ of error, certiorari or other appropriate method of review, which would correct the error where it was apparent in the proceedings. When the error and condition do not appear in the proceedings, and therefore these remedies are unavailing, then this statute reaches erroneous proceedings not otherwise correctible in favor of the persons laboring under disabilities therein mentioned. *Richardson* v. *Matthews,* 58 Ark. 484, is an application of this statute. A judgment on a promissory note was ren-

dered against a married woman. She had not appeared, and on its face the judgment was valid; but as a matter of fact she was surety for her husband and son on the note, and was a *feme covert.* The proof of her condition and those other facts rendered it an erroneous proceeding, but one not correctible without this statute, and it was held to apply. In this case the coverture of Mrs. Adkins did not affect the questions involved; and she appeared and put into the proceedings the facts of the case, and these facts disclosed the error of the court in the decree rendered. The court and her counsel put a construction on the decision in *Woolfork* v. *Buckner,* 60 Ark. 165, which rendered it fatal to appellant's cause, and therefore an appeal was abandoned; but that was an erroneous construction, as was shown when *Sparks* v. *Farris,* 71 Ark. 117, was decided. Recently this court on appeal corrected a similar misconception of it in *Rucker* v. *Dixon,* 78 Ark. 99.

Therefore the error did appear in the proceeding in the original case, and could have been corrected on appeal, and this statute is not applicable, and the rights of appellants must stand or fall on the 8th paragraph of section 4431; and for the reason pointed out Mrs. Adkins is precluded from recovery under it.

Justices BATTLE and RIDDICK differ with the majority of the court on the point that Mrs. Adkins is barred. They contend that she had one year after reaching 21 years to vacate the decree.

The motion is overruled.

FELLHEIMER v. EAGLE.

Opinion delivered May 28, 1906.

NEW TRIAL—ACCIDENT.—Where appellant was given until the first day of the ensuing term of court to file his bill of exceptions, and was prevented from doing so by the accidental destruction of the courthouse by fire, together with all the papers in the case, so that he was unable to have alleged erroneous rulings of the trial court reviewed, he can not on that account merely ask that the cause be reversed and remanded for a new trial.

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

Wood & Henderson, for appellant.

The appeal was granted within the time allowed by law, and upon an authenticated copy of the record. This gave this court jurisdiction. Kirby's Digest, § 1196. 73 Ark. 608 is not in point. This court, having jurisdiction, has power to grant a new trial, in order to prevent appellant from losing the benefit of an appeal which he had as a matter of right. The fire was an unavoidable accident with which appellant had no connection. Great injustice will be done appellant by refusing a new trial.

Hogue & Cotham, for appellee.

1. The appeal was not perfected within the time prescribed by law. Kirby's Digest, § 1199. The filing of a copy of the judgment is not a compliance with section 1194. 73 Ark. 608; 72 *Id.* 475; 69 *Id.* 281.

2. The appellant has not lost his right of appeal by accident or otherwise, and does not come within the rule of submission to a new trial. 61 Ark. 341; *Ib.* 354.

3. The charge of the court below not being before this court, there is nothing to review. It was appellant's duty to supply the burned record or get his bill of exceptions before the papers were destroyed. He has been guilty of negligence, and this court should affirm the judgment.

RIDDICK, J. On the 3d of October, 1904, Florence E. Eagle recovered a judgment in the Garland Circuit Court against H. Fellheimer for the sum of $1,800. Fellheimer filed his motion for a new trial, which was overruled, and at his request the circuit court allowed him until the first day of the March term to file his bill of exceptions. But, before that time arrived, the court house of Garland County and the records and papers in the case were destroyed by fire. Fellheimer prepared his bill of exceptions, setting out the evidence in the case, which was signed by the circuit judge, and filed in due time. The bill of exceptions referred to the instructions given by the court to the jury and also to those asked by the defendant Fellheimer and rejected by the court, and the clerk was directed to insert therein the instructions referred to. But these instructions had been destroyed

along with the other papers in the case, and the clerk was not able to perfect the bill of exceptions in that way.

The defendant has filed a transcript of the judgment and of the incomplete bill of exceptions, and has been granted an appeal by the clerk of this court. He admits that this record, of itself, shows no error and no ground for reversal, but he contends that the written instructions were lost without his fault, and that, as he is by reason of such accident unable to have this court review the rulings of the circuit court, the case should be reversed and a new trial ordered to prevent injustice. But the presumption is in favor of the justice and legality of the judgment of the circuit court. In order to have that judgment reviewed, it is incumbent upon the party appealing to file in this court a true and perfect transcript of the proceedings below, so far as they affect the error alleged to have been committed, and for which a reversal of the judgment is asked. When a part of the record in the cause has been lost or destroyed before a transcript thereof has been made for this court, it is the duty of the appellant, by appropriate proceedings in the trial court, to reinstate the record. In this case, as appellant claims that the trial court committed error in its instructions to the jury, it was incumbent on defendant to have those instructions preserved in the bill of exceptions, and a true and complete copy thereof filed in this court. The fact that those instructions were accidentally destroyed without his fault does not relieve him of that duty, for neither was the plaintiff in any way to blame for this accident.

In an unreported case in this court referred to by counsel where the appellant had filed a complete transcript and perfected his appeal within apt time, we held that the jurisdiction of the court could not be defeated by the withdrawal of the transcript by the other party. In that case, after the appellant had perfected his appeal, the attorney for the appellee obtained the transcript for the purpose of preparing his brief. While in his office, it was accidentally destroyed by the janitor who made fires therein. The court held that under such circumstances it was the duty of the appellee to restore the transcript by filing a certified copy of the original records; and as the original records were also lost, and could not be restored, the court treated the refusal to restore them as a confession of error, and reversed the judgment, and granted

a new trial to protect the rights of the appellant, who had done all that was required of him by law.

But in this case the appellee is without fault. It is the misfortune of the appellant that he did not preserve a copy of the instructions or present his bill of exceptions before the substance of those instructions had faded from the memory of the trial judge. Delays are sometimes hazardous. Neither the appellant nor the appellee was to blame for the accident that destroyed the records and papers in the case, but the delay in the filing of the bill of exceptions was allowed at the request of appellant. He took the chances of being injured by that delay, and can not now place the injury which has happened on plaintiff, instead of himself. In other words, it was the duty of appellant to file a complete transcript. By reason of an unforeseen acident he is now unable to do so. But, as no act of appellee contributed to this result, she is entitled to stand on her strict legal rights, and to insist on an affirmance where no error is shown. We are therefore of opinion that the judgment must be affirmed. It is so ordered.

LOVELL v. SNEED.

Opinion delivered May 28, 1906.

1. TRIAL—OBJECTION TO EVIDENCE—HOW TAKEN.—Where a question asked of a witness may not elicit incompetent evidence, an objection to the question is improper; but if it does elicit incompetent evidence, a motion should be made to exclude such evidence, or the court should be asked to stop the witness when he commences to give incompetent evidence. (Page 209.)
2. BANKRUPTCY—DISCHARGE—PLEADING.—A discharge in bankruptcy is no defense unless pleaded. (Page 210.)

Appeal from Logan Circuit Court; *Jeptha H. Evans,* Judge; reversed.

STATEMENT BY THE COURT.

In 1901 J. T. Sneed and R. H. Sneed were engaged in a mer-

cantile business in Booneville, Arkansas, under the firm name of Sneed Brothers. In that year R. H. Sneed sold his interest in the firm to his sister, Mrs. Hamilton, but the business was carried on in the name of the old firm. Afterwards in February, 1902, Mrs. Hamilton sold her interest in the business to J. T. Lovell, and after that the business was carried on in the name of Lovell & Company, the firm being composed of J. T. Lovell and J. T. Sneed. At the time that R. H. Sneed sold his interest in the business to Mrs. Hamilton the firm of Sneed Brothers had a contract with the Parlin & Orendorff Company, a corporation of Illinois, for the sale, on commission, of wagons manufactured by that company. This contract was not assignable without the consent of the company, and R. H. Sneed remained bound in this contract until Lovell bought an interest in the firm. At that time a settlement was made between the agent of the company and R. H. and J. T. Sneed, comprising the old firm of Sneed Brothers. It was ascertained that the firm owed the Parlin & Orendorff Company $675.58.

The old firm was unable to pay this amount in cash; and as the old firm had dissolved and gone out of business, the company was unwilling to take the note of the old firm in settlement thereof unless the new firm of Lovell & Company would sign the note as sureties. Lovell & Company agreed to do this, provided that J. T. Sneed and R. H. Sneed would execute notes to Lovell & Company each for one-half the amount of the note, in order to indemnify Lovell & Company against any loss by reason of signing the note of Sneed Brothers to the Parlin & Orendorff Company. Thereupon Sneed Brothers executed their note to Parlin & Orendorff Company for $675.58, payable 1st of November, 1902, and this note was then signed by Lovell & Company. J. T. Sneed then executed his individual note to Lovell & Company for $337.79, due 1st of December, 1902, and R. H. Sneed executed his note to Lovell & Company for the like amount, due also on the 1st of December, 1902. As R. H. Sneed had retired from that business, Lovell & Company required that he give security on his indemity note, and J. F. Basinger signed it as such surety.

When the note of Sneed Brothers to the Parlin & Orendorff Company fell due, it was paid by Lovell & Company, who, as before stated, were sureties on the note. Lovell & Company

afterwards brought this action on the indemnity note executed by R. H. Sneed with J. F. Basinger as surety. The defendants filed an answer, the substance of which was, first, that the debt for which this note was executed was in fact a debt due from the plaintiffs to the Parlin & Orendorff Company, and, second, that at the time this note was executed notes and accounts belonging to the old firm of Sneed Brothers, of the face value of about $900, were placed in the hands of J. T. Sneed, one of the plaintiffs, and that he was to collect these notes and accounts, and pay the note to the Parlin & Orendorff Company. The defendants alleged that Sneed did collect these notes and accounts, and that, if he did not pay the note of Parlin & Orendorff Company out of the money collected, the firm of Lovell & Company received the money collected, and that the plaintiffs for that reason had no right of action.

On a trial before a jury there was a finding and judgment for defendants, and plaintiffs appealed.

Anthony Hall, for appellees; *A. T. Barlow,* of counsel.

The burden was on appellees to show payment. There is absolutely no evidence to sustain the verdict, and it is contrary to the law. The verdict should have been set aside.

James Cochran, for appellees; *D. B. Castleberry,* of counsel.

There was evidence to sustain the finding of the jury. This court will not reverse unless there is a total absence of evidence to sustain the verdict. 46 Ark. 142; 56 *Id.* 314; 47 *Id.* 196.

RIDDICK, J., (after stating the facts.) This is an appeal by plaintiffs from a judgment rendered in favor of defendants in an action on a promissory note. The facts are set out above. Briefly stated, they are as follows: J. T. Sneed and R. H. Sneed, who had done business as partners under the firm name of Sneed Brothers, became indebted to the Parlin & Orendorff Company in the sum of $675. Afterwards the firm of Sneed Brothers dissolved. R. H. Sneed sold his interest in the firm to his sister, and she in turn sold her interest to J. T. Lovell. Lovell and J. T. Sneed then carried on the business as Lovell & Company. The old firm of Sneed Brothers was indebted to Parlin & Orendorff Company, an Illinois corporation, in the sum of $675.

When the firm of Lovell & Company was formed, Parlin & Orendorff Company insisted that, as the old firm of Sneed Brothers had dissolved, their debt to the company should be paid or secured in some way. As Sneed Brothers did not have the money to pay this debt, they induced Lovell & Company to become surety on the note of Sneed Brothers to Parlin & Orendorff Company for the sum of $675, and, to indemnify Lovell & Company for so doing, J. T. Sneed and R. H. Sneed each executed his individual note to Lovell & Company for half of that amount. The defendant Basinger became surety on this note of R. H. Sneed to Lovell & Company, and this is the note on which he and R. H. Sneed are sued in this action. The defendants admitted the execution of the note, and assumed the burden of proving that it had been paid, or that they were not liable on it.

R. H. Sneed, in his own behalf, testified that Lovell & Company agreed to pay Parlin & Orendorff Company the $675, and that this amount was due to that corporation from Lovell & Company, and was not his debt. He testified that he signed the note because Parlin & Orendorff Company would not accept the note of Lovell & Company. But this statement is inconsistent with other undisputed facts to which this defendant also testified. He admits that he gave the note sued on to Lovell & Company to indemnify them for signing the note to Parlin & Orendorff Company for the $675. But, if Lovell & Company owed this debt to Parlin & Orendorff Company, why was it necessary for defendant to execute his note to them with Basinger as surety in order to protect Lovell & Company from paying their own note? It is not usual for a debtor to insist that others shall indemnify him against having to pay his own debt, and if one did it is not likely that he would obtain the indemnity. As before stated, we think the testimony clearly shows that the note sued on was executed by defendant R. H. Sneed to Lovell & Company to indemnify them against having to pay a note which Sneed Brothers owed.

The note then was executed for a valuable consideration; and, as the testimony showed that Lovell & Company afterwards paid the note on which they became surety, they have the right to recover on this indemnity note, unless it has been paid. Now, the defendant R. H. Sneed admitted on the witness stand that he had neither paid this note nor the note on which Lovell & Com-

pany became surety, unless these notes were paid by Lovell & Company out of money collected on notes and accounts of Sneed Brothers. His whole contention that he paid this note is based on the fact that J. T. Sneed at the time this note was executed had in his possession certain notes and accounts belonging to the old firm of Sneed Brothers which it was understood that J. T. Sneed was to endeavor to collect, and, if collected, to pay on the debt due from Sneed Brothers to Parlin & Orendorff Company. But the defect in defendant's proof is that he does not know how much was collected by his brother on these debts. His testimony on this point is as follows: "I do not know what amount J. T. Sneed collected on the old notes and accounts turned over to him. He told me at one time they had collected about all of them. There was between $800 and $900 of these notes and accounts of Sneed Brothers. That was in October, 1901." Now, defendant, as will be noticed, does not state what the value of the old notes and accounts belonging to Sneed Brothers were in March, 1902, when they were specially turned over to his brother J. T. Sneed to collect and apply proceeds to the payment of the note of Sneed Brothers to Parlin & Orendorff Company, on which Lovell & Company were sureties. He testifies that their face value in October, 1901, was between $800 and $900. But that was the date of the sale by him of his interest in the firm to his sister. These $800 or $900 of notes and accounts were then held by his brother for collection; and, so far as the evidence shows, they may have been nearly all collected and paid out on other debts before the note to Lovell & Company sued on here was executed in March, 1902. The statement of his brother that he had collected about all of them, to which defendant testifies, may have been made before March, 1902; and, if so, would show that there were very few notes and accounts of the old firm of Sneed Brothers left uncollected in March, 1902, at the time the note sued on was executed. The defendant makes no complaint that his brother had not properly disposed of the proceeds of notes and accounts collected by him previous to March, 1902. He impliedly admits that there was no money on hand at that time belonging to Sneed Brothers with which to pay the debt of Parlin & Orendorff Company. He expressly admits that he has paid nothing on that debt, unless his brother collected

money on the notes and accounts of Sneed Brothers after the settlement in March, 1902, and yet he does not state what the amount of those notes and accounts was at that time, nor whether anything was collected on them or not. It thus appears that the testimony of this defendant does not show that this note, or any part of it, has been paid.

On the other hand, the testimony for the plaintiffs is direct and positive that the note sued on has not been paid. J. T. Lovell testified that J. T. Sneed had some old notes of Sneed Brothers for collection, but that he did not collect exceeding $35 on them. J. T. Sneed was not present at the trial, but it was admitted that he would testify as stated in the motion for continuance, and this was "that all the notes and accounts of Sneed Brothers in his hands in October, 1901, were applied on their indebtedness, and that no part thereof was ever received by Lovell & Company on the notes to them," and that the note sued on was not paid. This testimony is corroborated by the conduct of defendant R. H. Sneed in endeavoring to borrow money to pay his note when it came due, and in asking for an extension of time in which to pay it. Giving him the benefit of the $35 which Lovell testified was collected by J. T. Sneed, yet it is still evident that the testimony does not show that the note sued on has been paid in full. We are therefore of the opinion that the defendants do not show that this note has been paid in full, or that nothing is due on it.

As the judgment must be reversed, we will call attention to the fact that a large part of the testimony of the witness Pennington, introduced by defendant, related to the declarations of the defendant R. H. Sneed and his sister, Mrs. Hamilton. These declarations were hearsay, and not competent evidence against the plaintiffs, but it does not seem that any proper objection was made to this testimony. The plaintiff objected to the first question put to this witness, which was whether he knew anything "about the terms of the sale from R. H. Sneed to Mrs. Fulton of his interest in the business of Sneed Brothers." Now, that sale had very little to do with this suit; but, as the sale led up to the settlement in which the note sued on was executed, it was, we think, not improper to show that this sale was made, and the terms thereof, as explanatory of what followed. But it was not competent to allow the witness to detail at length conversations

between himself, the defendant, and his sister as evidence against the plaintiffs. The defendant or his sister might have testified as to the terms of the sale, but the evidence of this witness was mostly hearsay and incompetent, and should have been excluded, had a proper objection been made. The objection to the first question, though, was not sufficient, for it could not be told from that question that the answer would be improper. The plaintiffs should have moved to exclude the answer, or asked the court to stop the witness when he commenced to detail these conversations.

We think, also, that the court should have sustained the objection made by plaintiff to the testimony of defendant Sneed that he had been declared a bankrupt, and had filed the note sued on as one of his liabilities, for no plea of discharge in bankruptcy was filed by him. But, while the defendant had no right to introduce such testimony, we think that it helped to make out the plaintiffs' case, for it showed that the defendant recognized this note as a valid claim against himself, and for that reason we do not see that this testimony was prejudicial.

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

WHEELER v. BENNETT.

Opinion delivered May 28, 1906.

JUDGMENT—RES JUDICATA.—Where, in a proceeding based upon constructive service, the defendants made default, a judgment reciting that the cause was heard upon the evidence and dismissing the complaint for want of equity bars the plaintiff from prosecuting another suit upon the same cause of action.

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

Driver & Harrison, for appellant.

1. A judgment rendered in an adversary suit without notice is void. 49 Ark. 397; Freeman on Judgments, 4 Ed. § 117; 58 Ark. 181; 71 Ark. 565.

2. Appellant is not estopped by the decree rendered at the October term, 1902. The burden is upon the appellees to show to the satisfaction of the court an estoppel by virtue of this decree. 55 Ark. 286. The complaint in that suit was an effort to remove a cloud from title. It discloses that petitioner was out of possession, that it was an effort to attack collaterally the former decree under which appellees claimed title, and the decree dismissing this complaint was in effect an involuntary nonsuit. 47 Ark. 120, and cases cited.

3. It is patent upon the face of the complaint upon which the decree of dismissal was based that no cause of action was urged, and it could not support a decree that affected the rights of defendants. 62 Ark. 439; 57 Ark. 97. The merits were never presented in the petition to remove cloud from the title, and no binding decree could have been rendered thereon. 62 Ark. 78; 94 U. S. 608.

D. F. Taylor and *J. T. Coston,* for appellees.

1. It is conceded that a judgment without notice is void, but the question of service upon appellant has been litigated, and decided adversely to his contention by the decree rendered in October, 1902. His complaint stated a good cause of action. Bennett and Lollar were nonresidents. The court heard plaintiff's evidence, and dismissed the complaint for want of equity. It is *res judicata.* Black, Judgments, § 609, subsec. 2; *Ib.* § 614; 89 Fed. 652; 88 S. W. 980. In an action against non-residents plaintiff must substantiate his complaint by proof. Kirby's Digest, § 6253. A dismissal or a default may be the basis for a judgment on the merits. 85 Fed. 636; 7 Wall. 109; 157 U. S. 691; 166 U. S. 518; 152 U. S. 257.

2. As to the partition suit, the record shows that Wheeler was served, as appears by the sheriff's return, that *all* parties appeared by solicitors at the submission of the cause, and that *all* parties consented to the approval and confirmation of the report. These recitals are not contradicted. 61 Ark. 474. The presump-

tion in favor of jurisdiction is conclusive. 87 S. W. 436; 80 S. W. 884.

3. Appellant is not entitled to relief because of his own laches. 50 Ark. 462; 28 Minn. 132; 6 Wis. 164; 98 Ind. 165; 190 Pa. 345; 62 Minn. 18; 71 Hun, 519.

McCULLOCH, J. This is a suit in the chancery court of Mississippi County, Chickasawba District, brought by appellant, Cicero Wheeler, against appellees, B. F. Bennett, Dora Lollar, and certain other parties to annul and vacate a decree of that court rendered at a former term in a suit instituted by appellees against appellant, and others, for partition of certain lands aggregating several thousand acres, the particular tract claimed by appellant having been allotted to appellees Bennett and Lolar in the division. He alleged, for grounds of complaint, that he was not served with summons, did not appear in the suit, and had no information of the pendency thereof until after the rendition of the decree.

The decree for partition sought to be annulled was rendered at the October term, 1900, and the final order of the court confirming the report of commissioners dividing the lands was rendered at the October term, 1901. The present suit was commenced March 11, 1903.

Appellees alleged, among other defenses, that appellant had on September 2, 1902, instituted suit against them in the same court, setting forth the same cause of action and seeking the same relief as in this suit, and that said court at the October term, 1902, rendered a final decree, upon the pleadings and proof, dismissing the complaint for want of equity. Said decree is pleaded as a bar to appellant's right to maintain this suit.

The complaint in the former suit is set forth in the record, and discloses substantially the same allegations as contained in the complaint in the present suit.

The decree is as follows:

"Chancery Court, Chickasawba District, Mississippi County, Arkansas.

"Cicero Wheeler, Plaintiff,

v.

B. F. Bennett and Dora Lollar, Defendants.

"Comes the plaintiff by his attorneys, Little & Buck, and the

defendant, though duly served with process by warning order published as the law directs, came not, but made default. This cause is heard upon the pleadings, affidavit of plaintiff and the record of decree and report of partition in the case of Bennett *et al.* *v.* Bugg *et al.,* in the chancery court of Mississippi County, and the argument of counsel, and, upon consideration, the court finds that there is no equity in the plaintiff's complaint. It is therefore considered by the court, adjudged and decreed that plaintiff's complaint herein be and the same is dismissed at plaintiff's cost."

It is urged in behalf of appellant that the decree in the former suit was in effect a nonsuit or dismissal for want of prosecution, and was, therefore, without prejudice to another suit upon the same cause of action. The recitals of the decree do not sustain that contention. It appears therefrom that the cause was heard by the court "upon the pleadings and affidavit of plaintiff and the record of decree," etc., and that upon consideration the court found no equity in the complaint, and dismissed it. The defendants in that suit (appellees Bennett and Lollar) were constructively summoned, and made no appearance; so, notwithstanding the default, appellant was required by law to prove his cause of action against them. Kirby's Digest, § 6253. The court found the proof to be insufficient to sustain the allegations of the complaint, and dismissed it. That decree was not appealed from or set aside, so far as this record discloses, and therefore barred appellant from prosecuting another suit upon the same cause of action.

Affirmed.

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BROWN *v.* HASELMAN.

Opinion delivered May 28, 1906.

SCHOOL ELECTION—PENALTY.—Kirby's Digest, § 1667, imposing a penalty upon any judge or clerk of any election who "shall neglect, improperly delay or refuse to perform any of the duties required by law," etc.,

is inapplicable to school elections not conducted under the general election law, as provided by Kirby's Digest, § 7591.

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

C. C. Hamby and *J. M. Carter,* for appellant.

The complaint is sufficient in law, and the court erred in sustaining the demurrer. Kirby's Digest, § 1667; *Ib.* § 7589; *Ib;* § 2773; *Ib.* § 2772.

James H. McCollum, for appellee.

1. The statute upon which this action is based (Kirby's Digest, § 1667) was repealed by the later election law which covers the entire ground of the subject-matter of the former statute. Kirby's Digest, c. 57; 70 Ark. 25, and cases cited. Hence no cause of action was stated, and the demurrer was properly sustained.

2. But, if it had not been repealed, it has no application to school elections. Kirby's Digest, § 7680; 43 Ark. 413.

McCULLOCH, J. This is an action to recover the prescribed penalty for an alleged violation of the following statute:

"If any judge or clerk of any election, or any other person concerned in the conducting of any election, shall neglect, improperly delay or refuse to perform any of the duties required by law, having undertaken to do so, or shall be guilty of corruption, partiality or manifest misbehavior in any matter or thing appertaining to such election, or shall unduly attempt to influence the election, he shall forfeit and pay the sum of $200, to be recovered by indictment, or by action of debt, in the name of any person who may sue for the same." Kirby's Digest, § 1667.

It is alleged in the complaint that the defendant was one of the judges of the annual school election held on the third Saturday in May, 1904, in the school district of Ozan in Hempstead County, and, together with his fellow judges of election, refused to permit the plaintiff, who was a qualified elector of said district, to vote. The circuit court sustained a demurrer to the complaint and the plaintiff appealed.

The sole question presented for our consideration is whether or not the statute in question applies to elections held in single

school districts organized in cities and incorporated towns. This section was a part of the statute enacted January 23, 1875, entitled "An act providing a general election law." The act in term applies only to general elections of State, county and township officers, and to special elections held to fill vacancies in said offices. Another section of the same statute provides a penalty for keeping open dram-shops on the day of any election, but this court, in *Stout* v. *State,* 43 Ark. 414, held that it did not apply to school elections. The act of April 10, 1893, regulating elections in single school districts, provides in express terms that the act of March 4, 1891, regulating general elections, shall have no application. The act of April 10, 1903, provides that "it shall be lawful for the county court of any county, at the April term thereof, to enter an order adjudging that the general election law shall apply to any school election to be held in said county for said year," and that the sheriff shall make proclamation to that effect, etc. Kirby's Digest, § 7591. Even if it should be held, which is to say the least very doubtful, that such an order made by the county court put in force this statute prescribing a penalty against election officers, still the existence of such an order was not alleged in the complaint.

The statute in question is strictly penal in its nature, and must be strictly construed. This court refused to apply it in *Stout* v. *State, supra,* and we think the principles announced in the opinion in that case control this case.

Affirmed.

SOUTH OMAHA NATIONAL BANK *v.* BOYD.

Opinion delivered May 28, 1906.

1. FRAUDULENT CONVEYANCE—HOMESTEAD.—A conveyance of his homestead by a married man can not be fraudulent as to his creditors. (Page 219.)
2. SAME—INNOCENT PURCHASER.—One who purchases land for valuable consideration and without knowledge of or participation in his vendor's scheme to defraud his creditors is a *bona fide* purchaser. (Page 219.)

Appeal from Lonoke Chancery Court; *Jesse C. Hart,* Chancellor; reversed in part.

A. H. Murdock and *George Sibly,* for appellant.

1. The Nebraska judgment stands unappealed from and unreversed. Under the "full faith and credit" clause of the Federal Constitution, and the repeated decisions of this court, that judgment should have been recognized by the lower court. 52 Ark. 160; 35 Ark. 331; 30 Ark. 469; 47 Ark. 17; 13 Ark. 33. Neither the question of fraud nor want of jurisdiction in the court rendering the judgment is raised by the pleadings or evidence. It stands upon the same footing as a domestic judgment. 11 Ark. 157.

2. Tewksberry and wife have not appeared. The complaint as to them must be taken as true. Under the pleadings and exemplification of the Nebraska record, a valid judgment exists against Tewksberry. In any event plaintiff is entitled to judgment against his estate, and the circuit court erred in not rendering it. 13 U. S. Sup. Ct. Rep. 614.

3. The judgment is contrary to, and not supported by, the evidence. A voluntary transfer of property while the grantor is unable to pay debts raises a presumption of fraud as to existing creditors. 56 Ark. 73; 50 Ark. 42; 59 Ark. 614; 55 Ark. 59; 23 Ark. 494; 69 Ark. 224; *Ib.* 350; 66 Ark. 455. The circumstances, relations of the parties and their subsequent conduct in the management of the property warrant the presumption of fraud. 41 Ark. 186. The transfer being voluntary, it is not necessary to show that Mrs. Maxwell participated in the fraud. 46 Ark. 542; 34 Pac. 1009; 48 Pac. 809. Where one exercises the right to make a gift to wife, children or relative, he can only do so by making provision for the payment of debts. 54 U. S. 93; 91 U. S. 479; 52 N. W. 401. Mrs. Maxwell could not convey to Prosser by consent and direction of Tewksberry. 67 Ark. 105; 66 Ark. 419.

4. As to the defendant Sperry and intervener Prosser, it was error to dismiss the complaint for want of equity. Their alleged purchases were made after the institution of this suit, and they can not claim as innocent purchasers. 16 Ark. 175; 12 Ark. 425; 67 Ark. 571; Bigelow on Fraud, 396; 20 Ala. 732;

92 Ind. 310; 29 N. J. Eq. 554. The burden is upon those claiming through Mrs. Maxwell to show that they are entitled to the property by virtue of a good consideration, as against creditors whose debts existed at the time of the transfer to her. 68 Ark. 162; 23 Ark. 494. Appellees were not justified in relying on the abstract. They should have caused a search of the records to be made, and, having failed to do so, must abide the consequences of their own negligence. 60 Neb. 625; 63 Neb. 99.

It was not necessary for appellant to reduce its claim to a judgment in this State before instituting this action to set aside a fraudulent conveyance. 66 Ark. 486. It was error to dissolve the attachment. Kirby's Digest, § § 3310, 3311.

Trimble, Robinson & Trimble, for appellees.

1. The attachment was properly dissolved. The statute under which appellant proceeded has reference solely to domestic judgments. An execution could not be issued on the Nebraska judgment until after judgment thereon in this State. Sutherland, Notes on Const. 565, and citation; 146 U. S. 685; 20 Blatchf. 524; 12 Fed. 376; 13 Fed. 417.

2. The land sold to Sperry was the homestead of Tewksberry, and not subject to appellant's claim. 52 Ark. 101; 44 Ark. 180; 43 Ark. 429; 57 Ark. 242; 52 Ark. 493; *Ib.* 547; 31 Ark. 546; 57 Ark. 331. Prosser purchased and paid for his tract before this suit was brought, and the judgment in Nebraska was no lien on lands in Arkansas. 1 Black on Judgments, 2 Ed. 655. *Lis pendens* does not operate upon parties whose rights were acquired anterior to the commencement of suit. 1 Freeman on Judgments, 4 Ed. 366, § 201. Even if these facts did not exist, the Nebraska judgment would not have been *lis pendens* in regard to the title. 1 Black, Judg. (12 Ed.), 641; *Ib.* 633, par. 400.

3. The record not being fully set forth in the transcript, the presumption is in favor of the correctness of the decree. 2 Ark. 14; *Ib.* 73; 9 Ark. 535; 57 Ark. 304; 58 Ark. 448.

4. The services rendered, and the money expended by Mrs. Maxwell, in the care of Tewksberry, constitute a valuable consideration in the deed to her. 6 Am. & Eng. Enc. Law (2 Ed.), 703; *Ib.* 719; *Ib.* 693; 91 Tenn. 163.

George Sibly, for appellant, in reply.

The proof is conclusive that the deed from Tewksbury to Ida Smith was without any consideration whatever. The claim of Mrs. Maxwell shows on its face that it is fictitious and void and made to assist Tewksberry in defrauding his creditors. Her own deposition negatives her contentions that her account was the consideration for the deed, and that Fletcher acted as her agent.

McCULLOCH, J. John S. Tewksberry was the owner of a tract of 320 acres of land in Lonoke County—the east half of section 32, in township 2 north, range 8 west—and one George Burke obtained a judgment against him in the sum of $3,620 in Douglas County, Nebraska. Said judgment was assigned to appellant, a national banking corporation, and this suit was brought by appellant against Tewksberry and Mrs. Anna M. Maxwell, to whom he had conveyed a portion of the land, to cancel said conveyances and subject the land to the satisfaction of said judgment. It is alleged in the complaint that Tewksberry conveyed the northeast quarter of said section to one Ida Smith in February, 1896, and on March 2, 1898, caused said Ida Smith to convey the same to defendant, Mrs. Maxwell, who was his wife's niece, and that both of said conveyances were made without consideration, and for the fraudulent purpose of cheating and hindering his creditors, and especially appellant in the collection of said debt. The Nebraska judgment was rendered on July 31, 1899, upon a cause of action alleged to have arisen during the year 1887.

Subsequently appellee Frank Sperry was made defendant by amendment to the complaint, alleging that he purchased the southeast quarter of said section from Tewksberry since the institution of the suit, but with full notice of the pendency of the suit. Sperry answered, alleging that said tract was occupied by Tewksberry as his homestead at the time of the conveyance, and that he purchased without actual knowledge of the pendency of the suit.

Subsequently appellee John J. Prosser filed his intervention, claiming that Mrs. Maxwell had sold and conveyed the northeast quarter of said section to him for a valuable consideration before the commencement of the suit, and that he had no notice of the

alleged fraudulent design of Tewksberry and Mrs. Maxwell to defeat the collection of the debts of the former. Tewksberry died during the pendency of the cause below, and as to him the cause was revived in name of J. C. Boyd, special administrator.

The cause was heard upon the pleadings and depositions of witnesses, and the chancellor dismissed the complaint for want of equity.

The proof is clear that the southeast quarter of said section was the homestead of Tewksberry, and that he was a married man, and resided upon the same as his homestead at the time he sold and conveyed to Sperry. Therefore the conveyance of that tract was not fraudulent and void as to creditors. *Bogan* v. *Cleveland,* 52 Ark. 101; *Pipkin* v. *Williams,* 57 Ark. 242; *Gibson* v. *Barrett,* 75 Ark. 205.

The tract conveyed to Prosser by Mrs. Maxwell (northeast quarter of the section) stands in a different attitude in the case. It was not a part of the homestead. Mrs. Maxwell undertakes to prove a consideration for the conveyance to her of this tract, and to exonerate herself from the imputation of knowledge of or participation in the fraudulent scheme of Tewksberry to defraud his creditors, but she fails to do this satisfactorily. She was closely related to Tewksberry, and received this conveyance from him without payment of any money. She brings in an account against him aggregating $1,100 for services as nurse while he was sick, expenses of carrying him back to Nebraska from Lonoke, for board and attention while in Nebraska at $75 per month, and board for another period of six months at $25 per month, and for board of his wife for two years. No money seems to have passed between the parties during those important transactions covering a period of two years, and nearly all of this alleged debt was incurred after the conveyance of the land to Mrs. Maxwell.

The whole transaction is so unusual that, without corroboration, it is too unsatisfactory to be accepted as establishing its fairness and the good faith of the grantee in a conveyance from one near relative to another which deprives creditors of the opportunity to enforce payment of their just demands against the grantor. If the title remained in Mrs. Maxwell, we would have no hesitancy, upon this proof, in setting aside the conveyance to

her. But the grantee, Prosser, the present owner of that tract, appears to be an innocent purchaser. He bought the land from Mrs. Maxwell through her agent, Fletcher, before the commencement of this suit, and paid the purchase price. This suit was instituted on July 23, 1902, and the deed of conveyance from Mrs. Maxwell to Prosser is dated and was acknowledged on June 17, 1902, but was not filed for record until August 27, 1902. Mrs. Maxwell resided in Omaha, Nebraska, and left the land in charge of her agent, W. P. Fletcher, a real estate agent and abstracter of titles, at Lonoke, Arkansas. Prosser was a resident of the State of Missouri, and came to Lonoke County for the purpose of buying a tract of land. Fletcher sold him this tract, and sent the deed to Nebraska to Mrs. Maxwell for execution. She returned the deed to Fletcher, who delivered it to Prosser and received payment of the purchase price. We think the testimony is sufficient to justify the conclusion that the sale and conveyance to Prosser was consummated and the purchase price paid before the commencement of this suit, and that he purchased without any knowledge of or participation in Tewksberry's scheme to defraud his creditors. This being true, the chancellor was right in dismissing the complaint as to this tract of land.

The plaintiff was, however, entitled to a decree against the estate of Tewksberry for recovery of the amount of balance shown to be due on the Nebraska judgment, with interest and cost of suit, and the chancellor erred, to that extent, in dismissing the complaint. The cause is therefore remanded with directions to enter such a decree. The decree is affirmed as to Sperry and Prosser and the tracts of land claimed respectively by them.

WHITE SEWING MACHINE COMPANY v. SHADDOCK.

Opinion delivered May 28, 1906.

1. CONTRACT OF EMPLOYMENT—DISSOLUTION.—Where a contract for the employment of a sewing machine agent provides that he should have exclusive agency in certain territory, but that the contract might be dissolved by either party on notice, a notice from the employer to the employee cutting out part of the territory was, in effect, a dissolu-

tion of the old contract and, when accepted, the creation of a new one. (Page 223.)

2. SAME—EFFECT OF DISSOLUTION.—Where a sewing machine company, in employing an agent and giving him certain exclusive territory, reserved the power in either party to dissolve the contract on giving notice, the power of the company to dissolve the contract would not apply to machines which the agent had purchased before the contract was dissolved. (Page 224.)

3. SAME—DAMAGES.—Where a sewing machine company, in employing an agent to sell its machines, allotted to him certain exclusive territory, and reserved the power to dissolve the contract upon giving him notice, on a subsequent dissolution of the contract it will be liable to him for loss of profits on sales of its machines made within his territory by other salesmen before dissolution of the contract, and also for loss of profits on machines purchased by him but not sold before dissolution of the contract, so far as caused by its having placed other salesmen in his territory after the contract was dissolved, but not for loss of profits on sales made by other salesmen in his territory after the contract was dissolved. (Page 224.)

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

STATEMENT BY THE COURT.

The White Sewing Machine Company, of Cleveland, Ohio, brought this action against T. J. Shaddock and the other defendants who were sureties on a bond executed by him to the plaintiff, to recover the aggregate amount of two promissory notes executed by Shaddock for the purchase price of sewing machines purchased by him of plaintiff. The machines were sold and delivered pursuant to a written contract entered into between Shaddock and the Machine Company whereby the latter agreed to sell sewing machines to the former at prices set forth in the contract, and "to establish no other dealer within the following territory for the sale of the White Machines, during the continuance of this contract: all of Ouachita County in the State of Arkansas east of Ouachita River and the adjoining territory in Dallas and Calhoun counties that is close to and adjacent to Bearden, Ark."

Shaddock undertook by the terms of the contract, to purchase and resell machines exclusively for plaintiff. The contract contained the following clause: "This agreement to take effect from and after its acceptance by said first party, which accep-

tance is evidenced only by the signature of an officer of the said first part hereto, and the same is to continue in force until dissolved by mutual consent; but it may be dissolved by either party giving notice, or, in case of violation of this agreement by second party, the first party may cancel it without notice." Shaddock executed and delivered to plaintiff a bond, with his co-defendants as sureties, conditioned that he would promptly pay all indebtedness to plaintiff then existing or which might thereafter be incurred. Shaddock purchased machines from plaintiff pursuant to the contract, and executed the two notes sued on, dated respectively February 21, 1903, and February 27, 1903.

The defendants answered, admitting the execution of the contract, bond and notes, but pleaded, as a counterclaim against plaintiff, that the latter had violated the contract by establishing other dealers for sale of machines in the territory allotted to defendant Shaddock, and that by reason thereof he had sustained damages in the sum of $1,500 on account of loss of profits on resales of machines.

The jury returned a special verdict in favor of defendants, in the following form, viz.:

"1. We, the jury, find damages for the defendant to the value of notes and interest.

"2. The damages were assessed on thirty-two sewing machines sold in defendant's territory by other agents of the White Sewing Machine Company."

Judgment was rendered against plaintiff for the costs of the action, and plaintiff appealed.

E. H. Vance, Jr., for appellant.

1. Appellant had the right to modify or cancel the written contract, of which appellee had due notice. After this he purchased machines, and gave notes, and thereby ratified the change.

2. No damages are shown by the evidence.

3. Instructions 3 and 5 are certainly erroneous and misleading.

Thornton & Thornton, for appellees.

McCULLOCH, J., (after stating the facts.) The evidence adduced at the trial showed that appellant wrote a letter to Shad-

dock on February 13, 1903, giving notice of a dissolution of the contract, in so far as it related to the territory in Ouachita County, but that this notice was subsequently withdrawn, and he thereafter purchased more machines from appellant. Shaddock testified that the notice was renewed by a letter from appellant's agent, S. B. Kirby, dated April 8, 1903, forbidding him the territory in Ouachita County. On November 28, 1903, plaintiff gave notice to Shaddock of dissolution of the entire contract, so far as it related to exclusive control of territory.

The only testimony introduced by appellees tending to establish damages was that of Shaddock himself, which was as follows:

"I was damaged by the sales of other dealers of the machine in my territory, but it is hard for me to estimate it. Ritchie sold in the western part of Calhoun County, W. H. Henry at Holly Springs in southern part of Dallas, and E. A. Acruman at Fordyce. My profits on each machine depends on circumstances. It ranges from $15 to $20. * * * I had to sell my machines the best I could, on account of the other dealers selling in my territory. I would make trades for cattle, and would take in exchange secondhand machines in order to make a deal. I had on hand 35 machines altogether of different grades, including secondhand machines taken in exchange. I could have sold most of the machines sold by the other dealers in my territory if they had not sold any there. The territory east of the Ouachita River in Ouachita County was my main territory."

The verdict of the jury assessing damages is not sustained by the evidence.

Each of the parties to the contract reserved therein the privilege of dissolving it at any time upon notice to the other. Appellant's notice to appellee Shaddock cutting out of the contract the territory in Ouachita County was, in effect, a dissolution of the contract to that extent, though neither party had the right to alter the contract without the consent of the other. Appellee Shaddock then could have treated the contract as dissolved *in toto* by appellant, or could have accepted the proposed modification. He could not reject the proposed modification, and at the same time continue the original contract in force against appellant's consent; the notice of modification was in effect a dissolution of the

old contract and, when accepted, the creation of a new one.

But appellant's privilege of dissolving the contract at any time upon notice could not apply to machines which Shaddock had already purchased for resale in the territory at the time of the attempted dissolution. To that extent the contract was so far performed by Shaddock that appellant could not dissolve it so as to deprive him of the right to sell the machine in any part of the stipulated territory. A construction of the contract which would give appellant that power would be so manifestly harsh and unjust to Shaddock that it can not be deemed to have been reasonably within the contemplation of the parties. Appellant would be liable to Shaddock for loss of profits on sales which he was deprived of making by reason of appellant's alleged violation of the contract in putting other salesmen or dealers into the territory allotted to him before the date of modification; but the proof fails to show that any sales were made by other salesmen or dealers in the territory before that date, or that Shaddock was deprived of making sales in the territory. Therefore he sustained no damages on that account, as far as disclosed by the evidence. Appellant would also be liable to Shaddock for any damages resulting from sales made by other salesmen or dealers put into the territory after the date of the modification, in so far as they deprived him of profit on machines which he had already purchased when the notice of modification was given. But sales of machines made by other dealers after the date appellant modified the territorial limits of the contract are not to be considered, except to the extent that they may have interfered with or prevented resales by Shaddock of his own machines which he had purchased from appellant pursuant to the contract before the modification. Now, it is not shown that he failed to make timely sales of all the machines which he purchased from appellant, nor is there any proof of any loss of profit on them except the general statement of Shaddock in his testimony that he had to sell the machines in the best way he could by taking cattle and secondhand machines in exchange. He does not show any loss of profits on those machines, but contends only that other dealers put into the territory by appellant made sales which he could have made but for their interference, and that he was thereby deprived of profit he could have earned on other machines which he had bought and

re-sold. The jury assessed damages altogether upon profits on sales made by other dealers.

We are of the opinion that the evidence is insufficient to sustain the verdict, and the judgment is therefore reversed, and the cause remanded for a new trial.

HILL, C. J. and WOOD, J., dissenting.

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

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Opinion delivered May 28, 1906.

NEGLIGENCE—INSTRUCTION.—It was error, in an action against a railroad company to recover damages for injuries received in being run over by defendant's car, to instruct the jury that defendant was liable if its employees failed to exercise care to stop the car after they discovered plaintiff's danger, where the undisputed evidence showed that the car was not equipped with brakes and could not have been stopped in time to avoid the injury.

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

STATEMENT BY THE COURT.

The plaintiff, Samuel E. Cain, brought this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages sustained on account of being run over by cars on defendant's road at Eudora, Arkansas.

The circumstances attending the injury were, substantially, as follows:

The railroad at Eudora runs north and south, and there are four tracks at the point where the injury occurred. Counting from the west, there is first a sidetrack, called the "house track;" next is the main track; next is a sidetrack, called the "passing track," and the last on the east side is an open track, running off

to a gin. The tracks run through a deep cut, and engines and a steam shovel were at work excavating, loading and hauling dirt for use in construction of the road. The injury occurred about 5:30 o'clock in the afternoon of May 30, 1904, while plaintiff was attempting to cross along a footpath used by the public. This path was 244 feet north of the street crossing. Plaintiff and a number of other persons, from six to ten in number, according to the varying statements of the witnesses, started from the west side of the railroad tracks to accompany and assist an officer conducting a prisoner to the calaboose, situated on the east side of the tracks. When they crossed the tracks, several of the posse were immediately in front of plaintiff, and several behind him, but all were close together. They crossed the house track and main track, and attempted to cross the passing track at the south end of a line of three or four cars standing on that track, when a line of moving cars which had been pushed in on this track by an engine struck the standing cars, and set them violently in motion, and plaintiff was struck, knocked down and seriously injured. The line of cars pushed in by the engine—16 in number—had been standing on the main track north of the end of the switch for about an hour, loaded with dirt, and when the passenger or mixed train arrived, the engine was detached from its train, and coupled to the north end of the cars, and pushed on to the passing track. As soon as the cars cleared the switch, which was before the front end reached the cars near plaintiff and his companions, the engine was detached therefrom while the cars were in motion, and backed on to the main track, where it was standing several hundred yards distant when the accident occurred. The cars pushed in by the engine were equipped with air brakes, but none of the cars had handbrakes or other equipment for use in checking or controlling them. The air brakes contained no air, and the hose connecting the brakes was not coupled to the engine which pushed them in on the switch. A brakeman was seen standing on or near the front end of these cars at the time and immediately before they struck the cars near plaintiff. There was evidence tending to show that no signal or warning of any kind of the approach of the moving cars was given, and that no effort was made to check the cars.

Negligence of the servants of the company is charged in

several particulars, each of which charges is denied in the answer, and contributory negligence on the part of the plaintiff in going upon the track without looking and listening for approaching cars is also pleaded.

The only charge of negligence on the part of the defendants which was submitted to the jury was that of alleged failure of the employees in charge of the train of cars to exercise care to avoid injuring plaintiff after they discovered his perilous position.

The court gave the following instruction on that subject at the request of plaintiff:

3. "If you should find from the testimony that plaintiff was guilty of contributory negligence in going upon the railroad company's tracks at the time and place he was injured, and was a trespasser thereon, still, if you find from the testimony that there was a brakeman on the detached portion of the railway company's train, which was running along the sidetrack towards the plaintiff, and that said brakeman saw a crowd of men, of which plaintiff was one, crossing and about to cross the railroad tracks in time to have stopped said cars, if he could have stopped them and avoided the injury, and that, after he had discovered the imminent danger that said men were in, he made no attempt to stop said train, but permitted the same to run on against said dead cars, and thereby injured plaintiff, the defendant is liable for damages, and your verdict will be for the plaintiff."

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

B. S. Johnson, for appellant.

The third instruction, given over appellant's objection, was misleading, and not responsive to the evidence. There is no proof that the brakeman saw plaintiff on the tracks, nor that the train crew knew or had time to discover the peril of plaintiff in time to cheek the train. Neither is there any proof to show that the standing car could have been stopped by any human agency after it was struck.

Pugh & Wiley, for appellee.

Appellant, having obtained an instruction to the same effect as the third given for appellee, it is in no position to complain. That they are both correct, see 36 Ark. 371; 46 Ark. 522. The

court will draw the strongest inference in favor of the finding of the jury from the testimony. 74 Ark. 407. The jury were entitled to find the facts from the testimony and to deduce from them all reasonable inferences consistent with common knowledge, experience and observation. 60 Ark. 409; 14 Ark. 79. The rule does not require that the injured party be seen on the track. Liability accrues if the omission occurs "after becoming aware of plaintiff's peril." 36 Ark. 371.

McCULLOCH, J., (after stating the facts.) It was error to give an instruction on the subject of negligence of appellant's employees in failing to exercise care to stop the cars after they discovered the perilous position of the plaintiff. There was no evidence that they could have stopped the train after the plaintiff and his companions started upon the track behind the stationary cars. The moving cars were detached from the engine, there were no hand brakes on them with which to control them, and there was no air in the air brakes. They were moving at rapid speed, sufficient when they struck the standing cars to push or bump the latter a distance of about 250 feet, and they were very close to the standing cars when plaintiff and his companions went on the track. According to the undisputed evidence, it was impossible for the cars to have been stopped, after plaintiff or his companions started upon the track, in time to have avoided striking him.

It is urged by learned counsel for plaintiff that the brakeman might have given a signal or warning of danger to attract the attention of those in peril. That question was not, however, submitted to the jury by this instruction, which told the jury that, notwithstanding contributory negligence on the part of plaintiff, if they found that employees of the defendant discovered the peril in time to have stopped the cars and avoid the injury, and failed to do so, the defendant was liable. The jury should not have been instructed upon a charge of negligence for which there was no evidence. It was prejudicial error to do so. *Ark. & La. Ry. Co.* v. *Stroude,* 77 Ark. 109, and cases cited.

But, it is insisted, the jury could rightfully have inferred that the employees in charge of the train of cars would not have sent them moving swiftly toward a public crossing without some means of stopping or controlling them. The jury were not war-

ranted in drawing such inference in the face of the undisputed testimony of witnesses who stated positively that the cars were not at the time equipped with brakes or other means by which they could be stopped, and that there was no way in which they could have been stopped in time to avoid the injury.

Inasmuch as the case must be reversed on account of the error in giving this instruction, we need not discuss appellant's other assignments of error.

Reversed and remanded for new trial.

ALTHEIMER v. BOARD OF DIRECTORS OF PLUM BAYOU LEVEE DISTRICT.

Opinion delivered May 28, 1906.

1. LEVEE DISTRICT—LIMIT OF INDEBTEDNESS.—Ch. 31, Acts 1905, providing that the board of directors of the Plum Bayou Levee District should levee the Arkansas River front so as to protect the property in the district, and authorizing the issuance of bonds in the sum of $300,000, intended that the levee should be constructed, and that the lands of the district should be bound for the cost thereof, whether the cost exceeded the amount of money the board of directors was expressly authorized to borrow or not. (Page 232.)
2. SAME—ISSUANCE OF EVIDENCE OF INDEBTEDNESS.—The general statute prohibiting the issuance by levee districts of bonds, notes or other evidences of indebtedness applies only to districts formed under that statute, and not to districts formed under special statutes. (Page 236.)
3. SAME.—A levee board, having special authority to issue negotiable bonds in the sum of $300,000, bearing six per cent. interest, will not be authorized to issue bonds or other negotiable obligations for any purpose in excess of that sum or rate of interest, but will be authorized to contract debts in excess thereof in the necessary cost of constructing and maintaining the levee, and to execute non-negotiable written evidences of indebtedness contracted for such purposes, stipulating the dates of payment and bearing not exceeding six per cent. interest. (Page 234.)

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; reversed.

Bridges & Wooldridge, for appellant.

1. If the levee board has power to issue the evidences of indebtedness, it must be derived from the special act. The general act forbids the issuance of the kind of bonds or evidences of indebtedness in question. Kirby's Digest, § § 4962, 4963. The general and the special acts will be construed together, unless there is some provision in the latter expressly or by implication repealing the prohibition in the former. 73 Ark. 541; 71 Ark. 137. The provision in the special act that the directors may do all other acts not inconsistent with the laws of this State (Acts 1905, § 2, p. 86), leaves the general act in force, except where the new act makes contrary provisions.

2. All statutes authorizing additional burdens and liabilities upon property must be strictly construed. 59 Ark. 356; 71 Ark. 561.

3. The act expressly provides for bonds to the extent of $300,000, with no provision for any amount in excess thereof. It pledges the whole revenues of the district for the payment of this amount. Acts 1905, 104, § 26.

4. The courts can not construe statutes to subserve convenience or relieve from hardship. 59 Ark. 244; 65 Ark. 532.

White & Altheimer, for appellee.

1. The question is, can the district, a corporation, issue warrants or evidences of indebtedness to pay for work for which it has contracted, in addition to the bonds issued? The levee district, while a corporation created by the Legislature, is in the same class as a private corporation. 59 Ark. 513.

2. All corporations have such powers as are expressly conferred by their articles of incorporation, and such implied powers as are necessary to carry out the purposes and objects of the powers expressly conferred by the articles of incorporation. Cook on Corp. (5 Ed.), § 3; 173 U. S. 111.

3. Sec. 3 of the act defines the object and purposes of the district, and sec. 2 authorizes the board to do all other acts and things not inconsistent with the laws of the State which may be proper to carry into effect the purposes and objects of the act. It was necessary to borrow money to pay for the work, which the

corporation had the right to do. Cook on Corp. (5 Ed.), § 760. The warrants now sought to be issued stand in the same category with notes issued by a private corporation, not secured by deed of trust upon its property, which it has the right to issue. *Ib.*

4. Sections 26 and 16, when taken together, show that the corporation is given both the express and implied power to borrow such sums of money as become actually necessary to carry into effect the purposes for which it was incorporated.

5. The amendatory act clearly shows that the bonds were merely intended to be fixed as a first lien upon the property in the district, and that other debts were contemplated. Sec. 1, amendatory act. Even if the act limited the corporation to the borrowing of $300,000, yet, as the contract was made and the debt incurred for the purpose of carrying out the object and intention of the act, the district is liable for such sum as may be expended in excess of the $300,000. Cook on Corp. (5 Ed.), § 760; 173 U. S. 111.

McCULLOCH, J. This is a suit in equity brought by M. L. Altheimer, a tax payer of Plum Bayou Levee District, for the purpose of restraining (1) the execution of negotiable promissory notes by the Plum Bayou Levee District to evidence the balance owing for work done in constructing the levees, after money available for such payments had been exhausted; (2) to restrain the issuance and sale of certificates of indebtedness of the levee district for the purpose of raising money to pay the balance due for levee construction, and (3) to restrain the levying of a tax to pay the balance due for levee construction.

It is alleged in the complaint that the board of directors has entered into a contract for construction of the levee at a cost in excess of the levee taxes for the current year and the proceeds of the sale of bonds of the district in the sum of $300,000 authorized by statute to be issued; that the board is about to execute negotiable promissory notes of the district bearing interest at 8 per cent. per annum to the contractors for levee work done under contract, and that the board will also, unless restrained, issue and sell certificates of indebtedness of the district in the form of notes maturing at long time and bearing interest at from 6 to 8 per cent. per annum for the purpose of raising funds to pay the amounts due and to become due to contractors for levee work.

The chancellor sustained a demurrer to the complaint, and the plaintiff appeals.

The act of the General Assembly establishing the Plum Bayou Levee District expressly authorized the board of directors to borrow money and issue bonds of the district to the extent of the sum of $300,000 for the purpose of constructing and maintaining the levee. It prescribes in detail the form, terms and maximum rate of interest of such bonds and the manner in which the same should be sold, and pledges the revenue of the district arising from any and all sources to the payment of the bonds and interest. Acts 1905, c. 31.

Bonds of the district aggregating the sum of $300,000 have been issued and sold and the proceeds expended, leaving the levee incomplete, and it is contended on behalf of appellant that the power of the board of directors to create obligations of the district or to issue evidences of indebtedness for the construction of the levee is by the statute limited to the amount of the authorized bond issue.

The question turns largely upon a construction of the terms of the statute establishing the levee district, defining its object, and authorizing the construction of the levee.

The controlling purpose of the lawmakers in creating the district was to provide for the construction of a levee sufficient to protect the lands situated within its limits from overflow, and the authority to borrow money and issue bonds to the amount of $300,000 was conferred as a means to accomplish that end. The statute provides in the broadest terms that "the board of levee directors shall have power, and it is hereby made their duty, to levee the Arkansas River front * * * so as to protect the property in the district above named, and to protect and maintain the same in such effective condition as honest, able and energetic efforts on their part may obtain, by building, rebuilding, repairing or raising levees on the bank of the Arkansas River, or such other places as the board may select." Full power is conferred upon the board to determine the height and other proportions of the levee, and to exercise the right of eminent domain in condemning private property for right of way. In the very nature of things it was impossible for the lawmakers to determine in advance the precise or even approximate cost of constructing and

maintaining the levee. This was necessarily left to the judgment and discretion of the directors, when the plans were matured and the work progressed. We can not presume that the framers of the statute meant to set a limit upon the power of the board as to the cost of the levee, or that they intended to impose a condition upon the construction and maintenance of the levee that the cost should not exceed $300,000, or that the work should cease when that sum should have been expended, and that the construction should be delayed until the revenues of the district should afford sufficient funds to complete it. There is nothing in the act to manifest such an intention, especially when we consider the duty imposed upon the directors in mandatory terms to build a levee "so as to protect the property in the district above named.'

We think it is clear that the Legislature meant to provide for the building and maintenance of a levee sufficient to protect the real property in the district, and that the cost thereof was not limited to the amount of money which the directors were authorized by the statute to borrow and to issue bonds to cover. The primary duty and power of the board of directors is to cause the levee to be constructed, and the power to bind the district for the payment of the cost thereof necessarily follows, whether it exceeds the amount of money the board is authorized to borrow or not. The limitation upon the power to borrow money and issue bonds does not restrict or impair the powers to construct and maintain the levee and to contract debts in the performance of that duty. *Hitchcock* v. *Galveston,* 96 U. S. 341.

The board, therefore, having the power to contract debts for the construction of the levee, it may also issue written evidences of the indebtedness to the creditors of the district. Such writings do not enlarge the liability of the district, but only evidence the liability. *Merchants Nat. Bank.* v. *Citizen's Gas Light Co.,* 159 Mass. 505; *Williamsport* v. *Commonwealth,* 84 Pa. St. 487. "The power to contract a debt," says the Pennsylvania court, "carries with it by necessary implication the right to give appropriate acknowledgment of such debt, and to agree with the creditor as to the time and mode of payment; that, in the absence of any statutory provision, there is no rule of law limiting the extent of the credit."

And the board of directors, recognizing the condition which

the lawmakers who framed the statute must have had in mind, that the revenues of the district were collectable annually and the cost of construction might exceed the taxes for the current year, have the power to stipulate with the creditor for a future date of payment of the debt, so as to conform to the ability of the district to discharge the obligation, and also to stipulate for the payment of interest at the legal rate of six per cent. per annum for the forbearance. In other words, to execute to creditors of the district promissory notes for the amounts due, payable with interest at six per cent. per annum at such future times as the parties should agree upon. This would not enlarge the liability of the district, as the power to contract for the payment of interest on deferred payment may be fairly implied from the statute making it the duty of the board to construct the levee.

The act establishing the district does not prohibit the execution of such written evidence of the obligation of the district, and the general statute (Kirby's Digest, § 4963), prohibiting the issuance by levee districts of bonds, notes or other evidences of indebtedness, applies only to districts formed under that statute, and has no application to this district, which was established by special statute.

But the power to borrow money for any purpose in excess of the sum expressly authorized by the statute, or to issue bonds or other negotiable obligations of the district, or to contract for a greater rate of interest than six per cent. per annum on deferred payments of debts of the district stands upon a different footing. The authority to do so must be found in the statute whereby the district is established and its objects and powers defined, else it does not exist at all. It can not be implied from the power to construct the levee. We are cited by learned counsel for appellee to cases holding that powers conferred upon a municipal corporation to contract debt implies the power to borrow money on its obligation to pay the debt. 1 Dill. Mun. Corp. § 117; *State* v. *Babcock,* 22 Neb. 618. Even if we conceded that the principle stated is sound when applied to power of municipal corporations, it is not applicable to levee district boards and like bodies which are called into being to perform a specific function, and no other, and whose powers must be found in the strict letter of the law which creates them. Such an agency of government is *sui*

generis, and its powers can not be likened to those of municipal corporations, whose powers are broader and more general within their prescribed territory and over the subjects delegated to them. They exercise no governmental powers except those expressly granted by the legislative authority which called them into existence, and then only in the manner pointed out expressly or by fair implication.

Moreover, the statute expressly provides that "said board of directors shall have power to borrow money, and to that end may issue bonds of said board to the amount of not exceeding $300,000 payable in lawful money of the United States," etc. This is clearly a limitation upon the power of the board to borrow money as well as to issue bonds. *Expressio unius est exclusio alterius.* If the board had the power otherwise to borrow money or issue bonds and other negotiable evidences of indebtedness, it was unnecessary to specially confer that power to the extent of the limited amount named.

We therefore hold that the board of directors are not empowered to borrow money or issue bonds or other negotiable obligations for any purpose in excess of $300,000, or to enlarge the liability of the district by a contract to pay interest in excess of six per cent. per annum for forbearance, but that the board is empowered to contract debts in excess of $300,000 in the necessary cost of constructing and maintaining the levee according to the expressed purpose in establishing the district, and also to execute written evidences of indebtedness contracted for such purposes, stipulating dates of payments and bearing six per cent. interest.

The chancellor erred in sustaining the demurrer to that part of the complaint which sought to restrain the board of directors from exceeding its powers as herein stated.

The decree is therefore reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

BATTLE, J., dissents as to so much of the opinion as holds that the board of directors can not contract for interest exceeding the rate of six per cent. per annum.

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MARTIN v. STATE.

Opinion delivered June 4, 1906.

1. STATUTE—WHEN MANDATORY.—Where directions in a statute reach to the very essence of the thing to be done, and where a failure to observe them prejudices rights sought to be preserved by these directions, then they are mandatory, and not merely directory. (Page 240.)
2. LOAN OF COUNTY FUNDS—MANDATORY REQUIREMENTS.—Acts, 1905, c. 166, requiring the collector and treasurer of Scott County to deposit the county funds in bank, provides that the funds shall be loaned to the bank which offers to pay the highest rate of interest, and that the county court "shall require a good and sufficient bond to be filed with each bid." *Held* that the statute required that the bond should be filed with the bid and approved by the county court, that this requirement is mandatory, and not directory, and that a failure to obey it renders an order of the county court requiring the collector and treasurer to deposit the county funds in a certain bank void. (Page 240.)
3. STATUTE—CONSTITUTIONAL QUESTION.—A constitutional question presented in a record will not be decided if there is some other and clear ground upon which the decision of the case may be rested. (Page 240.)

Appeal from Scott Circuit Court; *Styles T. Rowe,* Judge; reversed.

STATEMENT BY THE COURT.

The General Assembly of 1905 passed an act providing in substance: That the treasurer and collector of Scott County deposit all county funds in their possession in the bank in Scott County which will pay the highest rate of interest on daily balances of the same; provided that the bank receiving said funds make a good and sufficient bond equal to one and one-fourth times the amount in cash that is held at any time during any year, to be approved by the county court. That each stockholder of the bank receiving said funds be jointly and severally liable; that this liability shall not relieve the bondsmen of the treasurer or collector from liability for said funds, except in case of loss of funds deposited in a bank as provided in the act. The county court shall annually make an order for the deposit of funds after advertising for bids. The section containing these provisions concludes as follows: "The court shall require a good and sufficient bond to be filed with each bid; provided no order of deposit

be made by the court for a longer period than the second Monday in July in each year, after notice has been given as provided in this act." It is also provided that the treasurer and collector shall, within five days after the order is made, deposit the public funds in the designated bank. Then follow provisions rendering the officers guilty of misdemeanor in office for failure to comply with such order, and providing for fines and penalties against them and vacation of their offices. Acts 1905, c. 166.

The county judge gave notice in conformity to the act, and received a bid from the First National Bank of Waldron to pay four per cent. per annum on the county funds. T. G. Bates, a taxpayer, filed a remonstrance. The court considered the bid and the remonstrance, and made an order requiring the money deposited in the said bank, and Bates excepted to the order, and filed affidavit and bond for appeal. Subsequently the treasurer, Martin, obtained an appeal and adopted Bates's remonstrance. The order is as follows:

"In the matter of bids for the county funds by the First National Bank of Waldron. Remonstrance by T. G. Bates. Now, on this day, this cause coming to be heard, comes M. C. Malone, cashier of the First National Bank of Waldron, in person, and offers 4 per cent. daily deposits or balances of county funds, and thereupon comes T. G. Bates in person, and files his remonstrance against any order being made by the court with reference to the county funds. And upon hearing, and the court being well and sufficiently advised in the premises, the remonstrance of T. G. Bates is, after due consideration by the court, dismissed, and thereupon it is ordered by the court that all the county funds be deposited in the First National Bank of Waldron, Arkansas, upon said bank filing a good and sufficient bond therefor, conditioned as required by law, and in due form of law, given in the penal sum of $25,000, which shall be approved by the judge of the county court, in vacation—to which rulings, orders and judgment of the court in this cause said T. G. Bates at the time excepted, and thereupon filed his affidavit and bond and prayer for appeal in this cause to the circuit court, and thereupon the matter of granting or rejecting the appeal to the circuit court in this cause is by the court continued until the second day of the next regular October term, 1905, of this court."

The treasurer did not deposit the money within the time. He gave supersedeas bond with his appeal from the order, and contended that it superseded the order.

Suit was brought by the State against him for penalties for failing to comply with the order depositing the money in the said depository. The circuit court held section 2 of the act, providing for liability upon the stockholders of the bank obtaining the deposit, to be unconstitutional, and sustained the remainder of the act as valid, and held the order properly made, and gave judgment against the treasurer for $360 as interest on the money in his hands not deposited in said bank. The treasurer has appealed from both judgments, and the appeals have been submitted together.

Ira D. Oglesby, for appellant; *F. A. Youmans,* of counsel.

1. The act is unconstitutional, being in violation of § § 17 and 18, art. 2, Const. It limits the right to bid for the deposit of funds to banks in Scott County, a special privilege, obnoxious to section 18, *supra.* It impairs the obligation of contracts, as between the treasurer, his bondsmen and the State, contrary to the prohibition in section 17, *supra;* 3 Ark. 285; 55 U. S. 304; 69 U. S. 10. Section 2 of the act is void, in that it attempts to impose a joint and several liability upon each stockholder, should loss occur by reasons of the deposit. Cook on Corp. § 422. If the unconstitutional part of an act can be separated from the rest, leaving a complete statute, the act will be sustained as to the valid portions; but when the parts are so mutually dependent and connected as conditions, considerations, inducements or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and that if all could not be carried into effect it would not pass the residue independently, then all must fall if some are unconstitutional. 37 Ark. 360; 53 Ark. 490; 55 Ark. 200; 34 Ark. 224. Section 2 of the act forms such an inducement and consideration for the passage of the whole act. The act fails to provide for subsequent advertisements for bids after the first and awarding the deposit pursuant thereto. The court can not supply the defect. Black. Int. Stat. 57, 58, 59.

2. The county court failed to comply with the act with reference to notice. It requires publication by at least two insertions,

which means two weeks, whereas ten days notice only was given.

3. It also failed to comply with the act requiring that bond be filed with the bid. By the act a new power is created, and it can be carried into execution only in the mode prescribed. 31 Ark. 339; 28 Ark. 359; 30 Ark. 612. See also Black, Int. of Laws, 338; *Ib.* 340; *Ib.* 345; 45 Miss. 247.

4. No action will lie against the treasurer under section 4 of the act, until he has been duly convicted of misdemeanor in office. The suit was prematurely brought. He appealed from the order of county court with supersedeas, and this appeal was pending when the suit was brought.

Carmichael, Brooks & Powers, for appellee.

Taking the whole act together, its meaning is plain, and it points out the manner in which it is to be carried out. The bondsmen of the treasurer and collector can not complain, because the act is for their benefit, relieving them of liability if its terms are complied with by the county court. It is not class legislation. 58 Ark. 407; 59 Ark. 513; 61 Ark. 21; 66 Ark. 575. The second section of the act does not impair the obligation of contracts. A corporation is a creation of the State, and a stockholder knows that the Legislature may amend, change, modify or even repeal the charter. 58 Ark. 427. A similar act, Kirby's Digest, § 859, has been upheld. 68 Ark. 433; 5 Ark. Law Rep. 435. See also 37 Mich. 185. If the meaning of the whole act is clear, or the meaning of the section clear, taken altogether, the act will stand. Every presumption will be indulged in favor of its constitutionality. 59 Ark. 513.

2. The county court, in advertising for bids and in letting out the money, has substantially complied with the act, which is all that is required.

HILL, C. J., (after stating the facts.) The act said: "The court shall require a good and sufficient bond to be filed with each bid." The bond was not filed with the bid, was not filed prior to the acceptance of the bid, and was not filed until after the order was made, and the court adjourned. The order was made that, upon a good bond in the sum of $25.000, conditioned as required by law, being approved by the county court, or judge in vacation, the funds be depos-

ited with this bank. The order was made August 28, and the bond filed and approved September 4, 1905. The act makes it the duty of the treasurer and collector to make the deposits within five days after the order of the county court is made, under heavy penalties for a failure to do so. In this case no bond was presented and approved until more than five days after the order. The order was made subject to the approval by the court or judge in vacation of such bond, thereby substituting a vacation order as the point from whch the five days should run, instead of having the whole matter settled in the county court as required by the act. The safety and security of the county funds were to be rested primarily upon the bond, whatever be the other securities, and the act plainly required it to be filed with the bid, and that it should be a good and sufficient bond, and it should be approved by the county court, and not the judge in vacation. All of these provisions were disregarded here, and the question turns on whether these provisions are directory or mandatory. Where directions in a statute reach to the very essence of the thing to be done, and where a failure to observe them prejudices rights sought to be preserved by these directions, then they are mandatory, and not merely directory. *Miss., &c., Rd. Co.* v. *Gaster,* 20 Ark. 458; *Neal* v. *Burrows,* 34 Ark. 491; *Rector* v. *Board,* 50 Ark. 116; *Watkins* v. *Griffith,* 59 Ark. 344; *Benjamin* v. *Birmingham,* 50 Ark. 439; *School District* v. *Bennett,* 52 Ark. 511; *Sonfield* v. *Thompson,* 42 Ark. 46.

Applying these principles to the case at bar, it is apparent that these directions as to presenting a good and sufficient bond with the bid, and its approval by the court in term time, and as a condition precedent to the operation of the order depositing the funds, reach to the essence of the thing to be done, and are mandatory, and a failure to obey them should avoid the order in question.

The appellant assails the act as unconstitutional and invalid for many reasons stated in the brief, and the circuit court held one section of it unconstitutional.

This court has long followed and approved this doctrine thus stated by Judge Cooley as to its duty to decide questions affecting the validity of acts of the General Assembly: "While courts can not shun the discussion of constitutional questions

when fairly presented, they will not go out of their way to find such topics. * * * It is both proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota.* * * * In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which can not be disposed of without considering it, and when, consequently, a conclusion upon such question will be unavoidable." *Railway Company* v. *Smith,* 60 Ark. 240.

Finding a clear and positive ground for decision of this case under the act itself, the court has not considered the constitutional question raised against the act.

The judgments are reversed, and remanded with directions to dismiss the suit against the treasurer and vacate the order requiring the deposit of the funds.

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

Opinion delivered June 4, 1906.

RAILWAY CROSSING—CONTRIBUTORY NEGLIGENCE.—Where, in an action against a railway company for injury to a traveler at a highway crossing, there was evidence that plaintiff looked and listened before going on the track, but that on account of obstructions he was unable to see an approaching train in time to avoid the injury, and that on account of defective hearing he was unable to hear it, the question whether he was guilty of contributory negligence was properly left to the jury.

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

L. F. Parker and *W. J. Orr,* for appellant.

The testimony shows that there was a point between the main line and the belt line where appellee could have seen the engine approaching for a distance of 164 feet, had he looked. It was his duty to look and listen, and to continue looking and listening until all danger was passed. 69 Ark. 134; 119 Fed. 157; 86 S. W. 283. If it be conceded that there was negligence on the part of appellant, still this did not excuse appellee from the duty to exercise care as a reasonable and prudent person for his own safety. 105 N. W. 557; 95 U. S. 697; 16 Atl. 624; 20 S. W. 162. Both the physical facts and the testimony of plaintiff prove his contributory negligence, and the case should have been taken from the jury. Authorities *supra;* 56 N. W. 603; 55 Atl. 627; 90 S. W. 136; 24 Atl. 747. See also 54 Atl. 276; 174 U. S. 379; 139 Fed. 739; 70 Ark. 606.

F. G. Taylor, for appellee.

Appellee, when about to go upon the crossing, fully performed his duty by stopping, looking and listening at the only place where he could stop with safety. Having done so, he had a right to presume that appellant's employees would perform their duty. 18 N. W. 651; 4 N. E. 84. Where there is a doubt as to the proper place to stop, look and listen, as a general rule such questions will be referred to the jury. 54 Atl. 276. If the negligence of the injured party is of a negative character, such as lack of vigilance, and no injury would have resulted from it but for the primary wrong or negligence of the corporation or its servants, it will not defeat a recovery. 23 Fed. 738; 7 N. E. 801. Where the question arises upon a state of facts on which reasonable men may fairly draw different conclusions, the fact of negligence is one for the jury. 61 Md. 53; 5 Atl. 329; 22 N. E. 20; 43 Pac. 1136; 74 Pac. 1104.

HILL, C. J. The instructions were more favorable to the appellant than it was entitled to, and the sole question in the case is the sufficiency of the evidence to sustain the verdict for the appellee.

Culberhouse Street in the city of Jonesboro runs north and south, and crosses at right angles the tracks of appellant railroad. The first track on the north is called the "belt line," and it is 41 feet from center to center of the next or main line track.

There are 36 feet in the clear between these tracks. The street is somewhat down grade from the belt line track to the main line; as one witness expressed it, "it is enough down hill for your wagon to run up on your team." Between these tracks, and on the east of the crossing, is a coal chute, and west of the chute is a projection to it, built of heavy timbers. Coming from the north on Culberhouse Street, it is impossible to see an engine on the main track beyond the point of the coal chute until just about to the main line track, and this projection, or scaffolding, partially obstructed the view from where it begins.

It is 52 steps (156 feet) from the main line crossing to the coal chute, and it is 37 steps (111 feet) from the same point to the projection to the chute.

Mr. Wyatt, the plaintiff below, was an old man of 82 years at the time of his injury. He was driving a pair of mules to a wagon partially loaded with corn, and he was sitting on his load. He was going south on Culberhouse Street, and as he approached the crossing he stopped before reaching the belt line track. He looked and listened there. He was afflicted with the "hard hearing" of old age. The belt line track was filled with box cars on either side the street, and a space of about 20 feet left to pass through. It was impossible to see east on the main line from where Mr. Wyatt stopped. Seeing and hearing nothing of a train, he drove on rapidly, intending to rush on through the crossing, as he thought no train was then approaching, and that it was best to get across the tracks quickly. A switch engine, moving rapidly from the east, struck the rear of his wagon, upsetting it and severely injuring him. The mules were on the main line track, or near to it, when he first saw the engine, which appeared to be only ten or twelve steps away. He was uncertain whether it was safest to try to back his mules or run them across, and tried the latter, and got hit. Mr. Wyatt heard no bell ringing or whistle sounding, and several other witnesses testified that the signals were not given.

In regard to looking and continuing to look and to look both ways, the testimony of Mr. Wyatt is not as clear as it might be, and is contradictory. All of it, so far as relates to this point, is as follows: On direct examination he said: "Were you looking as you approached the track?" "I was looking."

On cross-examination, this is the statement: "You didn't stop any more until you were hit?" "No, sir." "You didn't look to the right or left until you got on the track?" "No, sir."

The following is the redirect and recross-examination in full:

REDIRECT EXAMINATION.

Q. "At the time you stopped to look and listen before you started across could you hear any bell ringing or whistle sounding?". A. "No, sir."

Q. "Or engine puffing?" A. "I could not hear anything."

Q. "And when you saw that you could not see or hear any train you started across there?" A. "Yes, sir."

Q. "After you got past the box cars, could you see any train then?" A. "I saw the engine when I got past the box cars."

Q. "But at the time you saw it you think your mules were just about on the track?" A. "That is my idea; that they were on the track the engine was on."

Q. "And you could not back them?" A. "I could not back off or run across fast enough to keep from getting caught."

Q. "Now, as you approached this crossing, were you looking for a train?" A. "I was looking; I never crossed there but what I was looking."

Q. "And you could see part of the way on both sides of you?" A. "Yes, sir."

RECROSS EXAMINATION.

Q. "You say you were looking as you approached that crossing. That was before you stopped, was it?" A. "Yes, sir; I looked then and afterward, too."

Q. "You could not see these for the box cars?" A. "I was looking to see whether or not there was any person to tell me whether or not there was any danger."

While Mr. Wyatt stated on cross-examination that he did not look, yet he stated positively in the same examination that he did look, and no point was then made that he had contradicted himself, and his attention was not called to it. The jury were instructed if he failed to look to find against him, and their finding in his favor is a finding that he did look, and his testimony furnishes substantial basis for it. There is nothing in his testi-

mony that reflects upon his candor in the least, except this unreconciled contradiction on a material matter, and probably the jury concluded that his hard hearing had caused him to misunderstand the question. The questions he answered later to the effect that he did look show he did understand them, for they are not answered in monosyllables, but the answers are responsive to the questions, and show understanding of them. There is evidence to justify the jury in finding that he did comply with the requirements to continue to look in both directions until the danger was passed.

But the traveler "is deemed to have seen or heard what is plainly to be seen or heard." *St. Louis, I. M. & S. Ry. Co.* v. *Dillard,* 78 Ark. 520. If Mr. Wyatt could have seen the engine approaching by looking, he is charged with having seen it, for the courts will not hear a party say that he did not see what was plain to be seen. Therefore his conduct must be measured with his duty. He not only looked and listened before he crossed the belt line track, but he stopped to better see and hear; then, seeing an opening for passage and failing to see or hear an approaching train, he attempted to make the crossing rapidly. There were only 36 feet between these tracks, and he was going rapidly on a down grade. It was his duty to continue to look and listen as he approached the track. He could not see to the east until he cleared the cars on the belt line, and then he had an unobstructed view for only 111 feet east, and a possible view for only 156 feet east. He says he was looking, and the question narrows to whether he could have seen the approaching engine before he got on the main line track. It is apparent that it depends entirely upon how fast the engine was going as to whether it was in sight when he cleared the box cars and approached the main line. He was something like 30 feet from the main line before he could see at all, and his mules much nearer to it and going rapidly; and then, if the engine was more than 111 feet east of the crossing, it was not plainly to be seen, and, if more than 156 feet, not to be seen at all. And, as the evidence shows it was going rapidly, it is at once apparent that his testimony that he looked but could not see is not contradicted by the physical facts. Of course, he could have seen it at some time before it struck him. He puts that distance at only 10 or 12 steps away.

While he must continue to look, yet, as stated in the Dillard case, that does not mean that he must be constantly turning from one direction to the other. It does mean a strict and sensible compliance with this requirement to be vigilant for his own safety; such vigilance as is expected of men of reasonable prudence, care and understanding.

One of appellant's witnesses, while contradicting Mr. Wyatt as to the signals being given, yet strongly strengthens his position that he was looking and yet unable to escape. These excerpts from the witness' testimony explain the situation better than Mr. Wyatt did: "Before he crossed the belt line he stopped and raised up like he was looking for something, and I saw the train would catch him, and I pulled off my cap, and waved it to him, and he didn't pay me any attention, and when he got up beyond the box car where he could see the engine, his horses were on the track, and the engine was in 15 or 20 feet of him, and he commenced hallooing at them. * * * When he ran onto the track, the engine was in about 20 feet of him; and when he got to where he could see the engine, the engine was in about four rail lengths of the crossing." "And his mules were right on the crossing then, were they?" "No, sir, they were not; but with the force he was going, he could not have stopped before he got on the track to save his life."

While the distances given vary from Mr. Wyatt's somewhat, yet both reach exactly the same explanation of the collision, that where and when Mr. Wyatt could first see the engine it was then too late to avoid the collision. Whether Mr. Wyatt exercised the care required of him in discharging the duty enjoined on him presented a question upon which the minds of prudent and reasonable men might draw different conclusions, and hence was proper to be determined by a jury. *St. Louis, I. M. & S. Ry. Co.* v. *Robert Hitt,* 76 Ark. 224.

The judgment is affirmed.

BATTLE and MCCULLOCH, JJ., (dissenting.) We think that the testimony of the plaintiff shows plainly that he did not look or listen for approaching trains after he crossed the belt track. He could not see up or down the track until after he passed the belt track, and it was his duty to look and listen at a point, before

he went upon the track, where he could see and hear. Stopping to look and listen before he passed the belt track, where the view up and down the other track was so obstructed that he could not see, was not a performance of his duty. According to his own statement of the facts, he was guilty of negligence, and should not recover.

ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* HUTCHISON.

Opinion delivered June 4, 1906.

RAILROAD—NEGLIGENCE IN KILLING STOCK.—A verdict finding a railroad company negligent in the case of stock killed by its train will not be set aside if the evidence introduced by it to rebut the statutory presumption of negligence was inconsistent and contradictory.

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

S. H. West and *J. C. Hawthorne,* for appellant.

The uncontradicted evidence clearly exonerates the company from liability. A jury can not arbitrarily disregard the evidence of witnesses, unless their testimony is in some way contradicted. 67 Ark. 514; 66 Ark. 439; 53 Ark. 96; 62 Ark. 182; 43 Ark. 225.

C. F. Greenlee, for appellee.

Appellee's proof made out a *prima facie* case of negligence on the part of appellant. The contradictory evidence of appellant's witnesses was not sufficient in the minds of the jury to overcome it. Their verdict will stand. 57 Ark. 192; 88 S. W. 584; *Ib.* 593; *Ib.* 599.

BATTLE, J. The plaintiff, W. E. Hutchison, proved that his horse was killed by the operation of the railway of the defendant, the St. Louis Southwestern Railway Company. This was sufficient to show that the killing was the result of the negligence of the defendant, unless evidence adduced proved the contrary.

Plaintiff thereby cast upon the defendant the burden of excusing the killing. To do so it introduced two witnesses. But the testimony of each of these witnesses is inconsistent with and contradictory to itself. If the jury disbelieved their testimony on account of these inconsistencies and contradictions, the law warranted them in disregarding it, which they did, as shown by their verdict. *Railway Company* v. *Chambliss,* 54 Ark. 214. It will not be profitable or serve any useful purpose to set out the inconsistencies and contradictions.

Judgment affirmed.

LITTLE ROCK TRACTION & ELECTRIC COMPANY *v.* HICKS.

Opinion delivered June 4, 1906.

1. STREET RAILWAY—ASSIGNEE'S LIABILITY FOR TORTS.—An action against a street railway company was brought in a magistrate's court to recover damages for a tort not exceeding one hundred dollars, and after appeal to the circuit court plaintiff amended his complaint so as to make another company a defendant which had purchased the first company's property and assumed its liabilities. *Held* that the second company was not liable in an action *ex delicto* for the first company's tort, and that the circuit court had no jurisdiction *ex contractu,* the amount involved being less than one hundred dollars, the minimum limit of its jurisdiction. (Page 251.)
2. EVIDENCE—OPINION OF NON-EXPERT.—Where it was claimed that plaintiff's cow was killed by defendant's negligence in running its car at an excessive rate of speed, it was not error to permit a non-expert witness to testify that, judging from the ordinary speed of cars, being 6 to 8 miles per hour, the car in this case was running at a speed of about 20 miles an hour. (Page 252.)
3. NEGLIGENCE—PERMITTING ANIMAL TO RUN AT LARGE.—The fact that the owner of a cow permitted her to run at large outside the stock limits of a city did not constitute contributory negligence. (Page 252.)

Appeal from Pulaski Circuit Court; *Edward W. Winfield,* Judge; reversed in part.

Rose, Hemingway, Cantrell & Loughborough, for appellants.

1. As to the railway company, the suit was *ex contracta.* The amount involved was less than $100. The circuit court was without jurisdiction as to it. Sec. 40, art. 7, Const. This court will consider the question of jurisdiction, though not raised below. 45 Ark. 346; 45 Ark. 450; 48 Ark. 301. The court erred in permitting it to be brought in by amendment. 44 Ark. 375.

2. The evidence is not sufficient to sustain the verdict. The statute, Kirby's Digest, § 6773, does not apply to street railways. There is no presumption of negligence against them. 72 Ark. 572. The verdict was based upon inferences and presumptions which did not naturally flow from such facts as were proved. 34 Ark. 632.

3. The court erred in admitting improper and prejudicial evidence of Trustin Hicks who had not qualified to testify as an expert. The ordinary rate of speed of other cars had no connection with the speed of the car that struck the cow. 58 Ark. 454; 157 Ill. 612; 63 App. Div. (N. Y.), 423; 36 Ore. 315; 6 Wash. 75.

4. The court's first instruction given at request of plaintiff was erroneous, in that it withdrew from the jury plaintiff's contributory negligence in allowing the cow to run at large. 62 Ark. 167; 64 Ark. 421; 65 Ark. 435; 77 Ark. 398.

W. C. Adamson, for appellee.

1. There was evidence legally sufficient to support the verdict. It will not be disturbed. 51 Ark. 467; 57 Ark. 577.

2. It is not required that one be an expert in order to give his opinion as to how fast a car is traveling. 62 Ark. 254; 12 Am. & Eng. Enc. Law (2 Ed.), 473. Even if it was error to admit the testimony, it was merely cumulative evidence, and the judgment will not be reversed. 20 Ark. 216; 56 Ark. 37. Nor will it be reversed, if the fact toward which the incompetent evidence was directed was otherwise proved by competent evidence. 58 Ark. 125.

3. There was no error in the first instruction. It is in evidence that plaintiff lived outside the stock limits, and the injury occurred without the limits. Moreover, it is not shown that

the cow was at large through negligence of plaintiff, but on the contrary it was the custom to keep her up.

4. If on the whole case the verdict was right, the judgment will not be reversed. 44 Ark. 556; 43 Ark. 296; 46 Ark. 542.

BATTLE, J. Mrs. H. L. Hicks brought an action before a justice of the peace of Pulaski County against the Little Rock Traction & Electric Company, a street railway company, for damages caused by it negligently injuring a cow belonging to her. The amount sued for was $75. In a trial before the justice of the peace the defendant recovered judgment. Plaintiff then appealed to the circuit court, and on the first of October, 1904, filed in that court an amendment to her complaint, in which she made the Little Rock Railway & Electric Company a party defendant, alleging that it had purchased the property of the Little Rock Traction & Electric Company, and had assumed the payment of its obligations, and asked for judgment against the former company for $75. The Little Rock Railway & Electric Company answered, and admitted that it had purchased from the Little Rock Traction & Electric Company its property and assumed its liabilities, and adopted its answer, and asked for judgment against plaintiff.

On October 4, 1904, the issues in the case were tried by a jury, which returned a verdict in favor of plaintiff in the sum of $35. Judgment was rendered for that amount against both defendants, and from this judgment they prosecute an appeal to this court.

The evidence adduced at the trial, which sustained the verdict of the jury, tended to prove the following facts:

On the night of the 31st of August, 1902, about the hour of 9:06 P. M., a cow of Mrs. H. L. Hicks was seriously injured and greatly damaged by a collision with a car on the street railway of the Little Rock Traction & Electric Company, in the city of Little Rock. The night was fair, and the stars were shining. In the locality in which the collision occurred, on that night, at the time of the collision, a cow lying down could have been seen one hundred and forty feet away. If standing on the track, she could have been seen by the motorman in his place one hundred yards ahead of the car; if near the sidewalk on the street, she could have been seen by him one hundred feet ahead of the car;

and, if four or five feet from the track of the railway, could have been seen about one hundred yards away. No houses or trees cast a shadow in the street. The car was recklessly propelled at a great speed, to the great danger of persons and property on the track. One witness testified, over the objections of the appellants, "I have no means of telling how fast the car was running, but, judging from the ordinary speed of cars, being six or eight miles an hour, this car was running at a speed of about twenty miles per hour." The car struck the cow with great force, making a loud noise, pushing her a distance of thirty feet, tearing up the ground; one witness testifying that "there was a great big ditch in the ground where she (the cow) had been dragged." The cow was severely mangled by the collision. A witness who found her immediately after the accident says: "Several of the cow's ribs were broken, and she was hurt internally. Blood was coming out of her eyes and nose and mouth. Her hip was mashed, and she was skinned all over." In the locality in which this accident occurred stock were not prohibited from running at large. The car running at the rate of eight miles an hour could have been stopped in sixty feet; the usual rate of speed of such cars being from six to eight miles an hour.

The court instructed the jury, over the objection of the defendants, as follows: "The court instructs the jury that if they find from the evidence that the cow was lying, standing or walking on the track, and that the motorman saw her, or could, by the use of ordinary care, have seen her, in time to have avoided striking her, by the use of ordinary care and failed to use such care, then you will find for the plaintiff."

1. It is first insisted that the circuit court had no jurisdiction as to the Little Rock Railway & Electric Company. This contention is correct. The basis of proceeding against that company is the contract it made with the Little Rock Traction & Electric Company to assume the liabilities of the latter company. It was not a party to the tort involved in this action, and the only means by which the appellee sought to make it liable therefor was the contract it made with the latter company. By an amendment to her complaint in the circuit court she in effect attempted to enforce this contract by an action thereby instituted

against it in that court. The amount involved being less than $100, the circuit court acquired no jurisdiction; and the judgment rendered against it is void.

2. It is contended that the court erred in allowing Trustin Hicks to testify as follows: "I have no means of telling how fast the car was running, but, judging from the ordinary speed of cars, being six to eight miles per hour, this car was running at a speed of about twenty miles per hour." The ground of the contention is that Hicks did not show that he was an expert. The testimony was obviously introduced for the purpose of showing that the car was running at an unusual rate of speed. It did not require an expert to ascertain that fact, especially when the difference between the usual rate and the speed it was traveling at the time of the accident was very great. It was admissible to show that the car was running rapidly and at unusual rate of speed.

3. Appellants' objection to instruction copied above is that it ignored the negligence of appellee in allowing her cow to run at large. As the cow was running outside the "stock limit," the appellee was not guilty of contributory negligence in allowing her to run at large, and the objection was not well taken. *Little Rock Railway & Electric Company* v. *Newman*, 77 Ark. 599.

4. The evidence was sufficient to sustain the verdict.

The judgment as to the Little Rock Railway & Electric Company is set aside, and the action as to it is dismissed; and the judgment against Little Rock Traction & Electric Company is affirmed.

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OZARK INSURANCE COMPANY v. LEATHERWOOD.

Opinion delivered June 4, 1906.

1. PLEADING—JUDGMENT BY DEFAULT—DISCRETION.—Under Kirby's Digest, § § 6111, 6188, relating to judgments by default, the trial court is invested with a discretion to render judgment by default against a defendant on failure to answer, which should be used to prevent

unnecessary delays in pleading and for the speedy enforcement of the administration of justice, but not to cause injustice or oppression. (Page 255.)

2. COMPROMISE—ENFORCEMENT.—Where, in a case in which due service was had, the defendants appeared on the first day of the term and asked that the case go over for a week, at which time they appeared and filed answer and demurrer to the complaint, and the court, upon motion of plaintiff showing that the case had been compromised for a less sum than sued for, proceeded to take testimony, and ascertained that such compromise was made, it was not error to strike the answer and demurrer from the files, but judgment should have been entered for the amount of the compromise, and not for the amount originally claimed. (Page 255.)

Appeal from Sebastian Circuit Court; *Styles T. Rowe,* Judge; affirmed upon entry of remittitur.

Ira D. Oglesby, for appellants.

The record presents a case where an attempt was made between attorneys to settle. A misunderstanding arose as to the terms of settlement, and the compromise ended. An attorney has no right to compromise a suit without the express authority of the client, and none is shown in this case. When counsel disagreed upon settlement, the case should have been tried on its merits, and the court exercised power arbitrarily in attempting to compel defendants to conform to plaintiff's attorney's understanding of the terms of settlement.

Winchester & Martin, for appellee.

1. The motion to strike was addressed to the sound discretion of the court. It had the right, on overruling it, to impose conditions upon the other party. 63 Ark. 568; 31 Ark. 659. It is shown by the evidence that appellant's attorney was authorized to make the settlement.

2. A judgment will not be reversed for error or defect in pleading, unless the pleading be wholly bad. Pleadings are liberally construed—especially so after judgment rendered. Kirby's Digest, § § 6130, 6148; 53 Ark. 519.

BATTLE, J. On the 20th day of May, 1904, Mrs. E. Leatherwood commenced an action in the Sebastian Circuit Court, for the Fort Smith District, in Sebastian County, in this State, on a policy of fire insurance against the Ozark Insurance Company,

and the following sureties on its bond, E. H. Stevenson, A. J. Ingle, G. W. Moss, Hilliard Bryan and Houston J. Payne, for $400, the amount agreed to be paid to plaintiff by the insurance company as indemnity for loss by fire. Summons for the defendant was issued, and was served on the 21st day of May, 1904. On the 6th day of June, 1904, the circuit court of Sebastian County for the Fort Smith District was begun and held. After the commencement of the term the defendants appeared in court, and asked that the case go over until Monday following, which was the 13th of June, 1904, and said that "the case would be settled." On the 13th of June the defendants, without the consent of plaintiff and in the recess of court, filed a demurrer and answer. On June 21, 1904, the plaintiff moved to strike these pleadings from the files of the court, first, because they were not filed in apt time as provided by law; and, second, because the action was compromised by the plaintiff and the insurance company on the 8th day of June, 1904, the last day when, under the law, the defendants could plead. Thereupon the court heard testimony adduced in support of and against the motion, and found from the evidence that the liabilities and obligations of the insurance company to plaintiff and plaintiff to insurance company, including a note for $24 for premium, were adjusted on the 8th day of June, 1904, and it was agreed that the insurance company would pay $250 in liquidation and discharge of all such liabilities and obligations; and notified the defendants that, unless the sum of $250 was paid into court by 9 o'clock, A. M. of June 22, 1904, the motion of plaintiff would be sustained; and, the defendants announcing that it would not be paid, struck the demurrer and answer from the files; and on the next day rendered judgment by default, for want of an answer, against the defendants in favor of the plaintiff for $400, the amount sued for, and six per cent. per annum interest thereon from May 20, 1904, until paid, and costs. The defendants appealed.

The statutes of this State provide: "The defense to an action at law shall be filed on or before the third day of the term * * * when the summons has been served ten days before the commencement of the term in the county in which the action is brought," etc. "On the fourth day of the term the court shall render judgment by default in all actions at law wherein due ser-

vice has been had as provided in section 6111, and no defense has been filed; provided, the court may, for good cause, allow further time for filing a defense." Kirby's Digest, § § 6111, 6188. Under these statutes there is no duty resting upon a court to render a judgment by default against a defendant on failure to answer. Such is within the discretion of the court. It may grant further time. Such power is manifestly given to the court to prevent unnecessary delays in pleading and for the speedy enforcement of the administration of justice. The authority to give further time to plead is manifestly for the purpose of preventing injustice and oppression which might follow a judgment by default on a failure to plead in the time prescribed by the statute; and it should not be used to defeat the purpose for which it was given. Such an exercise of it would be an abuse of discretion.

Judgments by default upon a failure to answer are based upon an implied confession by the defendants of the allegations in the complaint. Hence such allegations must be sufficient to authorize and sustain it if true. But the court did not proceed upon that theory in this case. Upon being informed that the parties had compromised, and upon motion to strike the pleadings of defendants from the files of the court, it proceeded to take testimony and ascertained that the parties had adjusted their differences by an agreement that the insurance company should pay to appellee $250; and, willing that they should do so, offered to enforce it upon the payment of the $250; and, upon the refusal of the defendants to do so, struck their pleadings from file, and rendered judgment against them for $400, interest and costs—at least $150 more than the amount the plaintiff had agreed to accept in full of all her demands.

The court ascertained that a valid settlement of differences had been made. This settlement was virtually an admission or confession that $250 of the $400 sued for was due and owing; and, inasmuch as the defendants had lost the right to plead except upon terms fixed by the court that are just and reasonable, judgment should have been rendered, as upon default, in favor of plaintiff for that amount and interest from the 8th of June, 1904, and costs, upon the plaintiff remitting all of the sum sued for above that amount; and upon her failing or refusing to do so

the court should have granted to the defendants the privilege of pleading and maintaining their defenses.

Now, if the appellee will, within two weeks from this day, remit all of the judgment in this action above the $250 and interest thereon from the 8th of June, 1904, the date of the compromise, and costs, judgment will be rendered in her favor against the defendants by this court for that amount and interest, and costs in the circuit court; and, the trial court having offered to enforce the compromise upon payment of $250, judgment will also be rendered in her favor for all costs of appeal; and such judgment will be in bar of any action on the note for premium on insurance; otherwise the judgment of the circuit court will be reversed, and the cause will be remanded with directions to the court to allow the defendants the privilege of pleading and maintaining their defenses.

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81	170
82	235
79	256
85	64

TILLAR v. WILSON.

Opinion delivered June 4, 1906.

1. REFORMATION OF INSTRUMENT—SUFFICIENCY OF EVIDENCE.—Where, of evidence tending to show that a mutual mistake was made in drafting a contract, the most that can be said is that a mere preponderance tends to prove the alleged mistake, a reformation will not be decreed; the rule being that the evidence to establish the mistake must be "clear, unequivocal and decisive." (Page 261.)
2. EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.—Where a written contract, by its terms, undertook to compromise a pending lawsuit and to settle the affair of a partnership, parol evidence that the contract was intended to settle another matter not connected with the lawsuit or the partnership contravenes the rule which excludes parol evidence to vary the terms of a written contract. (Page 262.)

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

STATEMENT BY THE COURT.

Appellant and appellee were co-sureties on notes executed by the Gravity Boiler Feeder Company, a corporation, to the Bank of Commerce. The notes were respectively for $300 and $500. Appellant paid the notes, and this suit was brought by him against appellee as co-surety for half the amount paid; appellant alleging in his complaint that the maker and the two other indorsers were insolvent.

Appellee by his original and amended answer set up a certain agreement which he alleges was understood to be and was a settlement of "all matters, claims and differences of every kind existing between them, and he avers that, if the claim sued on was not in terms included in the written agreement for settlement, it is because appellee through mistake or misapprehension did not fully understand the true meaning thereof. He says that the settlement of the claim sued on was a part of the consideration of the written agreement, and he prays among other things that, if necessary, the agreement be reformed so as to express the intention and understanding of the parties thereto. In reply appellant denied that the written agreement was intended to embrace the liability set up in the complaint, and denied that there was any mistake or misapprehension on the part of the appellee as to the meaning of the writing. The agreement set up in the answer is as follows:

"This is to show that T. O. Wilson and T. F. Tillar have this day compromised the litigation between them growing out of the suit now pending in the Pulaski Chancery Court, for a dissolution of the firm of Tillar & Wilson, and the appeals taken therefrom. The terms of this compromise are as follows:

"Tillar takes all the assets of the firm, and to that end Wilson hereby assigns to Tillar all his (Wilson's) interest in such assets, and Tillar also assumes and agrees to pay all the liabilities of the firm of Tillar & Wilson, together with all unpaid costs, including the receiver's fee, and Tillar shall be authorized to prosecute for his own benefit suit against the Cypress Lumber & Shingle Company now pending in the Supreme Court. In consideration of the foregoing, Tillar has this day paid Wilson

$1,750 in cash, and agrees to pay him an additional amount of $1,500 within thirty days from this date. If the latter amount is not paid within the thirty days, then this compromise shall become null and void, and the cash paid herein is to be accounted for by Wilson in the settlements of the accounts of the partnership of Tillar & Wilson. In addition to the payment of the aggregate sum of $3,250 by Tillar to Wilson, as hereinbefore set out, Tillar agrees to hold Wilson harmless from any and all claims of the creditors of the firm of Tillar & Wilson. Tillar is to pay off the debts within the thirty days or give Wilson a satisfactory bond that they will be paid.

"Dated this January 23, 1904.

[Signed] "T. F. TILLAR,
"T. O. WILSON."

Appellee, after testifying concerning a partnership that had existed between himself and appellant, and after showing that suit was brought by appellant to dissolve the partnership, and that, growing out of the affairs of the partnership and its dissolution, a suit was pending in the Supreme Court involving differences between them which amounted to several thousand dollars, and out of which he expected to realize, should the litigation terminate in his favor, about six thousand dollars as against appellant, further testifies as follows:

"Tillar had at one time handed me a statement showing that he had paid out for the Gravity Boiler Feeder Company about $1,600. So on January 5, 1904, I wrote Tillar a letter asking him to advance me $3,000 on account of the balance that would be due me on the final settlement of the Tillar & Wilson firm, and proposing that if he would make the advance I would assume and pay half the amount he had paid out for the Gravity Boiler Feeder Company, but denying that I was really liable for anything on the latter account. Tillar did not accept my proposition—not directly. Shortly afterwards he visited Little Rock, and wanted to know the least I would take to settle up everything between us, and I told him $4,000. He said he would go home, and think about it. In a few days I went over to the office of his attorney, W. S. McCain, and said to him that decisions by the Supreme Court in the Ferguson Lumber case and in the Grady Shingle case might not be reached in two or three years, and I

asked his attorney to inform Tillar that I would compromise by accepting from him $3,500, he to take all the assets and give me a receipt in full. Tillar came up on February 23, and he proposed that we go over to the office of his attorney, W. S. McCain. We did so, and there we talked the matter over. He tried to get me to take less than $3,500. He proposed $3,000, but we finally agreed on $3,250. The contract was drawn up by Judge McCain as follows: [Here appellee makes a part of his testimony the agreement set out *supra.*] He then continues: "We did not sign the agreement at McCain's office, but we came over to the office of my attorney, Judge Allen, and I told Judge Allen I would like for him to look over the agreement, and see whether it needed any changes or corrections. Judge Allen took it, and said, 'Is this in full, is it a settlement of everything between you?' and I said 'Yes,' and he asked Mr. Tillar the same question, and he said 'Yes.' We then signed up the contract, and Tillar gave a check for $1,750. This contract was in settlement of everything between us individually as well as the partnership."

(All of the foregoing testimony was given over the objection of plaintiff as being irrelevant and incompetent.)

Samuel R. Allen testified: "I was the attorney of T. O. Wilson in the litigation between him and Tillar in regard to the dissolution of the firm of Tillar & Wilson. Wilson had a desk in my back office. The two came into my room, and Tillar said, 'Wilson and I have settled all our difficulties,' and Wilson said, 'Tillar has bought me out. We have been down to Judge McCain's office, and have come to an agreement. I suppose some paper is necessary, and we have had one prepared, which I would like to have you look over, and see if it is sufficient.' They handed me a paper and before reading it I asked them if they meant to say that they had settled all matters of every kind and nature between them, and they said 'Yes.' I then took the paper, the one copied above, prepared by McCain, and read it over carefully, and I then remarked to them 'that this paper in itself seems to refer solely to the affairs of Tillar & Wilson,' and they said 'it covers everything between us except an account Wilson owed the firm of Tillar & Company for Knights of Honor dues they had paid for him,' and I said 'I will just make this remark, so there will be no after-clap: While this paper is not quite as ex-

plicit as I would have made it, and while it does not cover the matter entirely, I think it will do.' I knew at the time that Tillar was claiming something from Wilson on account of the notes paid to the bank for the Gravity Boiler Company, and I had this in mind when they were talking to me."

Appellant's counsel objected to all of the foregoing testimony of Allen, and filed a motion to suppress the depositions of Wilson and Allen, and particularly that part relating to conversations at and before the time of the signing of the written agreement and explaining the meaning of the contract. The court overruled the motion, to which ruling plaintiff excepted.

Appellant testified in his own behalf as follows: "I was a co-surety with Wilson on the notes of the Gravity Boiler Company to the bank, and I paid them. This business of the boiler company had nothing to do with the shingle and timber business of Tillar & Wilson. The court realized about $15,000 on the sale of the Tillar & Wilson assets. At the time we made the agreement in Judge Allen's office there was no agreement except the written agreement, and that related entirely to the business of Tillar & Wilson. My attorney, W. S. McCain, wrote it up, and it was then referred to Judge Allen. We went to Judge Allen's office and signed it up there. Judge Allen, Wilson and I only were present. There was no other agreement except that which was in the writing signed. Judge Allen is mistaken in his recollection of what was said, and what he and Wilson testified to in their depositions is untrue, so far as relating to any other than the Tillar & Wilson matter."

The chancellor entered a decree for appellee, and this appeal was taken.

W. S. McCain, for appellant.

1. The compromise agreement was reduced to writing. Its meaning is plain. The claim sued on has no connection with the partnership business of the parties. The defense seeks to vary the meaning of the written instrument by parol testimony. 1 Greenleaf on Ev. § § 275, 288, 287, 292; 24 Ark. 210; 45 Ark. 198; 49 Ark. 285. See also 71 Ark. 185; 66 Ark. 399; *Ib.* 445; 65 Ark. 335.

2. Mere preponderance of evidence is not sufficient to war-

rant a reformation of the contract: The proof must be full, clear, decisive, free from doubt. Bishop on Contracts, 708. And the mistake must be mutual. 1 Wharton on Cont. 207; 14 Ark. 487; 41 Ark. 499; 49 Ark. 425; 46 Ark. 167; 56 Ark. 320; 72 Ark. 546. See also 70 Ark. 512; 71 Ark. 171.

Ratcliffe & Fletcher, for appellee.

1. The proof is clear that the matter in dispute in this case was intended by both parties to be included in the settlement, when it was entered into.

2. The evidence showing the agreement to settle this matter does not contravene the written agreement. It simply establishes a contemporaneous substantive agreement relating to the same subject-matter, and forming a part of the consideration of the written contract. 27 Ark. 510; 55 Ark. 112.

3. If the testimony be contradictory of the written agreement, the parties evidently signed it through mistake or misapprehension. The court has power to correct and reform it. 32 Ark. 342.

WOOD, J., (after stating the facts.) First. The chancellor found "that at the time the agreement as set forth in the answer was executed it was understood by and between the plaintiff and the defendant, and as part of the consideration for said agreement, that the claim sued upon herein as set forth in the complaint was to be fully settled and satisfied, and was so settled and satisfied by said agreement." If this finding were correct, the settlement of the amount due by appellee to appellant on account of the payment by the latter of the Gravity Boiler Feeder Company's notes was intended to be embraced in the written agreement, and its omission therefrom was a mistake common to both parties which would call for a reformation of the written agreement so as to effectuate their purpose. The decree of the court in favor of appellee was in effect tantamount to this. The testimony of appellee and Judge Allen tends to show that the parties to the agreement intended that it should settle all matters between them. But the testimony of appellant tends to show that it was intended to settle only differences growing out of the partnership transactions. So there is a conflict, and with the view most favorable to appellee it can only be said that there is a mere

preponderance of the evidence in his favor. But this is not sufficient to entitle a party to reformation. The proof must be "clear, unequivocal and decisive." *Goerke* v. *Rodgers,* 75 Ark. 72; *McGuigan* v. *Gaines,* 71 Ark. 614. We do not find it so in this case. The explicit language of the instrument shows that it had reference solely to the compromise of the litigation then pending between appellant and appellee, and to the settlement of the affairs of their partnership, and nothing else. Language could not more plainly set forth the purpose of this agreement, and the utmost stretch of construction could not make it include the settlement of appellee's liability on the notes mentioned, yet appellee read this agreement or had it read in his presence. He then had his attorney to read same, and, notwithstanding its failure to compass the specific object of including the settlement of appellee's liability to appellant on account of the notes, as one of the purposes which appellee contemplated and had in mind at the time, he nevertheless signed the agreement, without mentioning this particular matter to appellant. So, likewise, his attorney had this specific thing in mind, but failed to mention it specifically to appellant, and failed to suggest a modification of the agreement to cover it, although he says "it was not quite as explicit as I would have made it, and does not cover the matter entirely." This certainly tends to prove that, if appellee had this matter in mind at the signing of the agreement, he failed to mention it to appellant, and it does not at all contradict appellant's evidence that "there was no other agreement except that which was in the writing signed." There was no ground for reformation.

Second. The testimony of appellee and S. R. Allen to the effect that the agreement was intended to settle the liability of appellee to appellant on account of the notes was in contradiction, and not in explanation, of the terms of the written contract between the parties. It tended to vary those, and thus contravened the rule which excludes parol evidence. 1 Gr. Ev. § 275 *et seq.,* notes; *Colonial & U. S. Mortgage Co.* v. *Jeter,* 71 Ark. 185; *Moore* v. *Terry,* 66 Ark. 393, and cases cited; *West-Winfree Tobacco Co.* v. *Waller,* 66 Ark. 445. In the subject-matter of the written agreement was the compromise of the lawsuit pending in the Supreme Court and the settlement of the affairs of the partnership that had existed between them. The payment of the

Gravity Boiler Feeder Company's notes and appellee's contributory share thereof which was due appellant, had not even the remotest connection, under the proof, with the affairs of the partnership between Tillar and Wilson, much less with the lawsuit that was pending in the Supreme Court. Here the entire contract relating to the subject-matter about which the parties were contracting, as indicated by the terms of the instrument, was reduced to writing, and there is no ambiguity about it. The cases of *Weaver* v. *Fletcher,* 27 Ark. 510, and *Kelly* v. *Carter,* 55 Ark. 112, cited by appellee, are not applicable.

The decree is reversed, and judgment will be entered here in favor of appellant for the amount sued for in his complaint with interest. So ordered.

HEMPSTEAD COUNTY *v.* PHILLIPS.

Opinion delivered June 4, 1906.

1. COUNTY—CLAIM.—A demurrer does not lie to a claim presented to the county court for allowance, no formal proceedings being required in such case. (Page 265.)
2. APPEAL—PRESUMPTION.—Where the evidence upon which a finding of the trial court was made is not brought up in the transcript on appeal, it will be presumed that every fact necessary to sustain the finding and judgment of the court was proved that could have been proved. (Page 266.)

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

STATEMENT BY THE COURT.

Appellee presented to the county court of Hempstead County an account as follows:

"Hempstead County to J. W. Phillips, Dr.

"For expenses incurred in opening and repairing the vault door of the County Treasurer's safe."

Then follows an itemized statement of what was done and the charge for each item, amounting in the aggregate to $261.

The account was duly verified. The county court disallowed the claim, and Phillips appealed.

The record of the circuit court is as follows:

"John W. Phillips, plaintiff, *v.* Hempstead County, defendant.

"On this day, this cause coming on to be heard, and being regularly reached on the docket, and comes the plaintiff, by his attorney, Jas. H. McCollum, and comes the defendant, by the prosecuting attorney, John E. Bradley, Esq. This cause is, by consent, submitted to the court sitting as a jury, and, after hearing the evidence and argument of counsel, the court finds that the defendant, Hempstead County, is justly indebted to the plaintiff, John W. Phillips, in the sum of $261 for money advanced for the use and benefit of the defendant; and that plaintiff is entitled to recover said sum of and from the defendant and all costs in this cause expended. It is therefore, considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendant the sum of $261, with six per cent. interest thereon from this date until paid, and all costs in this cause expended.

"And it is further considered, ordered and adjudged by the court that the clerk of this court be and he is hereby directed and ordered to certify this judgment to the honorable county court of Hempstead County, and said county court of Hempstead County is hereby ordered and directed, by appropriate order, to have warrants upon the treasurer of Hempstead County issued in favor of the plaintiff and the officers and witnesses for the amounts due them, respectively, in payment of this judgment."

The cause comes here on a writ of error.

W. S. McCain, for appellant.

1. If, as argued by appellee, the phrase "county treasurer's safe" may be presumed to be really the property of the county, he is left in a worse situation. It is the business of the county judge to have county property repaired. If a volunteer, without request from the county judge, repairs county property, he can not present a claim and receive payment as a matter of right.

He assumes the risk of the county court ratifying his acts, if it has any such power.

2. But appellee only claims to have paid the laborer who did the work. The county court is without power to allow a claim for money paid.

Jas. H. McCollum, for appellee.

1. The only reasonably sure means by which the treasurer may keep the county money is to provide a safe or vault. It would be unreasonable to require the treasurer to provide the safe. The county court has power to alter, repair or rebuild any county building, and to *cause other necessary buildings and fixtures* to be erected; also to take necessary measures to preserve all buildings *and property* of the county from damage or waste. Kirby's Digest, § 1025. The levying court is authorized to make appropriations to defray the expense of "repairing and taking care of public property." *Ib.* § 1499. The county court is empowered to purchase, or receive by donation, any property, real or personal, for the use of the county, and to cause to be erected all buildings and all repairs necessary for the use of the county. *Ib.* § 1375. Certainly this is sufficiently comprehensive to include a safe for the treasurer's office.

2. No exceptions were saved to the findings and judgment of the court, which found from the evidence that the county was liable. Since the evidence has not been brought into this record, this court will presume that there was proof of every fact which was necessary to sustain the trial court's ruling. 40 Ark. 185; 44 Ark. 74; 45 Ark. 240; 54 Ark. 159; 55 Ark. 126; 72 Ark. 21.

WOOD, J., (after stating the facts.) In *Wiegel* v. *Pulaski County,* 61 Ark. 74, this court, in passing upon the judgment of the circuit court sustaining a demurrer to an account that had been presented to the county court for allowance, said: "No formal pleadings were filed in the case, and none were required. * * * A demurrer does not lie to a claim presented to the county court for allowance." Under this decision a claim which appears upon its face to be an improper charge against the county might by the proof be shown to be a correct charge. The matter is left open for the determination of the court upon the evidence adduced.

It appears from the record that "this cause is by consent submitted to the court sitting as a jury, and, after hearing the evidence, the court finds that the defendant, Hempstead County, is justly indebted to the plaintiff, John W. Phillips, in the sum of $261 for money advanced for the use and benefit of the defendant, and that plaintiff is entitled to recover said sum of and from the defendant," etc. It will be observed that the court, after "hearing the evidence," finds as above set forth. What the evidence was is not set forth in the record. Therefore we must presume that every fact necessary to sustain the finding and judgment of the court was proved that could have been proved. *Tucker* v. *Hawkins,* 72 Ark. 21; *Curtis* v. *Des Jardins,* 55 Ark. 126; *Ry. Co.* v. *Amos,* 54 Ark. 159; *Hershy* v. *Baer,* 45 Ark. 240; *McKinney* v. *Demby,* 44 Ark. 74; *Perry* v. *Cunningham,* 40 Ark. 185.

It is easy to see that evidence might have been adduced before the trial court to show that appellee's claim was a valid demand against the county. For instance, it might have been shown that the safe repaired was the property of the county, that it was in need of repairs, that an appropriation had been duly made for that specific purpose, and that appellee had been expressly authorized by the county court to make such repairs and had done so, or that he was expressly authorized by the county court to advance the money for such repairs, and that he had done so upon an express contract with the county court for reimbursement. Such proof would have shown the legality of appellee's claim.

No error appearing upon the face of the record, the judgment is affirmed.

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SECURITY MUTUAL INSURANCE COMPANY v. WOODSON.

Opinion delivered June 4, 1906.

1. FIRE INSURANCE—PROOF OF LOSS—WAIVER.—Where a fire insurance company denies any liability upon its policy, it will be held to have waived the necessity of the assured making proof of loss. (Page 268.)

2. SAME—WARRANTY AS TO KEEPING BOOKS—SUBSTANTIAL COMPLIANCE.—Under Kirby's Digest, § 4375a, providing that proof of a substantial compliance with the terms, conditions and warranties of a fire insurance policy shall entitle the plaintiff to recover in an action on the policy, proof that the assured kept a book showing the goods received by him, and another showing the goods sold therefrom, shows a substantial compliance with a condition in his policy that he should keep a set of books presenting a complete record of business transacted, including purchases, sales and shipments," etc. (Page 268.)

3. SAME—MISREPRESENTATION—KNOWLEDGE OF AGENT.—Where an application for insurance by a firm stated that the property insured belonged to the firm, when part of it belonged to one of the members of the firm, the insurance company can not claim a forfeiture on account of such false representation, if its agent who wrote the application was told the truth and wrote the falsehood into the application. (Page 270.)

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

STATEMENT BY THE COURT.

This is a suit on a policy of fire insurance. The property insured was a stock of general merchandise valued at $800, furniture and fixtures including iron safe for the store and office, valued at $50, and store building, valued at $150.

The complaint set up the contract of insurance, and alleged the loss, on the 14th of November, 1903, of the property by fire, a compliance by plaintiff with the terms of the policy, to entitle it to recover, and prayed for the amount of the policy.

The answer denied all the material allegations, and alleged that the plaintiffs were bound by the bylaws, rules and regulations of the company, it being a mutual company, and by the application which was made a part of the policy, and denied that the plaintiffs took an inventory on the day of the application as they had represented; alleged that their goods at that time would not inventory $1,300, as stated in their application; alleged that they did not carefully preserve their books and invoices in an iron safe or in some place secure against fire, so that they might be secure from fire, so that they might be submitted to the adjusters, as they agreed in their application they would do; that they did not keep the last preceding inventory; that they

made fraudulent representations at the time of making said application that their stock of goods was worth $1,300, that their house was worth $200, and that their store fixtures and safe were worth $100; that the policy contained this provision: "Loss to be paid sixty days after due and satisfactory proofs of the same shall have been made by the assured and received at the company's office in Little Rock, Ark., in accordance with the terms and provisions of this policy herein mentioned;" alleged that nothing was due and nothing payable under this policy until sixty days had elapsed after receiving proof of loss at the office in Little Rock, and that said proof of loss was not received sixty days prior to the commencement of the action.

The cause was submitted to a jury, and its verdict was in favor of appellee for the amount of the policy.

Mehaffy & Armistead, for appellant.

1. The policy is void because the proof of loss required by its terms is not shown to have been given within the required time or at any time. The condition is a reasonable one that proof of loss be furnished within sixty days from the date of loss. 72 Ark.

2. It is void because the insured did not keep a set of books as provided for in the policy. 53 Ark. 355; 7 Vroom, 35; 65 Ark. 241.

3. It is also void because the interest of the insured in the property for which they claim a recovery is not sole and unconditional. The soliciting agent is not shown to have had authority to waive the warranty that appellees were the sole owners. A question of waiver is always a question for the jury. 62 Ark. 43. A false representation as to the ownership of the property insured avoids the whole policy. 63 Ark. 187.

Jobe & Eakin, for appellees.

WOOD, J., (after stating the facts.) 1. Appellant contends that there was no proof of loss, as required by the terms of the policy. But appellant denied any liability whatever, and refused to pay. "Proof of loss," therefore, was waived. *Greenwich Ins. Co.* v. *State,* 74 Ark. 72.

2. It is next contended that the appellee did not keep a set

of books as required by the policy, which contained the standard provision on that subject, and did not comply with the iron safe clause. Such books as the appellee kept were not destroyed. The proof tended to show that a book was kept showing how many goods were received and how many were sold from the date of the issuance of the policy up to the time of the fire. What is termed in the evidence the "merchandise account" taken from the book kept was introduced without objection. It showed the amount of the merchandise received from the date of the issuance of the policy up to the time of the fire. It was shown that a cash book was kept showing the amount of goods sold. It was shown that appellee lost all the goods that were not sold. It was shown that appellee kept books showing the goods that were received and the goods that were sold. The difference between these of course would show the goods that were on hand. Appellees made an inventory showing the amount of goods that were on hand when the policy was issued. The insurance agent was on hand at the time the policy was issued, and examined the stock. The policy required the assured to keep a set of books which "shall clearly and plainly present a complete record of business transacted in reference to the property herein mentioned, including all purchases, sales and shipments, both for cash and credit, from date of the inventory provided for in the preceding section and during the life of this policy, or this policy shall be null and void."

The statute provides: "In all actions against any fire insurance company, individual or corporation, for any claim accruing or arising upon or growing out of any policy upon personal property issued by any such company, individual or corporation, proof of a substantial compliance with the terms, conditions and warranties of such policy, upon the part of the assured, or party, individual, person or corporation to whom it may have been issued, or their assigns, shall be deemed sufficient, and entitle the plaintiff to recover in any such action." Kirby's Digest, § 4375a. This act was passed March 29, 1899, and every policy of insurance written since its passage on personal property must be construed as if this provision were written in it. We are of the opinion that the proof showed a substantial compliance with the "bookkeeping clause" of the policy. The object of that clause

was to enable the insurer to ascertain the property that was on hand and the value thereof at the time of the fire, and it is reasonably clear from the testimony that appellant could have received all the information required by the above provision by an inspection of the books and inventory which appellee had kept and had on hand at the time of and after the fire.

3. The application, which was a part of the policy, contains this question: "Is your title absolute to the property proposed for insurance?" Answer, "Yes." The application is signed, "J. E. Woodson & Company." One of the partners testified: "One of the bills is for my personal account. It is made out to C. E. Gosnell. I had some stuff there that belonged to me, part of the goods, some surgical instruments and some books. The way that came, we asked Mr. Milburn for two policies. We asked for a policy for J. E. Woodson & Company's stuff and for a policy for my individual stuff, and Mr. Milburn said it wasn't necessary, and it would be expensive, and for us to list the stuff together and take one policy, and if we happened to a loss we could settle that between us." Appellant contends that the proof shows that the representation was false, and that it avoids the policy, which requires that the interest of the assured should be sole and unconditional. But this representation was superinduced by the agent of the company, whose business it was to solicit the insurance and write the application therefor. His knowledge was the knowledge of the company. If this representation was false, the company must be held to have known of its falsity at the time its agent wrote the falsehood into the application. This is clearly a matter which the agent taking the application could, and which the proof shows he did, waive. The representation was directly in the line of the agent's employment and bound the company. To hold otherwise would be enabling the company to take advantage of its own wrong and to perpetrate a fraud on an innocent party.

The case of *Germania Insurance Co.* v. *Bromwell,* 62 Ark. 43, cited by counsel for appellant, does not support its contention. On the contrary, the principles announced there, when applied to the facts of this record, will be found to sustain the doctrine we have announced here. In that case before any breach of the conditions constituting the forfeiture, and before the issuance of

the policy, the agent undertook by his statements to do away with a promissory warranty that was contained in the policy. Here there was a breach of the condition requiring sole and unconditional ownership at the time the assured made the representation. The condition existed at the time the policy was issued and before, and the insurer knew it. It did not relate to a condition that was to be performed in the future. A forfeiture for a breach of such condition, of course, could not be waived until the forfeiture had taken place.

The judgment is affirmed.

FLETCHER v. VERSER.

Opinion delivered June 4, 1906.

CONTRACT—ABANDONMENT.—Where A agreed to haul the logs from a certain tract of land for B, who agreed to keep a sufficient quantity of logs to furnish employment for A's teams, but failed to do so, A had a right thereupon to abandon the contract and recover the amount already earned.

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

Mehaffy & Armistead, for appellant.

Whether or not one *wrongfully* abandons a contract is a question of law, and not of fact. 58 Ark. 617.

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

The contract was verbal, and its conditions and terms were disputed. It was a question of fact for the jury.

RIDDICK, J. J. D. Verser brought this action against R. M. Fletcher before a justice of the peace in Hot Spring County to recover the sum of $76.89 which he claimed was due him by the defendant for hauling logs to defendant's mill. The justice gave judgment in favor of Verser for the amount claimed by him, and on another trial in the circuit court, where the case was carried by appeal, judgment was rendered against the defendant for the sum of $65.95.

The evidence showed that Verser has made an oral agreement with Fletcher to haul the logs from a certain tract of timber land. Verser hauled a portion of the logs, and defendant admitted that, according to the contract price, he would owe Verser $65.95 for the logs hauled, had he not abandoned his contract and refused to haul the remainder of the logs. But Verser testified that one of the conditions of the contract was that the defendant should keep a sufficient quantity of logs cut to keep the teams of plaintiff employed, and that plaintiff was compelled to quit because the defendant failed to perform this condition of the contract, and failed to keep a supply of logs for plaintiff to haul. There was some conflict in the evidence on this point, but it was sufficient to support the finding of the jury that Fletcher failed to carry out this provision of the contract, and failed to have enough logs cut to keep the teams of Verser employed, and that for this reason Verser was justified in quitting the work.

The court told the jury that if Fletcher, as part of his contract with Verser, agreed to keep a supply of logs cut sufficient to keep the teams of Verser employed until the timber was all hauled, and failed to do so, this violation of the contract on the part of Fletcher gave Verser the right to abandon his part of the contract, and this was clearly right.

The defendant then asked the court to give an instruction to the jury that if Verser abandoned his contract before completing the work they should find for defendant. This instruction, as asked, was clearly misleading, for Verser admitted that he had abandoned his contract before completing the hauling, but, as a justification therefor, he stated that the defendant, Fletcher, had failed to perform his part of the contract by keeping logs cut for plaintiff to haul. The question for the jury was, then, not whether the plaintiff had abandoned his contract—he admitted that he had done so—but whether the defendant had agreed to keep plaintiff supplied with logs and had failed to do so; for, if that was true, the plaintiff was justified in quitting the work. The circuit court, therefore, modified the instruction asked by defendant so as to tell the jury that if plaintiff wrongfully abandoned his contract he could not recover.

Counsel for defendant say that the insertion of the word "wrongfully" in the instruction rendered it erroneous, for the rea-

son that whether or not a contract was wrongfully abandoned is a question of law. That may be true in some cases, but, when all the instructions are read together, there was nothing misleading in the instructions in this case. The court had already told the jury that, if the defendant failed to perform a condition of the contract requiring him to keep a supply of logs on hand, the plaintiff had a right to abandon his contract on that ground. And when the court told them that if plaintiff wrongfully abandoned his contract he could not recover, they must have understood from this that the plaintiff had no right to abandon his contract if the defendant had performed his part of the contract and kept a supply of logs on hand, for that was the only question at issue.

Taken as a whole, we think the law of the case was clearly stated to the jury, and the evidence is amply sufficient to sustain the verdict. Judgment affirmed.

CARTER v. GRAY.

Opinion delivered June 4, 1906.

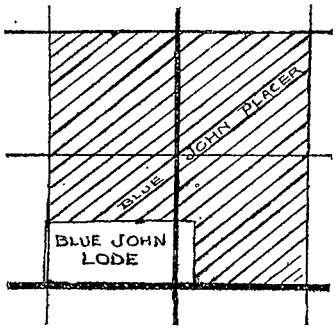
1. SPECIFIC PERFORMANCE—MISJOINDER OF PARTIES.—Where, the patentee of a tract of land, consisting of 160 acres, agreed by separate contracts to convey to A a certain 20 acres thereof and to convey to B one-fourth of the same 20 acres, there was no misjoinder of parties in a suit by A and B against such patentee to enforce specific performance of the two contracts. (Page 281.)
2. ESTOPPEL—ACCEPTANCE OF BENEFIT.—A grantee who accepts the benefit of a deed procured by his agent will be held to have had notice of and to be bound by a contract which the agent made with the grantor, whereby a part of the land was to be reconveyed to the latter. (Page 283.)
3. CORPORATION—NOTICE TO AGENTS.—Notice to the agents and officers of a corporation is notice to the corporation itself. (Page 283.)
4. MINING CLAIM—VALIDITY OF PATENT.—A patent from the United States for a placer claim covering 160 acres is not void because a claim for a lode has been filed on 20 acres of the ground, and the price per acre of the latter class of land is double that of the former, if the patent expressly excepted any lode of valuable metal known to exist within the limits of the grant, especially if the Government makes no complaint. (Page 283.)

Appeal from Marion Circuit Court in Chancery; *Elbridge G. Mitchell,* Judge; affirmed.

STATEMENT BY THE COURT.

In 1890 John G. Gray and N. T. Bennett were the owners of a mining claim of 20 acres in Marion County, Arkansas, known as the "Blue John Lode Claim."

Afterwards, in December, 1891, John G. Gray, William Kaler, E. V. M. Powell, J. C. Berry, C. W. Hequenberg, J. H. Bethune, C. B. Adams and W. A. Dripps located a mining claim known as the "Blue John Placer Claim." This placer claim contained 160 acres. It covered the 20 acres of the "Blue John Lode Claim" and 140 acres additional. The situation of these two to each other are shown in the following plat:



All of the parties who located this placer claim except Gray conveyed their interest to W. Frank Carter, of St. Louis. Carter thus became the owner of this 160-acre mining claim, with the exception of the one-eighth interest held by Gray. Carter was not the real owner, but held the title as the agent and trustee of other St. Louis parties.

As Carter desired to secure a patent to this land, and as he lived in St. Louis, some distance away, he executed the following power of attorney to E. V. M. Powell:

"Know all men by these presents:

"That I, W. Frank Carter, of the city of St. Louis, State of Missouri, a citizen of the United States, do hereby constitute and appoint E. V. M. Powell, County of Marion, State of Arkansas, my attorney in fact, for me and in my name to make application for patent of the United States in the proper land office upon

any and all placer mining claims owned by me or in which I may be interested situated in Buffalo Mining District, County of Marion, State of Arkansas, and to make or cause to be made any and all surveys, relocations, affidavits and all necessary papers which may be required in the prosecution of such application, or to perfect or protect the title thereto, and to do all other acts and things in and about the premises which I myself, if present, could do, until patent is finally delivered. Also in case of adverse claim, I authorize him to employ counsel and take all measures necessary to defend against said adverse claim or suit in support thereof, either in the land office or in judicial proceedings, and in such proceedings to execute any bonds or other papers, and verify all proceedings, to and including appeal or writ of error.

"Witness my hand and seal this 24th day of September, [Seal.] A. D. 1892.

"W. FRANK CARTER."

This power of attorney was duly acknowledged.

Afterwards Powell made a contract with Gray and Bennett, the owners of the lode claim, that Gray should also convey to Carter his one-eighth interest in the Blue John placer claim, and that Carter, so soon as the patent was procured, should, upon the payment of their *pro rata* of the total expenses in procuring the patent, convey to Gray and Bennett such portion of the land as was covered by the Blue John lode claim. In pursuance of such agreement, Powell executed in the name of Carter a bond to Gray as follows, towit:

"Know all men by these presents:

"That I, W. Frank Carter, of the city of St. Louis, State of Missouri, am firmly bound unto John G. Gray, of Webb City, State of Missouri, in the sum of five thousand dollars ($5,000), and by these presents do firmly bind my heirs, executors and assigns to the full amount of the above stated five thousand dollars ($5,000).

"The conditions of this bond are as follows: That, whereas the said John G. Gray did, by deed dated October 1, 1892, convey all his right, title and interest in and to what is known as the Blue John placer claim, No. two thousand, five hundred and thirty-four (2534) situated in the Buffalo Mining District, to

the end that I might make application for a patent for the same from the United States Government. Now, when I shall have received a patent from the United States Government, if I shall cause to be made or make unto the said John G. Gray, upon receipt from him of his *pro rata* proportion of the total amount of expenses incurred by reason of obtaining a patent to the Blue John placer mining claim, a good and sufficient deed for such portions of the said Blue John placer mining claim as is covered by what is known as the Blue John lode claim, and so set forth in deed from William Kaler and E. V. M. Powell, to John G. Gray, conveying the Blue John lode claim, which is duly recorded in the officer of the recorder of the Buffalo Mining District, at Yellville, Arkansas, then the above bond shall be void and of no force; otherwise to remain in full force and effect.

"Witness whereof I have hereunto set my hand and seal, this the 19th day of October, 1892.

"W. FRANK CARTER.
"By E. V. M. Powell, Attorney in Fact."

Powell also in the name of Carter executed a bond for title to Bennett, reciting that Bennett was the owner of a one-fourth interest in the Blue John lode claim, and obligating himself that, upon receipt of a patent from the United States to 160 acres of the Blue John placer claim, he would, upon the payment by Bennett of his *pro rata* of expenses, make a good and sufficient warranty deed to him for his interest in the Blue John lode claim.

After the patent was procured by Carter, he conveyed the land to the Southwestern Zinc Company, and this company refused to perform the contract made by Powell with Gray and Bennett. They brought this action for specific performance. The chancellor gave a decree in favor of plaintiffs, from which decree defendants appealed. The other facts are stated in the opinion.

DeRoos Bailey, Arthur N. Sager, Jno. T. Hicks and *J. W. & M. House,* for appellants.

1. The bonds for title are unacknowledged and unrecorded. They are not valid, and do not affect subsequent purchasers without notice. Kirby's Digest, § § 762, 763; 56 Ark. 239; 41 Ark. 363. They could not affect the zinc company, because it was a

stranger to the transaction, had no corporate existence when they were executed, there was no privity of contract between it and plaintiff, and they were unrecorded. They could not affect Carter, because they were *ultra vires* acts of Powell—not within the authority conferred by the power of attorney. 45 Ark. 81; 45 Ark. 309. The power of attorney is a clear and unambiguous statement of the authority and powers intended to be delegated. It must speak for itself. 28 Ark. 285; 85 N. W. 1019; 24 Cal. 127; 53 N. J. L. 189; 43 L. R. A. 808; 46 Pac. 295; 26 Am. St. Rep. 834; 75 Tex. 455; 43 Am. St. Rep. 819; 40 *Ib.* 313; 144 Ill. 248.

2. The deed from John G. Gray, purporting to convey his interest in the land, can not be explained or varied by oral testimony as to situation of the parties and their relation to the land in controversy. And the so-called bonds for title, as they were clearly beyond the authority of the attorney in fact, are inadmissible. 29 Ark. 544; 35 Ark. 156; 21 Ark. 69; 33 Ark. 150; 20 Ore. 482. The name of the grantee should have been inserted in the deed before delivery, to constitute a valid deed. 40 Ark. 58.

3. The doctrine of ratification can not affect the zinc company, because there was no privity of contract between it and plaintiff, and because it had no corporate existence when the so-called bonds for title were executed. As to Carter, it is in proof that the unauthorized acts of the agent were not known to him until the suit was instituted. There was no ratification on his part. 64 Ark. 220; 43 L. R. A. 809; 26 Am. St. Rep. 835.

4. Under the power of attorney, Powell had no authority from his principal, except as to placer mining claims. If plaintiff Gray conveyed the land for the purpose of having Carter procure a patient from the United States as a placer mining claim, whereas it should have been classed as a lode claim costing twice as much, this was a fraud on the Government, and plaintiffs are in no position to assert their claims in equity. 1 Pomeroy, Eq. Jur. (1905 Ed.), 663; 69 N. E. 614; 49 Am. St. Rep. 834; 57 Am. St. Rep. 450.

5. There was a misjoinder of parties plaintiff, and the motion to dismiss should have been allowed for this reason. The section providing for consolidation of actions seems to intend such consolidation only where there is one plaintiff. Kirby's Digest,

§ 6083. Moreover, the issues are not the same. Certain defenses would be available for one defendant and not for the other. The instruments sued on are different and independent contracts, and there is no privity of contract between plaintiffs. 65 Ark. 218. A motion to correct the misjoinder was proper practice, and should have been granted. 35 Ark. 365. See also, Phillips, Code Pl. § 200.

6. Plaintiffs were barred by the statute of limitation. By the terms of the bonds sued on, the conveyances thereunder were to be made when patent was secured, and the statute would run from the time such patent was secured. Kirby's Digest, § § 5069, 5074. Statutes of limitation are as binding in equity as at law. 47 Ark. 301; 46 Ark. 25. Equity discourages stale claims. Wood on Lim., Tit. "Stale Demands;" 95 U. S. 200; 70 Me. 17; 48 N. W. 767. If title to land which has passed through successive grantees, being subject in the hands of each to prior outstanding equity, comes to a purchaser for value and without notice, it is at once freed from these equities. He obtains a valid title. 17 Am. St. Rep. 686; *Ib.* 1; 75 S. W. 925; 25 S. W. 1098; 53 Am. St. Rep. 157; 148 U. S. 21.

Woods Bros., for appellees.

1. The motion to dismiss should be sustained. If an action is not revived against the heirs within one year, it can only be done thereafter by their consent. Kirby's Digest, § § 6313, 6315; 69 Ark. 215; 76 Ark. 122.

2. All persons having an interest in the subject of an action and in obtaining the relief sought, may be enjoined as plaintiffs. Kirby's Digest, § 6005. Equity abhors a multiplicity of suits, and all parties in interest must be joined. 28 Ark. 171; 37 Ark. 511; 33 Ark. 240.

3. The seven-year statute of limitations would be the only statute applicable in this case. Suit was brought within 5½ years from date of patent. Since Carter was trustee for Gray and Bennett, the statute would not begin to run until they had notice of his repudiation of trusteeship. Beach on Mod. Eq. Jur. § 155; 23 Ark. 363.

4. It is conceded that the power of attorney must speak for itself, and insisted that the language of the instrument confers upon Powell full authority to do all the things he did in the

premises, and that Carter is bound thereby. He is chargeable with notice of all the transactions at the time they occurred, purposely received all of their benefits, and must be held to have ratified such transactions in their entirety. 64 Ark. 217; 55 Ark. 112; 11 Ark. 189; *Ib.* 378; 21 Ark. 554; 29 Ark. 131; 54 Ark. 216; 55 Ark. 240; 1 Beach, Mod. Eq. Jur. § 371; Bishop on Cont. § 1110; 44 Mich. 519; 48 Ga. 85; 44 Ill. 325. Carter being a member of the appellant corporation at the time of his conveyance, for a nominal consideration, of the land to it, it succeeded to all his liabilities in the premises, and acquired no greater right therein than he had. 45 Ark. 17; Greenleaf, Ev. § 283.

5. Powell had full knowledge of the rights and interests of Gray and Bennett. His knowledge of these facts was knowledge of his principal, Carter. He was also agent for the zinc company from the time of its organization, looking after its interests in Arkansas, which gave it full knowledge of Gray's and Bennett's rights. 1 Am. & Eng. Enc. Law, 419; 29 Ark. 99; 49 Ark. 336; 52 Ark. 11. Knowledge of facts sufficient to put a prudent person on inquiry is equivalent to notice. 23 Ark. 744; 58 Ark. 84; *Ib.* 446. Notice of an unacknowledged and unrecorded title bond makes it as valid and binding as if acknowledged and recorded. 44 Ark. 517; 61 Ark. 527; 58 Ark. 252; 16 Ark. 543.

6. Testimony of John G. Gray, L. G. Gray, Bennett and Powell was admissible to show the relation of the parties and the consideration for the deed. It is not to vary the deed and bond, but to explain them and show their purpose. Kirby's Digest, § 3667; 70 Ark. 253; 5 Ark. 321.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment of the chancery court of Marion County ordering a specific performance of a contract to convey land. The facts, briefly stated, are that in 1902 the plaintiff, John G. Gray, and N. L. Bennett, were the owners of a mining claim in Marion County, Arkansas, known as the Blue John lode claim, which covered twenty acres. This claim was located in 1887. In 1891 Gray and seven others located a mining claim known as the Blue John placer claim. This Blue John placer claim covered 160 acres of land, and included the 20 acres of the Blue John lode claim, owned by Gray and Bennett. Afterwards the appel-

lant, W. Frank Carter, of St. Louis, became the legal owner of the Blue John placer claim, with the exception of the one-eighth interest held by Gray. Although the legal title to this interest in the Blue John placer claim was held by Carter, he held it as trustee and agent for other parties. As Carter lived in St. Louis, he and the parties for whom he acted had another agent, Powell, in Marion County, Arkansas, to look after and perfect the title to this and other mining claims. In order to carry out this purpose, Carter, as the legal owner of a part of this claim, executed and delivered to Powell a power of attorney, which is set out in the statement of facts, and which authorized Powell to make application for patents, sign papers and make affidavits in the name of appellant Frank Carter, and do all things necessary to secure patents. He was also authorized, in case of an adverse claim, to employ counsel and do whatever might be necessary to protect the interests of Carter. This agent, Powell, concluded that it would be to the interest of Carter and the others whom he represented to get a conveyance to Carter from Gray of Gray's interest in the Blue John placer claim. Powell thereupon, acting as the agent of Carter and those he represented, made a contract with Gray and Bennett that Gray should convey his interest in the placer claim to Carter, and that Carter should procure a patent for the 160 acres as a placer mine, and that when the patent was procured he should reconvey to Gray and Bennett the portion of the 160 acres covered by their lode claim. This arrangement was carried into effect. Gray under this agreement with Powell conveyed his one-eighth interest in the placer claim to Carter, and Powell, acting for Carter and in his name, executed bonds for title to Gray and Bennett, by which he obligated himself, upon the receipt of a patent to the 160 acres of the Blue John placer claim, to convey to Gray and Bennett that part of the tract which was covered by the Blue John lode claim. This 20-acre tract lay in the northwest portion of the 160 acres, the position of which can be better understood by reference to the plat accompanying the statement of facts.

The statute of the United States under which mining claims of that kind were patented required that at least $500 worth of improvement in the way of developing the mine should be made on each claim before a patent therefor would be issued. Gray

and Bennett, the owners of the lode claim referred to above, had done work on their claim, and by procuring the co-operation of these parties Carter was enabled to use this improvement as a part of the improvement required to be made on his claim. By acting for them in this way he obviated any contest between himself and these owners of the lode claim, and became, in effect, a trustee for them for their interest in this land. In this way Powell, acting for Carter, obtained the patent to the 160 acres in Carter's name. But, although the patent was obtained in that way for Carter, it seems that Carter and the parties in St. Louis whom he represented had no actual notice of the agreement made by Powell in the name of Carter with Gray and Bennett. These parties in St. Louis, who were represented by Carter and Powell, organized in 1894 a corporation known as the Southwestern Zinc Company, for the purpose of having this property transferred to it when the title was obtained by Carter. Powell was agent of this company also. The patent to the 160 acres of land was obtained by Carter in 1895, and in 1896 Carter conveyed the land to the Southwestern Zinc Company by quitclaim deed for the nominal consideration of one dollar, and the company issued stock to the parties interested in the mining claim for whom Carter had procured the patent to the extent of their interest in the land.

The zinc company afterwards refused to convey to Gray and Bennett any interest in the land, and they brought this action against Carter and the zinc company to compel the company to carry out the contract made by Powell, the agent, with Bennett and Gray. The company denied that Powell had authority to make such a contract, and alleged that it was a purchaser for value without notice of the claims of plaintiffs. The defendant also filed a motion to dismiss on the ground that the causes of action set up by Gray and Bennett were separate and distinct, and could not be joined.

First, we are of the opinion that there was no misjoinder of actions. By reference to the bond for title executed by Powell in the name of Carter to Gray, it will be seen that Powell agreed that Carter, so soon as he obtained the title to the placer claim, should, upon payment by Gray of his part of the expenses, convey to Gray all that portion of the placer claim covered by

the Blue John lode claim. In other words, he agreed to convey to Gray the full 20 acres covered by the lode claim, notwithstanding Bennett was interested in the lode claim. It will be noticed that, as Gray was the owner of a one-eighth interest in the 160-acre placer claim, amounting to 20 acres, he conveyed to Carter the same amount of land that Powell for Carter agreed to reconvey to him. But Powell, acting for Carter, also agreed to convey to Bennett a one-fourth interest in that part of the placer land covered by the lode claim. In other words, he agreed to convey to Bennett one-fourth of the same land he agreed to convey Gray. As the contracts made by Powell in the name of Carter with Gray and Bennett, though separate, covered the same land in part, it was proper for both of these parties to join in the action in equity, so that the seeming conflict between these two contracts could be determined, and the title cleared in one action.

The omission of the name of Gray at one place in the deed from him to Carter is a matter of no moment, as it is plain that it was a mere clerical omission that does not affect the validity of the deed in law, much less in equity.

Coming down to the merits of the case, as Powell was the agent of Carter, and also of the zinc company, these defendants must be held to have had notice of the means by which he obtained for them the interest of Gray in this placer claim. Gray was the owner of a one-eighth interest in the 160-acre placer claim. At the request of Powell, the agent of Carter, he conveyed this land to Carter under a written contract that Carter would reconvey to him. Carter accepted the deed, and now claims the right to hold the land on the ground that he had no notice of the contract made by Powell. But he had no reason to suppose that Gray was making a gift of this land to him, and, before he accepted the deed, he should have ascertained the consideration to be paid for it. If Carter authorized Powell to acquire title to the mining claims and accept deeds for the same in the name of Carter, then notice to Powell was notice to Carter. So we think that it is plain that he must be treated as having notice of this contract made by Powell with the plaintiffs. If he had notice, then the parties whom he represented must be held to have had notice; and if they had notice, the zinc company formed by them for the express purpose of having Carter convey these lands to

it had notice. Parties affected with notice of that kind can not escape the consequences thereof by forming a corporation and having their agent convey the land to the corporation and then set up that the corporation is an innocent purchaser for value. These parties were the officers and agents of the corporation, and notice to them was notice to the corporation.

If the case turned solely on the authority of Powell to bind his principal by a contract of the kind which plaintiffs seek to have performed in this case, we might hesitate to hold that he had such authority under the power of attorney executed by Carter to him. But the contract, so far as plaintiffs are concerned, has been executed, and defendants have accepted the benefits of it. Whether their agent had the authority to make the contract or not, equity will not permit these defendants to accept the benefits of this contract, and at the same time escape its burdens. But for this agreement made with plaintiff, Carter could never have procured the legal title to this claim, formerly owned by plaintiffs. It was to the mutual benefit of these parties that the legal title of this land should be conveyed to Carter. But he held it in trust as well for Gray and Powell as for the other owners, and we see no reason why he and the zinc company should not be made to carry out the contracts made by Powell with Gray and Bennett.

The only question as to which we have felt some doubt is whether this contract which is asked to be enforced was not one in fraud of the rights of the Government. The price required by law to be paid the United States for a patent to a lode claim is five dollars per acre, while the price for a patent to a placer claim is only half that amount. For this reason counsel for appellant say that, if plaintiffs' statements are true, then this land was conveyed by Gray to Carter for the purpose of having him procure a patent to it as a placer claim, and thus cheat the United States out of $2.50 per acre. But this contention can not be sustained, for the patent to Carter expressly excepts any lode or vein of valuable metal known to exist within the limits of the grant previous to November 2, 1902. As the Blue John lode claim was located in 1887, it does not seem that the rights of the United States to any lode or vein then known to exist within the bounds of the tract conveyed by this patent would be affected

thereby. Again, Gray had an interest, not only in the lode claim, but in the placer claim also. If we disregard entirely the rights of Gray and Bennett that are founded on the lode claim, still, as Gray was a joint owner with Carter of this placer claim, there is certainly no reason why the defendants should not be compelled to perform their contract with Gray. But the contract with Gray calls for the full 20 acres claimed by plaintiff. If Gray is willing to turn over one-fourth of the 20 acres to Bennett, defendants are not thereby injured, nor are the rights of the Government in any way affected. In fact, the government is not complaining, and, so far as the evidence shows, the motives of the parties in making this contract were legitimate and proper.

On the whole case, we are of the opinion that the decree was in accordance with equity and right. It is therefore affirmed.

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ARKADELPHIA LUMBER COMPANY v. ASMAN.

[Two cases]

Opinion delivered June 4, 1906.

1. SPECIAL JUDGE—VALIDITY OF JUDGMENT—ESTOPPEL.—As it is beyond the powers of the parties to an action to consent to a record which will make valid a pretended judgment rendered by one not regularly elected as special judge, they will not, under any circumstances, be estopped to deny its validity. (Page 286.)
2. APPEAL—REASON ASSIGNED.—Where the bill of exceptions recites that the cause came on to be heard upon the motion of appellant to amend the record and response of appellee thereto, and that the court overruled the same, and that "the defendant thereupon offered to introduce oral evidence to sustain its motion, to which the plaintiff objected, and the court sustained the objection," and the record entry of the order overruling the motion shows that the court's action was based on the ground that the appellant was estopped from insisting upon a correction of the record, it will not be assumed on appeal that the court refused to permit the evidence to be introduced because it was offered after the motion had been overruled. (Page 288.)

3. JUDGMENT—VACATION—ELECTION OF REMEDIES.—If it be conceded that equity has jurisdiction to restrain the enforcement of an invalid judgment at law, the judgment defendant will not be prejudiced by a denial of the privilege of prosecuting an action in equity for this purpose while he is proceeding at law under the statute (Kirby's Digest, § 4431) to vacate the judgment. (Page 289.)

Appeals from Clark Chancery and Circuit Courts; *James D. Shaver,* Chancellor, and *Joel D. Conway,* Judge; the chancery case is affirmed; the other reversed.

John H. Crawford, for appellant.

1. A special judge can not be lawfully elected or appointed, except in the manner provided by the Constitution. 72 Ark. 320; art. 7, § § 11 to 18, and 21. Under the facts in this case, there was no court within the rule stated in 2 Ark. 229. There must be jurisdiction in the court rendering the judgment, and jurisdiction is defined to be the power to hear and determine a cause. Freeman on Judgments, 4 Ed. § 118; *Ib* § 547; 34 Ark. 110; 55 Ark. 565. Consent can not confer jurisdiction. Freeman, Judg. § 120; 49 Ark. 443. And the agreement of parties that an attorney should act as a special judge confers on him no judicial power. 50 Ark. 34. A decree in chancery rendered in vacation, though entered upon the judgment record in a blank space left for that purpose, is a nullity, 71 Ark. 226. If, as held in 71 Ark. 112, it is reversible error for the presiding judge to leave the court room during a trial without suspending the trial, much more so is it reversible error to vacate the bench during the entire time of an alleged trial, leaving another to preside who is in no way qualified to act as a court. Want of jurisdiction may always be pleaded to a judgment, when sought to be enforced. 48 Ark. 151; 64 Ark. 108. The judgment being void, it is in effect no judgment. All proceedings founded upon it are worthless, and all acts performed under it are void. 58 Ark. 186; 7 Ark. 44; 9 Ark. 439. See also 64 Ark. 108; *Ib.* 556; 49 Ark. 397; 5 Ark. 424; 62 Ark. 439; 113 Ind. 10.

2. The so-called judgment may be enjoined in equity. 3 Yeager (Tenn.), 366; 16 Kan. 270; 23 La. Ann. 483; 63 Mo. App. 414; 33 Ark. 778; 50 Ark. 458; 61 Ark. 341; 68 Ark. 492; 73 Ark. 282; 73 Ark. 333; *Ib.* 440; 2 Dill. C. C. 312; Thompson, Prov. Rem. 277.

3. *As to the common law proceeding:* The court erred in refusing to hear testimony offered in support of the motion to correct and set aside the judgment entry, and in denying the motion on the ground that defendant is estopped by its conduct and the conduct of its counsel. 50 Ark. 344.

McMillan & McMillan, for appellee.

As to the chancery proceeding:

1. If appellant was entitled to an injunction, it should have applied to the court in which the judgment was rendered. Kirby's Digest, § 3986; 82 S. W. 696. The chancery court has no supervisory control over the circuit court. 57 Ark. 605.

2. Appellant is not entitled to relief in chancery, unless it can show that it has no adequate remedy at law. 48 Ark. 514; 82 S. W., *supra;* 57 Ark. 500. In this case the remedy was by amendment. 72 Ark. 322. Before a court will relieve against a judgment, the party must allege and prove a meritorious defense. 32 Ark. 438; 57 Ark. 599; 35 Ark. 123; 51 Ark. 341; 50 Ark. 458; 40 Ark. 388; 48 Ark. 535; Freeman, Judg. § 498. He must show that it was unjust, and not the result of inattention or negligence on his part. 43 Ark. 107.

As to the law proceeding:

The power to permit amendments should be exercised with great caution and delicacy after a case has been disposed of, and the court adjourned. 4 Ark. 591; 40 Ark. 230, 232. The motion was not sworn to, nor any supporting affidavits attached to it. The motion did not allege a defense and the general nature thereof so that the court could judge of its sufficiency. 57 Ark. 503. Appellant offered no testimony until long after the motion was overruled. There was no abuse of discretion. Each case rests in the sound judgment of the court. 9 Ark. 188.

McCULLOCH, J. This is an action brought by appellee to recover the sum of $400 alleged to be due him by appellant for salary. The case was here on the former appeal, and the facts are stated in the opinion of the court. *Arkadelphia Lumber Company* v. *Asman,* 68 Ark. 526. The case was tried anew, and judgment again rendered against the defendant, and an appeal taken. On the second appeal appellant showed by its bill of exceptions

that the case was not heard before the regular judge of the court, as recited in the record entry of the judgment, but that the regular judge had vacated the bench and absented himself, and that one of the attorneys of the bar had assumed to act as special judge without having been elected, and the case was tried before a jury whilst he was presiding. This court held that the record, showing that the regular judge presided, could not be attacked by recitals of the bill of exceptions, and dismissed the appeal. *Arkadelphia Lumber Company* v. *Asman,* 72 Ark. 320. The court held that if the record failed to speak the truth in that respect the remedy was to procure an amendment. Appellant thereupon filed in the circuit court of Clark County, in vacation, a motion to correct the said judgment entry, and alleged the foregoing facts concerning the absence of the regular judge. On the same day appellant filed its complaint in the chancery court of Clark County against the appellee, Asman, and the sheriff of Clark County setting forth the same state of facts concerning the absence of the regular judge and the incorrect recitals of the record as to its presence, and also alleging that execution had been issued on said judgment and was about to be levied, and that Asman was a non-resident of the State, and was insolvent. The prayer of the complaint is that further proceedings under said judgment be enjoined. The chancellor sustained a demurrer to the complaint, and an appeal was taken to this court.

The circuit court overruled the motion for amendment of the record, and an appeal to this court was also taken from that decision. Both appeals, therefore, involve substantially the same question, and are presented together.

As has already been pointed out, this court held, in dismissing the former appeal, that the proper method by which the alleged frailty in the proceedings below could be raised was by motion to correct the record entry of the judgment, so as to make it speak the truth. In that way it could be shown that the regular judge was absent, and that the trial was conducted before an incumbent of the bench who had not been elected as special judge. Such a showing and correction of the record would have rendered the judgment void. *Arkadelphia Lumber Co.* v. *Asman,* 72 Ark. 320; *Dansby* v. *Beard,* 39 Ark. 254; *Gaither* v. *Wasson,* 42 Ark. 126; *Wall* v. *Looney,* 52 Ark. 113.

The learned circuit judge, in overruling the motion, based his decision on the ground that the record entry sought to be amended had been originally made with the full knowledge, consent and approval of appellant's counsel, and that said counsel had, soon after the trial, presented to the regular judge of the court for his signature a bill of exceptions reciting that he (the regular judge) had presided at the trial. He decided that appellant was estopped by said conduct of its counsel from insisting on a correction of the record. This view can not be sustained. Judicial powers as special judge can not be imparted by consent of parties. *Dansby* v. *Beard,* 39 Ark. 254; *Gaither* v. *Wasson,* 42 Ark. 126. It being beyond the powers of the parties to consent to such a record so as to make a valid judgment, they could not be estopped from asserting its invalidity.

It is contended, however, that, according to the recitals of the bill of exceptions, appellant submitted to the court its motion, the allegations of which were denied in a response filed by the appellee, without offering any proof to sustain the allegations until after the motion had been overruled. We do not think the bill of exceptions bears out that contention. It is true that the bill of exceptions recites that the cause came on to be heard upon the motion and response, and that the court overruled the same, and that "the defendant thereupon offered to introduce oral testimony to sustain its motion, to which the plaintiff at the time objected, and the court sustained the objection." We think it is too narrow a view to take of the record to say that appellant did not offer, in apt time, proof in support of the disputed allegations of its motion for amendment. The foregoing recitals in the bill of exceptions are continuous, and fairly disclose the fact that appellant stood ready to prove the allegations of its motion, which the court refused to permit, holding that appellant was estopped by the conduct of its attorney in consenting to the record entry of the judgment from asking for an amendment. The decision of the circuit judge is based, not upon a failure to prove the disputed allegations of the motion, but upon the grounds of estoppel. It can not now be sustained upon the ground that appellant failed to prove the allegations of its motion before it was overruled, and that the court properly exercised its discretion in refusing to allow such proof to be introduced after

the motion had been overruled. *Carpenter* v. *Dressler,* 76 Ark. 400.

The court erred in overruling the motion, and in refusing to permit appellant to prove that the regular judge of the court was absent when the case was tried. The judgment overruling the motion must therefore be reversed, and the cause remanded to the circuit court for further proceedings. It is so ordered.

The decision of the chancellor sustaining a demurrer to appellant's complaint must be affirmed, and it is so ordered. The statutes (Kirby's Digest, § § 4431, 3224) seem to afford a complete and adequate remedy at law for correction of the record so as to show the invalidity of the judgment and to prevent its enforcement (*Shaul* v. *Duprey,* 48 Ark. 331); but, if it be conceded that a court of equity had jurisdiction to grant relief against such a judgment, appellant can not be prejudiced by the denial of the privilege of prosecuting both proceedings at the same time.

CORNEY v. CORNEY.

Opinion delivered June 4, 1906.

1. DECREE OF DIVORCE—FRAUD IN PROCUREMENT—VACATION.—Where a husband procured a divorce upon constructive service by falsely alleging that he resided in the county of the venue, and that his wife was a nonresident of the State, when both statements were false, and the wife, after the term of court had expired, brought suit to set aside the decree on the ground that it was procured by fraud, the court will vacate the decree and dismiss the original complaint for want of jurisdiction. (Page 291.)
2. DECREE—VACATION AFTER TERM.—Where a decree was obtained by a fraud upon the court's jurisdiction, as where a divorce suit was brought in another county than that of plaintiff's residence, a suit will lie to vacate such decree after term, whether there was a valid defense to the original suit or not. (Page 292.)

Appeal from Sebastian Chancery Court; *J. Virgil Bourland,* Chancellor; affirmed.

Sam R. Chew, for appellant.

A decree for divorce can be set aside to the extent only of permitting a defendant constructively summoned to appear and defend as for alimony. Kirby's Digest, § 6259. Before a judgment or decree will be vacated, the defendant must allege and prove that he has a valid defense to the action. Kirby's Digest, § 4434; 54 Ark. 539; 73 Ark. 281. Appellee's own testimony shows that she had no fixed or permanent residence in the State at the time the original suit was brought and warning order published. She was not a resident of the State within the meaning of the law. 43 Ark. 547; 8 Wend. 140; 2 Bish. Mar and Div. § § 124, 124a. The chancellor should have continued the cause to enable appellant to take testimony of witnesses showing that appellee was a resident of New York. The chancellor also erred in excluding testimony to show that appellant was coerced into the marriage.

Meyers & Bratton, for appellee.

The divorce obtained by appellant under the warning order published was a palpable fraud. The maxim that fraud vitiates everything applies to a decree of divorce. 2 Nelson's Div. and Sep. § 1050. The wife, not being the head of the family, of necessity has her residence with and at the home of her husband. 15 Am. & Eng. Enc. Law, 815. By her denials that she deserted appellant, and also that she coerced him into marriage, appellee has set up a meritorious defense.

McCULLOCH, J. Appellant, Robert B. Corney, obtained a decree for divorce from his wife, Mary F. Corney, in the chancery court of Sebastian County, Fort Smith District, on March 18, 1903. The suit was commenced on September 22, 1902, and a warning order was duly issued and published. Appellee brought this suit in said court to set aside the decree for divorce on the alleged ground that it was procured by fraud practiced upon appellee and upon the court. It is alleged in the complaint that appellant, at the time of the institution of said suit for divorce and during its pendency, was not a resident of the Fort Smith District, Sebastian County, but was a resident of Crawford County, Arkansas; and that appellee was, at the time, a resident of the State of Arkansas. She also alleged that appel-

lant made the affidavit upon which the warning order was issued with full knowledge that she was a resident of and was actually in the State, and that she was absent from her said husband by his procurement and command, and that she had not deserted him, as alleged in his complaint.

Appellant answered, denying all the allegations of fraud in the procurement of the decree and reiterating his allegations as to grounds for divorce. He also denied that appellee was residing in the State of Arkansas when the suit was instituted, or that he was not a resident of the Fort Smith District of Sebastian County at that time.

The cause was heard upon oral testimony adduced in open court, and a decree was rendered vacating and annulling the decree for divorce and striking appellant's original complaint from the files of the court.

The evidence sustains the findings of the chancellor that appellant was not a resident of the Fort Smith District of Sebastian County when he instituted and prosecuted the suit for divorce, and that appellee was in the State of Arkansas when the suit was instituted, and that appellant knew of her presence in the State. He was in frequent correspondence with her, writing letters to her in terms of endearment and expressing great solicitude for her health and happiness. He sent her money from time to time, and said nothing about suing for a divorce. Finally he addressed a letter to her at Green Forest, Ark., on September 20, 1902, just two days before he commenced suit for divorce, in which he sent money to enable her to go to Joplin, Mo., where he advised her to go for the benefit of her health. Appellant was then living at Van Buren, in Crawford County, Arkansas, engaged in the practice of medicine, and appellee was traveling about in Marion and Carroll counties, following some vocation or profession the precise nature of which is not disclosed by the testimony.

It is needless to add that appellant, under the state of facts detailed above, committed a fraud, not only upon his wife but also upon the court, in procuring a decree for divorce upon constructive service and in a court which had no jurisdiction of the subject-matter. Suits for divorce must be brought in the county where the plaintiff resides. Kirby's Digest, § 2674. He was then residing in Crawford County. He made affidavit, for the purpose

of procuring the issuance of a warning order, that his wife was not a resident of the State of Arkansas, when he knew that she was in the State, and he fraudulently induced her to leave the State immediately thereafter, without disclosing his purpose of suing for a divorce.

The principles of law announced by this court in *Womack* v. *Womack,* 73 Ark. 281, sustain the decree of the chancellor vacating the divorce decree.

It is contended, however, by counsel for appellant that the court erred in refusing to permit appellant to introduce testimony tending to establish the grounds for divorce set forth in the original complaint, and in refusing to consider the cause upon the original complaint after vacating the decree. In *Womack* v. *Womack, supra,* this court held that, as a condition precedent to the maintenance of a suit to vacate a decree for divorce on the ground of fraud in its procurement, it must be adjudged that there was a valid defense to the original suit. In that case, however, the court had jurisdiction of the cause of action set forth in the original complaint for divorce, whilst in the case at bar the court had no jurisdiction because the plaintiff did not live in the county.

When the court vacated the decree on the ground of fraud in its procurement, nothing remained to be done but to dismiss the original complaint for want of jurisdiction to proceed further. It is true, appellee did not in her complaint pray that the original suit be dismissed, but only asked that the decree be vacated so that she could defend against the allegations of the original complaint. Her failure, however, to ask for that relief, or even her express consent to a trial of the issues raised by the original complaint, could not confer jurisdiction upon the court.

We find no error in the decree, and the same is in all things affirmed.

HILL, C. J., not participating.

BEARD v. STATE.

Opinion delivered June 4, 1906.

1. SPECIAL TERM OF COURT—JURISDICTION.—Every fact necessary, according to the strict terms of the statute (Kirby's Digest, c. 47), to give authority to hold a special term of the circuit court for the trial of persons confined in jail must be made to appear of record; otherwise the jurisdiction of the court will fail. (Page 297.)
2. SAME—SUFFICIENCY OF ORDER.—An order for the holding of a special term of the circuit court for the trial of a criminal case which recites that the term is to be held for the trial of a person "now held in custody charged with a capital offense" sufficiently alleges that such person is "confined in jail." (Page 297.)
3. RAPE—SUFFICIENCY OF INDICTMENT.—An indictment for rape which accuses defendant of the crime of rape, and alleges he "then and there in and upon the body of A, a female, unlawfully, wilfully, feloniously, forcibly and with his malice aforethought did make an assault, and her, the said A, unlawfully, wilfully, feloniously, forcibly and of his malice aforethought did ravish and carnally know," etc., is sufficient on appeal to support a conviction of rape, though it fails to allege specifically that the act of carnal knowledge was done against the will of the female, if the objection to the indictment was not raised in the lower court. (Page 298.)
4. CRIMINAL LAW—OBJECTIONS NOT RAISED BELOW.—A judgment of conviction of a felony will not be set aside on appeal because the foreman of the grand jury failed to indorse his name on the back of the indictment, or because the judge ordered a special venire of petit jurors, instead of causing the regular panel to be summoned, if no objection on that account was raised in the court below. (Page 298.)

Error to Phillips Circuit Court; *Hance N. Hutton,* Judge; affirmed.

STATEMENT BY THE COURT.

The defendant, Govan Beard, was arrested upon the charge of having committed the crime of rape, and was indicted, tried and convicted at a special term of the circuit court called by the judge of the circuit for the purpose of trying the case, and was sentenced to be hanged. No objection was made below to any step in the proceedings, no demurrer to the indictment, motion for new trial nor motion in arrest of the judgment was filed.

After verdict and judgment a writ of error was issued by the clerk of the Supreme Court.

The order made by the circuit judge for holding a special term of court was as follows:

"To James R. Bush, Clerk of the Circuit Court of Phillips County, Arkansas:

"It is hereby ordered that a special term of the circuit court of Phillips County be had and held on Thursday, the 4th day of January, 1906, for the trial of one Govan Beard, now held in custody, charged with a capital offense. You are furthermore ordered and directed to issue a venire facias to the sheriff of Phillips County, requiring him to summon a good and lawful grand jury to attend such special term of circuit court. You are furthermore ordered and directed to issue a notice of the holding of said special term to the prosecuting attorney of the First Judicial Circuit, directed to the sheriff of Woodruff County, to the end that the said notice may be served at least ten days before the commencement of said special term. You are furthermore directed to spread this order at large on the records of the Phillips Circuit Court.

"Given under my hand as judge of said court in chambers at the city of Marianna, on this 22d day of December, 1905.

[Signed] "H. N. HUTTON,

"Judge of the First Judicial Circuit of Arkansas."

Since the cause came here on writ of error, the circuit court at the regular May term, 1906, has made an order correcting by *nunc pro tunc* entry the original order made by the judge in vacation, so as to recite the fact that the defendant was confined in jail at the time the special term was ordered. This additional order of the court has been brought here on writ of certiorari.

The indictment upon which the defendant was tried and convicted is as follows:

"The Grand Jury of Phillips County, in the name and by the authority of the State of Arkansas, accuse Govan Beard of the crime of rape, committed as follows, towit: The said Govan Beard, in the county and State aforesaid, on the 22d day of December, A. D. 1905, then and there upon the body of Annie McAble, a female, unlawfully, willfully, feloniously, forcibly and with his malice aforethought did make an assault, and her the said

Annie McAble, unlawfully, willfully, feloniously, forcibly and of his malice aforethought did ravish and carnally know, against the peace and dignity of the State of Arkansas.

[Signed] "P. R. ANDREWS,
"Prosecuting Attorney."

Vinson & Wooten, for appellant.

1. Many irregularities appearing in the record would, at a regular term with a fair opportunity to procure evidence and consult counsel, be cured by verdict in the absence of exceptions saved; but since defendant was indicted, tried and convicted all on the same day, without the time allowed by law to prepare for trial, with no witnesses in his behalf, and with time waived by counsel below for presenting motion for new trial or in arrest of judgment, these irregularities are submitted for the consideration of this court. The indictment is not signed by the foreman of the grand jury. Kirby's Digest, § 2224. Defendant was not served with copy of indictment 48 hours before being placed on trial, and the time was not waived except by plea on arraignment. *Ib.* § 2274. The judge in vacation ordered a special venire of petit jurors to try the case, which was executed by the sheriff without reference to the statute. *Ib.* § § 2345 and 4515. The sheriff made no return of the order showing whom he had served as such jurors until after the trial. See Kirby's Digest, § 4508 *et seq.*

The order calling the special term is defective because it does not show that the defendant was confined in jail at the time the order was made, nor that he was confined in jail on an indictment previously found, or for indictment to be found. Kirby's Digest, § 1532; 2 Ark. 253. The words "held in custody" and "confined in jail" are not equivalent terms. One may be in custody of an officer after arrest and before warrant is issued, but he may not be confined in jail without a commitment. Kirby's Digest, § § 2122, 2128, 2130. Sentence upon the verdict was pronounced on the day following the trial, etc. Upon the record, sentence must have followed immediately upon receipt of the verdict. Though it discloses that defendant waived his right to 48 hours, it does not show that he waived the six hours allowed him before passing sentence. *Ib.* § 2432.

Defendant was given no opportunity to show cause why judgment should not be pronounced against him. *Ib.* § § 2438, 2439.

2. The indictment is defective in that it does not charge that defendant carnally knew the female against her will. 4 Blackstone, Com. 210; Kirby's Digest, § 2005. This is the essence of the crime, and must be alleged. 8 Ark. 400; 29 Ark. 68; 32 Ark. 704; 50 Ark. 330; 54 Ark. 660; 12 N. C. 142; 27 Tex. App. 498; 106 N. C. 635; 63 Me. 210; 12 Tex. App. 612. The defendant can not be convicted of an offense with which he is not charged. 29 Ark. 68; 54 Ark. 664; 15 Ark. 204; 19 Ark. 205; 12 Ark. 170; 45 Ark. 470. That the court had no jurisdiction, that the indictment charged no offense, and that the record discloses errors at the trial or in giving judgment prejudicial to substantial rights of defendant, are matters that will be reviewed here on the record, though exceptions may not have been saved. 2 Ark. 230; 19 Ark. 205; Kirby's Digest, § 2427; Elliott on App. Proc. § 488; 28 Miss. 100; 83 S. W. 1074; 76 S. W. 953; 78 Pac. 81; 8 S. E. 346; 12 Ark. 170.

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

1. It is admitted that defendant must be confined in jail in order to give the court jurisdiction to hold the special term, but it is the existence of the fact, not the order calling the special term, that gives the court jurisdiction.

2. The crime of rape need not be alleged in the words of the statute. 17 Enc. Pl. and Pr. 648; 21 Ark. 184. If an indictment alleges an offense in words sufficiently clear to enable a defendant to plead intelligently, and to act as a bar to another prosecution for the same offense, it is good. 4 Tex. App. 349. The term "ravish," used in the indictment, was sufficient to charge that he obtained carnal knowledge of the woman forcibly and against her will. Webster's Dict.; 17 Tex. App. 574; 12 Pa. 69; 44 Ala. 110; 8 Cox, Crim. Law Cas. 131; 6 Minn. 279; 70 Conn. 104; 11 Tex. App. 301.

3. The requirement that the foreman sign the indictment is directory only, and must be objected to before pleading; otherwise it is waived. 52 Ark. 275; 73 Ark. 328.

McCULLOCH, J., (after stating the facts.) 1. The jurisdic-

tion of the court to proceed in the cause is challenged on the ground that the order of the circuit judge calling the special term of the court does not conform to the requirement of the statute in that it fails to recite that the defendant was *in jail* at the time. The order recites that the defendant was "held in custody charged with a capital offense."

The statute authorizing the holding of special terms of the circuit court read as follows: "The judge of any circuit court may at any time hold a special term for the trial of persons confined in jail, by making out a written order to that effect and transmitting it to the clerk, who shall enter the same on the records of the court." Kirby's Digest, § 1532. It has been held by this court that every fact, according to the strict terms of the statute, necessary to give authority to hold a special term of the court must be made to appear of record, otherwise the jurisdiction of the court will fail. *Dunn* v. *State,* 2 Ark. 230; *Pulaski County* v. *Lincoln,* 9 Ark. 326. The order of the judge must therefore recite every jurisdictional fact, because in no other way can those facts appear upon the record.

The particular question which we have to determine is whether or not the words "now held in custody charged with a capital offense" necessarily mean that the defendant was confined in jail, for under no other construction can the order be taken as having been in conformity with the statute. It is not essential that the exact words of the statute be used. Words of like import or meaning are sufficient. We think that the words used necessarily mean that the defendant was confined in jail. The law does not recognize any other method of holding a prisoner in custody charged with crime than by confinement in jail until examination or trial. The prime object of the statute providing for the holding of special terms of the circuit court is to afford speedy trials to persons deprived of their liberty, and an officer could not deprive a prisoner of that right by holding him in custody without actually confining him in jail.

We hold that the order made by the circuit judge was sufficient to give the court jurisdiction at the special term, and it is unnecessary to pass upon the question of the power of the court at a subsequent term to amend, by *nunc pro tunc* entry, the order made by the judge in vacation.

2. It is next contended that the indictment does not charge an offense, and that the conviction thereon can not be sustained because it fails to allege that the act of carnal knowledge was committed by the accused against the will of the female. If the sufficiency of the indictment had been questioned by demurrer, we are not prepared to say that the demurrer should not have been sustained. We do not decide that question. The indictment was not questioned either by demurrer or by motion in arrest of judgment, and we are confronted only with the proposition whether or not the alleged defect can be taken advantage of for the first time after the trial and verdict and in this court on appeal or writ of error. Where an indictment omits an allegation of some essential element of the crime—in other words, if it fails to charge a public offense, it is void, and can be questioned for the first time on appeal, without a demurrer or motion in arrest of judgment having been interposed. 12 Cyc. of Law and Proc. pp. 811, 812 and cases cited. But when the defect is one of form or of imperfect expression merely, it can not be taken advantage of on appeal or writ of error for the first time. In other words, if the indictment imperfectly charges a public offense, the defect must be taken advantage of by demurrer or motion to quash; but if it omits entirely an allegation of some essential element of the crime charged, so that it can be said that no offense is charged, then it can be taken advantage of at any time. 1 Bishop, Crim. Proc. § 707a; Clark, Crim. Proc. § 118; *Heymann* v. *Reg.*, 8 L. R. Q. B. 102; *Bradlaugh* v. *Reg.*, 3 Q. B. Div. 607; *Brennan* v. *People*, 110 Ill. 535; *People* v. *Swenson*, 49 Cal. 388; *State* v. *Knowles*, 34 Kan. 393; *People* v. *Schultz*, 85 Mich. 114.

Does the indictment in this case charge an offense? It omits an express allegation that the act was committed against the will of the female.

Our statute defines the crime of rape as "the carnal knowledge of a female forcibly and against her will." Kirby's Digest, § 2005.

The fact that the act was committed against the will of the female is an essential element of the crime, and must be charged in the indictment. The indictment accuses the defendant of the crime of rape and alleges that he "then and there in and upon the

body of Annie McAble, a female, unlawfully, wilfully, feloniously, forcibly and with his malice aforethought did make and assault, and her, the said Annie McAble, unlawfully, willfully, feloniously, forcibly and of his malice aforethought did ravish and carnally know," etc. This necessarily implies that the act of carnal knowledge was done against the will of the female. The act involved an assault, as is properly charged in the indictment, and it could not have been an unlawful assault if not against the will of the female. Therefore to charge an assault upon the female in committing the act necessarily charges that it was done against her will. The charge might not be deemed sufficiently specific and clear if the indictment had been met by a demurrer to quash, but it is sufficient to support a judgment of conviction. It can not be said that it wholly fails to charge the commission of a public offense.

3. It is also argued that the judgment of conviction was void because the foreman of the grand jury failed to indorse his name on the back of the indictment, and because the judge of the court ordered a special venire of petit jurors, instead of causing the list of jurors selected by the jury commissioners at the preceding term to be opened and the jurors thus selected to be summoned. It is too late to raise these questions for the first time on appeal or writ of error. No objection was taken below to the indictment nor to the petit jury summoned and impaneled.

Affirmed.

HILL, C. J. The Criminal Code provides: "The indictment is sufficient if it can be understood therefrom."

First. * * * (as to the grand jury and court).

Second. * * * (as to the venue).

Third. "That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the very right of the case." And it further provides: "No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." Kirby's Digest, § § 2228, 2229. An indictment alleg-

ing that the defendant is guilty of the crime of rape, and charging that in the county where found the defendant did at a certain time upon a designated female unlawfully, wilfully, feloniously and forcibly ravish and carnally know her, gives a sufficient understanding of the crime charged to enable the court to pronounce judgment on conviction according to the very right of the case. If, however, it was insufficient in not charging "against her will," it does charge he is guilty of rape (which is defined to be "the carnal knowledge of a female forcibly and against her will." Kirby's Digest, § 2005) in that he unlawfully, willfully, feloniously and forcibly did ravish and carnally know the designated woman, then the omission of those other words do not tend to the prejudice of any of the substantial rights of the defendant, and should be disregarded.

The Code in this, as in some other States, had to be construed and shaped by lawyers and judges learned in the intricacies of common-law pleading, and who were trained in the niceties and refinements of criminal procedure, and who looked with black disfavor upon radical changes wrought by the civil and criminal codes.

The natural result was to minimize the changes required; and by inimical and technical construction many of the wisest reforms were frittered away. The above-quoted sections have never been given the full sway which their plain language calls for, and, in my opinion, in consequence many cases have been reversed where the indictment should have been held sufficient, and where none of the substantial rights of the defendant had been prejudiced. Therefore, I think the indictment in this case was good, whether raised on demurrer, motion in arrest, or writ of error, or any other way.

For these reasons I concur in the judgment, but not in the reasoning and distinctions in the opinion of Mr. Justice McCULLOCH, as the basis of the judgment. They are sound, but I prefer putting the judgment on the ground mentioned. Upon the other questions discussed I concur entirely in the opinion.

Mr. Justice BATTLE concurs in the view that this is a good "Code indictment."

ON REHEARING.

Opinion delivered July 23, 1906.

HILL, C. J. A petition for rehearing was presented in this case after the time contemplated by the statute and fixed by the rules of the court when such petitions may be heard. The petition was accompanied by a showing of matters occurring after the trial indicating the falsity of the evidence adduced against the appellant, and asked a stay of proceeding under the judgment of this court until an application could be made to the trial judge for a writ of error coram nobis, and until this court reconsidered its decision. The court, being in recess, could take no action on the matter, but two judges of the court granted a supersedeas, to be effective until the court convened and could formally act upon the petition for rehearing. It is not pretended that this court could take cognizance of these subsequent matters, and they were only presented as an argument in favor of granting a temporary stay until those matters could be presented to the trial court and the decision of this court on the former hearing re-examined. The court has ignored the presentation out of time, and carefully re-examined its former decision, as it is within its power to recall a mandate during the term.

The case came here on writ of error, and only presented technical questions as to the sufficiency of the indictment and regularity of the order calling the special term of court at which appellant was convicted. The matters usually presented on appeal, the sufficiency of the evidence, the rulings and instructions of the court, were not presented in this case, and there was no bill of exceptions, nor motion for new trial nor in arrest of judgment. The evidence, not being preserved by bill of exceptions, was, of course, not before the court.

Some difference of opinion existed as to whether the indictment would have been sufficient if a demurrer had been interposed to it, but that point was not decided, as all the judges concurred in holding that this alleged informality could not be presented here for the first time on writ of error. Some of the judges thought the indictment in good form wherever attacked, and preferred putting the decision on that ground. There are no other questions before the court, and, a majority being satisfied

that the former decision was a correct declaration of the law on the points involved, the motion for rehearing is denied.

The only review in criminal cases, beyond a review of the events of the trial on writ of error or appeal, is an original proceeding in the trial court on writ of error coram nobis. The limits and office of this proceeding were considered by this court in 1893, and the opinion was written by Mr. John Fletcher, special judge (*Howard* v. *State,* 58 Ark. 229). Matters not presented in the trial and not reviewable on appeal must be reached by this ancient writ; and, when it is inapplicable, the power of the courts is exhausted, and a power is lodged elsewhere to relieve against convictions legally obtained, but which may be shown to be wrong in fact or too harsh. It is the paramount duty of the courts to preserve the constitutional limits of all departments of government, and it is needless to say that the courts must be the first to limit their power within their constitutional orbit.

BATTLE and MCCULLOCH, JJ., concur.

BEARD v. STATE.

(Dissenting opinion delivered July 23, 1906.)

WOOD, J., (dissenting.) When this case was first considered, I was of the opinion that the indictment was defective in omitting the words "against her will." But without extended research I yielded to the view that the defect could only be reached by demurrer or motion in arrest. Upon a careful consideration of the authorities cited in the able brief of counsel for the complainant on motion for rehearing, and upon a somewhat exhaustive investigation independent of such brief, I have reached the conclusion that the defect is jurisdictional, and renders the indictment void. The opinion of the court will establish a precedent for cases where human life is involved. It overrules, without mentioning, *Sullivant* v. *State,* 8 Ark. 400, and changes a sound rule of criminal pleading which has always obtained in this State before and since the adoption of the Code. In support of my position therefore, I shall trace the history of the definition of the crime of rape, as contained in our statute, and review at length the authorities upon the subject.

Rape is the carnal knowledge of a female forcibly and against her will. Kirby's Digest, § 2005. Mr. Blackstone de-

fines rape as above, and says: "It was punished by the Saxon laws, particularly those of King Athelstan, with death." and afterwards "by William the Conqueror with castration and loss of eyes." 4 Blk. 210-211*. During the reign of Edward I the following statute was passed: "The King prohibiteth that none do ravish any wife or maiden of full age nor any other woman of full age against her will," etc. Westm. 1, ch. 13 (3 Edw. I, A. D. 1275). And ten years later the following: "If a man from henceforth do ravish a woman, married, maid, or other, where she did not consent, neither before nor after, he shall have judgment of life and of member; and likewise where a man ravisheth a woman, lady, damsel or other with force, although she consent after, he shall have judgment as before is said," etc. Westm. 2, ch. 34 (13 Edw. I, A. D. 1285.) English authors who wrote while these statutes were in force treated them as declaratory of the common law as to the definition of rape, and they all use the words 'against her will' in giving the definition of the crime." 3 Coke, Inst. 60; 1 Hale, P. C. 627, 628: 1 Hawkins, P. C. 122; 1 East, P. C. 434. The statute of Geo. IV, ch. 31, after expressly repealing the statutes of Westminster 1 and 2, *supra,* declared that "every person convicted of the crime of rape shall suffer death as a felon." Thus it was assumed that the definition of rape was so well understood and established by the common law of England that a statutory definition was unnecessary. English writers on criminal law, since the repeal of the statutes of Westminster, having likewise followed the common-law definition given by Mr. Blackstone. 1 Russell on Crimes (3 Eng. Ed.), 675, 3 Int. Ed. 223; 2 Arch. Pr. & Pl. 304; 3 Chitty's Cr. Law, *p. 77.

Lord Campbell in *Regina* v. *Fletcher,* 8 Cox, Cr. Cases, 131, erroneously assuming that the statute of West. 2 was still in force, (notwithstanding its repeal, by the statute 9 Geo. IV, *supra*), followed that statute, and used the words "without her consent," instead of the words "against her will," in giving the definition of the crime of rape, and claimed that there was a difference in the meaning of the two expressions, and that the expression "without her consent" was the

*(Athelstan was king of England in A. D. 925 and William the Conqueror about one hundred years later. See the New International Ency. "Athelstan," "William I.")

proper one. He cites to support him the cases of *Regina* v. *Camplin,* 1 Cox, Cr. C. 220, and *Regina* v. *Ryan,* 2 Cox, Cr. C. 115. In *Regina* v. *Camplin,* as reported in 1 Den. C. C. at page 94, Mr. Baron Parke, in note to the editor giving the reasons for the decision, states: "All the ten judges agreed that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that an unlawful act, and when also the prisoner must have known that the act *was against her consent at the last moment that she was capable of exercising her will,* because he had attempted to procure her consent and failed, the offense of rape was committed." In *Regina* v. *Ryan,* it is said: "The presumption is the young woman *would not have consented,* and if she was in a state of unconsciousness at the time the connection took place, * * * any one having connection with her would be *guilty of rape.*" In these and similar cases where the female, on account of unconsciousness, nonage, or other cause, was incapable of consenting to the act of sexual intercourse, the decisions are put upon the ground that the law presumes or assumes that she did not and would not have consented to an unlawful act of sexual intercourse, and such an act must therefore be presumed to *be against her will.* As was said by Alderson, B., in *Camplin's Case,* 1 Cox, Cr. Cases, 220: "It may be considered against the general presumable will of a woman that a man should have unlawful connection with her." This states the reason upon which the decisions cited by Lord Campbell were based, and it shows clearly that the Lord Chief Justice was inaccurate in making a distinction between the words "against her will" and the words "without her consent" or "where she did not consent," as used in the statutes of Westminster 1 and 2 *supra.* Mr. Bishop, in giving what he calls the "corrected definition," follows Lord Campbell's idea, and, of course, makes the same mistake. Bish. Cr. Law, § 1115, note. Other American authors on criminal law and some of the State statutes have likewise followed the statute of Westminster 2 in giving the definition, using the words "without her consent" or "without her conscious permission." 1 Wharton on Cr. L. 556; Clark, Cr. Law, § 79; Penal Code of Texas, art. 528; *Walton* v. *State,* 29 Tex. App. 163.

Mr. Bishop, after saying that the words of the statute of

Westminster 2 and the modern amended definition of rape are not "against her will," but "where she did not consent," concedes that the former is the more common expression in our American statutes, and says: "This expression, 'against her will' appears to have been always in all our States and in England employed in the indictment;" and he continues: "Its sufficiency can not be doubted, even where the other expression indicates the exact law. It is a permissible substitute." 2 Bish. Cr. Pro. § 951. In his work on statutory crimes he says where the statutes contain the words "against her will," the indictment should contain the same words, instead of the words "without her consent," for, says he, "though the former ('against her will') are a permissible substitute for the latter ('without her consent'), it is not so plain that the latter is such for the former." Bish. Stat. Cr. § 480. In his first volume on Criminal Law, § 555, he defines rape as "the having of unlawful carnal knowledge, by a man of woman, forcibly and against her will, or when she does not consent," using the expressions synonymously.

So much for the definition of rape. The truth is, the statutes of Westminster 1 and 2, while they were in force in England, were never intended to change the definition of rape as it had always existed by the common law of England, and the words in the statute of Westminster 2 were not intended, as assumed by Lord Campbell, to have any different meaning than the words *"against her will"* in the statute of Westminster 1.

Mr. Stephen in his "Digest of the Criminal Law of England," speaking of the statute of Westminster 2, says: "I can not think the Legislature intended to lay down any definition at all Their language implies that the crime was then well known." See latter part of note 1, p. 190. But if any definition was intended by the statutes, when they were repealed, the definition of the crime was left as it had been established by the common law. Judge Gray in *Commonwealth* v. *Burke,* 105 Mass. 376, shows that the words "against her will" and "without her consent," as used in the statute of Westminster 1 and 2, mean the same thing, and "that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded."

I concede that it is wholly immaterial, for the purpose of

the discussion of the issue between my brothers and myself, whether or not there is any distinction between the words "against her will" and "without her consent," and also as to which of these was the proper definition in giving the common-law definition of the crime. My only purpose has been to show that our statute, in using the words "against her will," has followed accurately, *even to the very words,* the definition of rape as it has come down to us from the common law of England, and that one or the other of the two expressions "against her will" or "without her consent" (using the terms synonymously) are absolutely necessary, according to all authorities, in expressing an essential ingredient of the crime.

There can be no rape unless the act of sexual intercourse is *"against the will"* or "without the consent" of the female. The words "against her will," by the common law of England and our statute, are used to express this essential ingredient of the crime. They are therefore descriptive of the offense. Mr. Bishop says: "'Statutory words essential in the description of the offense can not be omitted." 1 Bishop, New Cr. Proc. § 618. With all due respect to my brothers, I think the court should be slow to sanction the omission from an indictment of words used in the statute, which, as we have seen, for a thousand years or more have been regarded as essentially descriptive of the offense. For my part, I prefer that such radical innovations in the law should be made by the Legislature. The Legislature has not prescribed any substitute for the words "against her will." The court should not do so.

Mr. Starkie says: "In indictments for particular felonies technical and appropriate words are frequently essential to the description of the offense." After giving "malice aforethought" as an example of such words in an indictment for murder, he says: "The usual course in an indictment for rape is to aver that it was committed *against the will of the female,* and therefore it would not be safe to omit the averment." 1 Starkie, Cr. Pleading. 77. Chitty gives the form of the indictment for rape at the common law as follows: "That A. O. (omitting unnecessary words) in and upon one A. J. (omitting unnecessary words) violently and feloniously did make an assault, and her the said A. J. *against the will of her* the said A. J. then and there

feloniously did ravish and carnally know," etc. 3 Chitty's Cr. Law, *815. Starkie and Archbold give same form. 2 Starkie Cr. Plead. 431; 2 Arch. Cr. Pl. & Pr. 304. In note C to 2 Starkie's Cr. Plead. 431, it is said: "The absence of previous consent is a material ingredient in the offense." Mr. Blackstone says: "Our English law makes it a necessary ingredient in the crime of rape that it must be against the woman's will." 4 Blk. *211. Mr. Russell says: "As the absence of previous consent is a material ingredient in the offense of rape, it must be averred in the indictment." 3 Russell on Crimes (Int. Ed.), 230. No case can be found in England, I think, holding that the words "against her will" are not essential in an indictment for rape. On the contrary, is is said in *Regina* v. *Allen,* 2 Moody, p. 235, *179: "The word *rapuit* is held to be essential. 1 Hale, 628 and 632. So are the words *against her will.*" It was essential therefore, in order to charge the crime of rape by the common law of England, that the indictment allege that the carnal knowledge was "against the will" of the female.

The majority concede that the act of sexual intercourse must be "against the will" of the female, and that such, being an essential element, must be charged in the indictment. But they hold that the other words used, under the Criminal Code, sufficiently convey the idea expressed by the words "against her will." The form of indictment for rape in our Criminal Code has the words "forcibly, unlawfully and against her consent." Cr. Code, p. 407. The liberality of the Code has been often successfully invoked to "cover a multitude of sins" in pleading, and I heartily approve its use in all cases to prevent technicalities, and to insure the trial of a cause upon its merits. But the omission here goes to the *merits of the cause,* and it is so egregious that the Code can not cure it. Even under the Code, a man *must be charged with a public offense before he can be convicted thereof.* Sec. 123 of our Criminal Code provides: "The indictment must be direct and certain as regards, first, the party charged; second, the offense charged; third, the venue; fourth, "the *particular circumstances of the offense charged where they are necessary to constitute a complete offense.*" Sec. 127 provides: "The indictment is sufficient if it can be understood therefrom that * * * third, the act or omission charged as the offense is stated with

such a *degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case.*" Sec. 129 provides: "No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by any defect which does not tend to the substantial rights of the defendant on the merits." Sec. 137 provides: "The words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying *the same meaning* may be used."

These are the only provisions of the Code that can aid us, and, when applied to the indictment under consideration, they show it to be wholly insufficient. 1. It is not certain as *to the offense charged.* True, the crime is named "*rape,*" but when the particulars constituting it are set forth, they fall short of describing that offense. "The name of the crime is controlled by the specific acts charged." *Harrington* v. *State,* 77 Ark. 480; *State* v. *Culbreath,* 71 Ark. 80; Bishop, Stat. Cr. § 120; *Johnson* v. *State,* 36 Ark. 242. 2. The particular circumstances necessary to constitute a complete offense omitted here are that the carnal knowledge was "against the will" of the female. 3. "The court could not pronounce judgment on conviction according to the rights of the case," because, in the absence of an allegation that the act of sexual intercourse was "against the will" of the female, the court would have to presume that no such proof was had. There could be no proof without an allegation. The court could not pronounce judgment upon the indictment for anything more than an assault. An assault is charged, but rape is not. 4. The defect mentioned does "tend to the prejudice of the substantial rights of the defendant on the merits" for the reasons stated.

While the precise words of the statute, under our Code, need not be used, yet words must be used *conveying the same meaning.* Cr. Code, § 137; *State* v. *Booe,* 62 Ark. 512; *Wood* v. *State,* 47 Ark. 488. "In an indictment for an offense created by the statute it is generally sufficient to describe the offense in the words of the statute." "As a general rule, a criminal charge must be laid in the indictment so as to bring the case within the offense defined in the statute, alleging distinctly all the essential requisites that constitute it." "Where a *general term* in a statute creating an offense is used in connection with the more definite

words, the indictment must charge the offense in the particular words." These excerpts from our own cases show how utterly worthless this indictment is. See cases collated in 1 Crawford's Digest, cols. 492-4.

Chief Justice HILL, in an opinion concurred in by Judge BATTLE, says: "If, however, it was sufficient in not charging 'against her will,' it does charge he was guilty of 'rape' (which is defined to be the carnal knowledge of a female forcibly and against her will, Kirby's Digest, § 2005), in that he unlawfully, wilfully, feloniously and forcibly did *ravish and carnally know the designated woman,* then the omission of those other words do not tend to the prejudice of any of the substantial rights of the defendant." etc. The learned Chief Justice evidently overlooked or ignored *Sullivant* v. *State,* 8 Ark. 400, where it is said: "Every crime consists of certain facts and circumstances, and it is not sufficient to allege in general terms that the offense by name has been committed; but it is necessary to charge those facts and circumstances with requisite certainty, in order that the accused may be apprised of what it is that he is called upon to answer." He also must have overlooked the principle announced in the other cases cited from Crawford's Digest, *supra.*

The acts which are relied upon as constituting the offense must be stated. An offender can not be charged "with having committed an offense of a certain nature and name, without identifying the particular act or acts relied upon. The statement of a conclusion of law, without stating the facts, is bad." Clark's Crim. Pro. § § 61, 62. This rule of criminal pleading is so old and universally established that I refrain from citing further authority.

Taking up the particular words, they neither singly nor combined convey the idea that is intended by the words "against her will," and therefore they can not be used as a substitute for them. The words "against her will" are used to describe the condition of mind of the female. She must be *unwilling* to the act of *sexual intercourse.* This must be shown by the positive conscious resistance of the woman, or by showing a condition of her mind from which it will be conclusively presumed that she did not consent, as where the mind and body were so subjugated that the power of volition and mental capacity to either assent or dissent

is gone. *Whittaker* v. *State,* 50 Wis. 523. None of the other words used show what the *woman* did or did not do; they are used to express the condition of the mind of the accused, and what he did.

But the words "against her will" are distinctive and peculiar, as applying only to the female and describing what must be the status of her mind. A man may *"unlawfully, wilfully,* and of his malice aforethought assault a female and *unlawfully, wilfully, feloniously,* forcibly and of his malice aforethought may *ravish and carnally* know her," and still the act of carnal knowledge may not be *"against her will."* For instance, if a man has carnal knowledge of a female over twelve but under the age of sixteen, although she consents thereto, in law he has unlawfully, wilfully, feloniously and forcibly assaulted her, but he has not committed the crime of rape. Kirby's Digest, § 2008.

The statute used the words "forcibly" *"and* [not or] against her will." The word "forcibly" is not used as an equivalent or synonym for "against her will." Only such force as is incident to the physical character of the act of coition will meet the requirements of this term where the woman does not consent. 1 Wharton, Cr. Law, § § 550, 556, 562. "Wherever there is a carnal connection, and no consent in fact, * * * there is in the act itself all the force which the law demands as an element in this crime." *Regina* v. *Camplin,* 1 Den. C. C. 92; 2 Bishop, Cr. Law, 4; *Coates* v. *State,* 50 Ark. 330; *Warner* v. *State,* 54 Ark. 660. *"Forcibly* does not necessarily mean *violently,* but with that description of force which must be exercised in order to accomplish the act." *Regina* v. *Dee,* 15 Cox, Cr. Cases, 579.

The word "assault" does not convey the idea that the act of sexual intercourse was against the will of the female. A man may put his arms around a woman, or lay his hands upon her unlawfully and against her will, intending to arouse her passions and to secure her consent to the act of sexual intercourse. She may resist for a time and finally yield assent to the act of sexual intercourse. In such case there would be no rape, although at any moment prior to the time her consent was given he would be guilty of an assault upon her. Moreover, "assault," as used in the indictment, is a generic term to describe what the prisoner did. It precedes in the indict-

ment the assault involved in the act of sexual intercourse, and may refer to some other assault than that. It could not be held to include the specific words "against her will," used to describe the woman's status at the time of the alleged carnal knowledge. Mr. Bishop says: "Though the common form charges in terms an 'assault,' it has been well judged not to be necessary in the indictment." 2 Cr. Pro.; *Com.* v. *Fogerty,* 8 Gray, 489. Then how can this court conclude that it takes the place of an omitted allegation that *is essential?*

The word "ravish" does not signify the same as "against the will," and does not convey the idea that the carnal knowledge was "against the woman's will." It is derived from the Latin verb "*rapio*" and signifies to "snatch," to "seize." Andrews' Lat.-Eng. Lex. Lord Coke says it "signifieth properly to take away by violence and force." 1 Coke, Lit. 137. This is the meaning he gives it under the statute of Westm. 2, ch. 35. Neither under that statute nor by the common law of England was the use of that word sufficient to charge the carnal knowledge of a woman against her will. The word "ravishment" was equally as applicable to abduction as to rape, and to males as females. 1 Coke, 137, *supra;* 3 Blk. Com. 141; Stephen's Dig. Cr. Law, 190, note 1.

According to Lord Campbell, the word "ravish" under the statute of Westm. 2, means: "having carnal knowledge of a woman by force, and the question then is whether she consents." *Regina* v. *Fletcher, supra.* In an old case in Pennsylvania it is held that it is not necessary to charge that the offense was committed "forcibly and against the will of the woman," where the indictment charges "that the defendant feloniously did *ravish* and carnally know her." *Harmon* v. *Com.,* 12 S. & R. 69. But the learned court cites to support it Hale, Hawkins, Chitty, and East, to the effect that an indictment for rape must contain the technical word "*rapuit.*" The authors were discussing certain technical terms of art that could not be dispensed with, like "*murdravit*" in murder, "*cepit*" in larceny, "*rapuit*" in rape. 2 Hawkins, P. C. p. 249, § 77; p. 342, § 110. See 3 Chitty, Cr. Law, p. 813; 3 Russell on Crs. 230 *et seq.; Gouglemann* v. *People,* 3 Parker's Cr. Rep. 15. But not one of them holds that the word "ravish" in an indictment would alone be sufficient to

charge an act of carnal knowledge against the will of the woman. According to the authors cited, the technical descriptive word *"rapuit"* is essential in an indictment for rape. It can not be omitted, any more than the technical words murder, *"murdravit,"* or "malice aforethought," from an indictment for murder, or *"cepit"* from an indictment for larceny, *"burglariter"* from an indictment for burglary, etc. But none holds that it can be used as a substitute for other essential words. Some of them seem to think it carries the idea of carnal knowledge with force, but Lords Coke and Hale say the words *"carnaliter cognovit"* are also essential with *"rapuit"* (Hale, P. C. 628-634; 3 Coke, Inst. 60.), showing that they did not consider that *"rapuit"* necessarily meant carnal knowledge, even, much less carnal knowledge "against her will." The authors cited in *Harmon* v. *Com. supra,* all define rape as the carnal knowledge of female forcibly and "against her will," showing that they regarded these latter words as expressing an essential ingredient of the crime; in fact, *the very essence of it.* 3 Chitty, Cr. Law, 810. In my humble judgment, the authorities all cited in *Harmon* v. *Com., supra,* on this particular point do not contravene the doctrine I have announced, but support it. See Hale's P. Cr. pp. 628 to 634, note 1; 3 Hawkins, P. C. 310; 2 Hawkins, 342; 3 Chitty's Cr. L. 812, 814. Mr. Chitty, after saying that the indictment must contain the technical word "ravished," lays down the form of indictment as I have indicated *supra,* using the words "against her will." 3 Chitty, Cr. L. p. 815, as the particular words to express that essential fact.

The case of *Harmon* v. *Com.* was decided in 1824. Texas follows it in several cases. *Gibson* v. *State,* 17 Texas App. 574; *Williams* v. *State,* 1 Tex. App. 90; *Davis* v. *Texas,* 42 Tex. 226.

The case of *O'Connell* v. *State,* 6 Minn. 279, seems to hold the same view in *dicta,* but in that case the form of indictment for rape suggested by the statute was: "forcibly ravished C. D., a woman of ten years and upwards," and the statute further provided that "it shall be sufficient to follow substantially the forms," etc. prescribed. Of course where the statute in defining forms," etc. prescribed. Of course, where the statute in defining upon the part of the man and want of consent on the part of the

woman, as some of them do, then the indictment may follow the language of the statute. Such is the case of *Leoni* v. *State,* 44 Ala. 110, and *O'Connell* v. *State, supra.*

But the doctrine of *Harmon* v. *Com., supra,* the Texas, and any other cases that follow *Harmon* v. *Com.,* are unsound, as I have endeavored to show. In both Pennsylvania and Texas, in principle, if not *eo nomine,* these cases have been overruled. For, in *Mears* v. *Com.,* 2 Grant's Cases (Penn.), 385, in passing on an indictment for an assault with intent to rape, the court say: "The present bill charged an assault on the prosecutrix with intent to *ravish and carnally know* her *but without denying her consent,* for the term *'ravish'* does not necessarily import the employment of violence." The court held the indictment bad as a charge for an assault with intent to rape, but good for assault and battery. In *Langan* v. *State,* 27 Texas App. 498, the indictment charged that the defendant "in and upon Jennie Barnett, a woman, did make an assault with the intent, her, the said Jennie Barnett, *by force to carnally know.*" The Supreme Court of Texas, speaking through Judge Hurt, said: "This indictment would be good for assault with intent to rape if it had alleged that appellant intended to have carnal knowledge *without or against the consent of the prosecutrix.* This omission renders the indictment insufficient for that offense."

If an indictment for an assault with intent to rape is not good because the words "against her will" are omitted therefrom, it is difficult to see how an indictment for rape itself could be good with these words omitted. See *State* v. *Peak,* 130 N. C. 711. The words *"by force"* and "ravish" in above indictments, it was held, could not be used as substitutes for the words "against her will."

In *Jackson* v. *State,* 114 Ga. 861, it is said: "A charge in an indictment that the accused did feloniously assault and attempt to ravish and carnally know the female alleged to have been assaulted necessarily implies that the act was done forcibly and against her will." But the case *harks back* to the old case of *Harmon* v. *Com.,* 12 S. & R., and the Texas cases following it, and the case from Minn., *supra.* I have just shown that Pennsylvania and Texas have repudiated the doctrine, holding in recent cases just the reverse in indictments for assault with intent to

rape, and that the Minnesota case is based on a peculiar statute.

In *Com.* v. *Fogerty* and others, 8 Gray (Mass.), 487, it is said: "The word *'rapuit'* of itself imports the use of force, and, *when coupled with the allegation that the act was done against the consent of the woman, technically charges the crime of rape."* The word *"rapuit"* alone was not sufficient to carry that idea. Although, by all the authorities, the word "ravish" carries with it the idea of force, the terms feloniously "ravished" will not supply the essential allegation that there was an act of sexual intercourse, *"forcibly and against the will of the female."* As was said by Chief Justice Clark in a recent case: "The words 'unlawfully, wilfully and feloniously did ravish and carnally know' do not charge it was *against her will except by implication* * * * and they do not even sufficiently charge that the act was forcibly perpetrated in the absence of the words 'against her will.'" *State* v. *March,* 132 N. C. 1000. See also *State* v. *Powell,* 106 N. C. 635; *State* v. *Johnson,* 67 N. C. 55; *State* v. *Jim,* 12 N. C. 142.

The doctrine early announced in this State in *Sullivant* v. *State,* 8 Ark. 400, is supported by all the text writers on criminal law and procedure, and all the well-considered adjudications in England and America, and it should not be overruled. The State, by omitting the words "against her will' has failed to exclude the possibility that the act of sexual intercourse was with the consent of the prosecutrix. The indictment therefore failed to charge the plaintiff in error with the crime of rape. No man under our decisions can be convicted of a crime with which he has not been charged. *Barton* v. *State,* 29 Ark. 68; *Warner* v. *State,* 54 Ark. 664; *Childs* v. *State,* 15 Ark. 204; *Sweeden* v. *State,* 19 Ark. 205; *Fletcher* v. *State,* 12 Ark. 170; *Davis* v. *State,* 45 Ark. 470.

As an essential of the crime has been left out of the charge, the error may be raised here for the first time. *State* v. *March,* 132 N. C. *supra.*

Under both our State and Federal constitutions the "accused shall enjoy the right to be informed of the nature and cause of the accusation against him." Const. U. S. art. 6; Const. Ark. art. 2, sec. 10. "No person shall be deprived of life without due process of law." Const. Ark., art. 2, sec. 8.

If I am correct, and there is no indictment, then it would seem that the complainant is about to be deprived of life under forms of law, but without *due process.*

RIDDICK, J., concurs.

79	315
f79	483
f81	162
81	510
81	511
79	315
f87	78
88	555

PEOPLE'S FIRE INSURANCE ASSOCIATION OF ARKANSAS *v.* GOYNE.

(Three cases.)

Opinion delivered June 11, 1906.

1. INSURANCE—ESTOPPEL BY ACT OF AGENT.—An insurance company may be estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question or of any other breach of warranty or violation of the provisions of the application or policy, notwithstanding clauses in the application or policy provide that it shall not be bound by any such conduct of its agent. (Page 322.)
2. SAME—PAROL EVIDENCE OF WAIVER.—Parol evidence is admissible to show that an insurance agent, in writing the application for a policy, waived a forfeiture on account of a false answer to a material question or a violation of provisions of the application or policy, in the face of clauses in the application or policy to the effect that no waiver shall be effective unless indorsed in writing on the policy at the office of the company. (Page 322.)

Appeals from Ashley Circuit Court; *Zachariah T. Wood,* Judge. Three suits were brought against the appellant by Goyne, by Bird and by Freeland & Bro. Recoveries were had in each suit by the plaintiffs, and the insurance association appealed. The cases were submitted together. Affirmed.

STATEMENT BY THE COURT.

There was a jury trial in Goyne's case, resulting in verdict and judgment for him against the insurance company in the sum of $1,018.24. Bird's case and Freeland's case were tried before the court sitting as a jury by consent, and resulted in judgment

for $1,044.40 and $569 respectively. The insurance company appeals, and this is its statement of facts:

These three actions are based upon three policies of insurance issued by the appellant on the 14th day of December, 1903. The applications for the policies were taken by the same agent of appellant, were made by the respective appellees on the same day upon property alleged to be situated in the same town, and the losses claimed to have been sustained were caused by the same fire, which occurred on the 10th day of January, 1904. The facts and principles of law involved are, practically, the same in each case. Hence counsel have agreed to submit them together.

In Goyne's case, No. 5902, the appellant denied liability because, it alleged, the policy was obtained by fraud and misrepresentation and concealment of a material fact on the part of appellee, in this, that in his application for the insurance, which, by the terms and conditions of the policy, formed a part of the contract of insurance, he represented that there was no building nearer to his store building, upon which he desired insurance, than 90 feet, when, in fact, there was another building less than ten feet therefrom, thereby largely increasing the risk assumed by appellant without its knowledge or consent, either at the time of issuing the policy or at any time previous to the fire.

In Bird's case, No. 5903, the complaint stated that appellee was the owner of lot 3, in block 11, in the town of White, Ashley County, together with a one-story frame building situated thereon and occupied as a store, and that this building and a stock of goods, etc., located and being therein, were insured by appellant. The policy of insurance issued by appellant was filed with and made part of the complaint. In its answer appellant denied that appellee was the owner of said lot and building. It admitted the issuance of the policy upon the building and goods described in the complaint and their loss by fire, but denied liability, because, it alleged, said policy was obtained by fraud and misrepresentation and concealment of material facts, in this, that appellee, in his application for the insurance, which was, by the terms and conditions of the policy, a part of the contract of insurance, represented that there was no building nearer to his said store building than 30 feet, when, in fact, there was another building less than 20 feet therefrom, thereby largely increasing

the risk assumed by appellant without its knowledge or consent, either at the time of issuing the policy or at any time previous to the fire; and in this, that appellee was a United States postmaster, and kept the postoffice in said building at the time of making his said application, which fact largely increased the risk, and was concealed from and unknown by appellant until after the fire.

In Freeland's case, No. 5904, the complaint alleged ownership by appellees of lot 7, in block H, together with household and kitchen furniture contained in said building. The policy was made part of the complaint. In its answer appellant denied that appellees were the owners of said lot and building. It admitted the issuance of the policy, but denied liability because it alleged that it was obtained by fraud and misrepresentation and concealment of material facts by appellees, in this, that in their application for insurance, which, by the terms and conditions of the policy, was a part of the contract of insurance, the appellees represented that there was no building within 100 feet of the building to be insured, when, in fact, there was another building less than ten feet therefrom, thereby largely increasing the risk assumed without the knowledge or consent of appellant, either at the time of issuing the policy or at any time previous to the fire; and in this, that in said application appellees represented that the building was occupied as a private boarding house, when, in fact, it was occupied and used as a public hotel or tavern, by reason of which the risk assumed was largely increased without its knowledge or consent at any time; and in this, that in said application appellees represented that said building was occupied as a private boarding house, when, in fact, it was also used as a general store for the sale of merchandise, and at that time contained some $1,500 worth of merchandise, and was also used as a barber shop, all under one roof and described in said application as one building, thereby increasing the risk assumed without the knowledge or consent of appellant at any time.

In each case, both in the pleadings and the proof, it was shown and admitted that, as soon as appellant ascertained the facts set out in its answers, it denied its liability and returned the premiums received by it, which were refused by each of the appellees, and in its answers again tendered them.

Goyne's title to the property insured was not put in issue, but Bird's and Freeland & Bro.'s were. The proof showed that neither Bird nor Freeland & Bro. were the owners of the land or lots upon which the insured buildings were located. In Bird's case the policy insured a building on lot 3, block 11, in the town of White, and certain goods while contained therein. The proof showed that all the land owned by Bird was lot 10 in Block E in the town of White. In Freeland & Bro.'s case, the policy insured a private dwelling house and contents situated on lot 7 in block H, in the town of White. The proof showed that all the land they owned was an indefinitely described lot 9 in block G, and an indefinitely described lot 8 in block G, in Ashley County, Arkansas, and that the building thereon was a public hotel or tavern, and not a dwelling house, nor a private boarding house. These facts are not disputed anywhere in the record. In fact, each allegation of each answer in the three cases was clearly proved, and is not disputed, but appellees rely wholly upon the fact that appellant's agent was present, saw the property, examined the deeds, and made out the applications for insurance, and that, therefore, appellant is bound by his knowledge or his means for having knowledge. They testified, with perfect uniformity, that this agent was an entire stranger to them, and that they did not read, nor hear read, nor ask to have read, either of the applications, but signed them upon this agent's assurance that they were all right, at the same time admitting that they knew that they could not get the insurance unless they signed the applications. H. J. Freeland said that he could not read nor write, but that his brother, who was his partner, could do both, and that he signed their application. This agent was only authorized to solicit and forward applications for insurance and collect the premiums therefor. He could not issue policies, nor did he make any pretense of being a general agent. The applications exhibited with the answers and introduced as evidence clearly state that the company shall not be held liable for any loss or damage, or for any insurance until they were received and approved at the home office in Little Rock, Arkansas. Appellees also testified that this agent asked them no questions, and that they made no answers, but simply trusted the whole matter to him, and did not even see him make out the applications.

The above and foregoing statement fairly presents the facts. In addition thereto, it may be added that it was shown, without dispute, that each matter relied upon as avoiding the policy was well known to the agent. In Goyne's case the agent was shown the building nearest to the house where the property insured was located, was fully informed of the facts, and wrote the application containing the misstatement. The same was true in Bird's case in regard to the location, and the agent knew Bird was postmaster and kept the postoffice in his store, and he (the agent) received mail at it; the same facts as to location existed in Freeland's case, and as to the representation of the building being used as a private boarding house, when in fact it was a hotel, the agent stopped at the house for several days, slept in the best room and on the only feather bed, and knew the facts concerning the character of the house as well as the owner. In regard to the description of the lots in Bird's and Freeland's cases, the property was all either of them owned in the place, was pointed out to the agent, and he was given the deeds to write in the proper description. It seems that this was a new town, and a recent plat had been made, and descriptions were uncertain, probably not in conformity to the new plat. The agent wrote all the applications on information given him. No false answers were made to him. None of the insured read over the applications. They signed them without reading them. All had opportunity to read them.

The following clauses in the applications and policies are material to the issues presented:

"This application shall be considered a part of the contract for insurance and a warranty by the applicant, and it is further understood and agreed that this association will not be bound by any representations of the applicant or promise of the agent or solicitor not contained herein; and I further agree that the answers to all questions are my own, or by my express authority.

"I warrant the foregoing application to contain a full and true description and statement of the condition, situation, value, occupation and title of the property proposed to be insured in the People's Fire Insurance Association of Arkansas, and I warrant the answer to each of the foregoing questions to be true, full,

complete and correct, and the same shall be a part of my policy of insurance in said association."

This application is signed by appellee. Across the face of the application, in red ink, is the following:

"Notice to applicant: This association will not be bound or held liable for any insurance this application calls for until this application is received and approved by the association at its home office at Little Rock, Ark."

In the body of the policy are the following terms and conditions: "This entire policy shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the assured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

Below the numbered lines are the following terms and conditions:

"Special reference is had to insured's application, which is his warranty, and is the basis upon which this policy is issued, and is made a part of this contract.

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto at the home office, and no officer, agent or other representative of this association shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisional conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Daniel W. Jones and *J. H. Hamiter,* for appellant.

1. If a policy describes one building, no external evidence is admissible to show that another was meant, even though the description was a mistake of the agent, he being only authorized

to make surveys and receive applications, the company approving the risks. 1 May on Ins. § § 144f, 277, 278; 115 N. Y. 279.

2. In each case the contract was entire and indivisible. If void as to part of the property insured, it was void as to all. 63 Ark. 202.

3. Although the knowledge of the agent, or notice to him, of the inaccuracy of the statement in an application upon which a policy of insurance is issued after such knowledge or notice, binds the insurance company, and prevents it from availing itself of the inaccuracy in defense, yet, if the agent be guilty of fraud upon the company, and the person knowingly aids in its perpetration, or, by neglecting to read the application, suffers it to be perpetrated, a policy obtained by him under such circumstances is void. 1 May on Ins. § 144g, 280; *Ib.* § 288; 41 Conn. 168; 58 Ark. 528; 117 U. S. 519; 74 Mo. 167; 46 Me. 394; 58 Ark. 277; 52 Mo. App. 94; 72 Ark. 484.

Geo. W. Norman, for appellee Bird.

The agent was present, and knew the situation of the building as to its proximity to other buildings, and of the fact that a U. S. postoffice was maintained therein. He examined the deed, and wrote up the application, himself filling in the answers to the questions and the description of the property. The company is bound by his knowledge. The court's declaration of law is fully sustained by this court. 52 Ark. 11; 71 Ark. 242; 53 Ark. 215; 52 S. W. 862; 41 S. W. 519. The doctrine of waiver applies to warranties as well as false representations. 60 S. W. 576; 51 *Ib.* 617; *Ib.* 755; 50 *Ib.* 545; 57 S. W. 456; 65 Ark. 581; *Ib.* 337; 64 Ark. 245.

R. E. Craig and *Pugh & Wiley,* for appellees Goyne and Freeland & Bro.

1. As to appellee Goyne: If there is any distinction to be drawn between this and the Brodie case, 52 Ark. 11, the difference, if any, is in favor of appellee. In this case, the answer was written by the agent, and the *question was not put to appellee* at all for answer.

2. As to appellee Freeland: On the question of exposures, occupation and description of property, practically the same conditions exist as in the Bird case, and the same argument and authorities apply. As to the description, the deeds, the application

and the policy all referred to the same property. It would make little difference as to the description, if it could be definitely ascertained what property was intended. It was not necessary to bring suit in equity to reform the policy. 6 L. R. A. 524; 65 Iowa, 308; 11 Kan. 533; 48 Tex. 622; 90 S. W. 284.

3. The rule that the knowledge of an insurance agent is imputable to the company applies also, in most instances, to a soliciting agent with reference to matters made known to him prior to the execution of the policy. 3 Cooley's Ins. Briefs, 2524. When the application is filled out by the agent from his own knowledge without seeking information from the insured, and the latter signs the application without reading it, relying on the agent's good faith and assumption of knowledge, the insured can not be called on to bear the consequences of false statements in the application. *Ib.* 2558; 125 Ill. 361; 121 *Ind.* 524; *Ib.* 570; 16 Wis. 257. In this case, the facts relied on to avoid the policy are admitted to have been known to the agent before forwarding the application. The company is estopped. 74 Fed. 114; 74 Am. St. Rep. 769; 70 S. W. 603; 7 Am. St. Rep. 557; 45 N. W. 792.

HILL, C. J., (after stating the facts.) These are the questions involved in these cases:

May an insurance company be estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question or other breach of warranty or violation of the provisions of the application or policy, notwithstanding clauses in the application or policy to the effect that the company shall not be bound by any such conduct or representation of its agent? And if such estoppel is available, may it be proved by parol evidence, in the face of clauses in the policy or application to the effect that no waiver shall be effective unless indorsed in writing on the policy at the home office of the companay?

The leading case for many years upon the subject was the case of *Insurance Co.* v. *Wilkinson,* 13 Wallace, 222. The opinion was delivered by Mr. Justice Miller, and concurred in by the entire court. Mr. Justice Miller said:

"If, however, we suppose the party making the insurance to have been an individual, and to have been present when the ap-

plication was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

"It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels. or, as it sometimes called, estoppels *in pais.* The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood, and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country."

In *Insurance Co.* v. *Brodie,* 52 Ark. 11, this court followed *Insurance Company* v. *Wilkinson,* and quoted largely from the opinion. After quoting from this opinion, the court proceeded to review the authorities of other courts upon the subject, and concluded that the insurance company was estopped from taking advantage of the falsity of an answer where its agent knew it was false, and had notice of the falsity at the time it was made; and the court further said in that case, and cited to support it many authorities, that the waiver may be proved by either written or oral evidence, notwithstanding the declaration in the policy to the contrary. If this case is followed, there could be no question

but what the judgments in these cases should be affirmed, for in principle the answers are of exactly the same character as in the Brodie case.

The Supreme Court of the United States in *Northern Assurance Company* v. *Grand View Bldg. Assn.*, 183 U. S. 308, has decided these questions otherwise. Mr. Justice Shiras delivered the opinion of the court, and the case of *Insurance Co.* v. *Wilkinson* and the other cases is the Supreme Court of the United States along the same line were "distinguished" in name, but in fact were overruled, and the Wilkinson case was almost in terms overruled; part of its language was disapproved, without designating which part went under the ban. The fact that the Supreme Court of the United States has decided differently from this court upon a question of general law calls for a careful examination of the question in order to see if error has been committed, and, if possible, to obtain uniformity of decision upon important questions constantly arising in both Federal and State courts. After a review of the authorities, Mr. Justice Shiras stated the position of the court as follows:

"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and can not by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited

grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

This position does not commend itself as sound in principle. Insurance contracts are not, as a rule, made like other contracts. They are prepared by one party to the contract, and the other party thereto has no opportunity to deal with his contractor as to the terms, conditions and limitations of the contract. The only option open to him is to contract or not to contract; and when he contracts, it is upon terms prepared in advance by the other party, and reduced to printed form which is sought to be as unchangeable as the laws of the Medes and Persians.

To procure these contracts of insurance, agents are sent forth whose duties are limited to procuring insurance, and various clauses are inserted in the policies and in the applications therefor disabling the agent from binding the company in any manner not stipulated in the policy. Can one party to a contract thus prevent himself being bound by the ordinary principles governing principal and agent? If a man sends forth an agent and clothes him with authority to do certain acts, his acts within the scope of that authority are binding upon the principal; and moreover if he clothes him with apparent authority to do certain acts, and privately instructs him to the contrary, and the agent proceeds to do those acts within the apparent scope of his authority, but contrary to his private instructions, still the principal is bound. When an agent does anything within the real or apparent scope of his authority, it is as much the act of the principal as if done by the principal himself. These are fundamental doctrines in the law of principal and agent, and have been applied in every court where the common law prevails.

When a person does an act or makes a representation which leads another person to a certain course of conduct which he would not otherwise have pursued, the party causing this action is estopped to take advantage of anything contrary in fact to his misleading conduct or representation. Courts of law, as well as of equity, apply the doctrine of equitable estoppel or estoppel *in pais*. As was stated by Mr. Justice Miller in the Wilkinson case, and the cases cited in the footnote thereto, that principle prevails generally. The application of these familiar doctrines of agency and estoppel to insurance contracts and insurance agents necessarily sustains the decision in the Wilkinson case and in the Brodie case. It will not do to say that an agent can go forth clothed on the one hand with authority for insuring and on the other hand is disabled from binding the company in regard to the insurance which he is procuring. The scope of his authority is to obtain that insurance, and for that purpose he is furnished with applications and usually with policies. His business is to have those applications filled out truthfully, to the end that an insurance contract or policy be obtained by the applicant. If the company clothes him with that power, it is necessarily bound by his action in performing that power. If he has sufficient power to obtain benefits for his company in this particular matter, he has power to impose liability upon the company in the very manner in which he is entrusted with the power. The power to act for the company in a particular case gives the power to bind in that self-same instance. One can not be dissociated from the other.

In *Fidelity Mutual Life Ins. Co.* v. *Bussell,* 75 Ark. 25, it was pointed out that this court had always confined the waiver by an agent to an act within the scope of the authority conferred, and to a matter which could be waived, and the decisions in this court to that effect are therein cited. Therefore these decisions, each in its own way, serve to sustain the principle of the Brodie case, and is antagonistic to this new doctrine in the Supreme Court of the United States.

Can such an estoppel or waiver be proved by parol? The courts excluding the estoppels and waivers do so upon the rule against varying and contradicting a written contract by parol, as well as upon sustaining the contractual right to exclude such

estoppels and waivers. No court has been found which holds the estoppel or waiver available which excludes parol evidence to prove it. Some rest the admission upon the theory of fraud or mistake, to prove which parol evidence is always admissible; others rest it upon the theory that an estoppel against the contract or a waiver of its terms is not varying or contradicting the written instrument. In the one instance the writing can not be asserted, and in the other it is no longer in force because abrogated by the waiver.

The court is convinced that the reasoning in *Northern Assurance Co.* v. *Bldg. Association* is not sound, and should not be followed, and that the Brodie case, following the Wilkinson case, states the true rule in such matters. The court is reinforced in that opinion by the decisions of many other courts on the same subject since the decision of *Northern Assurance Co.* v. *Building Assn.*

In *Thompson* v. *Traders Ins. Co.,* 169 Mo. 124, the Supreme Court of Missouri said:

"But the defendant relies upon the case of *Northern Assurance Co.* v. *Grand View Building Assn.,* decided by the Supreme Court of the United States on January 6, 1902, and reported in 22 S. C. Rep. 133, and upon a number of like cases in other jurisdictions, and upon the authority of those decisions contends that the Missouri rule is wrong, because every principal—insurance company as well as individual—has a right to limit the power and authority of his agent, and is not bound by any act of the agent in excess of his power.

"With every possible respect for the courts whose decisions are cited, and, also, for the learning of the able counsel for the defendant in this case, it is only necessary to say that the Missouri rule does not impair the power of a principal to limit the authority of his agent, nor does it bind the principal for the acts of the agent done in excess of the power conferred on the agent. On the contrary, it holds the principal liable just as far, and no further, as he has made himself responsible. It measures the responsibility of the principal for the acts of the agent, not alone by the terms of the original power conferred on the agent, but also by the subsequent power, written or parol, expressly conferred, or such as is necessarily implied from the conduct of the

principal, and of his agent with his knowledge, and from their course of business with third persons, and which conduct and course of business estop the principal from denying the power of the agent to do the particular act relied on, albeit the power to do that act was not conferred, but, on the contrary, was expressly denied to the agent by the original contract.

"In other words, the Missouri cases give full effect to the contractual power of the principal to limit the authority of his agent in the original appointment or at any other time, but those cases also give like effect to all subsequent powers conferred by the principal upon his agent, either expressly, or by implication, or by estoppel, notwithstanding such powers are in conflict with, in derogation of, or in enlargement of, the powers originally conferred. And this rests upon the doctrine that in each instance the principal binds himself—not that the agent binds the principal beyond his power to bind him. The act of the principal limiting the power of the agent is not irrevocable at the will of the principal. As the principal has the freedom to contract to impose the limitations upon the power and authority of the agent in the first place, so also the principal has the freedom to contract to remove, abolish, alter, diminish or increase the limitatitons originally imposed upon the power of the agent, and this the principal may do in any manner that in law will be binding upon him, but in every case it is the act of the principal that the law simply enforces, and not the unauthorized act of an agent done in excess of the authority conferred. The cases relied on by defendant fail to compel conviction or to be accepted as authority in other jurisdictions, because they lose sight of these fundamental principles of law." 169 Mo. 24.

The Supreme Court of Appeals of Virginia in *Virginia F. & M. Ins. Co.* v. *Richmond Mica Co.*, 46 S. E. 462, said:

"Much reliance has been placed by counsel for the plaintiff in error upon the opinion of Mr. Justice Shiras in the case of *Northern Assurance Company* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 22 S. Ct. Rep. 133, 46 L. Ed. 214, reversing the judgment of the Circuit Court of Appeals of the Eighth Circuit. While the pronouncements of that great court must always command the highest respect, its judgment in the particular case is deprived of much value as a precedent by the circumstance that

it is not in harmony with many former decisions of that court, and that the Chief Justice, Mr. Justice Harlan, and Mr. Justice Peckham did not concur in the opinion of the majority. Since that decision was rendered, Mr. Justice Shiras has retired from the bench, and been succeeded by Mr. Justice Day, who presided in the Circuit Court of Appeals in the case of *Queen Ins. Co.* v. *Union Bank & Trust Co.*, 111 Fed. 699, 49 C. C. A. 555, where a different conclusion was reached. So there are now on that bench at least four justices who entertain views opposed to those of the majority, as expressed in the case referred to. In this state of the law, this court can hardly be expected to abandon its own well-considered precedents to follow the questionable ruling of another tribunal."

The Court of Appeals of Kentucky in *German-American Ins. Co.* v. *Yellow Poplar Lumber Co.*, 84 S. W. 551, said:

"The fact that the contract provides that no subsequent agreement shall be valid unless in writing and indorsed on the policy does not change the rule, for this part of the contract stands like any other part of it, and may be changed by a subsequent parol agreement, just as any other provision of the contract may be subsequently modified. This rule is supported by the previous cases referred to, and by the decisions of a majority of the States, Appellant relies very strenuously upon an opinion of the Supreme Court of the United States—the case of *Northern Ins. Co.* v. *Grand View, etc., Assn.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. Deference and great respect is always due this exalted tribunal, but in this case it should be borne in mind that the Supreme Court was not construing a provision of the Constitution of the United States, an act of Congress, a treaty, or giving an exposition of law upon which its judgment would be final and conclusive here and elsewhere. The court was dealing with a question of general jurisdiction, upon which it was privileged, as this court is privileged, to exercise an independent judgment. It is no new thing for this court and the honorable Supreme Court to be in disagreement upon questions of general law. To review the long line of authorities in Kentucky, and bring them in accord with the conclusion reached by the Supreme Court of the United States in the case quoted above, would be to confess previous inability of this court to make and declare the law gov-

erning the rights and responsibilities of insurance companies and their patrons in this State."

The Supreme Court of Illinois in *Orient Ins. Co.* v. *McKnight,* 64 N. E. 339, said:

"Counsel for appellant have referred to cases holding otherwise, including *Northern Assurance Co.* v. *Grand View Bldg. Assn.* (decided by the Supreme Court of the United States, at its October term, 1901, by a divided court), 22 Sup. Ct. 133, 46 L. Ed. 213; but we have adopted a different rule in this State, and it must be applied in this case."

The Appellate Division of the Supreme Court of New York pursued a like course in *Benjamin* v. *Ins. Co.,* 80 N. Y. Sup. 256, but that was not the court of last resort, and hence was not at liberty to change the rule if desired; the same is true of the Civil Court of Appeals in Texas in *Home Mut. Ins. Co.* v. *Nichols,* 72 S. W. 440.

More notable than any of these cases is the case of *Grand View Bldg. Assn.* v. *Northern Assurance Co.,* in the Supreme Court of Nebraska, being the same case decided by the Supreme Court of the United States, in the 183 U. S. heretofore referred to, which was brought in the form of a chancery proceeding, after the Supreme Court of the United States had decided in favor of the insurance company. The Nebraska Court, in 102 N. W. 246, said:

"From the final decision in the former action, four out of the nine judges of the United States Supreme Court dissented. The opinion of the majority, being the adherence to the letter of an antiquated and worn-out technical formality, seems to us to be an ironical commentary upon the often-repeated judicial boast that the law is a progressive science, and that the courts are continually adapting their processes and proceedings to changing social business needs and customs. Either so, or else, as we consider, the court fell into a still more grievous error. The familiar maxim that equity regards that as having been done which was agreed to and ought in good conscience to have been done, has not for a long time been a stranger in courts of law in cases in which equitable matters are properly in issue."

Mr. Robert J. Brennan wrote a review of this Nebraska case in 60 Cent. Law Journal, 464.

The Supreme Court of Appeals of West Virginia in *Maupin* v. *Ins. Co.*, 53 W. Va. 557, followed the Northern Assurance case. Judge Poffenbarger filed a dissenting opinion, reviewing at great length the Northern Assurance case and disagreeing with it. Fifteen months later the same question came before the court again in *Medley* v. *Ins. Co.*, 55 W. Va. 344. Judge Poffenbarger wrote the opinion this time, and had secured two of his brethren to agree with him, and the former decision was overruled, two of the judges dissenting. A somewhat careful investigation fails to discover any decision following the Northern Assurance case except the Federal and Territorial courts which are concluded by it, save only West Virginia, and, as stated, it quickly receded from that position.

One of the best discussions of this question is to be found in *Sternaman* v. *Met. Life Ins. Co.*, 170 N. Y. 13, decided in the month following the decision in Northern Assurance case, but evidently without having seen that decision. The majority of the court reached the same conclusion as did this court in the Brodie case. The minority opinion was written by Chief Judge Alton B. Parker. The two theories are well presented in that case.

Mr. Ashley Cockrill, in an interesting and instructive address before the Arkansas Bar Association at its 1905 session (page 62), reviewed the history of *Northern Assurance Co.* v. *Bldg. Assn.*, and strongly supported it. His address furnishes a careful survey of the decisions on this question before and after the rendition of this decision, and his investigation has lightened the labor of this examination of the cases.

In addition to the cases heretofore cited, which have not followed the decision of the Supreme Court of the United States, and which have been decided since that decision, are the following, all of which sustain the position here taken. Most of these cases are found in Mr. Cockrill's article, but some are more recent: *Fire Assn.* v. *Yeagley*, 72 N. E. 1035; *Vesey* v. *Com. Union Assn. Co.*, 101 N. W. 1074; *Fire Assn.* v. *Masterson*, 83 S. W. 49; *Nute* v. *Hartford Fire Ins. Co.*, 83 S. W. 83; *Continental Ins. Co.* v. *Thomasson*, 84 S. W. 546; *Madden* v. *Phoenix Ins. Co.*, 70 S. C. 295; *Foster* v. *Ins. Assn.*, 79 Pac. 798; *Ohio Farmers' Ins. Co.* v. *Vogel*, 73 N. E. 612; *Johnson* v. *Aetna Fire Ins. Co.*, 51 S. E. 339; *Reilly* v. *Empire Life Ins. Co.*, 90

N. Y. Sup. 866; *German-American Ins. Co.* v. *Yeagley,* 71 N. E. 897.

In the cases of *Spalding* v. *New Hampshire Fire Ins. Co.,* 52 Atl. Rep. 858, the authorities upon this subject are fully reviewed, and it is there shown that the great weight of the American authority sustains the position taken by this court; and since that time many more decisions have been rendered upon the same side of the question.

It is unfortunate that the Supreme Court of the United States should take this departure. It puts in force a different rule on the same subject in Federal courts than is in force in the great majority of the State courts, and such a condition is to be regretted. But to avoid this situation it can not be expected that the State courts should abandon their own decisions, which were frequently bottomed upon the doctrine announced from an undivided court in the opinion written by that great jurist, Mr. Justice Miller, in the Wilkinson case, and change because that court has changed. Especially reluctant should the State courts be to do so where, as in this State, the other doctrine has become woven into the jurisprudence of the State, and should not be changed except for the weightiest reasons.

The law must adjust itself to new conditions arising in the commercial and industrial growth of the country, and the flexibility of the common law has always been one of its sources of strength. It became the duty of the courts to adjust and adapt to these new questions arising from a new method of contracting and conducting affairs the elemental principles governing the subject-matter so as to effect justice and to prevent the rules of law becoming engines of oppression or injustice. The adaptation of the doctrine of estoppel and the usual rules applicable to principal and agent to these insurance contracts was meeting with elemental principles the exigencies of the case. To deny application to them after being so long in force in both Federal and State courts is a retrogression which this court declines to make.

The judgments are affirmed.

Mr. Justice McCULLOCH not participating.

HENDERSON *v.* STATE.

Opinion delivered June 11, 1906.

LARCENY—NECESSITY OF ASPORTATION.—A conviction of larceny will not be sustained, though there was some evidence that defendant sold another's lumber, if the uncontradicted evidence showed that defendant tried to prevent the lumber from being taken from the owner's possession.

Appeal from Scott Circuit Court; *Styles T. Rowe,* Judge; reversed.

Jim Johnson, I. S. Simmons and *Carmichael, Brooks & Powers,* for appellant.

1. Larceny is not proved. 37 Ark. 274; 41 *Id.* 173. No proof of value. 33 Ark. 567.

2. Verdict contrary to the evidence. 56 Ark. 217; 57 *Id.* 467; *Id.* 402.

3. A felonious intent is an essential of larceny. The law presumes in favor of innocence and the burden of proving guilt is on the State. 32 Ark. 232; 68 *Id.* 529. The intent must be specific with an intent to steal. 34 Ark. 341, bot. p. 344.

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

The evidence sustains the verdict. There is no occasion for muddying the waters by attempting to raise the question of principal and accessory. 1 McClain, Cr. Law, 544; 32 Tex. App. 78.

HILL, C. J. Henderson was indicted for grand larceny, charged with stealing 16,000 feet of lumber, the property of Oliver & Hudson, was convicted, sentenced to one year in the penitentiary, and appealed.

The State proved that Henderson bought of Oliver & Hudson a boiler and engine for $100, payable in lumber at $5 per thousand; that 16,000 feet were delivered, checked up and left standing in stacks on Henderson's lumber yard. It stayed there for several months for the convenience of Oliver & Hudson. In the meantime Henderson moved his mill seat to another place. Hearing that the lumber was being hauled away, Hudson went to see Henderson about it, and was told that the haulers

were taking it away, and that he could not prevent them doing so; He told Hudson where seven or eight loads of it were. Hudson tried to get Henderson to have it hauled back and replace what was beyond recovery, and, upon Henderson failing to do so, had him arrested. The State also proved that Henderson sold this lumber to Harris, and that Harris had caused it to be hauled away. Appellant testified, and he was corroborated by others, that in the sale to Harris this lumber was excluded, and that he had tried to prevent Harris's haulers carrying off this lumber; that he had posted it as belonging to Oliver & Hudson, and had made haulers unload it when he found them taking from these sacks. But, disregarding appellant's evidence where it is found in conflict with the State's evidence, and testing the conviction by the State's evidence alone, it is found insufficient.

There is a total dearth of evidence to connect Henderson with the carrying away of the lumber. On the contrary, the State's evidence showed that he tried to prevent it; and on this point there is uncontradicted evidence on behalf of the appellant of instances where he tried to prevent it.

The question narrows then to whether the evidence of Harris that Henderson sold this lumber to him of itself is sufficient to sustain a conviction for larceny. To constitute larceny, there must be an asportation of the goods. 2 Bishop, Crim. Law, § 794; Rapalje on Larceny and Kindred Offenses, § § 26, 27.

The sale to Harris, if a good sale, authorized Harris to have the lumber hauled away. Henderson was not present, permitting or consenting to the hauling other than by the implied authorization to it. This may have made him an accessory before the fact, justifying the State proceeding against him in that way, or the sale may have been a crime against Harris in obtaining money from him for the sale of property not his. These are not questions in this case; the question being whether this sale of itself made larceny when Harris, not Henderson, caused the lumber to be taken; and manifestly it did not. 2 Bishop, Crim. Law, § 836, par. 6.

Judgment reversed, and cause remanded for new trial.

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

Opinion delivered June 11, 1906.

1. CARRIER—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.—The mere fact that a railway passenger stood up in a coach for the purpose of getting a drink of water while the coach was standing and while switching was being done by the engine for the purpose of making up the train, it being near the time for the departure of the train, can not be said, as matter of law, to constitute contributory negligence on the passenger's part. (Page 337.)
2. SAME—EXCESSIVENESS OF DAMAGES.—Where a passenger had her thigh bone fractured by the negligence of the carrier, and suffered greatly for three weeks, when she died, a verdict for $5,000 as damages for her pain and suffering was not excessive. (Page 338.)

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

B. S. Johnson, for appellant.

1. The proximate cause of the injury to deceased was her own carelessness, in violation of the company's printed warning at the time posted in the coach. Railroads have the general power to make, and to require passengers to conform to, reasonable rules and regulations for the government of their business. 4 Elliott, Railroads, 1576; 45 Ark. 263; 47 Ark. 79; 49 Ark. 357. Passengers must take notice of and obey these general rules. *Ib.;* 30 S. W. 574; 38 Kan. 507; 29 Ind. 232; 8 Bissell, 131. See also, on the right to make rules, etc., 1 Elliott on Railroads, § 199; 31 Ark. 50; 118 Mass. 228; 55 N. Y. 108; 92 Ala. 204; 88 Ky. 232; 76 Penn. St. 510. Voluntarily and unnecessarily standing up in a car upon a freight train, where the company's rules forbid it, and one has warning of same, is, as a matter of law, negligence. 98 N. C. 494; 89 Mo. 233; 95 Ga. 376; 4 Elliott on Railroads, 2553; 52 Ark. 517. See also 40 Ark. 298; 14 Allen, 429; 107 Mo. 653; 18 Mo. App. 290; 41 *Ib.* 432; 16 Col. 103; 65 S. W. 1028. It was deceased's duty to read the notice, and her failure to do so can not now be pleaded in extenuation of her fault, or in justification of her standing up in the coach while switching was being done. 25 C. C. A. 489; 14 Allen, 429; 95 U. S.

439; 3 Allen, 18; 114 N. Y. 609; 29 Ind. 82; 65 Pa. St. 284; 33 Pa. St. 318; 132 Pa. St. 1; 58 Me. 176; 41 Minn. 178; 32 Md. 377; 85 Ga. 653; 56 Ia. 664; 78 Va. 645; 71 Ark. 593. And where, as in this case, the undisputed facts show the existence of contributory negligence upon the part of plaintiff, it is the duty of the court to instruct the jury to find for the defendant. 32 C. C. A. 283; 33 N. W. 474; 38 C. C. A. 412; *Ib.* 540; 14 Allen, 429; 51 Ill. 495; 31 N. Y. 314; 24 Ark. 613; 40 Ark. 322; 46 Ark. 528; 6 C. C. A. 643. See also 5 C. C. A. 347; 85 Pa. St. 283; 27 Am. & Eng. R. Cas. 216. The dangers incident to railroad travel are greater by freight than on passenger trains, and call for a correspondingly higher degree of care on the part of the passenger. 52 Ark. 517; 34 Am. & Eng. R. Cas. 552; *Ib.* 557; 8 Am. & Eng. R. Cas. (N. S.), 79; 26 Ill. 373; 16 Ill. 568; 57 Ark. 298; 46 Ark. 530.

2. The verdict was far in excess of what, under the proof, would be compensatory or remunerative.

Stuckey & Stuckey, Jos. W. Phillips and *S. D. Campbell,* for appellee.

1. There was no error in submitting the case to the jury under the evidence disclosed, upon proper instructions. As to the purported warning notice, an inspection of the record fails to disclose any identification, from competent evidence, of the contents of the placard; any evidence of such warning notice being posted in a conspicuous place; any testimony showing the size of the letters of the warning notice. Deceased had a right to enter the coach in this train, the right to go to the water cooler, get and drink the water, and to return to her seat, without being guilty of negligence, as a matter of law. Kirby's Digest, § § 6705, 6637.

2. The nature of deceased's injury and the proof of her suffering fully warrant the verdict.

RIDDICK, J. On the 30th of November, 1903, a mixed passenger and freight train of the defendant company was scheduled to leave Batesville for Newport, Arkansas, at about seven o'clock in the morning. Mrs. Mary L. Hurley, a lady 77 years old, went to the depot at Batesville for the purpose of going to Newport on this train. The passenger coach of the train was standing on the track opposite the waiting room of the depot. It being near the time for the departure

of the train, Mrs. Hurley got on the passenger coach. About a half car length from this coach was a freight car standing on the track. After Mrs. Hurley got in the passenger coach, she went to the front end of the coach for the purpose of getting a drink of water, and, while she was in the act of getting the water, two freight cars were kicked back against the freight car standing a short distance from the passenger coach. They struck the car with considerable force, and it rolled back and struck the passenger coach, in which Mrs. Hurley was standing getting water, and the force of the collision was such that she was thrown down and injured. A part of her thigh bone near the hip joint was fractured. On account of her age or for some other reason the fractured bone did not unite, and after three weeks she died from the effects of the injury. The administrator of her estate brought this action to recover damages for the pain and suffering caused by the injury. On the trial he recovered a judgment for five thousand dollars.

It seems to be conceded that the court instructed the jury correctly as to the law of the case. But the defendant contends that the facts show that Mrs. Hurley was guilty of contributory negligence, and that on that account her administrator can not recover. The only act of negligence shown on her part is that she went to the front of coach to get a drink of water. It was not shown that she remained standing longer than was necessary for that purpose, and the mere fact that she attempted to get a drink of water while the coach was standing, and while switching was being done by the engine, for the purpose of making up the train, does not in our opinion conclusively show negligence on her part. The defendant's employees had placed the passenger coach on the track in front of the waiting room of the depot with doors unlocked. It was near the time for the departure of the train, and Mrs. Hurley was justified in supposing that the coach was ready for the reception of passengers. While a passenger on a local freight or mixed train might be charged with negligence if he stood up and unnecessarily exposed himself to danger, yet it is often necessary for passengers to have water, and the law requires passenger coaches to be supplied with it. It is not usually considered dangerous for a passenger, who exercises due care in other respects, to stand up the short time required to

get a drink of water, and the court can not say, as a matter of law, that it is negligence to do so. That question, we think, was properly left to the jury.

A box car had been placed on the track about a half car length distant from and in front of the passenger coach. The brakes on this were set, and it thus acted as a sort of fender for the passenger coach to protect it from being struck by other cars kicked down by the engine or allowed to roll down. But two cars were allowed to strike this box car with such force that the brakes did not hold it, and it rolled on down and struck the passenger coach, causing the injury complained of. The evidence was sufficient, we think, to support the finding of the jury that the injury was caused by negligence of the defendant's employees.

The result of this injury was that Mrs. Hurley suffered greatly for three weeks, and then died. We are not able to say that a verdict for the amount recovered is excessive, and the judgment is affirmed.

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WALNUT RIDGE MERCANTILE COMPANY v. COHN.

Opinion delivered June 11, 1906.

1. INSTRUCTIONS—EXCEPTION IN GROSS.—An exception in gross to several instructions given by the court is not available on appeal unless the charge is erroneous in its whole scope and meaning, or unless none of the instructions given by the court is correct. (Page 341.)
2. EVIDENCE—LETTER AS PART OF RES GESTAE.—A letter containing an offer to sell goods, dictated by the general manager of two corporations and signed by one of the corporations, is admissible against the other as part of the *res gestae* where it led up to a sale afterwards made by the latter. (Page 341.)
3. STATUTES OF FRAUDS—PART PERFORMANCE.—Delivery and acceptance of part of chattels sold and payment therefor done in pursuance of the contract take the sale out of the statute of frauds, though at the time of such part performance there was no express reference made to the contract; it being sufficient if the circumstances surrounding the contract and purchase and the subsequent delivery of the

goods show that they were delivered in part performance of the contract. (Page 343.)

4. DAMAGES—BREACH OF CONTRACT OF SALE.—For breach of a contract to sell and deliver goods, the vendee is entitled to recover the difference between the contract and the market price of the goods, (Page 344.)

5. EVIDENCE—VALUE—SUFFICIENCY.—Where plaintiff alleged that defendant undertook to sell so many bales of middling cotton at 9½ cents per pound to plaintiff, and that, on defendant's failure to perform the contract, he bought enough bales of middling cotton to make the required number, and testified that the cotton so purchased cost 11½ cents per pound, and there was no issue raised by the pleadings as to the grade of cotton purchased by plaintiff after defendant's default, and no questions were asked of plaintiff as to the grade of cotton purchased by him, a finding that middling cotton was worth 11½ cents per pound on the day plaintiff purchased will not be set aside. (Page 344.)

6. SAME—RECEIPT OF STRANGER.—The written receipt of a third person acknowledging the payment of money, while a statement against the receiptor's interest, is not admissible unless the receiptor is dead or otherwise unavailable. (Page 345.)

7. APPEAL—HARMLESS ERROR.—Error in the admission of evidence is not prejudicial where the fact which it tends to prove is otherwise established by competent and undisputed evidence. (Page 346.)

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

STATEMENT BY THE COURT.

I. Less was the vice-president and general manager of the Walnut Ridge Mercantile Company, a corporation doing business in Walnut Ridge, Arkansas. In 1903, acting for the Mercantile Company, he made a contract for the sale of a certain quantity of middling cotton to R. Cohn, of Memphis, Tenn., at 9½ cents per pound. The Mercantile Company afterwards delivered to Cohn 34 bales of cotton, but refused to deliver more. Cohn brought this action against the Mercantile Company to recover damages for breach of contract. He alleged that his contract with the defendant company was for 100 bales of cotton of the grade middling at price of 9½ cents per pound; that the defendant delivered on the contract 34 bales of cotton, and refused to deliver more; that plaintiff thereupon purchased 66 bales of middling cotton for the account of defendant at 11½ cents per pound;

that plaintiff, by reason of the failure of defendant to deliver the cotton, was damaged in the sum of $3,917.13, for which he asked judgment. The defendant filed an answer, denying most of the allegations of the complaint. On the trial the court gave certain instructions, and refused other instructions asked by defendant. The language of the bill of exceptions, noting exceptions of defendant to these instructions, is as follows:

"The following, given upon behalf of the plaintiff, numbered 1, 2, 3 and 4, which were excepted to by defendant. The court, upon its own motion, gave instructions 5, 6, 7 and 8, which were excepted to by defendant. The defendant asked instructions numbered 1, 2, 3 and 4, which were refused by the court, and the refusal to give same was excepted to by the defendant."

After this statement in the bill of exceptions the instructions are copied in full without any further reference to exceptions.

There was a verdict in favor of plaintiff for the amount of his claim, and defendant appealed.

W. E. Beloate, for appellant.

1. From the evidence it is clear that there was no such meeting of minds as would constitute a contract for the sale of 100 bales.

2. There was no evidence showing that Less as manager of appellant had authority to sell cotton for future delivery. 78 S. W. 49. The burden is on appellee to show that appellant was engaged in the business of selling cotton for future purchase and delivery, and that Less had authority to transact such business. 29 Am. Dec. 543. The appointment of a general agent to do and transact all matters of business does not necessarily authorize the agent to sell stock or other property of the principal. 1 Black (U. S.), 192. Acts must be shown to be within the apparent scope of authority. 14 S. W. 1071. See also 1 Am. & Eng. Enc. Law (2 Ed.), 998, note; *Ib.* 1022, note.

3. At the time of making the contract something must be delivered and accepted as a part of the whole lot sold, or afterwards some part of the property must be delivered and accepted by the buyer as a part of the whole, and such delivery and acceptance must be made under the former oral contract, with some reference made thereto at the time of delivery and acceptance;

otherwise the statute of frauds is not satisfied. Benjamin, Sales, 1888 Ed., 154; *Ib.* 188, note; 19 Ark. 473; 2 Sandf. 157; Tiedeman, Sales, 154; *Ib.* 155. Prior to right of recovery appellee should have tendered payment. Tiedeman, Sales, 1891 Ed., § 207; 69 Mich. 215; 35 Ohio St. 104; 11 N. Y. Supp. 597; 39 Ga. 597; 43 Wis. 227; 55 L. R. A. 301. Acceptance must be voluntary and unconditional. Receipt of part of the goods without acceptance is not sufficient, such acceptance must be as part performance. 47 N. Y. 450; 65 N. Y. 368; 51 N. Y. 211; 63 N. Y. 587.

4. The court erred in giving instructions 1, 2, 4, 5 and 8. 25 Am. & Eng. Enc. Law (2 Ed.), 1151; 24 *Ib.* 1152; 2 Ark. 396; 57 Ark. 257; 159 N. Y. 371; 2 Sedgwick on Dam. (8 Ed.), 734; 105 U. S. 709; 20 Hun, 416; Kirby's Digest, § 3656.

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

1. If there was error in the instructions, it was waived. Objections to instructions in gross will not be considered. 2 Ark. Law Rep. 678; 3 *Ib.* 333; *Ib.* 570.

2. The controversy is settled by the verdict.

RIDDICK, J., (after stating the facts.) This is an appeal by the Walnut Ridge Mercantile Company from a judgment rendered against it for the sum of $631.62 in favor of R. Cohn for failure to carry out a contract for the sale of 100 bales of cotton.

The defendant reserved exceptions to a number of instructions given by the presiding judge to the jury on the trial, but these exceptions were in gross, and not to any specific instruction, as will be seen by reference to the statement of facts, where the exceptions are copied. Such a general exception is only available where the charge is erroneous in its whole scope and meaning, or where none of the instructions given by the court are correct. We do not find that the charge of the court is in this case so radically wrong, and, therefore, if there be any special defect, it is not presented by the general exceptions made. *Quertermous* v. *Hatfield,* 54 Ark. 16; *Dunnington* v. *Frick Company,* 60 *Ib.* 250; *Young* v. *Stevenson,* 75 Ark. 181; *Dowell* v. *Schisler,* 76 Ark. 482; 8 Enc. Plead. & Prac. 258, 259.

The next question relates to the admission of evidence on the part of plaintiff. It seems that the negotiations between

the company and the plaintiff, which resulted in this contract for the sale of the cotton, were carried on by the defendant through Mr. Less, the vice-president and general manager of the company. The plaintiff testified that he first wrote Mr. Less in reference to the purchase of cotton, and received a reply from him, saying: "We turn out 30 to 40 bales per day," and asking plaintiff to make "an offer on 50 to 100 bales f. o. b. Walnut Ridge." This letter was signed "Walnut Ridge Gin Co., per R." Defendant contends that, as this letter was from the Walnut Ridge Gin Company, it was not competent evidence against the Walnut Ridge Mercantile Company. But the testimony of Less, the general manager and vice-president of the Mercantile Company, shows that this letter from the gin company was dictated by him, and written by Redwine, the bookkeeper of the Mercantile Company. It was a part of the negotiations between plaintiff and Less, the general manager of the defendant, which led up to the sale of the cotton, and was, we think, competent, as a part of the *res gestae* of the transaction, showing how the negotiations for the sale of the cotton commenced.

Again, counsel contend that the court erred in permitting the plaintiff to read to the jury the receipted bill of the cotton factors from whom the plaintiff purchased the 66 bales of cotton after defendant had refused to deliver the remaining 66 bales due on its contract. The plaintiff testified that he went into the open market, and purchased this cotton from these factors at 11½ cents a pound, and read their receipted bill for the same in connection with his evidence. Now, it is customary for cotton factors to give such bills to purchasers of cotton, and this receipt was a part of the *res gestae* of the sale. Being an admission against the interest of the factor making it and made in the ordinary course of his business, it was, we think, competent evidence of the fact of the sale and price that was paid, even in an action between third parties. *Sherman* v. *Crosby,* 11 Johns. 70; *Reed* v. *Rice,* 25 Vt. 171; 1 Greenleaf on Ev. (12 Ed.), § 120, and note to § 147. See *Cutbush* v. *Gilbert,* 4 S. & R. 555. It may not have been competent evidence of the market value of cotton, but only evidence that plaintiff had paid the cotton factor 11½ cents for cotton on that day. But where evidence is admissible for any purpose, an exception to the admission of the evidence

can not be sustained. The court should have been asked to tell the jury that they could not consider such evidence in deciding the question of the market value of the cotton.

The other questions relate to the sufficiency of the evidence. But, without going into a discussion of it, we will say that we think the evidence sufficient to support the finding of the jury that there was a contract for one hundred bales of cotton. Mr. Less, the general manager of defendant, was positive that he only agreed to sell 50 bales, but the finding of the jury, where the evidence is conflicting, settles the question, so far as this court is concerned.

The delivery and acceptance of part of the cotton on the contract and payment therefor takes the case out of the statute of frauds. The evidence makes it clear to us that the 34 bales of cotton delivered by the defendant to the plaintiff and paid for by him were delivered on this contract. According to the testimony of Less, the manager of the defendant, these were delivered on a contract to sell 50 bales. It is conceded that there was only one contract, though whether it was a contract for the purchase of 50 or 100 bales was a disputed question. But, a part of the cotton bought having been delivered and accepted on the contract and paid for, the whole contract was taken out of the statute, without regard to whether it was a contract for 50 or 100 bales. *Swigart* v. *McGee,* 19 Ark. 473.

The contention that there must have been some reference to the contract at the time the 34 bales of cotton were delivered and accepted on the contract is not sound argument under our statute. It is sufficient, under our statute, if "the purchaser shall accept a part of the goods so sold and actually receive the same; or, third, shall give something in earnest to bind the bargain or in part payment thereof." Kirby's Digest, § 3656. The delivery and acceptance of part of the goods must, of course, be done in pursuance of the contract. A delivery and acceptance of cotton on another contract would not be sufficient to take this contract out of the statute; but, if the 34 bales of cotton were in fact delivered on this contract, it is immaterial that no express reference was made to the contract at the time. That is required under the statute of New York and perhaps other States, but not where the language of the statute is the same as our statute. Under our

statute and statutes similar thereto, it is sufficient if the circumstances surrounding the contract of purchase and the subsequent delivery of the goods show that they were delivered in part performance of the contract. 29 Am. & Eng. Enc. Law, 969.

The evidence shows that the plaintiff purchased the cotton in the market as soon as he ascertained definitely that the defendant did not intend to perform his contract. He was therefore entitled to recover the difference between the contract price and the market price of cotton of same grade called for in the contract on the day he ascertained that defendant would not perform its contract.

The evidence tending to show the market value of the cotton at that time is not very satisfactory. Plaintiff testifies that the cotton he bought from the factors was worth 11½ cents per pound. The evidence does not show what the grade of that cotton was. But plaintiff alleges in his complaint "that on November 9, 1903, in order to protect himself in the purchase made from defendants, he bought in for the account of the defendants 66 bales of middling cotton at and for the price of 11½ cents per pound, amounting to the sum of $3,917.13." The answer of the defendant to this allegation of the complaint is as follows: "Defendant further denies that "plaintiff bought for the account of defendant 66 bales of cotton at any price whatever." It will be noticed that this is not a denial that the defendant bought 66 bales of middling cotton on the day and at the price alleged in the complaint, but is only a denial that the cotton was bought for the account of defendant. As there was no question raised by the pleadings as to the grade of this cotton which plaintiff alleged that he purchased after default of defendant, so neither party asked the plaintiff, while he was on the witness stand, any question in reference to the grade of this cotton. It seems to have been assumed by both parties, as they had the right to do under the pleadings, that the cotton purchased by plaintiff was middling cotton. As he alleged in his pleadings that he bought middling cotton, and testified on the stand that this cotton was worth on the market on that day 11½ cents per pound, we must take it that he meant to say that middling cotton was worth on that day 11½ cents per pound, and

that the parties so understood. While, as before stated, the evidence on that point is not quite satisfactory, it is sufficient to sustain the verdict of the jury.

The contention that the charter of the defendant does not permit it to sell cotton for future delivery is not sustained by the proof. That was a matter peculiarly within the knowledge of the defendant, but it introduced no evidence to sustain this allegation in its answer. In the absence of any evidence, it will not be presumed that the general manager of the defendant made this contract without authority.

Judgment affirmed.

ON REHEARING.

Opinion filed July 23, 1906.

RIDDICK, J. There is only one point on which we feel doubtful as to the correctness of our former decision in this case, and that is whether it was competent for the plaintiff to introduce the receipted bill of Stuart, Gwynne & Company as evidence of the fact that plaintiff had paid 11½ cents per pound for the 66 bales of cotton purchased by him from that firm. In holding, as we did in the former opinion, that this receipted bill was competent evidence of the fact of payment, we followed the law as stated in Greenleaf on Evidence, and as decided in the following cases referred to in the opinion. *Sherman* v. *Crosby,* 11 Johns. 70; *Reed* v. *Rice,* 25 Vt. 171; Greenleaf on Evidence (12 Redfield's Ed.), § 120, and note to section 147.*

These authorities seem to uphold the admission of such evidence as a part of the *res gestae* of the payment. But on further consideration of the question we are of the opinion that the weight of authority, as well as reason, is against the admission of receipts executed by persons not parties to the action unless it be shown that the person executing the receipt is dead or beyond the jurisdiction of the court, and this was not shown on the trial of this case. The law on this point is thus stated in a late work on evidence. "The written receipt of a third person acknowledging the payment of money is undoubtedly a statement of a fact

*These sections have been omitted from text of 16th edition of Greenleaf on Evidence, and transferred to the appendix and to notes.

against interest, but it can not be received * * * unless the receiptor is deceased or otherwise unavailable." 2 Wigmore on Evidence, § 1456; *Silverstein* v. *O'Brien,* 165 Mass. 512; *Ferris* v. *Boxell,* 34 Minn. 262; *Cutbush* v. *Gilbert,* 4 S. & R. 551. But, although we have concluded that the admission of the receipt executed by a person not a party to the action was improper, a majority of the court are of the opinion that no prejudice resulted, for the reason that in their opinion its only effect was to show the price paid by the plaintiff for the cotton in Memphis, which fact, as they think, was shown by the undisputed testimony of the plaintiff himself. As other undisputed evidence shows the same facts shown by the receipt, a majority of the court are of the opinion that the admission of the receipt was harmless error.

But Judge WOOD and myself are not able to concur in this ruling, for in our opinion there is nothing to show that the market price for middling cotton on the day Cohn purchased the 66 bales was as high as 11½ cents per pound except the testimony of Cohn and this receipt. There is other evidence that tends to show that the price of middling cotton about that time was less than the price named. Under such circumstances we are not able to say that the introduction of this receipt was harmless error. It was read to the jury as evidence of the facts stated therein, and it seems to us that the natural inference is that it had some weight with the jury in deciding the question as to what the market value of the cotton was at that time. *Silverstein* v. *O'Brien,* 165 Mass. 512. For these reasons we think that the judgment should be reversed, and a new trial ordered, unless a remittitur be entered.

But, as before stated, the majority of the court think otherwise; and on the whole case they are of the opinion that the motion should be overruled. It is so ordered.

THRASH *v.* STATE.

Opinion delivered June 11, 1906.

1. RECEIVING STOLEN PROPERTY—SUFFICIENCY OF INDICTMENT.—An indictment which in apt terms alleges the receiving of a stolen hog with intent to deprive the true owner thereof alleges an offense under Kirby's Digest, § 1830. (Page 348.)
2. WITNESS—IMPEACHMENT.—A witness can not be impeached on cross-examination by his admission that he has been convicted of an infamous crime, as the record of conviction is the best evidence of that fact. (Page 348.)
3. LARCENY—EVIDENCE OF INTENT TO STEAL.—Evidence that a hog belonging to A was found in defendant's possession with its earmarks changed, that he then offered to and did buy it of A, and that he claimed to have purchased it from another who denied having sold or delivered it to him, was sufficient evidence of an intent to steal. (Page 349.)

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

STATEMENT BY THE COURT.

The grand jury of Monroe County returned an indictment against appellant, Wes Thrash, containing two counts, one charging the crime of grand larceny by stealing a hog, and the other the crime of receiving stolen property. He was tried and convicted. The jury returned a general verdict, without specifying the count upon which the verdict rested, and fixed the punishment at a term of one year in the penitentiary.

George F. Chapline, for appellant.

1. The possession alone of stolen property is not sufficient to sustain a conviction of larceny. It must be shown that the property was recently stolen, and the possession must be unexplained. 44 Ark. 41; 34 Ark. 443; 54 Ark. 621; 55 Ark. 224. No felonious intent is proved in this case. Kirby's Digest, § 1821; Bish. Cr. Law, 427; 32 Ark. 239.

2. The court erred in refusing to exclude and withdraw from the jury the testimony of witness Park. Witness admitted his infamy on cross-examination. 70 Ark. 288. As distinguishing between "impeachment" and "competency" of witnesses, see Kirby's Digest, § § 3138, 3095. Since in our statute there is

nothing said about the competency of witnesses in criminal cases, the common law must be taken as the guide, which makes petit larceny an infamous crime. 1 Bish. Cr. Law, § § 743, 744; 6 Fed. 861; 3 Eng. Ev. 204, and cases cited.

3. Appellant could not be convicted of receiving or buying a hog, knowing it to be stolen, because that animal is not mentioned in the statute. Kirby's Digest, § § 1828, 1829.

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

1. Appellant's explanation of his possession is not satisfactory, and there is ample evidence to support the verdict.

2. It is settled that the admission of a witness is not competent evidence of his infamy for the purpose of disqualifying him, although it may be shown to affect his credibility. 33 Tex. Crim. 177; 94 Tenn. 505; 3 Enc. of Ev. 207, and cases cited. The record of the conviction, if in existence and accessible, must be produced. 1 Greenleaf, Ev. § 375; 58 Ark. 278; 70 Ark. 282; 49 Ark. 156; 33 Ark. 475.

3. Granted that appellant could not be punished under Kirby's Digest, § 1829, but see *Ib.* § 1830.

McCULLOCH, J., (after stating the facts.) 1. It is contended by appellant that the second count of the indictment for receiving stolen property does not charge the commission of a public offense, and in support of that contention it is pointed out that section 1829, Kirby's Digest, relating to the crime of receiving stolen animals, does not mention hogs. Counsel for appellant has doubtless overlooked section 1830, Kirby's Digest, which provides that "whoever shall receive or buy any other goods, money or chattels, knowing them to be stolen, with intent to deprive the true owner thereof, shall, upon conviction, be punished as is, or may be, by law prescribed for the larceny of such goods or chattels in cases of larceny."

The indictment, in apt terms, charges an offense under this section.

2. The State introduced as a witness one James Parks to prove an essential element of the crime, and on cross-examination he admitted that he had been convicted of petit larceny before a justice of the peace of the county. The defendant then asked

that the testimony be excluded on the ground that he was incompetent to testify, and saved exceptions to the refusal of the court to exclude the testimony. This court held in *Vance* v. *State,* 70 Ark. 272, that the incompetency of a witness by reason of previous conviction of an infamous crime could be established only by introduction of the record of the conviction—that the admission by the witness of his conviction was insufficient to establish his incompetency, though the admission might go to the jury on impeachment of his credibility. We do not feel disposed to overrule that case, and it is conclusive of the question.

3. It is earnestly argued that the evidence is insufficient to warrant a conviction of the defendant, in that it fails to establish, beyond a reasonable doubt, an intent to steal. The defendant is charged with stealing a hog, the property of one Bias Anderson. Anderson found the hog, with the ear marks changed, in defendant's possession, and the latter, after a parley, offered to buy, and did buy it from Anderson. He claims to have bought the hog from James Park. Park was introduced by the State, and testified that he did not sell or deliver the hog to defendant. The defendant's explanation of his possession of Anderson's hog was corroborated, in some measure, by the testimony of other witneses introduced by him, but we can not say that the jury were unwarranted in believing the statement of Parks, instead of those of defendant, and in rejecting his explanation of the possession of the hog.

Appellant also complains at the refusal of the court to give certain instructions which he asked, but we find that they were substantially covered by the instructions given by the court of its own motion. There was, therefore, no error.

Affirmed.

WELLS FARGO & COMPANY EXPRESS *v.* STATE.

Opinion delivered June 18, 1906.

1. GAME—SHIPMENT BEYOND STATE—GUILTY KNOWLEDGE OF CARRIER.—Under Kirby's Digest, § 3620, providing among other things that it shall be unlawful to ship game beyond the lines of this State,

and that any railroad or express company which shall receive any game for shipment beyond the State line shall be guilty of a misdemeanor, and fined accordingly, where an express company received packages containing game for shipment beyond the State, it is no defense that the express company and its agents had no knowledge that the package contained game. (Page 351.)

2. SAME—CONSTITUTIONALITY OF STATUTE.—Kirby's Digest, § 3620, providing that it shall be unlawful to ship game beyond the State, is not unconstitutional, in so far as it applies to game killed without the State, as the act of Congress of May 25, 1900, makes operative the game laws of the States on game brought into the State. (Page 352.)

Appeal from Polk Circuit Court; *James S. Steel,* Judge; affirmed.

Read & McDonough, for appellant.

1. It is admitted that it was not necessary to allege nor prove an intent to violate the law in this case, but it was admissible for the defendant to prove that it had been imposed upon by the shipper, and that it was ignorant of the fact that it was receiving game for shipment. Proof of justification or excuse must come from the defendant. 48 Ark. 27. See also 1 Bishop's Crim. Law, § 303.

2. The act (Kirby's Digest, § 3620) is unconstitutional, because by its terms it applies not only to game killed within this State, but also to game killed in other States and shipped through or out of this State. 134 Fed. 282; Kirby's Digest, § 3618; 102 Fed. 540; 86 N. Y. Supp. 272; 164 N. Y. 100; 92 U. S. 214.

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

1. If the act stated that the offense consisted in "knowingly receiving" game for shipment, appellant's contention would be sound; but the offense is completed in the acceptance of the game for shipment. Kirby's Digest, § 3620; 69 Ark. 185; 36 Ark. 58; 37 Ark. 108; *Ib.* 219; *Ib.* 399.

2. This court has decided that the act is constitutional. 56 Ark. 267.

HILL, C. J. At Mena, Polk County, Arkansas, W. H. Graves delivered to the appellant express company for shipment to Senter Commission Company, at St. Louis, Missouri, three packages of furs. A constable with a search warrant opened the

packages while in the possession of the Express Company, and found they contained game, a saddle of venison and eight wild turkeys. The circuit court, without a jury, tried the case, and found that the agent and employees of the express company were without knowledge that the packages contained game. The court found the appellant guilty by reason of having received the game for shipment, and the express company appeals.

Two questions are presented by appellant.

1. That the evidence that the agent and employees—the company itself—had no knowledge that the packages contained game should have been held a defense.

2. That the act under which the proceeding was based is unconstitutional.

1. The statute is as follows: "It shall be unlawful for any person or persons, or corporation, to ship, export or carry beyond the lines of this State any deer, turkey, wild fowl, game fish, or game of any description; and any railroad company, express company, corporation or individual, who shall ship, export, or carry, or receive for shipment, or export, or carry beyond the State line of Arkansas, any game fish, deer, turkey, or game of any kind, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than $100 or more than $500 for each separate offense." Section 3620, Kirby's Digest.

That it is competent for the Legislature to make the receipt of game for shipment an offense, irrespective of knowledge or intent, can not be gainsaid. Clark's Crim. Law, p. 84.

If a statute makes the offense consist in knowingly or willfully doing or omitting to do an act, then there is nothing left for construction; but when, as in this instance, the statute omits such words, then it is a matter of construction, from the subject-matter and the evil to be remedied, whether such words are to be implied, or the statute enforced as written. Many statutes which are in the nature of regulations for the protection of health, morals or other public concerns are considered as making criminal the forbidden act, notwithstanding ignorance or mistake of the doer. Clark's Criminal Law, pp. 84, 86.

This court has approved this statement of the doctrine: "Where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done without cul-

pability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation;" and applied it to a sale of liquor to a minor irrespective of ignorance of his minority. *State* v. *Redmond,* 36 Ark. 58.

Judge Cooley, while Chief Justice of Michigan, and speaking for the court, said:

"Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." *People* v. *Roby,* 52 Mich. 579, s. c. 50 Am. Rep. 270.

Many instances of such statutes are given in the cases and the text book cited. Without attempting to formulate any rule on the subject, suffice it to say that the statute in question seems to be exactly of the kind where ignorance does not excuse, and where criminal intent is not necessary. Doubtless, such statutes work individual cases of hardship, as the one at bar, where the company was imposed upon; but, unless the Legislature had made the act itself the crime, there would have been no use in passing the law. The ease with which game and fish could be enclosed in packages to deceive the express agents would render a statute against knowingly receiving game or fish an idle form. Similar reasons were given for holding the offense complete without guilty intent in many of these cases.

2. Is the statute constitutional? It was held so in *Organ* v. *State,* 56 Ark. 267; but counsel contend that the only point decided in that case and in *Geer* v. *Connecticut,* 161 U. S. 519, was as to the validity of such a statute when acting upon game killed within the State, and that this statute applies equally to game killed without the State or to game killed within the State, and is for that reason unconstitutional. It might be answered that the game in question was not shown to have been killed beyond the borders of the State, and the burden was upon the appellant. 1 Bishop, Cr. Law, § 303, par. 3. But, meeting the argument as broadly as it is made, it will be found that the appellant is equally guilty, whether the game was killed in Polk County or across the border in the Indian Territory and brought into Mena for shipment. Following the precedent which was sustained in In re *Rahrer,* 140 U. S. 545, the Congress conferred

upon the States in the "Lacey Act" a police power, not theretofore possessed, of making operative their game laws on game brought into the State. Act Cong. May 25, 1900. This act was intended to aid the States in the enforcement of their game laws by rendering them equally applicable to game imported into the State as to game killed within the State. It is fully discussed in a recent opinion of Chief Judge Cullen speaking for the Court of Appeals of New York, *People* v. *Hesterberg,* 76 N. E. Rep. 1032. The decision of that eminent court is undoubtedly sound.

The judgment is affirmed.

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

Opinion delivered June 18, 1906.

1. CARRIER—LIABILITY FOR FREIGHT.—The liability of a carrier begins when it receives freight for immediate shipment, and is not dependent upon the issuance of a bill of lading. (Page 356.)
2. SAME—RIGHT TO SUE FOR LOSS OF FREIGHT.—Where the course of dealing between a consignor and a consignee was, first, that cotton was delivered to a carrier to be delivered to the consignee, next the carrier delivered a bill of lading, lastly the bill of lading was delivered either directly to the consignee or with draft attached to a bank when in due time it would reach the consignee, the title did not pass to the consignee merely upon delivery of cotton to the carrier for shipment, and in case of its subsequent loss the consignor was entitled to recover its value. (Page 356.)

Appeal from Johnson Circuit Court; *William L. Moose,* Judge; reversed.

Garner Brothers sued the St. Louis, Iron Mountain & Southern Railway Company, alleging that on the 23d of December, 1901, they delivered to the defendant on the cotton platform at the station of Knoxville on the L. R. & Ft. Smith Ry., operated

by it, to be carried and delivered to the Lesser Cotton Company, at Little Rock, eight bales of cotton, describing them; and, at the time of the delivery of the cotton and the acceptance thereof for shipment to the Lesser Cotton Company, its agent went upon the platform, and took the number of bales and their numbers, marks and weights, from which to issue therefor a bill of lading, but did not do so; and whilst the cotton was in the exclusive possession of defendant for immediate shipment, with directions where and to whom to ship the same, and during the night of said 23d of December, 1901, was consumed by fire on the platform where it was placed by plaintiffs and received by defendant for shipment, as aforesaid, and therefore was not transported and delivered to the Lesser Cotton Company. The value of the cotton at time of delivery is said to have been $309.60.

The answer disclaimed all knowledge as to whether or not the eight bales of cotton had been delivered to it for immediate shipment, and demanded proof, denied that the cotton was destroyed by fire whilst in its exclusive custody, as alleged, and that it had damaged plaintiffs in the sum claimed, or any other sum.

Mohon testified that at the instance of Robinson he put eight bales of appellant's cotton on the platform at Knoxville on the 23d of December, 1901. That about 12 o'clock he went into the office in the depot, and informed the agent and Robinson that appellants' cotton (eight bales) had been put on the platform. That evening the agent, Reed, came out on the platform and checked the eight bales he had put on the platform for appellants. That he was with the agent when the cotton was checked, that he had the numbers of the bales on a piece of paper, and when he would find a bale of it he would make a cross out to the right. He thus checked the eight bales put on the platform for the Garners, and no more, as he had put only eight bales on the platform for the Garners. That the cotton put on the platform by him that day was burned that night.

J. W. Robinson testified substantially that he was watchman over the cotton on the platform at night, and frequently assisted the agent in making out bills of lading, and had previously done so for Garner Bros.; that shortly before the platform and cotton on it was burned they sent him a list of their cotton at

Knoxville with instructions to ship to the Lesser Cotton Company, and this he hung up on a hook in the office at the depot; that on the morning of the day before the fire they called him up to know if he could not get their cotton on that day, and he told them he would if he could get some one to haul it, and went out and engaged Fred Mohon to haul and put it on the platform. He was sick that day and went home, but in the evening went back to the depot, and Reed, the agent, said something to him about the Garner cotton, and he said to him, "I left these instructions like I told you this morning, the shipping business, on that file." He further says he told him that cotton goes to the Lesser Cotton Company. Reed then asked him if he had checked the cotton, and he told him no, that he had been sick all day. Reed then said something about going out to check it, or that he had checked it, he doesn't remember which. That he doesn't know that Reed read the letter of instructions as to shipment from Garner Bros. to him, but he pointed him to it and told him the shipment was to be made to the Lesser Cotton Company.

This was all the material evidence. Defendant moved the court to instruct the jury to find for it, which was done. Plaintiffs have appealed.

Cravens & Covington, for appellants.

The title was still in appellants when the cotton was destroyed. No bill of lading had been issued, nor any draft drawn on the Lesser Cotton Company with bill of lading attached. Appellants were the proper parties to sue. 82 S. W. 253; 73 Ga. 472; 9 Am. St. Rep. 199; 1 Am. Rep. 137; 60 Ark. 333; 56 Ark. 279; 73 Ala. 396.

HILL, C. J. The Garners were merchants at Lamar, and contracted to sell Lesser Cotton Company 100 bales of cotton at seven and one half cents f. o. b. the railroad platform. When delivered to the railroad, a bill of lading was issued, and Garner would attach it to a draft drawn on Lesser Cotton Company, and collect the draft at his bank. The details of the sale are not otherwise important. The Garners had eight bales of cotton at Knoxville, and directed it shipped. It was delivered upon the railway platform, the numbers checked by the agent preparatory

to issuing a bill of lading, and shipping instructions were delivered to the agent. The night of the day when the cotton was put on the platform the station burned, and this cotton was destroyed. The Garners sued the railroad company for its value, and the court directed a verdict for the railroad company, and the Garners have appealed.

A carrier's liability begins when it receives freight for immediate shipment, and is not dependent upon the issuance of a bill of lading. *Railway Company* v. *Neil,* 56 Ark. 279; *Railway Company* v. *Murphy,* 60 Ark. 333; *Little Rock & Ft. S. Ry. Co.* v. *Hunter,* 42 Ark. 200. There was ample evidence to go to the jury on the contention that the cotton was received for immediate shipment, although a bill of lading had not been issued.

Appellee's counsel has not favored the court with a brief, but appellants' counsel states that his theory was that from the evidence of J. S. Garner it was shown that the cotton belonged to Lesser Cotton Company, and not to the Garners. This was evidently the theory upon which the verdict was directed.

A bill of lading represents the property. It is a muniment of title, and is both a receipt and contract. *Turner* v. *Israel,* 64 Ark. 244; Ray on Negligence of Imposed Duties of Freight Carriers, § 25. When such instruments are attached to drafts, then the title to the property passes with the draft, and the pledgee or purchaser of the draft has a special ownership in the goods, which he may assert against every one. Ray, *Id.* § 31. But this principle can not control here. The testimony of Garner shows that he was not entitled to receive anything on the cotton under this contract with Lesser Cotton Company until he received his bill of lading. Then he was entitled to draw for the money. In this way Lesser Cotton Company was protected, for it could hold the cotton against the world upon such an instrument. It would pay the draft, or a bank would cash it in reliance upon such payment, only when the bill of lading was attached thereto conveying the title. Until the Garners furnished Lesser Cotton Company with the muniment of title, they were not entitled to receive a cent on the cotton under the contract. This cotton was being prepared to follow a course of

affairs when the title would pass to the cotton company. The first step was delivery to the carrier, the next securing a muniment of title, and finally to deliver that muniment either directly to the Lesser Cotton Company or to a bank with draft attached when in due commercial course it would reach the Cotton Company. In this case only the first step had been taken, the delivery to the railroad company. None of the other necessary acts to change the title to Lesser Cotton Company had been performed.

Appellant's counsel say that appellee relied upon "opinions of this court in certain liquor cases in support of his contention." Doubtless, reference is made to *State* v. *Carl,* 43 Ark. 353, and cases following it, where it was held delivery to the carrier completed the contract. *Burton* v. *Baird,* 44 Ark. 556, is another instance where delivery to the carrier in pursuance of directions from the other party completed the contract. But those cases do not reach to this one. Here the mere delivery to the carrier with shipping directions was not the termination of Garner's conduct to complete his sale. He had to get a bill of lading and attach it to a draft before he was entitled to a cent, and hence his sale was not complete when he delivered the cotton to the carrier. This was not the final act in consummation of his contract. This was Garner's evidence. It was reasonable and consistent with a common business practice, and, if given credit, the cotton was appellants' at the time of the fire. The case should have gone to the jury.

Judgment reversed, and cause remanded.

BROMLEY *v.* ATWOOD.

Opinion delivered June 18, 1906.

1. WILL—CONSTRUCTION.—After making various bequests to Mrs. B., amounting to a substantial sum, a will proceeds: "But the said Mrs. B. is to make no charges against my estate for anything I owe her, or for waiting on me during my sickness at any time;

said gifts above being given to satisfy all of said claims and her kindness to me during her lifetime and waiting on me during my sickness." An account kept by testator showed that Mrs. B. was indebted to him in a large amount. *Held* that the bequests were given in lieu of a business settlement with Mrs. B. (Page 363.)

2. SAME—PAROL EVIDENCE.—On the issue whether or not a legacy or devise was intended to forgive a debt from the legatee or devisee, parol evidence is admissible, and does not offend against the rule forbidding the varying or altering of a written instrument by oral testimony. (Page 363.)

3. SAME—FORGIVENESS OF DEBT.—Testimony of a witness that after a will was written the testator had the witness to cast up the value of the property devised to a certain person, putting estimates upon each item, and that when the total was stated he then said that he had done a good part by the devisee, indicates that it was this total that the devisee was to have, and not that sum less what she owed him. (Page 363.)

4. APPEAL—CONCLUSIVENESS OF FINDING.—Where the evidence is undisputed, and it is a mere question as to its effect and construction, the court's findings are not conclusive on appeal. (Page 364.)

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

C. B. Atwood died in Cleveland County, Arkansas, about the 3d day of May, 1904, leaving personal property amounting in value to the sum of $10,292.10 and certain real property.

On the 1st day of May, 1904, he made the following will: "*In the name of God, Amen.*

"I, Curtis B. Atwood, of Smith township, Cleveland County, Arkansas, being in ill health, but of sound mind and memory, do make and publish this my last will and testament.

"1. It is my desire, as soon after my death as possible, that my executors hereinafter named pay my funeral expenses and all of my debts out of my personal property if possible, and, if not, out of my real estate, unless I have cash and accounts to pay off my indebtedness.

"2. I give, bequeath and devise to Mrs. M. A. Bromley, who is now keeping house for me, the following real and personal property, towit: East half of northeast quarter of section seven (7), in township nine (9) south, range ten (10) west, containing 80 acres with all improvements thereon, and my horse,

one-horse wagon, and harness; all household and kitchen goods and furniture of every kind and description that I may own at my death; all corn and other feed stuff; one tool chest and all carpenter tools; all farming tools and implements, and all provisions, meat, corn, etc., that I may own at my death (except one mower and reaper); two baskets; all chickens that I may own; two cows and calves, and seven head of sheep to be selected by her; also the sum of five hundred ($500.00) dollars to be paid to her by my said executors as soon as possible after my death. But the said Mrs. M. A. Bromley is to make no charges against my estate for anything I owe her, or for waiting on me during my sickness at any time; said gifts above being given to satisfy all of said claims, and her kindness to me during her lifetime, and waiting on me during my sickness.

"3. I give, bequeath and devise to my brothers and sister all the rest of my real and personal property of every kind and description, debts or evidences of debts, after the first and second paragraphs are complied with, and all moneys or anything else that I may own at my death, to have and to hold, sell and dispose of as they may see fit.

"4. I do hereby appoint my brothers, G. C. Atwood and W. D. Atwood, my executors of this my last will and testament, to take charge of my property and dispose of same as directed above; directing my said executors not to disturb said Mrs. M. A. Bromley in any way in the possession of land or stock, or anything given to her, but to let her remain on said land, and at once allot to her the property so given, and to pay over to her the money so given as soon as possible. I hereby also notify my said executors, that I will keep as near out of debt as possible, so they will have but few debts to pay.

"It is my desire that said executors keep said estate out of the probate court, and wind the same up with as little expense and trouble as possible.

"In testimony whereof I hereunto set my hand and seal this first day of May, 1904."

W. D. Atwood and G. C. Atwood, named as executors of the will, accepted the appointment and acted as such.

The plaintiff, Mrs. M. A. Bromley, filed a petition in the probate court, in which she stated that deceased had devised and

bequeathed to her certain lands and personal property, including $500 in money, and directing that said executors pay to her the said sum of $500 as soon as possible after his death. She further stated that she was not indebted to the estate of deceased, and was not indebted to deceased at his death, but, on the contrary, that deceased was, at the time of his death, largely indebted to her for cooking, washing, keeping house and waiting on him, but that she was willing to relinquish all demands against the estate, and accept in lieu thereof the money and other property bequeathed to her in said will; that deceased owed very few debts, if any, at his death, except what he owed her; that she is entitled to the immediate payment of the said $500, and concluding with a prayer that the court direct the executors to pay over to her the said sum of $500 in cash, as directed by the will.

To this petition the executors answered, admitting the execution of the will, the probate thereof, the death of deceased, C. B. Atwood, and their possession of the assets of the estate, together with the books of account of the testator, and that he bequeathed to plaintiff certain real estate and personal property, and $500 in money, and that all property given her under the will had been turned over to her, except the sum of $500, but claimed that plaintiff, under the will, was to make no charge against the estate for anything deceased owed her for waiting on him during his sickness at any time, and that the bequest in the will was made to satisfy all of said claims, and for her kindness during his lifetime, and waiting on him; and further in the books of accounts of deceased they find that plaintiff owes to the estate of deceased an account, kept in his handwriting, amounting to $374.93; that this amount is due from plaintiff to the estate, and that she is insolvent, and that, if they should pay to her the $500 in money, they could never collect the account from her; that they have offered to pay her $125.07, the difference between the amount she owes the estate and the $500. This amount they bring into court and tender her. The petition and answer, together with testimony, was heard in the probate court at the August term, 1904, resulting in the prayer of the petition being granted, and from this order the executors appealed to the circuit court.

It was admitted at the trial by the executors that plaintiff commenced keeping house for the deceased in the year 1886,

and that the ledger containing the account for that year had been lost or misplaced by them, and it was agreed by the parties that at the top of the first page containing the account of deceased against plaintiff, commencing in 1886, there was a written contract or statement, written by the deceased, in which he stated that he had that day employed plaintiff to keep house and work for him, and had agreed to pay her $45 per year for this service. It was shown in evidence by the books that the last credit entered in the account against the plaintiff by the deceased was in January, 1893, and is as follows, towit: "Work, 1891 and 1892—$90." The evidence also showed that the account kept by the testator against plaintiff was continued from page to page, and from ledger to ledger, in his book of accounts from 1886 to his death, and was never balanced or changed after the said $90 credit was entered in 1893—was only added up at the bottom of the page, and the total carried forward to the new page, and when the last page was added up, after the death of the testator, amounted to $394.93 in favor of deceased. It was admitted by the parties that to credit said account with $45 for 1893, and for each subsequent year up to the death of deceased, would show a balance of $130 due plaintiff.

C. D. Bromley, son of petitioner, testified that in the year 1886, his mother entered into a contract with deceased to keep house for him, and he agreed to pay her $45 per year; that she lived with him, and kept house for him, and worked for him, under the contract, about two years, and then married, and was away only about two weeks, when she and her husband separated. She then returned to the home of deceased, and commenced working and keeping house, under the contract as first made in 1886, and remained working and keeping house for him, under this contract until his death.

H. D. Sadler testified that he was present when deceased made the will, was one of the subscribing witnesses to it, and that, immediately after the will had been signed and witnessed, the testator called on him to get a pencil and sheet of paper and take down what he had willed to plaintiff, Mrs. Bromley; that he did so, and that testator had him to put down the $500 mentioned in the will, along with what the testator considered the value of other property devised to her, and add the whole together, and

when this was done the testator remarked that he had done a very good part by Mrs. Bromley.

The defendants called as a witness W. D. Atwood, one of the executors, and a brother of deceased, who stated that he had run up the account kept by the testator against plaintiff, as shown by book of account, and found that she owed testator at the time of his death $374.93; that the estate of testator inventoried $10,000 in personal property, and that the executors now have sufficient funds in their hands, belonging to the estate, to pay off the claim of the plaintiff. All other property bequeathed had been given plaintiff except the $500.

This was all the evidence in the case. The court adjudged that plaintiff owed the estate $374.93, which should be deducted from the legacy of $500, and rendered judgment against defendants for the balance. Plaintiff has appealed.

Taylor & Jones, for appellant.

1. Although it is a legal presumption that no release was intended when a debt stands against a legacy, yet this presumption may be rebutted by proof arising on the face of the will or by parol. Rood on Wills, § 737; 47 Am. Dec. 428. The will itself recognizes an indebtedness from the testator to appellant, and nowhere intimates that the latter was in any manner indebted to him. The testimony of witness Sadler was competent to show the intention of the testator, and that the legacy was to be paid in full. Authorities *supra;* 13 Am. & Eng. Enc. Law, 80.

2. There is no indebtedness proved against appellant.

W. S. Amis, for appellees.

1. At the death of the testator an unsettled account against appellant stood on the account book of the testator. Debts owing by an executor, administrator or legatee, are assets of the estate. 2 McCord (S. C.), 269; 1 Allen (Mass.), 531; 7 Cow. (N. Y.), 781. See also Kirby's Digest, § 56.

2. If the testator had intended to forgive the debt owing by appellant, he would have so stated in the will, or would have marked account settled.

HILL, C. J. The Reporter will state the issues, set out the will and give a summary of the evidence, and from this statement of facts it will be seen that three questions are in the case.

1. Does the will on the face of it forgive the legatee's debt to the testator?

2. Does the evidence show that the testator intended to forgive the debt of the legatee to him?

3. Was a debt in fact proved against the legatee?

1. After making various bequests to Mrs. Bromley, amounting to a substantial sum, the instrument proceeds: "But the said Mrs. M. A. Bromley is to make no charges against my estate for anything I owe her, or for waiting on me during my sickness at any time; said gifts above being given to satisfy all of said claims and her kindness to me during her lifetime and waiting on me during my sickness." This shows the object of the devise to be twofold: (1) The satisfaction of charges which the testator felt Mrs. Bromley would be entitled to make against his estate for services for which he owed her, and, (2) in gratitude for her kindness the legacy and devise is evidently made much larger than a mere payment for services. While this language does not literally reach to a forgiveness of a debt due him from her, yet it does indicate that there is no such debt. He could not be indebted to her for services if they had been overpaid by the matters set forth in this account when he made this will, which was only two days before his death. The account exhibited against Mrs. Bromley is all in Mr. Atwood's handwriting, and of course he was possessed of exact knowledge of it. While not free of doubt, it seems that the will on its face showed an intention to give these bequests in lieu of a business settlement of his affairs with Mrs. Bromley.

2. Whatever doubts there are on this subject, derived from an examination of the will alone, are dispelled when the testimony is considered. In the first place, it may be said that parol testimony on an issue whether or not a legacy or devise was intended to forgive a debt from the legatee or devisee is admissible, and does not offend against the rule forbidding the varying or altering of a written instrument by oral testimony. Rood on Wills, § 737; *Zeigler* v. *Eckert,* 47 Am. Dec. 428; *Gilliam* v. *Brown,* 43 Miss. 641.

After the will was written the testator had Mr. Sadler to cast up the value of the property given Mrs. Bromley, putting estimates upon each item, and then said, when the total was

stated, that he had done a very good part by her; clearly having in mind that this total was what she was to have, not that sum less what she owed him.

3. It is doubtful whether under the evidence appellees have proved the debt. Mrs. Bromley was charged with the various items making up the account from time to time, but she was not credited since January, 1893, with her services at the agreed sum of $45 per annum. It was proved that these services continued until Mr. Atwood's death in May, 1904. If she was credited with this salary, then Mr. Atwood would have been in her debt $130 instead of the account standing $394.93 against her. There is but one way to escape the conclusion that Mr. Atwood was in debt to her, and that is to infer that he paid her salary in cash, and hence it was not entered upon the account. It is much more probable that it was a fixed charge, and he did not think of entering it, and merely charged her with items as she got them. It is not necessary to pursue this question whether the debt was proved or not. The court is of the opinion that the will and the evidence shows that Mr. Atwood intended to give Mrs. Bromley the items named in the will, irrespective of the state of the account between them, and in lieu of all compensation for her services, and also as a token of his gratitude to her. It is not consistent with his conduct that he intended the accounts to be cast up and a balance recovered. This is not a case where the findings of the circuit court are binding. The evidence is undisputed, and it is a mere question of its effect and construction.

Judgment reversed, and cause remanded.

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DICKINSON v. HARDIE.

Opinion delivered June 18, 1906.

LIMITATION—VOID TAX TITLE.—Continuous adverse possession for more than two years under a void tax title confers a valid title.

Appeal from Desha Chancery Court; *Marcus L. Hawkins,* Chancellor; reversed.

J. W. Dickinson, appellant, *pro se.*

The action is barred by the statute. Kirby's Digest, § 5061; 53 Ark. 418; 71 Ark. 117; 59 Ark. 460; 60 Ark. 499; *Ib.* 163; 67 Ark. 411; 71 Ark. 390; 30 Ark. 44; 32 Ark. 131.

Baldy Vinson, for appellee.

1. The question is, were the taxes charged against this land for the year 1887 paid before the sale on June 11, 1888? The tax book shows that they were paid June 9, 1888, and the number of the receipt record page, where the receipt is recorded, is 680. This is sufficient (the original tax receipts, and the tax receipt record being lost) to sustain the chancellor's finding that the taxes had been paid. 68 Ark. 134; *Ib.* 314; 73 Ark. 489. If the taxes were paid, no valid sale could be made. Kirby's Digest, § 7105.

2. The statute (Kirby's Digest, § 5061) does not apply, for the sale could not be for nonpayment of taxes, and the collector has no more authority than any other citizen to make the sale, unless there had been in fact a nonpayment. It is as if in fact there had been no sale, and in law there was none. 132 U. S. 339; 73 Ark. 221; 91 S. W. 85.

HILL, C. J. Passing other questions raised and discussed, and going to the core of the controversy, these facts are developed: Dickinson bought the land in suit at tax sale in 1888, and received clerk's deed therefor in 1890, and went into possession immediately, and held actual possession continuously until this suit was brought in 1896. After many delays the case finally came to trial as to this tract (other tracts in the suit had been previously disposed of) in September, 1904, in which it was found that the taxes were paid on the land two days before the sale, and a decree was entered for Hardie, who had succeeded to the title of the person who owned the land at time of the tax sale.

The action is barred by section 5061, Kirby's Digest. The appellee argues that this section can not apply because this could not be a sale for nonpayment of taxes; that the collector, no more than any other citizen of the State, has the right to sell lands unless in fact there has been a nonpayment. It is true that the collector has no such right; but still he did sell for an alleged nonpayment, and the purchaser went into possession

under deed based upon such sale, and continued in possession for more than two years before this suit was brought.

This is purely a statute of limitations, and runs against void sales, as well as voidable sales or regular sales. The statute is not in favor of those holding under valid deeds issued pursuant to valid tax forfeitures and valid sales, but is in favor of the possession for two years under deeds therein mentioned, one of which is the deed under which Dickinson held here.

A statute of repose is not needed in favor of purchasers at valid tax sales. The validity of the sale and precedent proceedings effectually carries the title, and renders unnecessary such statutes, and they are enacted for the benefit of those acquiring these State titles and quieting these questions after two years possession under them. This whole matter was gone into fully and conclusively in the recent case of *Ross* v. *Royal,* 77 Ark. 324.

The judgment is reversed, and cause remanded with directions to enter decree for Dickinson.

LOVE v. PEEL.

Opinion delivered June 18, 1906.

1. CONTRACT OF EMPLOYMENT—TERMINATION BY DEATH.—Where the appointment of a commissioner to collect claims against the United States in favor of one of the Indian tribes was induced by a reliance on his skill and integrity, such appointment was terminated by his death, and his executors, administrators or heirs could not employ another to carry out the contract. (Page 372.)
2. ESTOPPEL—ACQUIESCENCE.—A commissioner appointed by one of the Indian tribes to collect certain claims against the United States died before accomplishing anything toward such collection, and his heirs and representatives selected an attorney to prosecute the claim on behalf of the estate of the deceased commissioner. Subsequently such attorney was employed by the tribe to represent them, independently of the estate of the deceased commissioner, and he proceeded, with the knowledge of such heirs and representatives, to prosecute the claim of the tribe under the latter employment for a long time and to incur great expense in doing so. *Held* that the heirs and representatives were estopped to claim any part of the fees received by the attorney under employment by the Indian tribe. (Page 373.)

Appeal from Benton Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

W. M. Cravens, for appellants.

While, in view of the act, § § 2103-4-5, Rev. Stat. U. S., appellee might not be able to recover upon the contract between him and Love, without such agreement being approved as provided in the act, yet the act was never intended to defeat the rights of the Indian, if any, to recover from a citizen of the United States any moneys or things of value due him under such contract. 23 Ark. 77; 122 Ind. 54; 23 N. E. 1080; 148 U. S. 222; 37 Law Ed. 429; 164 Ark. 72. Appellee, having accepted the employment with retainer fee for his services, having never repudiated the employment nor paid back nor offered to repay the fee accepted by him, was bound to use all legal means to recover for his clients the money due them, and, having recovered the money, can not now be heard to say that the contract was void because it had not been approved by the Secretary of the Interior. He stands in a relation of trust toward his clients, and can not place himself in an adversary position. 101 U. S. 494, 25 Law. Ed. 1065; 52 U. S. 232; 106 U. S. 586, 27 Law. Ed. 306; 30 Ark. 44; 27 Fed. 782; 38 Iowa, 649; 10 Pet. 269. See, also, 159 U. S. 317; *Ib.* 319; 3 Am. & Eng. Enc. Law 2 Ed. 295, and cases cited; *Ib.* 296; *Ib.* 266; 53 Cal. 272; 12 R. I. 84; 15 Cal. 387; 15 Barb. 650; 25 Pa. 354.

McGill & Lindsey, for appellee.

The testimony is uncontradicted that Peel collected the money under and by virtue of his contract with the Chickasaw Nation, and not under the contract with Love, and that he could not have collected under the Love contract. Whatever authority Colbert, Love or Peel had to prosecute the claim was derived primarily from the Chickasaw Nation. Being a claim due from the United States to that tribe of Indians, the contracts and agreements in evidence all come within the purview of the act. Rev. St. U. S. § 2103. Contracts not in accordance with the requirements of the statute are void and can not be enforced. Bishop on Cont. § 613; 15 Am. & Eng. Enc. Law (2 Ed.), 935, *et seq.;* 25 Ark. 209; 32 Ark. 619; 47 Ark. 378; 48 Ark. 487; 63 Ark. 318; 3 McLean (U. S.), 276; 21 Wall, 441; 50 N. J. Eq.

761; 35 Am. St. Rep. 793; 71 *Ib.* 772; *Ib.* 837; 191 Pa. St. 582; 92 Tex. 219; 71 Vt. 253; 76 Am. St. Rep. 767. The Legislature of the Chickasaw Nation could at any time, acting for the public, have revoked the authority of Colbert as commissioner, agent or attorney. 1 Am. & Eng. Enc. Law (2 Ed.), 1216-1219; 3 *Ib.* 409-411. His agency was in fact terminated by his death. 1 Am. & Eng. Enc. Law (2 Ed.), 1226.

In the situation presented appellee had the right to repudiate the contract with Love, because it was void and prohibited by statute. 48 Ark. 487. And notice of its repudiation was not necessary. A void contract can not be made valid and binding by failure to give notice of its repudiation.

The act whereby appellee was employed repealed all the previous acts on the subject, by implication, that were in conflict with it. None of the previous acts were contracts in the sense that they could not be impaired by subsequent legislation, even if they had been valid; but, not being valid, they had no binding force which could be impaired. 15 Am. & Eng. Enc. Law, 1044; Cooley's Const. Lim. (5 Ed.), 346.

Appellee contends that his employment by the Nation was known to or acquiesced in by Love.

The statute which prohibits the making of certain contracts, makes no exception in favor of contracts made with attorneys, and the courts can make none.

No validity can be given to the contract through any principle of estoppel. It would be the duty of a court of equity to refuse to enforce it, even if its illegality were not pleaded. 15 Am & Eng. Enc. Law (2 Ed.), 1013; 47 Ark. 351; 13 Otto, 261; 165 Mass. 501.

BATTLE, J. Overton Love, Betsy Colbert, and Eula Myers belong to and are a part of the tribe of Chickasaw Indians, and reside in the Chickasaw Nation, Indian Territory, and Betsy Colbert is the widow, and Eula Myers is the only surviving child and heir, of Holmes Colbert, deceased.

On the 24th day of October, 1867, the Legislature of the Chickasaw Nation passed an act appointing Holmes Colbert commissioner for and in behalf of the Chickasaw Nation to collect certain claims and demands of the Nation against the United States, arising under the treaties of 1832 and 1834 between the

United States and the Chickasaws, allowing him a fee of twenty-five per cent. upon whatever amount he may recover in full satisfaction for his services, and authorizing him to employ at his own expense whatever additional counsel, aid, or assistance that may be necessary to enable him to collect such demands and claims. Holmes Colbert accepted the appointment, and entered upon the discharge of the duties of the office, and so continued until the 24th day of March, 1872, when he died.

On the 8th day of May, 1872, the Legislature of the Chickasaw Nation passed another act authorizing and requiring the Governor of the Nation to appoint some competent person commissioner to fill the vacancy caused by the death of Colbert, to make all necessary settlements, to carry out contracts made by Colbert "with his attorneys at Washington, as originally agreed upon by him, and no further, to settle and pay over all moneys arising under said contract to his widow, or to the administrator" of his estate; and, "upon being notified of the final adjustment of said claims," to "proceed to Washington and receive all funds that may have been awarded by the Government under said contract, and proceed at once to disburse the same according to the original agreement of said H. Colbert, and to settle with and pay over all moneys *due* to his widow or to the administrator of the said H. Colbert's estate."

On the 30th day of June, 1893, Overton Love, acting for himself, Betsy Colbert and Eula Myers, entered into the following contract with Samuel W. Peel:

"Whereas, the Chickasaw Nation of Indians has a claim against the United States for arrears of interest at five per cent. on the sum of $240,164, or about that sum, which sums were erroneously dropped from the books of the Treasurer of the United States many years ago and restored by the award of the Honorable Secretary of the Interior, as provided by the fourth article of the treaty between the United States and the said Nation of Indians in the year 1852, which claim for interest now amounts to about $550,000.

"And, whereas, the said Chickasaw Nation many years ago employed and appointed one Holmes Colbert to collect said claim, with interest thereon, agreeing to pay him for his services a sum equal to 25 per cent. of the amount recovered, and, whereas, the

said Holmes Colbert departed this life many years ago, and before any part of said claim was collected, leaving his widow and one daughter his sole heirs. And, whereas, said widow, daughter, has substituted Overton Love of the Chickasaw Nation to prosecute said claim for interest (the principal having been paid).

"Now, therefore, I, Overton Love, of the Chickasaw Nation, do hereby employ Samuel Peel of the town of Bentonville, Arkansas, as the attorney in the case to prosecute said claim for interest, either in the courts, before Congress, or any department of Government, or any commission of the Government, and for his services I agree to pay him the sum of $30,000 out of the 25 per cent. of said claim; if not but only a portion of said claim is recovered, then in proportion or at the rate to which $30,000 bears to the whole amount of said claim, the said Peel agreeing to give said claim all needed attention. Made and executed in duplicate at Sherman, in the State of Texas, on this the 20th day of June, 1893.

[Signed] "Overton Love."

The following receipt was appended to the contract: "Received from Overton Love as a retainer in the above case $2,500, June 30, 1893, to be deducted out of my fee.

[Signed] "S. W. Peel."

Peel undertook to perform his part of this contract, and so continued for about one year.

On the 26th day of September, 1894, the Legislature of the Chickasaw Nation passed an act, which was approved by the Governor on the day following, and which authorized the Governor of the Nation to contract with and employ Samuel W. Peel, an attorney at law, to collect interest on said claims against the United States, the principal having been paid, and to pay him for his services ten per cent. upon whatever amount he may "secure;" and repealed all acts and parts of acts in conflict with the last act.

On the 26th day of September, 1894, the Governor of the Chickasaw Nation entered into a contract with Peel in the manner provided by the act of September 24, 1894. It was stipulated in the contract that it should continue for six years from date; and it was executed and approved in the manner provided

by section 2103 of the Revised Statutes of the United States.

Under the latter contract Peel recovered $557,189.43, of which $55,718.94 was paid to him for his services, and the remainder was paid to the Chickasaw Nation.

Overton Love, Betsy Colbert and Eula Myers, alleging that the services rendered by Peel to the Chickasaw Nation were performed by him under his contract with Love, and that he received of the sum recovered $55,852.05, and that Love paid him $5,500 on the contract Love made with him, making in the aggregate $61,352.05 received by him, of which he is only entitled to $12,008.19 leaving $49,343.86 to which he was not entitled, brought suit in the Benton Chancery Court against Samuel W. Peel, to recover the $49,343.86, alleging that it belonged to them.

The defendant answered, and denied that the services rendered by him to the Chickasaw Nation were performed under the contract with Love; that he received of the amount recovered $55,852.05, and that Love paid him on contract with him $5,500; and alleged that his services were performed under the contract he made with the Governor of the Chickasaw Nation on the 26th day of September, 1894; that he received of the sum recovered by him $55,718.94, and that out of this fee collected by him he paid to counsel employed by him to assist him and for necessary expenses for a period of five years, which he devoted to the performance of his contract, about $25,000; and that the amount paid on the contract of Love with him was $2,500, and that for about one year thereafter he "devoted his professional services to the prosecution of said claim (the claim he was employed to collect) in good faith under said contract, and expended for traveling, hotel bills, office rent, etc., at least $1,500 when he discovered that the contract of plaintiff for the prosecution and collection of said claim was invalid because it was not executed and approved in the manner provided by section 2103 of the Revised Statutes of the United States; that the same was not recognized by the Government of the United States nor by the Chickasaw Nation; that nothing could be collected for said Chickasaw Nation or for the members thereof under the same, nor attorney's fees could be collected for the prosecution of the same;" and that his professional services rendered under the contract with Love were worth more than $1,000.

Defendant pleaded other defenses in bar of plaintiff's suit.

The chancery court dismissed the complaint of plaintiffs for want of equity.

The relation of Holmes Colbert to the Chickasaw Nation was of a very high trust and confidence, and his appointment of commissioner to collect the claims of the Chickasaw Nation against the United States was presumably induced by a reliance on his skill, learning, ability, integrity, judgment and discretion. When he died, the duty and right to perform his contract with his client did not devolve upon his executors, administrators, or heirs; and they could not lawfully employ any one to perform the same. Plaintiff's contract with Peel, by which they sought to do so, was without authority and of no force or effect.

Before this contract was made, on the 8th of May, 1872, the Legislature of the Chickasaw Nation by an act authorized and required the Governor of that Nation "to appoint some competent person as commissioner to fill the vacancy caused by the death of Holmes Colbert, to take charge of and to carry out the programme begun and commenced by the said H. Colbert without alteration or amendment; to make all necessary settlements, to carry out contracts made by the said H. Colbert with attorneys at Washington, as originally agreed upon by him;' and to pay over all moneys due to his widow or administrator, if any, by reason of services already performed. This was a denial to plaintiffs of the right to make such contracts as that undertaken by them. The Chickasaw Nation had the right to employ one or more attorneys to collect its claims. The fact that it had one, if it had, did not deprive it of the right to employ another. The contract made by its Governor, by authority of its act, with Peel, on the 26th day of September, 1894, whether it employed him as sole or additional counsel, was a valid contract. His services were rendered under that contract, and he is entitled to the fee stipulated.

The weight of evidence adduced in the hearing of this cause shows that Love paid Peel on the contract he made with him $2,500. Peel, in an effort to perform this contract, spent divers sums of money, amounting to $1,500, and performed professional services worth as much as $1,000. It was not his fault that the object of the contract was not accomplished. These expendi-

tures were made and services were performed virtually at the request of Love and under his directions; and Peel should not bear the losses.

Decree affirmed.

ON REHEARING.

Opinion delivered July 23, 1906.

BATTLE, J. Appellants insist that appellee, having been employed by them to collect the interest due the Chickasaw Nation on a certain claim, and having recovered the same, and received for his services the sum of $55,852.05, is entitled only to retain so much thereof as they agreed to pay him for such services; and that the remainder thereof he holds in trust for them. They argue that, having been first employed by them, he could not in good faith accept employment by the Chickasaw Nation to render the same service, and in law and equity was not permitted to do so, and should be held bound to account to them for moneys received for his services over and above the fee they agreed to pay him. Is this contention correct?

They claim under the contract of the Chickasaw Nation with Holmes Colbert. That contract expired with the death of Colbert. They claim that Colbert was employed to collect money which belonged to the Chickasaw Nation. They had no authority to employ Peel to collect it, and their contract with him did not empower him to do so. It does not appear that, at the time they undertook to contract with Peel, the Chickasaw Nation was indebted to either of them, or that any part of the interest he thereby undertook to collect belonged to them or either of them. The contract was void. Peel recovered nothing under it, and held no money received by him in trust for them.

Peel was engaged about five years in prosecuting the claim of the Chickasaw Nation for interest against the United States, under his contract with the Chickasaw Nation made on the 26th day of September, 1894. Love testified that he did not know that Peel had abandoned the contract with him until after Peel had received his fee of ten per cent. On the other hand, Peel testified that he met Love after he was employed by the Chickasaw Nation, and they "talked the matter over freely," and "discussed

the propriety of Love trying to get the Nation to give him some additional contract under the statutes, so he might be able to collect something;" and that he knew all about the employment of Peel by the Chickasaw Nation, and never made any objection to it, and never at any time, before the claim was collected, claimed any interest therein or any share in the fee earned thereby. No other witness testified as to these facts about which the parties disagree. The weight to be given to the testimony of each depends upon the circumstances. One of the most important of these circumstances is the time Peel was engaged in prosecuting the claim under his contract with the Nation. He was engaged about five years. If Love believed he was prosecuting it under the contract with him, it would have been natural and reasonable for him to have supervised the prosecution, and from time to time made some inquiries about its progress and prospects of success. The large amount involved, and the obligation he assumed by his contract with Peel, were sufficient to have induced him to give it his most earnest attention. Had he done so, and the presumption is he did, he would doubtless have in the course of five years discovered under what contract Peel was acting. There was no reason or necessity for Peel withholding correct information, practicing fraud or deception, and there was nothing to be gained by it. This circumstance (time) then corroborates the testimony of Peel and gives it preponderance. The publicity of the contract with the Nation, it having been entered into under a special act of the Chickasaw Legislature, and its great importance, on account of the considerable amount involved, to the Chickasaw Nation, and the prominence of Love in Indian affairs, he being a prominent and active member of the Nation and participant in its affairs, also tend to corroborate Peel's testimony.

Love having, without objection, knowingly permitted Peel to prosecute the claim of the Chickasaw Nation, under his contract with that Nation, for a long period of time, and incur a great expense in so doing, is estopped from claiming any portion of the fee received by him under the same. His co-plaintiffs, who claim under his contract with Peel, are also estopped; they claiming under and through him. Perry on Trusts (5 Ed.), § § 467, 849, 853, 870.

Appellants, in their motion for reconsideration, insist that

Love paid Peel $7,500 as a retainer, instead of $2,500. In the opinion of this court it is stated that "the weight of evidence adduced in the hearing of this cause shows that Love paid Peel on the contract he made with him $2,500." Love testified that he paid Peel $7,500 as a retainer, on the contract. Peel testified that he paid him $2,500 as a retainer, and $5,000 to be paid to Ex-Governor Sharpe of Kansas, which he paid. The receipt appended to the contract at the time it was executed shows that it was $2,500, and corroborates the testimony of Peel, and sustains the statement made by the court in its opinion.

BUNCH GRAIN COMPANY *v.* LAW.

Opinion delivered June 18, 1906.

INSTRUCTION—SHOULD BE BASED ON EVIDENCE.—Where there was no evidence that the plaintiff had released defendant on its contract, it was error to instruct the jury to find for defendant if plaintiff had released him.

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

Morris M. Cohn, for appellant; *George W. Norman*, of counsel.

Law was estopped to rely upon the defense of nonperformance of the contract. 5 Ark. 595; 21 Ark. 145. One who claims under an assignment can not attack it. 30 Ark. 453; 52 Ark. 389. Nor can one assume inconsistent positions respecting the same transactions. 36 Ark. 577; 53 Ark. 532; 101 Mass. 193; 26 Wis. 84; 99 Ala. 119; 108 Mass. 50; 45 Ark. 37; 57 Ark. 632, 638; 157 U. S. 198; 156 U. S 180; 11 So. 760; 47 N. W. 986; 49 Ark. 253. By his testimony in the Pryor branch of the case, Law recognized the validity of the contract and his obligation to pay it. He can not now, after having procured Pryor to pay him the $425 on the strength of this testimony, be heard to say that it was not true. 52 Fed. 385; 68 Ia. 703; 35 La. Ann. 743; 72 Tenn. 687; 130 N. Y. 662.

The 5th, 6th and 7th instructions given for defendant are erroneous. 2 Chitty, Contracts, 11 Am. Ed. 913, and cases cited; 35 Am. Dig. Col. 93, and cases cited; 8 Mich. 433; 12 Ore. 81; 35 Ark. 31.

Robert E. Craig, for appellee.

The doctrine of estoppel does not apply in this case. There is nothing in the conduct of Law, nor misrepresentation on his part, to induce appellant to act to its prejudice—no concealment of material facts. 16 Cyc. 680; Bigelow on Estop. (Ed. 1872), 480. Estoppel was not pleaded below. One relying on estoppel must plead it specifically and with certainty. 27 Am. St. Rep. 344, note. Authorities cited by appellant are inapplicable to the issues in this case.

BATTLE, J. The T. H. Bunch Grain Company, of Little Rock, Arkansas, in due course of business, on the 13th day of September, 1901, after correspondence with the Portland Oil Mill, at Portland, Arkansas, received from it through its business manager—shown to be such on its stationery—its letter agreeing to deliver to said grain company, during the season, at the rate of a car a day, 500 tons of cotton seed hulls, manufactured by it, at and for the sum of $2.50 per ton, f. o. b. cars at Portland.

After this contract had been made, the date not being given, it was assigned by the grain company to one John C. Law, for $750, $100 of which was cash, and, to use the language of the assignment, Law was "to pay $1.50 per ton in addition to paying the Portland Oil Mill $2.50 per ton. * * * The said John C. Law is to settle with the Bunch Grain Company as often as he settles with the Portland Oil Mill, and is to pay the said $1.50 per ton on each ton of hulls delivered on said contract, until he has paid the said T. H. Bunch Grain Company $750, the full consideration of said contract."

Thereafter, on October 4, 1901, Law assigned said contract to one Ike T. Pryor of Kansas City in the State of Missouri, for a cash consideration of $350, in addition to $650 to be paid to Bunch Grain Company and the $2.50 per ton to be paid to the Portland Oil Mill.

Law having failed to pay the $650 to the Grain Company, it brought an action against him in the Ashley Circuit Court for

the same. Law answered, and admitted the execution of the contract as set out in the complaint, and that it was assigned to him as therein stated, for which, upon the delivery of the hulls by the Portland Oil Mill, and as delivered by said mill, and paid for by him, he was to pay the plaintiff the said sum of $750, upon which he paid $100 leaving the balance due, had said seed been delivered as contracted, the sum of $650, but he avers the said mill never delivered him any of said hulls under said contract. He further averred "that, with the consent and by the advice of plaintiff, he, on the 4th day of October, 1901, for a valuable consideration, transferred the contract to Ike T. Pryor, whom he made a defendant, and made his answer a cross-complaint against him, and averred that Pryor, by reason of his assignment of the contract, assumed the execution of the contract and all of Law's liability to plaintiff for the $650, which he is informed and believes that Pryor failed to pay to plaintiff." He asked that "the judgment herein be rendered against Pryor, or, if it be found, upon the hearing of the evidence, that plaintiff did not agree to accept Pryor for said indebtedness, that he (Law) may have judgment against Pryor for said sum and interest." He afterwards amended his answer by alleging that the Portland Oil Mill never made the contract sued on. He afterwards filed an amended cross-complaint, which did not materially vary from the other, except that there was no claim therein that the mill had refused to deliver the hulls, he therein alleging "that the said Ike T. Pryor neglected and refused to pay, and still refuses to pay, the said sum of $650, either to the Bunch Grain Company or to him, to his damage in said sum of $650 and interest."

The cross-action instituted by the cross-complaint, upon change of venue, was transferred, at Pryor's instance, to the Drew Circuit Court. After there had been two mistrials in the cross-action, Law compromised with Pryor, and, receiving $450 from him, released him from the contract sued on.

A jury trial was had in the main action, which resulted in a verdict for Law.

There was no evidence to prove that the Bunch Grain Company released Law from his contract with it. The cross-complaint and amended cross-complaint were read as evidence to the

jury, and evidence showing the compromise with, and release of, Pryor in the cross-action was also adduced.

And the court instructed the jury, in part, over the objections of the plaintiff, as follows:

"5. If you believe from the evidence in this case that the T. H. Bunch Grain Company, after said contract had been assigned to Law, referred Law to Ike T. Pryor as a probable purchaser, and agreed with Law that if he would transfer said contract to Pryor, and Pryor assumed the amount due plaintiff, and that Law, in pursuance of said agreement, transferred said contract to Pryor, and Pryor agreed to pay him by Law, then Law is absolved from any obligation to plaintiff, and your verdict will be for defendant."

This instruction is clearly wrong and prejudicial.

Reversed and remand for a new trial.

[79 378]
[189 228]

LITTLE ROCK RAILWAY & ELECTRIC COMPANY v. DOYLE.

Opinion delivered June 18, 1906.

1. STREET RAILWAY—NEGLIGENCE—INSTRUCTION.—It was not error in an appropriate case to instruct the jury that the defendant street railway company was liable in damages if plaintiff, a passenger, while in the act of stepping from defendant's slowly moving car at a street crossing, was without negligence injured by reason of the fact that the speed of the car was suddenly increased, whereby plaintiff was thrown down and injured; it being shown that it was usual for passengers to alight at crossings when the cars were running slowly. (Page 382.)

2. CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTION.—An instruction that the burden of proving contributory negligence is on defendant is not erroneous in that it fails to contain the qualification that such burden is on defendant unless it appears from plaintiff's testimony. (Page 383.)

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. Instruction No. 3 given at plaintiff's request was erro-

neous. There is no evidence that the speed of the car was suddenly increased. The motorman's testimony shows that, after he cut off the current, it was not reapplied until after the car was brought to a stop at Nineteenth Street, and this is uncontradicted. 37 Ark. 598. It is also objectionable because it did not submit to the jury the question of fact whether the jerk, if any, was the proximate cause of the injury. 87 N. Y. Supp. 523; 171 N. Y. 309; 6 Mackey, 57; 73 Pac. 243; 83 N. Y. Supp. 380. The defects of this instruction are not cured by other instructions which conflict with it. 57 Ark. 203; 37 Ark. 333; 51 Ark. 88; 61 Ark. 156. It is further objectionable because it required the defendant to anticipate that plaintiff would alight from the car before it stopped, and to foresee the result of that action. A street railway company is not an insurer of the safety of passengers, nor required to anticipate any action one may take. If the accident is one that a prudent man could not foresee, as the probable result of the negligence complained of, no recovery can be based upon it. 118 Mass. 131; 51 N. E. 657; 115 Mass. 304; 59 Ill. 349; 85 Pa. St. 293; 5 C. C. A. 349.

2. Instruction No. 5 is erroneous because, in announcing the burden of proving contributory negligence to be on defendant, it did not contain the qualification that this was true unless such contributory negligence appeared from the plaintiff's testimony. 48 Ark. 106; 72 Ark. 572.

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

There is abundant testimony that the current was turned on after the car was slowed up. It was not necessary for plaintiff to point out the specific act of negligence or omission which caused the injury. Especially is this true where such acts are exclusively within the knowledge of the defendant. 62 N. E. 372; 12 Am. St. Rep. 443. A clear case of negligence is made out when it is shown that plaintiff signalled for the car to stop, that it had been slowed up, and the conductor knew he was in the act of alighting, and that then it started with a sudden jerk. It was not negligence *per se* on his part to attempt to alight from the slowing moving car. 3 Thomp. Neg. § 3592; 27 Am. & Eng. Ry. Cas. (N. S.), 124; 18 Am. St. Rep. 333; 83 N. W. 905; 4 Am. & Eng. Ry. Cas. (N. S.), 246; 49 Ark. 182; 31 Am. & Eng.

Ry. Cas. (N. S.), 156. See also 13 L. R. A. 95; Booth on Street Ry. § § 329, 349; 9 Am. & Eng. Ry. Cas. (N. S.), 843; 24 *Ib.* note 913 to 928. When one is injured in alighting from a moving car, the question of contributory negligence is one for the jury. 18 Am. St. Rep. 330; 12 Am. St. Rep. 443; 13 L. R. A. 95; 81 N W. 904; 7 Am. & Eng. Ry. Cas. (N. S.), 314; 49 Am. St. Rep. 382; 53 N. W. 915. Appellee contends that the instruction complained of submits the proximate cause question even more favorably to defendant than it was entitled to. Moreover the question of proximate cause is fully covered by other instructions given at request of plaintiff and at request of defendant.

On the question as to the right of the trial court to instruct the jury as to what constitutes negligence, see 72 Ark. 572.

2. It was the duty of the company and its employees to see that the appellee had safely alighted before the car was started again. 60 Fed. 702.

3. Appellant's objection to instruction 5 can avail nothing here. That the burden of proving contributory negligence is on the defendant is universally recognized. On the specific objection raised, see 147 U. S. 580; 93 U. S. 291.

BATTLE, J. T. N. Doyle brought this action against the Little Rock Railway & Electric Company. He alleged in his complaint "that on the 5th day of June, 1903, the defendant injured him through the carelessness and negligence of its employees operating a car. That plaintiff was a passenger on a South Main car, and when the car was near Eighteenth and Main he motioned the conductor to stop for him to get off; and the conductor obeyed and slowed the car as plaintiff was advancing to the rear end, and continued to slacken its speed until he reached the step on the rear platform. That while he was standing on the rear of the car with his left hand holding the hand rail of said car, and when the speed had been slackened to a speed when it was customary for male passengers to alight, and so that plaintiff could step from the car with safety and just as he raised his right foot with the intention of stepping to the ground, his left hand still holding the handle bar, and his left foot still upon the step of the car, the car was negligently started forward, and the sudden jerk threw him backwards, and caused him to fall to the ground, thereby fracturing the bones of his left wrist, and

lacerating the ligaments at his wrist and elbow, and bruising his left knee; that the injuries are permanent and greatly impair his ability to work, and that his left arm has been permanently disfigured at the wrist. He prayed damages for medical expenses, $250, and for pain and suffering, $10,000."

The defendant answered, and denied the allegations in the complaint, and alleged that, "if he was injured by falling from the car, the accident was due to his own negligence in attempting to alight from a moving car in a negligent manner;" and pleaded, generally, his contributory negligence.

A jury tried the issues in the case, and returned a verdict in favor of the plaintiff for $780; and the defendant appealed.

The evidence adduced in the trial tended to prove the allegations in the complaint.

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

"3. The jury are instructed that if they believe from the testimony that at the date of the alleged injuries the plaintiff was a passenger on one of the defendant's cars, and that at or near where Eighteenth Street would intersect Main Street he signalled or notified the conductor that he desired to get off, and thereupon, in response to such signal, the speed of the car was slackened or slowed up, and the plaintiff, while the speed of the car was being slackened, stepped upon the rear step of the platform when the car was moving slowly, and while he was in the act of stepping from the car its speed was suddenly increased, and thereby threw the plaintiff down, causing the injuries complained of, then the defendant company would be guilty of negligence, and you must find for the plaintiff, unless you further believe from the testimony that the plaintiff, in undertaking to step from the car while in motion, was guilty of contributory negligence which proximately contributed to the injuries complained of.

"5. The burden of proving the negligence of the defendant company is upon the plaintiff, and the burden of proving the contributory negligence of the plaintiff is upon the defendant company."

And the court instructed the jury, in part, at the request of the defendant as follows:

"4. If you find from the evidence that the plaintiff was

guilty of negligence, either in attempting to alight from the car while it was in motion, or in the manner in which he stepped from the car, and that his negligence contributed to cause his injury, then he can not recover in this case, even though you may find that defendant's employees were negligent."

"5. If you find from the evidence that plaintiff attempted to alight from the car while it was in motion, and in doing so stepped off backwards (that is, with his back to the front of the car), at the same time holding on to the hand rail with his right hand, and was thrown by the forward motion of the car, then he was guilty of contributory negligence, and can not recover, even though you may find that the car moved forward with a sudden or accelerated motion.

"6. If you find from the evidence that plaintiff failed to exercise reasonable care in alighting from the car, and that such failure approximately contributed to cause his injury, if any, then he can not recover, even though you may further find from the evidence that the defendant's employees were also negligent in operating the car."

Appellant objects to the instruction numbered 3, given over its objection, because "it told the jury that if plaintiff notified the conductor that he wanted to get off, and the conductor then caused the speed of the car to be slackened for that purpose, and, while plaintiff was in the act of alighting from the slowly moving car, *its speed was suddenly increased,* then the defendant was guilty of negligence;" and contends that there was no evidence that the speed of the car was suddenly increased. But this is not accurate. There was evidence which tended to prove that "the speed of the car was slackened, so that it was only running at a speed of from three to four miles an hour, or about as fast as a man would ordinarily walk when it was started forward with a sudden jerk, and it ran from 100 to 200 feet uphill before stopping." There was evidence, as we understand it, which tends to prove that the speed of the car was suddenly increased.

Appellant further insists that it was objectionable for the "reason that it required the defendant to anticipate that plaintiff would alight from the car before it stopped." If such was its effect, it is not erroneous. It might reasonably have anticipated that plaintiff would alight when the speed of the car was so

slackened that he could do so in safety, and that he might be injured if it was started forward, while he was doing so, with a sudden jerk. The evidence tended to show that it was usual for male passengers to alight when the car was running so slowly that they could do so in safety.

Appellant also contends that "instruction No. 5, given by request of the plaintiff, was also erroneous, because, in announcing the burden of proving contributory negligence to be on the defendant, it did not contain the qualification that this was true unless such contributory negligence appeared from the plaintiff's testimony." What the court said in *Indianapolis & St. Louis Railroad Co.* v. *Horst,* 93 U. S. 291, 298, in answer to an objection to a similar instruction is an appropriate answer to appellant's objection. "The court did not say, if such negligence were established by the plaintiff's evidence, the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence, coming exclusively from the party on whom rested the burden of proof. It is not improbable that the charge was so given by the court from an apprehension that the jury might, without it, be misled to believe that it was incumbent on the plaintiff to show affirmatively the absence of such negligence on his part, and that if there was no proof, or insufficient proof, on the subject, there was a fatal defect in his case. It was, therefore, eminently proper to say upon whom the burden of proof rested; and this was done without in anywise neutralizing the effect of the testimony the plaintiff had given, if there were any, bearing on the point adversely to him."

Other instructions of the court, which were given upon the same subject, were sufficient to prevent the jury being misled by the instruction objected to.

Construed as a whole with reference to the evidence in the case, as they should have been, there was no prejudicial error in the instruction of the court; and the evidence was sufficient to sustain the verdict of the jury.

Judgment affirmed.

STONE v. DRAKE.

Opinion delivered June 18, 1906.

1. GARNISHMENT—SITUS OF DEBT.—A debt due from a foreign corporation to a non-resident, who is only constructively served with process, is subject to garnishment in a State in which such corporation does business, although the debt is not payable in that State, and did not arise out of business transacted therein. (Page 387.)
2. EXEMPTION LAWS—LEX FORI.—Exemption laws are not part of the contract, but pertain to the remedy, and are subject to the law of the forum. (Page 388.)

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

STATEMENT BY THE COURT.

On the 13th day of July, 1901, the appellant, a citizen of Arkansas, commenced this action by filing before W. H. Rankin, a justice of the peace of Big Rock Township, Pulaski County, Arkansas, an account and bill of particulars, in the sum of $90.15, caused summons to issue for defendant, Walter Drake, which was returned on the 24th day of July, 1901, served, and on said 24th day of July, 1901, appellant recovered a judgment by default against said defendant in the sum of $90.15 and costs of the action, which judgment has never been satisfied. On the 7th day of March, 1904, appellant caused a duly certified transcript of the proceedings had before W. H. Rankin, J. P., to be filed before W. J. Smither, a justice of the peace for Garland Township, Miller County, Arkansas, and caused a judicial garnishment to issue against the appellee, Texas & Pacific Railway Company, which writ of garnishment was returned duly served on the 22d day of March, 1904. The appellee, as garnishee, on the 20th day of June, 1904, filed before W. J. Smither, J. P., its answer, admitting an indebtedness to the defendant, Drake, in the sum of $95.50, but stated that said sum of money was due for wages earned in the State of Texas, and that by the laws of that State same was exempt from garnishment or attachment, and that therefore the garnishee should not be held liable.

The appellant demurred orally to paragraph 3 of appellee's

said answer, which paragraph is as follows: "That said indebtedness of ninety-five dollars and fifty cents ($95.50), due by the garnishee, the Texas & Pacific Railway Company, to the defendant, Walter Drake, is for current wages earned by said defendant while in the employ of said garnishee in the State of Texas, and, under the Constitution and law of said State of Texas, exempt from garnishment and attachment; and therefore this garnishee ought not to be compelled to pay said sum into this court, or to be liable herein as garnishee, to the extent of such indebtedness," which demurrer the justice sustained, and, defendant failing to appear and claim said wages as exempt, said justice rendered judgment for appellant in the sum of $95.15.

On the 13th day of July, 1904, the appellee, Texas & Pacific Railway Company, filed its affidavit and bond, and appealed the case to the circuit court, where appellant again demurred to paragraph 3 of appellee's answer, and same was by said court overruled, and judgment rendered for appellee, the garnishment dissolved, and the garnishee discharged, and appellant prosecutes this appeal.

Pratt P. Bacon, for appellant.

This fund can not be garnished in Arkansas. Kirby's Digest, § 6070; 60 Iowa, 346; 14 N. W. Rep. 343; 45 Wis. 172; 19 R. I. 220. The wages are exempt under the law of Texas. Garnishment does not lie. 69 Ark. 401. See also on the subject 31 Kan. 180; 47 Am. St. 497; 83 Ala. 462; 3 So. Rep. 852; 25 *Id.* 258; 83 Iowa, 491; 102 Ill. 249; 157 *Id.* 176; 127 Mo. 244. The courts of Arkansas are under no obligation to enforce the exemption laws of Texas in a suit within the jurisdiction of its own courts. 83 Ala. 462; 3 So. Rep. 852; 31 Kan. 180; 47 Am. St. 498; 65 Iowa, 670; 87 *Id.* 567; 88 Tenn. 646; 21 Ala. 261; 33 S. W. Rep. 834; 97 Ky. 575; 31 S. W. Rep. 133. The exemption laws of one State can not avail a debtor in a suit in another. 20 W. Va. 450; 49 Iowa, 688; 18 Pick. 175; Drake, Attach. and Garn. 528. Exemptions are allowed to residents of this State. Kirby's Digest, § § 3903, 3904; 41 Ark. 249; 52 *Id.* 547; 54 *Id.* 226. They do not apply to non-residents. 52 Ark. 352.

Glass, Estes & King and *W. F. Kirby,* for appellee.

The default judgment is void, there being no service. Kirby's Digest, § 4424. A foreign corporation can not give a *situs* to its debt in every State in which it qualifies or does business. 145 U. S. 444, 36 Law Ed. 768; 146 U. S. 202; 190 U. S. 326; 8 Idaho, 74; 50 N. Y. 656; 84 *Id.* 157; 116 N. C. 804; 86 Wis. 281; 91 Me. 431; 40 Atl. Rep. 338.

The *situs* is essential to jurisdiction. 26 N. C. 223; 35 S. E. 471. Wages due from one non-resident to another non-resident are payable, as a matter of law, in the place where the labor was performed, the State of their common residence, and in such case there could be no property in this State subject to seizure. 68 Fed. Rep. 685. The railway company was not subject to garnishment proceedings, the wages being exempt by the laws of Texas. 92 Ala. 31; 79 So. Rep. 286; 78 Ala. 524; 6 Col. App. 85; 61 Miss. 237; 6 N. H. 497; 128 Ill. 28; 138 N. E. 209; 61 S. C. 361; 55 L. R. A. 146; 68 Fed. Rep. 685; 8 Am. & Eng. Enc. Law, 1129, 1130. See also 69 Ark. 401.

WOOD, J., (after stating the facts.) The question presented by overruling the demurrer to the third paragraph of appellee's answer is:

"Can appellant, a citizen of Arkansas, garnish the Texas & Pacific Railway Company, a foreign corporation of the State of Texas, that has a track and runs trains in Miller County, Arkansas, and has an agent there, for a debt due one of its employees for labor performed in the State of Texas, the employee being a citizen and resident of the State of Texas, and such wages by the laws of said State not being subject to garnishment?"

1. In *Kansas City, Pittsburg & Gulf Ry. Co.* v. *Parker,* 69 Ark. 401, we said: "The *situs* of a debt, for purposes of garnishment, is not only at the domicil of the debtor, but in any State in which the garnishee may be found, provided the law of that State permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the State." True, the debt due by the railway company in that case was for labor performed in this State. But, in our opinion, that makes no difference. While, as we said in *Kansas City, etc., Ry. Co.* v. *Parker, supra,* there is great contrariety of judicial opinion upon the question, yet the doctrine there announced is sound, and sup-

ported by abundant authority. In addition to the authorities there cited, see Rood on Garnishments, § 245, and authorities cited in note. In *Harvey* v. *Great Northern Ry. Co.,* 50 Minn. 405, Judge Mitchell, speaking for the court, said: "While, by fiction of law, a debt, like other personal property, is for most purposes, as, for example, transmission and succession, deemed attached to the person of the owner, so as to have its *situs* at his domicil, yet this fiction yields to laws for attaching the property of non-residents, because such laws necessarily assume that the property has a *situs* distinct from the owner's domicil. For such purpose a debt has *situs* wherever the debtor or his property can be found. Wherever the creditor might maintain a suit to recover the debt, there it may be attached as his property, provided, of course, the laws of the forum authorize it."

Under our statute, Drake, the original defendant, a non-resident, could have maintained an action against the appellant for his wages in this State by giving bond. Section 959, Kirby's Digest.

Mr. Wharton, in his excellent work on Conflict of Laws, § 368a, cites the following cases as supporting the doctrine that a debt due from a foreign corporation to a non-resident who is only constructively served with process is subject to garnishment in a State in which such corporation does business, although the debt is not payable in that State, and did not arise out of business transacted therein. *Mooney* v. *Buford & G. Mfg. Co.,* 72 Fed. Rep. 32; *Nat. Fire Ins. Co.* v. *Ming* (Ariz.), 60 Pac. 720; *Lancashire Ins. Co.* v. *Corbetts,* 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; *Missouri Pac. R. Co.* v. *Flannigan,* 47 Ill. App. 322; *German Bank.* v. *American Fire Ins. Co.,* 83 Ia. 491, 32 Am. St. Rep. 316, 50 N. W. 53; *Pittsburg, C. C. & St. L. R. Co.* v. *Bartels,* 108 Ky. 216, 56 S. W. 152; *Howland* v. *Chicago, R. I. & P. R. Co.,* 134 Mo. 474; 36 S. W. 29; *Natl. Fire Ins. Co.* v. *Chambers,* 53 N. J. Eq. 468, 32 Atl. 663; *Fithian* v. *New York & E. R. Co.,* 31 Pa. 114; *Datz* v. *Chambers,* 3 Pa. Dist. Rep. 353; *Neufelder* v. *German-American Ins. Co.,* 6 Wash. 336, 32 L. R. A. 287, 36 Am. St. Rep. 166, 33 Pac. Rep. 870.

We have examined these cases, and they support the doctrine we have announced. See also to the same effect *Chicago, Rock Island & Pac. Ry. Co.* v. *Sturm,* 174 U. S. 710.

2. It is a well established rule that exemption laws are not a part of the contract. They pertain to the remedy, and are subject to the law of the forum. Wharton on Conflict of Laws, § 791a, and numerous authorities cited in note, among them *Chicago, R. I. & P. R. Co.* v. *Sturm,* 174 U. S. 710; 12 Am. & Eng. Enc. Law, 793, note; 18 Cyc. 1376. The amount due from appellant to Drake for wages was not exempt from garnishment under our laws. Appellee had obtained judgment against Drake. Section 3695, Kirby's Digest.

The judgment of the circuit court is reversed, and the cause is remanded with directions to sustain the demurrer to the third paragraph of appellant's answer, and for further proceedings not inconsistent herewith.

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FT. SMITH LIGHT & TRACTION COMPANY v. SOARD.

Opinion delivered June 18, 1906.

1. STREET RAILWAY—OBSTRUCTING DRAINAGE—LIABILITY.—Where the city ordinance under which a street railway was constructed required that the company should construct its track with suitable bridges, drains or pipes at all gutters so as to permit the flow of water under the same, and the company obstructed a natural drain, so that more water was forced into a certain stream, and by placing a bent under a bridge lessened the capacity of the stream to carry off water, and permitted the stream to become filled with brush and dirt, it became liable for damages from overflows caused by such obstructions. (Page 391.)
2. SAME—LIABILITY OF ASSIGNEE.—Where the city ordinance under which a street railway was constructed required of the company constructing the road, its successors and assigns, that the roadbed should be constructed and maintained with suitable bridges, drains and pipes to permit the flow of water under and through the same, an assignee of the street railway takes subject to the ordinance, and will be liable to a person injured by its failure to comply therewith. (Page 392.)
3. NEGLIGENCE—EVIDENCE.—Where a street railway company is sued for damages from an overflow caused by its failure to put in a culvert

at a certain place, the fact that it placed a culvert there after the injury to plaintiff happened is not evidence that it was guilty of negligence in not doing so before. (Page 393.)

Appeal from Sebastian Circuit Court, Ft. Smith District; *Styles T. Rowe,* Judge; reversed; affirmed.

STATEMENT BY THE COURT.

J. F. Soard had a grocery store in the city of Ft. Smith, which was also his residence. The store was located on North Eleventh Street near its intersection with Twelfth Street. North Eleventh Street runs northeast, and plaintiff's store is south of this street. About 200 feet northeast of the store of plaintiff the street crosses a brook or small stream which flows northward. There is a bridge on the street over this stream. Not far from the bridge the street crossed another depression or drain where in time of rain water flowed across the street. Afterwards the Ft. Smith Traction Light & Power Company, by permission of the city, constructed its track along North Eleventh Street. In doing so it raised the bed of the street and left no drains or other openings for the escape of the water, except where the bridge crossed the stream. This bridge was built by the City of Ft. Smith, but when the company obtained permission to construct its line across it, the company put in what the engineer who testified called a bent with posts to support it. This was done to strengthen the bridge. This bent under the bridge obstructed the flow of the water to some extent. The ordinances of the city under which the street car track was constructed required the company, its successors and assigns, to construct and maintain its tracks with "suitable bridges, drains or pipes at all gutters so as to permit the flow of water under the same."

After the track was constructed, the Ft. Smith Traction, Light & Power Company sold its franchise and property to the Ft. Smith Light & Traction Company, and this company continued to operate its track without changing the same. The brook, when it passed under the bridge, became partially filled with dirt, sand and debris deposited by the water, and during a heavy rain which occurred in March, 1904, the opening under the bridge was insufficient to carry all the water, and it was forced back, and entered plaintiff's store, causing him damage to the

extent of $300. He brought this action to recover damages for the injury. The defendant answered, and denied about every material allegation of the complaint.

On the trial there was a verdict and judgment in favor of plaintiff for the sum of $300, and defendant appealed.

Mechem & Mechem, for appellant.

1. It was error to permit proof that the defendant put in a culvert in the dump in front of plaintiff's place after the injury complained of. 70 Ark. 183.

2. The case should have been taken from the jury because the dump was built under directions and supervision of the city, or with its sanction and approval; because the bridge was the proximate cause of the injury; and because, conceding that the work as constructed was a nuisance, which caused the injury, the defendant, not having constructed the dump, was not responsible for an injury caused by its existence until it was notified that the dump was a nuisance, and was requested to remove it. Wood, Nuisance, § 838; 64 Pac. 859; 35 Md. 385; 3 N. H. 88; 98 Mass. 39; 27 N. J. L. 457; 75 Mo. 548; 44 Me. 154; 124 Ill. 51; 115 N. Y. 203; 35 Wis. 675; 39 Vt. 558; 64 Fed. 679; 59 Ark. 316 and cases cited.

A. A. McDonald, for appellee.

1. Appellant, having used and operated the street railway after its purchase, which is admitted, is liable, the same as if the roadbed had been constructed by it. 66 Ark. 276; 54 Am. Rep. 111; 59 Ark. 316; 24 Atl. 361.

If notice to appellant was necessary, there is sufficient proof thereof appearing in the record; but such notice was not necessary, since appellant used the railway. 59 Ark. 316.

2. Appellant is liable because it assumed such liability in its contract with its predecessor from which it purchased.

3. The contention that the bridge was the proximate cause of the injury is contrary to the evidence.

4. Likewise the contention that the dump was built under the direction and supervision of the city is contrary to the facts. It is in proof that the owner of the street railway was to build the grade to suit himself, so that the bridge remained the same.

that the company passed over it, put in a middle bent and props or posts to support it, and that the bridge was to be repaired and maintained by appellant.

RIDDICK, J., (after stating the facts.) This is an appeal by the defendant company from a judgment rendered against it in favor of plaintiff for damages for negligently and wrongfully obstructing the natural flow of water and causing it to back up and enter the plaintiff's store.

Counsel for defendant in their argument for reversal say that the track of the street railway owned by it was constructed along a public street, and contend that, if any injury happened through the wrongful construction of the street or bridge, it was the fault of the city, and not the defendant company. It is true that the company is not responsible for the work done by the city. But there was evidence tending to show that the company which constructed this street car track was permitted to construct the track along the street on any grade the company chose, though it was not allowed to change the height of the bridge. In constructing its track across a depression or drain not far from the store of plaintiff, it built up a solid roadbed, on which track was laid higher than the street was before, so that the water that formerly crossed the street at this drain could not afterwards do so. The company also put in a bent under a bridge over a stream near plaintiff's store, in order to strengthen the bridge, and this, with the supports on which the bent rested, to some extent obstructed the water. By obstructing a natural drain the company forced more water into the creek that flowed under the bridge, and at the same time by putting a bent under the bridge they lessened the capacity of the creek to carry off the water. After having completely obstructed a natural drain and partially obstructed the stream at the bridge, the company allowed the creek to become still further filled by brush and dirt. It declined to remove such obstructions on the ground that it was the duty of the city, and not the company, to keep this creek open. But the ordinance of the city under which this road was constructed required that the company should construct its tracks with suitable bridges, drains or pipes at all gutters, so as to permit the flow of water under the same. If the company had done nothing but cross a bridge constructed by the city, there

might be serious question as to its liability. But, as before stated, this is not the case, for it built its roadbed across a depression or drain which crossed the street without putting in a culvert or drain for the water to pass through. It thus forced more water to pass under the bridge where it also partially obstructed the creek by placing a bent under the bridge, with the supports resting in the bed of the creek. Having altered the flow of the water in that way, it became its duty to see that this creek should not become further obstructed, and the contention that the company that constructed this track was guilty of no wrong in this respect can not be sustained.

The defendant company itself did not construct the track, but is the successor of the company that constructed it. Its counsel now contends that, as the defendant did not construct the roadbed or erect the posts and bent under the bridge, it can not be held responsible for the injury, in the absence of notice that the solid roadbed and the bent under the bridge obstructed the water and were nuisances. But this contention does not seem to be sound, for the reason that the ordinance of the city under which the street railway was constructed required of the company constructing the road, its successors and assigns, that the roadbed should be constructed and maintained with suitable bridges, drains and pipes to permit the flow of water under the same. As a general rule, a grantee is not responsible for the erection of an injurious structure by his grantor when he has had no notice thereof, and when there has been no request to remove. But there are exceptions to this rule, and it does not apply in a case of this kind where it became the duty of the grantee to maintain its roadbed and track with sufficient drains and openings to admit the passage of water. As before stated, the city ordinance under which the street railway was constructed required that it should be "constructed and maintained" with sufficient openings for the passage of water. When it purchased this railway and took charge of it, the defendant assumed the burden of complying with this ordinance. It can not escape by saying that it had no notice. It was its duty to exercise ordinary care in examining its roadbed and track, and in seeing that it had the required openings, and that such openings or drains as were already there were not allowed to become filled up and obstructed, so that the water could

not pass through. If it failed to exercise due diligence in this respect, it was guilty of negligence, and must pay the damages caused by such negligence.

But while we think the evidence was sufficient to support the verdict, we are of the opinion that the court erred in permitting the plaintiff to show that the defendant put in a culvert in the dump in front of plaintiff's place after the injury to plaintiff had happened. The fact that the defendant put in this culvert did not legitimately show that it was guilty of negligence in not doing so before. This question was discussed in the case of *Prescott & N. Ry. Co.* v. *Smith,* 70 Ark. 183; *St. Louis S. W. Ry. Co.* v. *Plumlee,* 78 Ark. 147.

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

HILL, C. J., did not participate.

NUNN *v.* MCKNIGHT.

Opinion delivered June 18, 1906.

1. STATUTE OF LIMITATIONS—PART PAYMENT.—There was evidence that defendant, while indebted to plaintiffs, delivered to them cotton with the understanding that it should be held by them for him for a rise in value, and that, so soon as a satisfactory price could be obtained, it should be sold and the proceeds credited on his debt; that, before the debt was barred, the cotton was sold and the proceeds credited on defendant's debt; and that defendant was notified of the sale, and assented to the application of the proceeds as a credit on the debt. *Held,* that the payment made a new point from which the statute of limitations began to run. (Page 396.)
2. ACCOUNT—SINGLENESS.—Where a running account was composed of various items for goods and merchandise furnished defendant during a certain year, and by agreement was due on the first day of the following year, it would be incorrect and misleading to speak of each item of the account as a separate contract. (Page 397.)
3. STATUTE OF LIMITATIONS—PART PAYMENT ON OPEN ACCOUNT.—It seems that a payment generally on an open account makes a new

point for the running of the statute of limitations as to the whole account. (Page 397.)

4. SAME—PART PAYMENT ON STATED ACCOUNT.—A part payment on an account stated stops the running of the statute of limitations as to the entire account, which constitutes a single debt. (Page 397.)

5. SAME—INSTRUCTIONS.—It was proper to refuse an instruction in a suit upon account that the plaintiffs must show that each item of the account sued on became due within three years before the beginning of the suit before they can recover, as it would have compelled a verdict, even though there had been a part payment. (Page 398.)

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

C. V. Murry, for appellant.

1. The account, and every item thereof, is barred by the statute of limitations. 44 Ark. 534; Kirby's Digest, § 5079; 60 Am. Rep. 254; 17 Am. Rep. 171; 11 Ark. 32. The burden was on plaintiff's to show the action was not barred. 69 Ark. 311.

2. The proceeds of the cotton should have been credited as of the date of the delivery, in January, 1896. Defendant testified that he delivered the cotton on the account, and did not instruct plaintiff to hold it. Plaintiff's own testimony shows that they treated the cotton as their own from the time it was delivered. 60 Ark. 497; 132 Mass. 33.

Hardage & Wilson and *John H. Crawford,* for appellees.

1. The whole of a running account is one debt. 38 Ark. 285; 57 Ark. 595. The entire account as one debt was credited with the payments, the effect of a payment being to fix a new point of time from which the statute would begin to run.

2. When an account is stated, and an amount agreed upon, although the statement is verbal, the statute begins to run from the date of the settlement. 2 Greenleaf, Ev. § 127; 64 Cal. 64; 89 Am. Dec. 85; 75 Cal. 192; 85 Va. 820; 107 U. S. 325; 3 Pick. 96; 27 L. R. A. 811.

3. The cotton was delivered by appellant to be held and finally sold, and the proceeds to be applied on the account. The credit of the proceeds was a sufficient payment from which to imply a promise by appellant to pay the remainder of the account. 45 Am. Rep. 106; 4 N. J. L. 334.

RIDDICK, J. This is an action by W. T. and Alex McKnight against T. J. F. Nunn to recover the sum of $609.68 alleged to be due on an account for goods and merchandise sold and delivered and for balance found due on an account stated. The plaintiffs recovered judgment for $549.68, and, so far as the amount due is concerned, the evidence fully sustains the judgment, but the main defense relied on is the statute of limitations. The action was commenced July 6, 1903, and it is conceded that the account was due more than three years before that date, but plaintiffs contend that there was a part payment made on the account within three years before the bringing of the suit.

The plaintiffs are merchants who had for a number of years furnished goods and supplies to the defendant. Their custom was to have a settlement with him at the end of each year, and then carry over any balance which defendant might be unable to pay until the next year. The last settlement was made in early part of 1897 for goods sold previous to that time, and a balance of $566.77 was stated, and by agreement with defendant this balance was placed on the books of plaintiffs as due January 1, 1898. At this time the plaintiffs had in their possession cotton of defendant which had not been sold, but it was understood that, when sold, the defendant should have credit for the proceeds of the cotton on his debt. After this settlement was made the plaintiffs continued to sell the defendant goods and merchandise during the year 1897, with the understanding that this account should become due and be paid along with the balance found due on the 1st of January, 1898. But the defendant did not pay his debt when it became due on 1st of January, 1898.

The cotton in the hands of plaintiffs was afterwards sold, and the defendant was given the following credits therefor on the books of plaintiff, towit: February 18, 1899, by proceeds of four bales of cotton $120.24; August 7, 1900, by proceeds of two bales of cotton $81.23. It is this last payment which is relied upon by plaintiffs to prevent the bar of the statute. This cotton, the proceeds of which were credited in August, 1900, was delivered by defendant to plaintiff in 1896. But at the time it was delivered the price of cotton was low, and by consent of defendant it was held to await a rise in price. Afterwards there was a still further decline in the price of cotton, and it was not sold until August,

1900. By this delay defendant obtained several cents a pound more for the cotton than he would otherwise have received, and so soon as sold the proceeds were credited on his account. Shortly afterwards defendant was informed by plaintiffs of the disposition of the cotton, and expressed himself as pleased that he had obtained such a good price for it. Counsel for defendant now contends that crediting the proceeds of this cotton on defendant's account was not such a payment as to make a new date from which the statute of limitations began to run, and that the proceeds of the cotton must be treated as paid when the cotton was delivered. As this cotton was delivered before the debt was due, if there had been nothing more than this delivery with request that plaintiffs should hold the cotton and sell when price of cotton was satisfactory, and then credit proceeds on debt, there would be much force in the contention of defendant that this would not affect the statute of limitations, for the reason that there would then have been no act of defendant recognizing the debt, after its maturity, that we could treat as admitting its existence and impliedly promising to pay the balance due. *Chase* v. *Carney*, 60 Ark. 491.

But there is something more than that in this case. One of the plaintiffs testified that when the cotton was sold it was applied to defendant's account, and that the defendant was soon afterwards informed of the sale of the cotton. The witness was then asked, "Was it satisfactory to him?" He answered, "Yes, sir; he said he was well satisfied with the price, for it was more than it had been." The other plaintiff testified that, after the cotton was sold, he told defendant of the sale the first time he met him in town, and that defendant did not at first remember that he had two bales. Witness was then asked, "What did he say about it?" and replied, "He didn't say anything more than that he had forgotten it, and was well pleased after he found that he had gotten more for it." This is certainly not very satisfactory testimony, for the witnesses were not asked, and do not directly state, whether defendant assented to the placing of the proceeds of the two bales of cotton to his credit; but we think the jury had the right to draw that conclusion from the testimony of these witnesses, for we infer from his testimony that defendant did not demand the

proceeds of the cotton in cash, or object to the action of the plaintiffs. That being so, the case stands that the defendant, while he had a running account with the plaintiffs, delivered them this cotton with the understanding that it should be held by them for him for a rise in value, and that, so soon as a satisfactory price could be obtained, it should be sold and the proceeds credited on his debt; that, before the debt was barred by the statute, the cotton was sold and proceeds credited as a payment on the debt; that the defendant was then notified of the sale of the cotton and assented to the acts of plaintiffs in selling it and placing the proceeds as a credit on his debt. This brings the case within the decision of *Less* v. *Arndt,* 68 Ark. 399, 59 S. W. 763, and made a new point from which the statute runs. See also *Day* v. *Mayo,* 154 Mass. 472; *Buffinton* v. *Chase,* 152 Mass. 534; *Porter* v. *Blood,* 5 Pick. (Mass.), 54; *Harris* v. *Howard,* 56 Vermont, 695; 19 Am. & Eng. Enc. Law, 325-329.

We find no error in giving or refusing instructions. The first instruction asked by defendant was not correct, for it contained a statement that each item of the account constituted a separate contract. If that was true, the circuit court would have original jurisdiction over but few actions on account for goods sold and delivered, for such accounts are usually composed of small items, the value of which, taken separately, is seldom sufficient to give that court jurisdiction. The account sued on in this case, with the exception of the first item for account stated, is composed of items for goods and merchandise furnished defendant on a running account during the year 1897. This whole account, by agreement between the parties, was due the 1st of January, 1898, and it would be incorrect and misleading to speak of each item of the account as a separate contract. *Hughes* v. *Johnson,* 38 Ark. 285; *Dunnington* v. *Kirk,* 57 Ark. 595; *Ring* v. *Jamison,* 2 Mo. App. 584.

A payment generally on this account would, it seems to me, make a new point for the running of the statute as to the whole account, but it is unnecessary for the court to decide that question, for the reason that, if the payment made be applied to the first item on the account, and if we concede that it tolled the statute as to that item only, still the balance due on that item would be more than the amount found by the jury; for the first item is that

for account stated, and after application of all credits it still amounts with interest to more than the verdict, and supports the judgment, even though the remainder of the account be rejected. The balance due on the account stated is one debt. *Patillo* v. *Allen-West Com. Co.*, 131 Fed. Rep. 680.

By the second instruction asked by defendant, the court was requested to tell the jury that the plaintiffs must show that "each item of the account sued on became due within three years before the beginning of this suit, before they can recover thereon." But that would have been misleading, under the facts of this case, for the plaintiffs admitted that all of the items became due more than three years before the commencement of their action, and relied on a part payment. This instruction, as asked by defendant, would have compelled a verdict for defendant, even though there had been a part payment, and was properly refused.

The third instruction asked by defendant related to the effect of a verbal promise to pay on the statute of limitations; but, as there was no claim that a verbal promise had been made in this case, and no evidence of such a promise, it was unnecessary to give an instruction on that point.

The fourth instruction requested by defendant, so far as correct, was covered by the instructions given by the court on its own motion.

The evidence clearly shows that the defendant was liable, unless the debt was barred by limitation. On that point the evidence was conflicting, and was settled by the verdict. On the whole case, we are of the opinion that the judgment should be affirmed, and it is so ordered.

HOSKINS v. FAYETTEVILLE GROCERY COMPANY.

Opinion delivered June 18, 1906.

1. CHATTEL EXEMPTION—CLAIM BY WIFE OR MINOR CHILD.—Where a married man and head of a family deserted his family and left the State, his wife or minor children could make the claim of chattel exemptions. (Page 400.)
2. SAME—FRAUDULENT SALE.—Where all the personal property of an absconding debtor did not exceed the amount he was entitled to claim exempt from execution, his creditors could not complain of a sale of it made either by the debtor himself or by his wife. (Page 400.)
3. FRAUDULENT CONVEYANCE—INNOCENT PURCHASER.—One who pays full value for merchandise without knowledge or notice that the vendor is indebted is an innocent purchaser. (Page 400.)
4. SAME—EXCHANGE OF PROPERTY.—A creditor can not complain of an exchange of the debtor's property subject to execution if it was exchanged for other property of equal value and alike subject to execution. (Page 401.)

Appeal from Madison Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

Harris & Ivie, for appellant.

The court had no jurisdiction. No warning order was ever made upon the complaint. Kirby's Digest, § 6065; 71 Ark. 322; 55 *Id.* 30; 70 *Id.* 409. The judgment debtor is an indispensable party. 8 Am. & Eng. Enc. Law, 775; Pomeroy, Rem. & Rem. Rights (1 Ed.), § 447. Actions like this are based on the fraudulent intent to hinder and delay creditors and a participation by the debtor's vendee in such intent. 17 Ark. 146; 31 *Id.* 554; 41 *Id.* 316. The insolvency also must be shown. The sale under the evidence was not fraudulent. Kirby's Digest, § § 3658-9; 2 Ark. 251; 63 *Id.* 416; 11 *Id.* 411. Bailey had less than the law allowed as exempt, and his wife could claim the exemptions. Kirby's Digest, § 6019; 31 Ark. 554; 54 *Id.* 193; 57 *Id.* 331; 52 *Id.* 547.

The appellee, *pro se.*

The court had jurisdiction. J. M. Bailey was not a necessary party. 8 Am. & Eng. Enc. Law, 776. A warning order was issued, and an attorney *ad litem* appointed. 71 Ark. 322; Kirby's Digest, § 6055. Actual knowledge of the fraud was not

necessary; only knowledge of facts sufficient to put a prudent man on inquiry. 58 Ark. 446; 55 *Id.* 579; 50 *Id.* 320. The evidence was ample. 58 Ark. 446; 52 *Id.* 547; 55 *Id.* 579. The burden was on appellants to show that the debtor owned less property than his legal exemptions, and this they failed to do. 52 Ark. 547.

McCULLOCH, J. Jas. M. Bailey owned a small stock of merchandise, and was indebted to appellee, Fayetteville Grocery Company, in the sum of $147.39 for merchandise purchased from the latter. He deserted his family, and left his stock of goods in the possession of his wife and son, and they sold it to appellant Hoskins for the sum of $375, which is shown to be the fair value thereof. Appellant paid for the goods by the delivery to Mrs. Bailey of two mules valued at $100 each, and a lot of cattle of sufficient value to make up the balance of the agreed price of the goods. The Grocery Company brought this suit in equity to cancel the sale of the merchandise to appellant, and to subject the same to the payment of its debt. The chancellor granted the relief prayed for, and the defendants appealed.

We are of the opinion that the chancellor erred in holding that the sale of the goods was fraudulent.

There is no proof of express authority on the part of Bailey's wife and son to sell the goods; but Bailey is not complaining, and appellant is not, under the circumstances of this case, in a position to do so. Bailey was a resident of the State, the head of a family, and was entitled to hold as exempt, personal property of the value of $500. The right to claim the exemption was not forfeited because he deserted his family and left the State. His wife or minor children could make the claim of exemptions. *White* v. *Swann*, 68 Ark. 102; *Hollis* v. *State*, 59 Ark. 211; *Hall* v. *Roulston*, 70 Ark. 343.

The proof shows conclusively that all the personal property of Bailey, the debtor, including the merchandise sold to appellant, did not exceed in value the sum of $500, and was therefore exempt from execution. His creditors were in no position to complain of a sale of it made either by the debtor himself or by his wife. *Bogan* v. *Cleveland*, 52 Ark. 101; *Sims* v. *Phillips*, 54 Ark. 193.

The evidence, moreover, entirely fails to show participation

by appellant Hoskins in any fraudulent design to hinder the collection of Bailey's debts. He paid full value for the merchandise, or rather gave property of equal value in exchange for it, and did so in ignorance of the fact that Bailey was indebted to the Grocery Company. He made inquiry as to any indebtedness of Bailey, and was told that he owed no one. The property (mules and cattle) which he gave in exchange was as much subject to execution and within reach of Bailey's creditors as the merchandise was before the sale to Hoskins, so the creditors were not injured or in any way hindered in the collection of debts by the exchange.

Upon any view of the evidence, the decree was erroneous, and must be reversed and the cause remanded with directions to enter a decree dismissing the complaint for want of equity. It is so ordered.

GROOMS v. NEFF HARNESS COMPANY.

Opinion delivered June 18, 1906.

1. AGENT TO SELL—APPARENT AUTHORITY.—An agent with power to sell and receive money in payment for his principal has not the apparent authority to accept the cancellation of his own debt due to a vendee who knows, or by the exercise of reasonable diligence could know, that his debtor is acting as agent; and the principal, upon discovery of such unauthorized sale, may repudiate it, and recover possession of the article attempted to be sold. (Page 404.)
2. APPEAL—CONCLUSIVENESS OF FINDING.—A finding of the jury that one who bought from an agent of a corporation knew that he was such agent is supported by evidence that the corporation was duly organized, that its articles of incorporation were on record, and that the buyer had had repeated transactions with the company. (Page 404.)
3. AGENCY—LIMITATIONS OF AUTHORITY.—In applying the rule that one who buys from a known agent is bound to know that he has no authority to sell the goods of his principal in satisfaction of his own debt, it is not necessary that the buyer should know the precise limitations upon the agent's authority, it being sufficient if he knew or ought to have known of the existence of the agency. (Page 404.)

4. SALE—INNOCENT PURCHASER—KNOWLEDGE.—One who purchases a chattel with actual knowledge that a suit is pending against the vendor to recover the chattel can not claim to be an innocent purchaser. (Page 405.)

5. TRIAL—IMPROPER ARGUMENT—WHEN HARMLESS.—Where undisputed evidence shows that the agent of a corporation, who was also a stockholder therein, had no authority to sell goods of the corporation in payment of his individual debts, the purchaser, when sued by the corporation to recover such goods, can not complain of a statement of plaintiff's counsel to the effect that such agent had never paid for his stock in the corporation. (Page 406.)

6. TRIAL—REFUSAL TO GIVE PEREMPTORY INSTRUCTION—WAIVER—Though the defendant, at the close of plaintiff's evidence, may test its legal sufficiency by a request for a peremptory instruction in his favor, yet if, after a denial of his request, he introduces evidence which, together with that introduced by the plaintiff, is legally sufficient to sustain a verdict against him, he waives the error of the court in refusing to give such instruction. (Page 407.)

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

Replevin by Neff Harness Company, a corporation, against A. S. Grooms. Plaintiff recovered, and defendant has appealed.

Carmichael, Brooks & Powers, for appellant.

1. There is no evidence that appellee retained title to the surrey. On the contrary, it is shown that Neff had the right to sell, and that it was sold and charged as an open account in the usual way. Plaintiff, to support its action, must show title. 4 Ark. 94; 42 Ark. 313; 39 Ark. 438.

2. There was no evidence to show title in plaintiff or any right of possession. There must be some evidence legally sufficient to sustain the verdict. 57 Ark. 467; 31 Ark. 196.

3. The fourth instruction was erroneous, because W. L. Grooms was not a party to the suit, and appellant was not a party to the transaction between Neff and said W. L. Grooms. One who, without knowledge of the agency, deals with an agent as a principal may set off any claim he has against the agent before he is undeceived against the demand of the principal. 50 Ark. 380.

4. To bind one by *lis pendens,* with or without actual

notice, "the litigation must have resulted in a judgment against the party." 21 Am. & Eng. Enc. Law (2 Ed.), 608.

5. To constitute fraud, there must be actual deception—a false representation made with intent to deceive. Anson on Cont. 154. See also 60 Ark. 425.

6. The case should be reversed for prejudicial remarks of plaintiff's attorney. 61 Ark. 139.

W. C. Adamson, for appellee.

1. In the absence of express authority from the principal, an agent can not settle his private debts with his principal's goods; and if one accepts a principal's goods for such purpose, knowing the facts, or if by the use of reasonable diligence he could know, then the principal may repudiate the transaction and recover the goods. 53 Ark. 135; *Ib.* 224; 50 Ark. 385; 52 Ark. 253; 1 Am. & Eng. Enc. Law, 1172 *et seq.;* 14 L. R. A. 234; 52 L. R. A. 790. See, also, Shinn on Replevin, § 192; *Ib.* 189.

2. There is no error in plaintiff's fourth instruction. Appellee contends that A. S. Grooms owned and controlled the business, and was the one to whom Neff was directly indebted; and even if W. L. Grooms was the real purchaser, appellant was not a *bona fide* purchaser for value without notice.

3. The evidence is plain that appellant had actual notice. Actual notice not only charges the purchaser *pendente lite* with knowledge of the issues directly involved in the litigation, but puts him on inquiry as to collateral issues. 21 Am. & Eng. Enc. Law, 596.

4. The language of plaintiff's attorney, complained of, if it was used, was immaterial, did not affect the merits of the case, and could not have been prejudicial. 71 Ark. 433.

McCULLOCH, J. Appellee, Neff Harness Company, is a domestic corporation, engaged in the business of selling harness, buggies and other vehicles in Little Rock. W. B. Neff, who was secretary of the corporation and manager of the business, was indebted to W. L. Grooms in the sum of $82 on account for groceries and meat, and sold him a surrey in part payment of the debt. Grooms was also to deliver a second-hand buggy in exchange to cover a part of the price of the surrey, and the balance of the price was to be taken out by purchase of more

groceries and meat from Grooms by Neff, but it appears that the old buggy was never delivered. The price of the surrey was charged to Grooms on the books of the company. Shortly after the transaction Neff severed his connection with the company, and the latter repudiated the sale of the vehicle to Grooms in payment of individual indebtedness of Neff. W. L. Grooms disposed of the surrey to his father, A. S. Grooms, and, after making demand for payment of the price, which was refused, Neff Harness Company brought replevin to regain possession of the vehicle, and to recover damages for detention. The suit was first brought against W. L. Grooms, but was dismissed before final judgment, and the present suit is against A. S. Grooms.

There was evidence tending to show that none of the other officers had any information, at the time of the sale of the vehicle to Grooms, that it was made in satisfaction of individual indebtedness of W. B. Neff; and as soon as information of that fact was received, the corporation repudiated the transaction, and demanded payment of the price or return of the vehicle. There was also evidence tending to show that Grooms, when he purchased the vehicle from Neff, had no actual knowledge of the fact that the business was owned by a corporation, but thought that it was owned by Neff.

It has been decided by this court that "an agent with power to sell and receive money in payment for his principal has not the apparent authority to accept the cancellation of his own debt due to a vendee who knows, or by the exercise of reasonable diligence could know, that his debtor is acting as agent," and that the principal, upon discovery of such unauthorized sale, may repudiate it, and recover possession of the article attempted to be sold. *Smith* v. *James,* 53 Ark. 135. This principle is so well settled by the authorities that further citation is unnecessary.

It is contended, however, that the evidence in this case is insufficient to warrant the jury in finding that Grooms was aware, or by the exercise of reasonable diligence could have ascertained, that he was dealing with one who was acting as agent for another. In other words, that Grooms believed Neff to be the owner of the business, and was unaware of the corporate existence of the Neff Harness Company. It is true that Grooms testified that he thought Neff owned the business, but we can not say that there

was entire absence of evidence to justify the finding of the jury. The plaintiff was a corporation duly organized under the laws of this State. Its articles of incorporation were on record in the office of the Secretary of State, and in the office of the county clerk of Pulaski County. It was openly doing business under its corporate name, and Grooms was doing business in the same city, and had previously had repeated transactions with the company. He was repeatedly in and about the place of business of the company, and came in contract with other employees of the company. The fact that plaintiff was doing business under its corporate name did not necessarily carry information to all who dealt with it that it was a corporation; but we can not say, under all the circumstances of the transactions with Grooms, that the jury were not warranted in concluding that he knew, or had information sufficient to put him on inquiry, that he was dealing with an agent. It was not necessary that he should have known the precise limitations upon Neff's authority. He was bound to know, when he knew that he was dealing with an agent, that the latter had no authority to sell the goods of his principal in satisfaction of his own debt.

The court, among other instructions given at the instance of each party, gave the following at the request of the plaintiff: "The court instructs the jury that if they find from the evidence that at the time of the transaction between W. L. Grooms and W. B. Neff the surrey in controversy was the property of the Neff Harness Company, and that the transaction was entered into between W. L. Grooms and W. B. Neff for the purpose of paying or securing payment of Neff's private debt, then you will find for the plaintiff, unless you further find that Neff Harness Company knew that Neff was dealing with the property, its property, as his own, and allowed him to do so, or that W. L. Grooms did not know, and had nothing to excite his suspicion, that Neff was acting as agent." The instruction is objected to on the ground that W. L. Grooms is not a party to the suit, and that it leaves out of consideration the claim of A. S. Grooms that he was an innocent purchaser of the surrey from his son W. L. Grooms. It is true that W. L. Grooms is not a party to this suit; but the sale was made to him, and the right of the plaintiff to recover the surrey is dependent upon the terms and circumstances

of that transaction. A. S. Grooms, according to the undisputed evidence, was not an innocent purchaser, and can claim no greater rights than those of his son and immediate vendor. He confesses that he bought the surrey from his son after the commencement and dismissal of the first suit. He had actual knowledge of the pendency of the suit, was present in court for the purpose of making defense for his son when the suit was dismissed. He therefore knew, when he received the surrey from his son, that the plaintiff had repudiated the sale, and was claiming title and right to possession of the surrey.

Other instructions given at the instance of plaintiff were objected to by the defendant, but for the reasons already stated we think the objections were not well founded.

Upon the whole, we think that the case was submitted to the jury upon instructions quite as favorable to appellant as the evidence warranted, and that the evidence was sufficient to justify the verdict.

Appellant also urges as grounds for reversal alleged improper conduct of counsel for the plaintiff in stating, in his closing argument to the jury, that W. B. Neff had never paid for his stock in the corporation, when there was no evidence in the record of that fact. The fact of Neff having failed to pay for his stock was immaterial, and could not have influenced the jury in arriving at a verdict. It was undisputed that Neff was acting in a representative capacity, and had no power to sell goods of the corporation in payment of his individual debt. Therefore it detracted nothing from his authority as agent and officer of the corporation to say that he had not paid for his stock.

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

ON REHEARING.

Opinion delivered July 9, 1906.

McCULLOCH, J. The defendant requested the court, at the close of the plaintiff's testimony, to peremptorily instruct the jury to return a verdict in his favor. This was refused, and the defendant introduced testimony.

We held on the consideration of the case that the evidence was sufficient to warrant the verdict, but counsel for appellant ask us now to say whether the plaintiff's testimony, without being supplemented by that introduced on behalf of defendant, was sufficient to sustain the verdict; and, if it was not, to reverse the judgment because of the court's refusal to give the peremptory instruction. They contend that the defendant did not waive his exception to the court's refusal to give a peremptory instruction at the close of plaintiff's evidence by introducing evidence which supplied the defects in the proof, and justified the verdict.

A demurrer to the evidence, as a means of challenging its sufficiency, is unknown in our code of practice.

The defendant may, however, at the close of the plaintiff's evidence, test its legal sufficiency by a request for a peremptory instruction in his favor. If, after a denial of the request, he introduces evidence which, together with that introduced by the plaintiff, is legally sufficient to sustain the verdict, he waives the error of the court in refusing to give the instruction.

After verdict the only method of challenging the sufficiency of the evidence is to assign in the motion for new trial, as ground therefor, that "the verdict is not sustained by sufficient evidence." On appeal this raises that question, and in testing the sufficiency of the evidence the court must consider *all* the evidence, whether introduced by the plaintiff or by the defendant. So, in testing the correctness of the ruling in denying a request for peremptory instruction, regardless of the time when the request is made, this court must look to all the testimony introduced, and will not reverse the case on account of the trial court's refusal to give the request, even though the evidence was insufficient at the time the request was made, if upon the whole case there is sufficient to sustain the verdict. This is but another way of saying that the defendant, by introducing evidence sufficient to sustain a verdict against himself, waives an error of the court in refusing his request for a peremptory instruction, at the close of the plaintiff's evidence. This is the rule of practice adopted and steadily adhered to in the Federal courts, and which we think is correct. *Grand Trunk Ry. Co.* v. *Cummings,* 106 U. S. 700; *Accident Ins. Co.* v. *Crandal,* 120 U. S. 527; *Union Pac. Ry. Co.* v. *Daniels,* 152 U. S. 684.

The evidence introduced by the plaintiff was sufficient to justify the verdict in its favor. It established the fact that the sale made by Neff to W. L. Grooms in satisfaction of his own debt was unauthorized. This cast the burden upon the defendant, A. S. Grooms, of showing that W. L. Grooms was innocent of knowledge of Neff's lack of authority, and also that he (defendant) was an innocent purchaser from W. L. Grooms for value and without notice of any defects in his title. He attempted to prove these facts, but failed. So at all stages of the trial there was evidence sufficient to sustain a verdict for plaintiff.

Rehearing denied.

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GRIFFIN v. DUNN.

Opinion delivered June 18, 1906.

1. HOMESTEAD—INVALIDITY OF PROBATE SALE.—The probate court has no jurisdiction to order the sale of the homestead of a decedent for the payment of his debts subject to the rights therein of his widow. (Page 410.)
2. STATUTE OF LIMITATIONS—HOMESTEAD—ABANDONMENT BY WIDOW.—While the statute of limitations does not run against a cause of action in favor of the heirs for recovery of the homestead during occupancy by the widow, an attempt by her to alienate the homestead operates as an abandonment of the homestead, in which event the right of action of the heirs becomes complete, and the statute of limitation begins to run against them. (Page 410.)
3. SAME—JUDICIAL SALES.—Kirby's Digest, § 5060, providing that "all actions against the purchaser, his heirs or assigns, for the recovery of lands sold at judicial sales shall be brought within five years after the date of such sale, and not thereafter," applies to the case where the right of action accrued after the date of such sale and within the period of five years, provided that the period of time between the completion of the right of action and the expiration of five years from date of sale is not too short to allow a reasonable opportunity within which the right may be asserted. (Page 411.)

4. HOMESTEAD—CONVEYANCE BY WIDOW—DOWER.—Conveyance of her deceased husband's homestead by a widow carries with it an equitable transfer of her unassigned dower right, but this outstanding right did not postpone the heir's right of entry. (Page 412.)
5. WIDOW'S QUARANTINE—ABANDONMENT.—The widow's right to hold the dwelling house and farm attached until dower shall be assigned is a personal privilege, which is not assignable; and while she may rent out the farm, and receive the rents and profits, she can not convey the land or transfer her rights; if she does, she thereby abandons the land, and the heir's right of entry becomes complete, subject only to the right to have dower assigned. (Page 412.)

Appeal from Johnson Chancery Court; *Jeremiah G. Wallace,* Judge; reversed.

Cravens & Covington, for appellants.

The sale of the homestead by the administrator was void. 47 Ark. 445; 50 *Id.* 729; 49 *Id.* 75; 56 *Id.* 565; 37 *Id.* 316. Since the decision in 47 Ark. 445, the sale of a homestead may be conceded to be void, but prior to the act of 1873 such sales were common. 37 Ark. 316; 40 *Id.* 17. The sales were treated as void only as to the interests of the minors. But plaintiffs are estopped. 12 Am. & Eng. Enc. Law, pp. 542-8; 72 Ark. 446; 2 Herman on Estoppel and Res Judicata, secs. 937-8-9, 951, 954, 958; 24 Ark. 131, etc. They are also barred by laches and limitation. 75 S. W. 692; 61 Ark. 575; 52 Fed. 627; 35 N. E. 315; 30 *Id.* 874; 71 Ark. 209.

T. B. Pryor, for appellee.

The sale was void. 47 Ark. 445, 455. A married woman is not barred by the seven year statute of limitations. Nor by the five year statute as to judicial sales. 53 Ark. 410. The doctrine of laches does apply. 67 Ark. 320; 70 *Id.* 371. No estoppel is shown.

McCULLOCH, J. R. R. Posey owned and occupied as his homestead a quarter section of land in Johnson County, and died in August, 1876, leaving surviving him his widow, Sarah Posey, and daughter, Martha R. Dunn, who was then an adult married woman. Her coverture continues to the present time. The tract of land was by an order of the probate court set apart to the widow as her homestead, but in June, 1878, the entire tract

was sold, subject to the homestead right of the widow, by the administrator of the estate of said decedent for the purpose of raising funds to pay the debts of the estate, and was purchased by F. R. McKinnon. The sale was ordered and confirmed by the probate court. In November, 1878, McKinnon and Mrs. Posey, the widow, presumably acting under the belief that the sale made by the administrator subject to the homestead right of the widow was valid, and that McKinnon had obtained title to the land subject only to the widow's homestead right, exchanged conveyances, whereby McKinnon conveyed to the widow the west half of the tract, and she conveyed to him the east half. Appellants hold the said east half, containing 80 acres, under mesne conveyance from McKinnon. The widow died in July, 1901, and in September, 1903, appellee Martha R. Dunn and R. O. Herbert, her grantee of an undivided interest, brought ejectment to recover possession of the land. Appellants, among other defenses, alleged adverse possession held by them and their grantors since the date of the deed from Mrs. Posey to McKinnon in 1878, and pleaded the five year statute of limitation under the judicial sale made by the administrator. The defendants also pleaded certain equitable defenses unnecessary to enumerate here, and made their answer a cross-complaint, containing a motion that the cause be transferred to the chancery court, which motion was granted. Upon final hearing a decree was rendered in favor of the plaintiffs for the recovery of the land and rents, but allowing the defendants for taxes paid, and also for a portion, by way of subrogation, of the amount of the probated claims against the estate of Posey for the payment of which the land was sold by the administrator.

The sale of the homestead by the administrator was void because the court had no jurisdiction to order it. *McCloy* v. *Arnett,* 47 Ark. 445; *Stayton* v. *Halpern,* 50 Ark. 329; *Nichols* v. *Shearon,* 49 Ark. 75; *Bond* v. *Montgomery,* 56 Ark. 563.

The statute of limitation does not run against a cause of action in favor of the heirs for recovery of the homestead during occupancy by the widow, but an attempt by her to alienate the homestead is ineffectual, and operates as an abandonment of the homestead claim. In the event of such abandonment the right of action of the heirs becomes complete, and the statute of limita-

tion begins to run against them. *Garibaldi* v. *Jones,* 48 Ark. 230; *Killeam* v. *Carter,* 65 Ark. 68; *McAndrew* v. *Hollingsworth,* 72 Ark. 446.

In *Kessinger* v. *Wilson,* 53 Ark. 400, the five year statute of limitation under a judicial sale was pleaded against adult heirs whose right of action did not accrue until the coming of age of an infant heir more than ten years after the date of the sale. The court held that the statute ran from the date of the sale, but did not apply to a cause of action which arose in favor of the adult heirs after the expiration of five years from the date of the sale. The court there said: "It is manifest that the statute was never intended to be applied in such cases, but that its object was to require all parties to bring suits against purchasers at judicial sales within five years after the date of the sale for the enforcement of only such rights to recover the land sold as can be enforced in an action brought within that time, and to bar the recovery of such rights in any suit brought thereafter." The cause of action asserted by the plaintiff in the case at bar arose within five years from the date of sale. It arose upon the abandonment of the homestead by the widow in about five months after the sale, and, according to the construction of the statute in *Kessinger* v. *Wilson, supra,* was barred at the expiration of five years from date of the sale. It is said that the statute should be construed to apply only to causes of action for recovery of land which were complete and capable of being asserted when the sale was made, and to no other. The majority of the court are of the opinion that this is not the effect intended to be given to the statute by the framers thereof. There is certainly no reason found, either in principle or from the language of the statute, why it should not apply to all causes of action which come into existence and are complete within the period of five years from the date of the sale, provided that the period of time between the completion of the cause of action and the expiration of five years from date of sale is not too short to allow a reasonable opportunity within which the right may be asserted. A period of time too short for the reasonable assertion of the right would be equivalent to no time at all, and would be the same as if the right did not accrue within the five years. The statute plainly reads that "*all* actions against the purchaser, his heirs or assigns, for

the recovery of lands sold at judicial sales shall be brought within five years after the date of such sale, and not thereafter." Kirby's Digest, § 5060. While it does not apply to those who do not have a right of action within five years from the date, yet it would circumscribe the comprehensive language of the statute to say that it does not apply to causes of action which arise after the sale but within that period.

In addition to the homestead right, the widow had the right to claim dower in the land, which was never assigned, and she might have asserted this right after abandonment of the homestead. She also had the right to hold possession of the dwelling house and farm thereto attached until the dower should be assigned. Kirby's Digest, § 2704. The further question is, therefore, presented whether or not these two rights, or either of them, that is to say, the widow's unassigned dower right and her right to tarry in the mansion or chief dwelling house until dower should be assigned, postponed until the death of the widow the accrual of the cause of action of the heir to recover possession after the attempted alienation of the premises by the widow which resulted in the abandonment of her homestead right.

The conveyance of the land by the widow carried with it an equitable transfer to the grantee of her unassigned dower right (*Weaver* v. *Rush,* 62 Ark. 51), but this outstanding right to have dower assigned did not postpone the heir's right of entry. *Carnall* v. *Wilson,* 21 Ark. 62; *Padgett* v. *Norman,* 44 Ark. 490; *Barnett* v. *Meacham,* 62 Ark. 313.

The widow's right to hold the dwelling house and farm attached until dower shall be assigned is a personal privilege, and not an estate in the land which can be transferred to another. She may rent out the farm and receive the rents and profits, but can not convey it or transfer her rights. If she does, she thereby abandons it, and the right of entry of the heir becomes complete, subject only to the right to have dower assigned. *Padgett* v. *Norman, supra; Garibaldi* v. *Jones, supra; Morton* v. *Morton,* 112 Ky. 706; *Burk's Heirs* v. *Osborne,* 9 B. Mon. 579; *Norton* v. *Norton,* 94 Ala. 481; *Wallis* v. *Doe,* 2 Sm. & M. (Miss.), 220.

It follows that the right of action of the plaintiff Mrs. Dunn was complete from the date of conveyance executed by the widow to McKinnon, and was barred when this action was commenced.

The statute contains no exception in favor of married women.

The decree is therefore reversed, and the cause remanded with directions to enter a decree dismissing the plaintiff's complaint for want of equity.

HILL, C. J., (dissenting.) *Kessinger* v. *Wilson,* 53 Ark. 400, decided that the five years statute of limitations in favor of purchasers at judicial sales did not apply to causes of action which did not accrue until after five years from the sale, and as to such causes of action this statute had no application, and for the limitation of such actions some other statute should be looked to. The logic of that decision requires some other than the five years statute to be looked to to find the proper limitation of this action.

At the time of sale the action had not accrued, and the case was then exactly like *Kessinger* v. *Wilson.* The statute in terms runs from the date of sale. If at the date of sale the cause of action had not accrued, this particular statute could not apply. Six months after the sale this cause of action accrued by the widow abandoning her homestead right, and the limitation should run from that period, and which statute should apply? One dating from a sale when that sale had taken place six months prior thereto? The beginning point of limitation is the abandonment by the widow, and this decision takes that point, and fits it to a statute which names another point, the sale, as a starting point. To find the limitation in such cases, find the starting point, count out the time from the date of sale to this starting point, and the remainder is the period of limitation. In this case it is four years and a half. If the widow had abandoned her rights four years and a half after the sale, then the limitation would be six months. If too short to give an opportunity to bring the action, then the court says that this statute does not apply, and it will be treated like it did not accrue within the five years. Yet the Legislature intended five years to be the limitation, in all cases where this statute applied, and never contemplated the movable period, long or short, according to each case.

The error of such construction is in substituting some other starting point than that named in the statute. The statute fixes the sale as the starting point; but it was ruled in *Kessinger* v. *Wilson* that in cases where said statute could not apply some

other statute should be looked to to find the limitation, and that would be the case here. The court lets in the five years statute on the happening of a subsequent contingency, and puts it into operation from the prior date.

I can not concur in this construction, and think this strange running of the five years statute should be avoided by sticking to the text of *Kessinger* v. *Wilson,* and holding that it did not apply, and looking to a statute which does apply from the happening of the contingency which puts it in motion, the seven-year statute.

COLLIER v. TRICE.

Opinion delivered June 25, 1906.

1. ADMINISTRATION—AUTHENTICATION OF ASSIGNED DEBT.—Under Kirby's Digest, § 118, relating to the probate of claims against estates of deceased persons, which provides that, "if the debt be assigned after the death of the debtor, affidavit shall be made by the person who held the debt at the death of the debtor, as well as the assignee," it is not contemplated, where the debt is assigned after it has been presented, with proper authentication, to the executor or administrator, that any further or additional authentication should be necessary. (Page 416.)
2. PARTY—ASSIGNOR.—It is only where the assignment of a thing in action is not authorized by statute that the assignor is required, by Kirby's Digest, § 6000, to be made a party. (Page 417.)
3. WITNESS—TRANSACTIONS WITH DECEDENT.—Under Const. 1874, sched. 2, providing that "in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward unless called to testify thereto by the opposite party," the ground of disqualification is not the interest of the witness, but the fact that he is party to the suit. (Page 418.)

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

Johnson & Huddleston, for appellant.

1. The claim was not properly authenticated. Kirby's Digest, § 118. The statute directing a nonsuit if authentication is not made is peremptory. 30 Ark. 756; 48 Ark. 304.

2. The claim was never, in fact, assigned. Presentation of the claim by Crawford, duly authenticated, was, in effect, the beginning of suit (see 28 Ark. 238), and there was no effort to comply with the statute (Kirby's Digest, § 4457) with reference to the sale of a cause of action after suit filed. Crawford was therefore a necessary party plaintiff. 10 Ark. 304; 47 Ark. 541; 46 Ark. 420; 57 Ark. 496; 69 Ark. 62; Kirby's Digest, § 6000.

3. The testimony of Crawford as to transactions and conversations had with deceased was not admissible. 70 Ill. 144; 14 S. W. 157; 116 Pa. 308; 8 Ala. 846; 15 Ala. 618; 50 Ala. 470; 56 Ill. App. 280; 73 Me. 345; 26 Ark. 477; 48 Ark. 133; 75 Ga. 246; 64 Mo. 142; 3 Mont. 351; 50 Ala. 470.

J. D. Block, W. S. Luna and *F. H. Sullivan,* for appellees.

1. The section urged by appellant (Kirby's Digest, § 118) is not to be taken alone, but is evidently to be taken with those which accompany it. Kirby's Digest, § § 113, 114, 124, 126. It follows that the provisions as to verification have to do with the presentation of the claim *to the administrator.* If the verification answer the statutory requirements under conditions existing when the claim is exhibited to the administrator, no further or additional verification is afterwards necessary. 21 Ark. 474; 63 Ark. 556.

2. If notice was necessary from appellees to the administrator of intention to present the claim to the probate court, he waived it by appearance in that court, participating in the trial and by appeal to the circuit court. 19 Ark. 484; 20 Ark. 424. Presentation of the claim to the administrator is not the beginning of a suit. He has no judicial powers. It is the exhibition of the demand to the administrator, and not an action upon it, that stops the statute of non-claim. Kirby's Digest, § 110, subdiv. 5; 21 Ark. 474; 29 Ark. 243; 37 Ark. 155. Kirby's Digest, § 4457, has no application to the condition here.

3. There was no error in admitting Crawford's testimony. Kirby's Digest, § 6006; 23 Ark. 30; 15 Enc. Pl. & Pr. 747 *et seq.;*

Kirby's Digest, § 509; 47 Ark. 541; 1 Ark. 220; 37 Ark. 39; 44 Ark. 564; 31 Ark. 603; 5 Ark. 649; 34 Ark. 531; 37 Ark 556; *Ib.* 200; 46 Ark. 306; 63 Ark. 556; 19 Fed. 286; 42 Fed. 488; 64 Fed. 267; 45 Me. 165; 73 Me. 342; 47 Mo. 145.

BATTLE, J. On the 16th day of January, 1883, H. W. Glasscock executed to J. W. Crawford his promissory note for the sum of $800 and ten per cent. per annum interest thereon from date. The note was due and payable to the order of Crawford twelve months after date, the 16th day of January, 1883. Sundry credits, beginning in 1886 and ending in 1889, were indorsed upon the note. On the 25th of January, 1901, Glasscock died, and on the 4th day of March, 1901, M. F. Collier was appointed administrator of his estate. On the 19th of November, 1902, Crawford presented the note, properly authenticated, to the administrator for allowance, who rejected the claim, and waived notice of presentation to the probate court. Thereafter Crawford, for a valuable consideration, assigned the note to H. S. Trice, J. R. Miller and J. W. Weatherby. No further affidavit of authentication was made by the assignees or either of them. The claim was presented to the probate court and allowed, and the administrator appealed to the circuit court.

In the circuit court the administrator moved to dismiss the action because the claim was not properly authenticated, which was overruled. He then moved to make Crawford a party plaintiff, which was overruled. He then answered and pleaded the five years statute of limitation.

In the trial J. W. Crawford was permitted to testify, over the objections of the administrator, as to transactions with Glasscock, the deceased. His testimony, if true, proved that the note was executed by the deceased, and was given for a valuable consideration, and that the credits indorsed thereon were for amounts actually paid on the days of their respective dates.

Plaintiffs again recovered judgment against the administrator for the balance due on the note, and he appealed.

The first contention of appellant is that appellees should have verified the claim after it was assigned to them. The basis of this contention is section 118 of Kirby's Digest, which is as follows: "If the debt be assigned after the death of the debtor, affidavit shall be made by the person who held the debt

at the death of the debtor, as well as the assignee." Does this mean that the affidavit must be made by the assignee when the assignment has been made after the claim has been presented to the administrator? Section 113 of the Digest provides how a claim shall be presented to the administrator or executor. Section 114 provides how it shall be authenticated. Section 115 provides that, "before any executor or administrator shall pay or allow any such debt, the same shall be sworn to as aforesaid." Section 118 provides how it shall be authenticated when it has been assigned after the death of the debtor. All these sections as to authentication manifestly have reference to the time when the claim shall be presented to the administrator or executor for allowance, and have no reference to an assignment made after such presentation. After it has been presented to the administrator or executor, without providing for any other authentication, section 123 provides: "It shall be the duty of every person having claims against the estate of any deceased person, after having exhibited his claim to the executor or administrator, as required, and after the same has been approved and allowed by him, to file the same, together with a copy of the notice served on the executor or administrator, in the office of the clerk; and the said clerk shall, at the next term of the court after the filing of such claim, present the same to the court for classification," etc. Section 124 provides: "If any executor or administrator shall refuse to allow any claim or demand against the deceased, after the same may have been exhibited to him in accordance with law, such claimant may present his claim to the court for allowance," etc. And section 126 provides: "No demand against any estate shall be presented to the court for allowance until after the executor shall have refused to allow and class the same," etc. All these statutes show that the claim must be authenticated in the manner indicated when presented to the executor or administrator, and it necessarily follows that if the authentication answers the statutory requirements, under conditions existing when the claim is exhibited to him, no further or additional authentication afterwards becomes necessary.

Appellant's next contention is that Crawford should have been made a party. This is not true. The note sued on was assignable. It is only when the assignment of a claim or thing in

action is not authorized by the statute that the assignor must be made a party. Kirby's Digest, § 6000.

Crawford was a competent witness. He was not rendered incompetent by section 2 of the schedule to the Constitution of 1874. That section provides: "In civil actions no witness shall be excluded because he is a party to the suit or interested in the issues to be tried. Provided, that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party." Under this section only parties to actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them are incompetent to testify. Interest can not disqualify. Crawford was not a party to this action, and was a competent witness. *Bird* v. *Jones,* 37 Ark. 195; *Bozeman* v. *Browning,* 31 Ark. 364; *McRae* v. *Holcomb,* 46 Ark. 306; *Lawrence* v. *La Cade,* 46 Ark. 378; *Stanley* v. *Wilkerson,* 63 Ark. 556; *Potter* v. *Bank,* 102 U. S. 163.

Judgment affirmed.

HILL, C. J., not participating

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FOSTER v. BEIDLER.

Opinion delivered June 25, 1906.

1. RESULTING TRUST—SUFFICIENCY OF EVIDENCE.—To establish a resulting trust in land by parol, the proof must be full, clear and convincing. (Page 425.)

2. EQUITY LOOKS AT SUBSTANCE.—An execution sale of trust property, ostensibly for debts of the trustee but in reality for debts of the *cestui que trust,* will not be set aside at the instance of a privy of the latter, as equity looks at the substance, and not the form, of the transaction. (Page 427.)

Appeal from Miller Chancery Court; *James D. Shaver,* Chancellor; reversed.

STATEMENT BY THE COURT.

This suit is by appellee against appellant Foster *et al.* to set

aside certain deeds. The complaint alleged that appellee is the only heir of H. M. Beidler, and reached his majority on July 31, 1897; "that H. M. Beidler some time before his death was the owner of a large landed estate in, at and near the city of Texarkana, Arkansas; that he became involved in domestic difficulties, ending in a separation and divorce from his wife, Amanda J. Beidler; that his business was that of speculator in real estate, and that he was threatened and feared that his former wife would bring an action against him for alimony, and thus tie up his property, and interfere with and prohibit his making sales and conveyances to those desiring to purchase, and to provide against which he allowed a large amount of his said property to go delinquent for the non-payment of taxes, and allowed the same to be sold to the State of Arkansas for the non-payment of taxes, and afterwards re-purchased it from the State, taking the title in the name of the defendant, J. H. Beidler, who was his brother, and who was to hold it for him; that, to facilitate sales by the said J. H. Beidler, he afterwards on December 22, 1887, executed deed to the property or the lands for the nominal consideration of $7,000, and on April 6, 1888, he executed a deed for certain other property to the said J. H. Beidler for the nominal consideration of $5,000."

Then follows a recital of other alleged facts to show that J. H. Beidler held the lands so conveyed to him in trust for H. M. Beidler. The complaint then alleges that J. H. Beidler conveyed certain portions of the property to two of his children without consideration and in violation of the alleged trust, and continues in substance as follows: "The said J. H. Beidler purchased large property in Battle Creek, Michigan, and executed his notes therefor, and on February 1, 1890, Joseph L. Foster brought suit against him, and caused an attachment to be levied upon the property heretofore referred to; that said Foster obtained judgment for a large sum in said case, and caused all of said property to be sold thereunder, and bought said property; that said sales were confirmed, and deed executed to the said Joseph L. Foster, who has made deed to numerous parcels of said lands, and on October 10, 1894, conveyed the remainder by quitclaim deed to his son, W. J. Foster, who now holds and controls the same; that all said conveyances should be set aside, save con-

veyances made by X. F. Beidler to innocent purchasers." The prayer was for the setting aside of conveyances and revesting the property in the plaintiff.

Appellant demurred to the complaint, which was overruled, and he saved his exceptions. Appellant then filed an answer, which, after certain denials of material allegations, is as follows:

"That a large property was purchased near Battle Creek, Michigan, by the said J. H. Beidler, who executed his notes therefor; that Joseph L. Foster, father of this defendant, now deceased, did bring suit against J. H. Beidler on said notes; attachments were issued and levied against the property described in the complaint, which was in the name of J. H. Beidler; said Foster obtained judgment, and said property was sold by order of the court under the attachment, which was duly sustained; and was also in part sold under execution; and both attachment and execution sales were confirmed by the court, and the sheriff of Miller County, Ark., executed to said J. L. Foster his deeds for said property; that, if it be true, as alleged in plaintiff's complaint, that H. M. Beidler was using his property and his brother J. H. Beidler's, name, for the purpose of selling his interest in the real estate to avoid his obligation to his wife for dower and alimony, as admitted in the complaint, it is also true that said Battle Creek, Michigan, property was purchased by H. M. Beidler in the name of J. H. Beidler, for the same purpose; and if, in fact, said J. H. Beidler was trustee for the Texarkana property, he was clothed by said H. M. Beidler with the title to the Texarkana property, whereby the said H. M. Beidler was enabled to purchase the Battle Creek, Michigan, property in the name of the said J. H. Beidler; and if it be true that the said J. H. Beidler was acting as trustee only, the Battle Creek, Michigan, debt was in fact the debt of H. M. Beidler, made in the name of J. H. Beidler, and upon the faith of the property held by the said J. H. Beidler; and this arrangement was made by the said H. M. Beidler with the said J. L. Foster, whereby the Texarkana property in the name of J. H. Beidler was property subject to the debt for the Battle Creek, Michigan, property by the said H. M Beidler, in the name of said J. H. Beidler; that the debt effected by the said H. M. Beidler with the said Joseph L. Foster was

made by the said H. M. Beidler upon the faith of the Texarkana property, and it was intended that any and all of said Texarkana property would respond to the payment of the debt of the Battle Creek, Michigan, property, if the same was not paid at maturity. The defendant states that H. M. Beidler, and any one claiming under him, can not in equity now be heard to claim that the Texarkana property was not subject to the payment of said debt."

Defendant denies that any of the property sold under attachment or execution to J. L. Foster should be declared the property of plaintiff; denies that J. L. Foster or this defendant, W. J. Foster, or his vendees are not in position to claim title tc said property; denies that they hold the same without right; then follow allegations of payment of taxes and setting up statute of limitations of seven years. There was a written stipulation that all the exhibits were to be considered in evidence, and that appellant had been in possession since the execution of the deeds under the judgment and execution in the case of J. L. Foster *v.* J. H. Beidler, which were exhibits, and that appellant and those under whom he claimed had paid all taxes since 21st of February, 1890; that all papers in the case of J. L. Foster *v.* J. H. Beidler, the attachment suit, were in evidence, and that J. L Foster purchased the land at attachment and execution sales and credited his judgment in the circuit court with amount of his bid.

The deposition of appellee, so far as material, showed that he was the son of H. M. Beidler, the deceased, and his only heir; that he had heard from his father, when a small boy, that his uncle had no interest in the property, and heard his father say to his uncle in Battle Creek, Michigan, "Now, brother, if anything happens to me, you will, of course, deed all the property to the boy;" and my uncle said: "Why, certainly, brother, there can be no trouble about that;" that no one was present; that he had been led to believe that his father's estate had been held from him, but could get no explanation from his uncle; he was a little over twelve years of age when his father died; can not give dates of the conversation which he stated occurred between his father and his uncle, but thinks it was only a few months before his father's death. He had been on friendly terms with his uncle all the time.

J. H. Beidler testified that he held the property in suit under

deeds which had been executed to him in trust by his brother, H. M. Beidler. He paid nothing for the property; did not know why it was put in his name. It was understood that he was to make deeds to whomsoever H. M. Beidler directed. He reconveyed the property to H. M. Beidler a few days before the latter's death, except that which he had caused to be deeded to purchasers before his death. He delivered the deeds to his brother before his death, and after his death the deeds and other papers were returned to him. He could not find the deed of the Texarkana property among the papers; says he told the plaintiff that he would do right by him, and did this he says because, being a non-resident, he could not administer on the estate, and thought he could take better care of the estate in the shape it was than to have it administered by strangers. When asked to explain why he and his agent continued in possession of the property conveyed to him by H. M. Beidler, and continued to sell and offer said property for sale after the death of H. M. Beidler, if he knew it did not belong to him, says he did this to meet expenses and outlay; explains his conveyance to his son, X. F. Beidler, by claiming it was for money advanced to pay taxes and traveling expenses, but makes no explanation of the conveyance to his daughter, Grace; does not undertake to account for the proceeds of any of his sales, except in the general way of saying they were consumed in paying taxes and expenses; says his son knew nothing about his having the deeds to any of H. M. Beidler's property until last summer, when J. D. Cook came to Lincoln; denies concealing them to defraud the plaintiff; says plaintiff had been angry with him for years on account of not being satisfied with his explanations about his father's estate. He admits mortgaging the property, long after H. M. Beidler's death, but says he did not do it for the purpose of defrauding any one; says: "At the time I thought it for the best." When asked what became of the money, says: "I do not know." When asked when plaintiff was informed and had knowledge of such mortgages, he answers: "I can not say; I do not know; never from me." Says the property at Texarkana was not conveyed to him until long after the debt was created on the Michigan property. He states that in the purchase of the Michigan property H. M. Beidler made the contract, and was the actual purchaser; that he permitted his

name to be used, and supposed Foster understood his position. That he merely lent his name; that all the arrangements were made by H. M. Beidler as to the title of the Michigan property and the execution of the notes in the name of J. H. Beidler, and for his own (H. M.'s) benefit; that he signed the notes because his brother requested it. That his guardian has supported plaintiff, but he is not familiar with the guardianship, and says he is not unfriendly to plaintiff, but that plaintiff has not been cordial, but unfriendly, for many years.

The decree of the chancellor in this case finds that the title to all said land is in the plaintiff, S. R. Beidler, and that J. L. Foster obtained no title by reason of his purchase or the proceedings in said case against J. H. Beidler, but S. R. Beidler was and is the rightful owner of all of said land, and entitled to the possession thereof in his own right; describes the land; finds that plaintiff commenced this action on May 5, 1899, and within three years after having reached his majority; and decrees possession of the premises to said S. R. Beidler and all cost against W. J. Foster, who prosecutes this appeal.

Webber & Webber and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

1. A conveyance to defeat a wife's claim for alimony is fraudulent. Wait, Fr. Conv. § 70; Bigelow, Fr. Conv. 147; Bump, Fr. Conv. 505. This is an attempt by the heir of the grantor to set aside a fraudulent conveyance. He is bound by it. Bump, Fr. Conv. 444; Wait, Fr. Conv. § 121. See also 47 Ark. 301; 34 Ark. 392; 52 Ark. 171; *Ib.* 390; 26 Ark. 317; 51 Ark. 390; 67 Ark. 325; 57 Ark. 610.

2. Before a court of equity will set aside a judgment and execution at law, it must be made to appear that the party seeking relief has a meritorious defense. 50 Ark. 458; 52 Ark 80; 51 Ark. 34; 72 Ark. 106; 56 Ark. 546; 57 Ark. 602.

3. "To establish a resulting trust by parol, the evidence must be full, clear and convincing." 44 Ark. 365; 48 Ark. 169; 64 Ark. 156; 11 Ark. 82. In this case the evidence is not only not convincing, it is incredible and in every way discredited.

4. Appellee is barred by the statute of limitations. To begin a suit, not only must a complaint be filed, but summons

must be issued or a warning order entered. 10 Ark. 479; 20 Ark. 112; 47 Ark. 120; 62 Ark. 401. The filing of complaint in the clerk's office and publishing a warning order, without first entering it on the record, was not the institution of an action. This court found on former appeal that no warning order was entered as required by law. 71 Ark. 318. See also 55 Ark. 34. There was, therefore, no suit pending against appellant until he entered his appearance, which was more than 7 years after he acquired title, and more than 3 years after appellee reached majority. The former decision is the law of this case, and can not now be modified. 3 How. 413; 17 Wall. 283; 104 Fed. 647.

J. D. Cook, for appellee.

1. An incomplete sale, when a deed has been executed and the consideration has not been paid, and when there is no intention of gift or sale on time, makes a resulting trust in favor of the vendor, not for the purchase price, but for the land. 33 Ark. 762. A resulting trust may be proved by parol. 45 Ark. 472; 40 Ark. 146; 48 Ark. 169; 9 Ark. 518; 11 Ark. 82. As to the property forfeited for taxes, when it was purchased from the State by H. M. Beidler and paid for by him, and the deeds taken in the name of J. H. Beidler, this created a resulting trust which took the transactions as to all these transfers out of the statute of frauds. Sand. & H. Digest, § 4381; 9 Ark. 518; 30 Ark. 239. An estate purchased by one and deed taken in the name of another creates a resulting trust in favor of the purchaser. 80 Ala. 142; 58 Cal. 621; 40 Ark. 62; 63 Ga. 522; 11 Ill. 412; 34 Ind. 382; 17 Wall. (U. S.) 44.

2. Appellant Foster, having purchased at his own sale, receiving deed from the sheriff, and giving credit on his judgment for the purchase price, was not an innocent purchaser, and took subject to the trust. 44 Ark. 48; 30 Ark. 249; 31 Ark. 253; 58 Ark. 252; 71 Ark. 318.

3. Before this court will hold the acts of H. M. Beidler to be fraudulent, it must affirmatively appear that some valid claim for debt or alimony existed against him, and that he had disposed of so much of his property that the remainder would be insufficient to meet the just demands of creditors or claimants.

4. To begin an action, it is not necessary that the summons be served; the requirements are that the complaint be filed

and summons issued. In this case, the defendants being non-residents, the warning order takes the place of the summons. It has been held that an irregular, if not a void, writ, is a compliance sufficient to stop the running of the statute. 11 Ark. 334; 12 Ark. 760; 8 Ark. 313; 10 Ark. 122; 13 Ark. 36; 47 Ark. 12; 62 Ark. 401; 57 Ark. 459. See also 22 Ga. 359. The testimony shows such fraud and bad faith on the part of J. H. Beidler, the original trustee, as to suspend the running of the statute and begin a new time limit when the fraud was discovered by appellee. 24 Ark. 556; 46 Ark. 170; *Ib.* 25; 52 Ark. 76; 48 Ark. 248.

WOOD, J., (after stating the facts.) 1. If we should concede that the complaint stated a cause of action, still the proof in our opinion was not sufficient to establish a resulting trust. To establish a resulting trust by parol, the proof must be "full, clear and convincing." *Camden* v. *Bennett,* 64 Ark. 156; *Crow* v. *Watkins,* 48 Ark. 169; *Johnson* v. *Richardson,* 44 Ark. 365; *Crittenden* v. *Woodruff,* 11 Ark. 82. To sustain appellee's contention, we must set aside solemn instruments of writing purporting to convey title absolute which were entered upon record. To sustain his contention, we also, in legal effect, must set aside the solemn judgment of a court of record that was sustained against J. H. Beidler as the apparent owner, and operated upon his property because it appeared to be in his name, and because he, by various conveyances and visible acts of occupation and control, had held out to the world that he was the absolute owner of the property. A judgment is demanded of a court of equity that will have this effect partly upon the testimony of the very man whose conduct in dealing with the property appellee himself denounces as "basely fraudulent." Appellee must not expect a court of chancery to give credit to the testimony of a witness (not against his interest) who he himself says, perpetrated "grievous frauds upon him." No weight should be attached to the testimony of J. H. Beidler in favor of appellee in establishing any independent fact necessary for recovery. For the facts show that, if he was a trustee, he robbed his dead brother's estate and perpetrated "gross frauds" upon his own nephew, while he was yet a boy of tender years. The testimony of this witness is utterly unworthy of belief. His

conduct through all those years *under his deeds* are of infinitely more force than his words at the trial. "Tell me what a man has done under an instrument, and I will tell you what it means." Then the only other proof is a statement by appellee himself that "he had heard from his father, when a small boy, that his uncle had no interest in the property, and heard his father say to his uncle, 'Now, brother, if anything happens to me, you will of course deed all of the property to the boy; and his uncle's reply, "Why, certainly, brother; there can be no doubt about that." The deeds which purport upon their face to convey the property in fee for a valuable consideration should not be canceled upon this proof. It does not come up to the standard. *Goerke* v. *Rodgers,* 75 Ark. 72; *McGuigan* v. *Gaines,* 71 Ark. 614. The testimony that "he had heard from his father when a small boy that his uncle had no interest in the property," as it appears in this record, was not competent to establish the fact that his uncle had no interest in the property. The declaration of the grantor in a deed which purports upon its face to be for a valuable consideration, and to convey the absolute title, can not be used to impair or impeach the title of the grantee in the deed, or those claiming through or under him. It is not shown that this statement was made in the presence of the grantee, under circumstances which required of him to affirm or deny the statement.

The testimony of appellee that he heard his father say to his uncle in Michigan: "Now, brother, if anything happens to me, you will, of course, deed all the property to the boy," conceding it to be true, is too indefinite to establish a resulting trust for the property in controversy. Moreover, this alleged conversation between father and uncle is said to have occurred when appellee was only about twelve years of age. After more than a dozen years had passed he testified to his recollection of the conversation. But he gives no minutiæ, he details no circumstances showing why a conversation between two grown people about a grave business matter should have found a lodgment in his memory to abide for all those years. Such recollections are not impossible, but, without any accompanying circumstances calculated to impress such conversation upon the child's mind, it seems improbable, if not unnatural, that he should have remembered it. It is

not "the way of a child." Such testimony is inherently weak, and not entitled to the probative force necessary to overcome written instruments, and to destroy titles acquired through reliance thereon.

2. Appellee's witness, J. H. Beidler, says that H. M. Beidler himself contracted the debt for the property in Michigan. H. M. bought the property in his brother's name and had his brother to execute the notes therefor, evidencing the debt which is the foundation of appellant's right to the property in controversy. If this contention were true, then indeed appellee would be "hoist with his own petard," for equity looks to the "*real thing*." According to the contention, the property purchased in Michigan was the property of H. M. Beidler, and J. H. Beidler was merely acting as the trustee of his brother, and held it as such for him. Then, of course, equity would not permit the burden of paying for it to be shifted on to the shoulders of the trustee and agent. So, while the suit in attachment really progressed against J. H. Beidler, he being the ostensible debtor and owner of the property in Arkansas and Michigan, it was in reality the debt of H. M. Beidler, and his property that was subjected to its payment. So, if appellee's contention in this regard were correct, it would furnish the strongest reason of all, in equity, why he could not recover. The decree of the Miller Chancery Court is therefore reversed, and the complaint of appellee dismissed for want of equity.

MCCULLOCH, J., concurs in the judgment.

BATTLE, J., not participating.

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79 427
80 220

BOURLAND v. MCKNIGHT.

Opinion delivered June 25, 1906.

1. LANDLORD'S LIEN—SUPPLIES—TAKING QUESTION FROM JURY.—In a contest between a landowner and a mortgagee over the proceeds of a sharecropper's interest in the crop, where the landowner's testimony tended to prove that by the terms of his contract with the sharecropper he was to receive one-half of the crop for the use of the land, and the team and tools to make the crop, and that from the proceeds of

the other half of the crop were to be deducted the sums due to the landowner for supplies and other necessaries furnished the sharecropper to make the crop, it was error to instruct the jury that a cow and calf and medicine and medical attendance do not constitute such supplies to make the crop as will be secured by the landowner's lien; the question whether these things were "supplies and necessaries" within the terms of the contract being for the jury. (Page 430.)

2. INSTRUCTIONS—PRESUMPTION.—Where an instruction is inherently defective, it will not be presumed, because the bill of exceptions does not purport to contain all of the instructions, that its defects were cured by others given. (Page 432.)

Appeal from Clark Circuit Court; *Joel D. Conway,* Judge; reversed.

STATEMENT BY THE COURT.

S. H. Bourland and his wife, Carrie Bourland, let C. D. Reynolds have land to cultivate during the year 1903. In the early part of that year Reynolds gave a mortgage or deed of trust to McKnight & Bro., merchants, to secure them for supplies to be furnished to him and for a debt which he owed them. During the year the Bourlands also furnished certain supplies to Reynolds, and at the end of the year he turned over the crop to them with directions that, after paying what was due them, they should pay the remainder of the proceeds of the crop to McKnight & Bro. Afterwards McKnight & Bro. brought this action against the Bourlands to recover $146.12 as for money had and received for them.

The Bourlands filed separate answers, in which they admitted that they had made a contract with Reynolds by which he had agreed to make a crop on the land of Mrs. Bourland. Mrs. Bourland alleged in her answer that the conditions of this contract were as follows:

"She was to furnish the land, team and tools to work the crop and feed for the team for which she was to receive one-half of the crop; the remainder of the crop was to belong to said C. D. Reynolds after he had paid her for any supplies, money or other necessaries that she might furnish him to make and gather said crop." She further alleged that after paying such debts only about three dollars remained due Reynolds, which she was willing to turn over to plaintiffs.

On the trial the court gave the following instruction asked by plaintiffs:

"The jury are instructed that the plaintiff had a lien upon the crop made in the year 1903 by C. D. Reynolds upon the place owned by the defendants, S. H. and Carrie Bourland, subject to the lien of said defendants for the rents and supplies furnished by them to make said crop. The jury are instructed that a cow and calf and medicine and medical attendance furnished by Dr. Bourland to said Reynolds's family do not constitute such supplies to make the crop with as will entitle the defendants to receive pay for the same before the plaintiffs' account furnished under their deed of trust, nor will the defendants be permitted to deduct the item of costs paid by Dr. Bourland on the security debt held by him against the said C. D. Reynolds as against the deed of trust held by McKnight & Bro."

But the court refused to give the following instruction asked by defendant:

"You are instructed that, if you find from the evidence that the defendants let C. D. Reynolds have land to cultivate and raise a crop of cotton and corn upon, and furnished tools, team and provender necessary to make the crop, and that the said Reynolds was to have a portion of the crop so made for his services, but that the defendants were the owners of the crop, and were to reserve out of the said Reynolds's part of the crop such sums of money as would pay them for the supplies and advances made to the said Reynolds, and that the remainder was to be turned over to the said Reynolds, then in that event the said Reynolds had no such interest in said crop that he could mortgage or sell until the same had been set apart to him, and your verdict will be for the defendant."

The jury returned a verdict in favor of plaintiffs for the sum of $61.60, and the defendants appealed.

Hardage & Wilson, for appellants.

The court should have instructed the jury upon the theory contended for by appellants that they were the sole owners of the crop, and that Reynolds had no interest in it, but was to receive a part of the crop as wages for his services. The testimony shows that the contract with Reynolds was not that of an ordinary share cropper, but that the crop was to be appellants' prop-

erty until his account, including medicines and medical attention, was fully paid. He had no title to any part of the crop until a settlement and what remained to him out of one-half the crop was set off to him. 48 Ark. 264; 32 Ark. 436; 34 Ark. 687.

John H. Crawford, for appellees.

A mortgage or sale by a share cropper of his interest in a crop is valid, and may be enforced to the extent of the cropper's interest. Kirby's Digest, § 5031; 48 Ark. 293; 54 Ark. 346. See also 69 Ark. 551; 34 Ark. 179; 43 Ark. 284. Since this is not an action in replevin, but for the value of the proceeds of Reynolds's part of the crop remaining after paying for the supplies furnished by the landlords, the instruction contended for by appellants was not applicable.

RIDDICK, J., (after stating the facts.) The questions in this case relate to a contract made by Mrs. Bourland with Reynolds for the cultivation of land owned by her. The contract was not in writing, and the evidence as to the terms of the contract was somewhat conflicting. The testimony of S. H. Bourland, the husband of Mrs. Bourland, who made the contract for her, tended to support the allegations of the answer, and to show that by the terms of the contract the title to the crop remained in his wife, the landowner, who was to receive one-half of the crop for the use of the land, team and tools, and that from the proceeds of the other half of the crop were to be deducted the sums due Mrs. Bourland for supplies and other necessaries furnished by her to Reynolds to enable him to make a crop, and that after paying such debts Reynolds was to receive any balance left. The testimony of Reynolds as to the terms of the contract was somewhat different from Bourland's, but the defendants had the right to have their theory of the case submitted to the jury. If this testimony of Bourland was correct, then Reynolds was only an employee, and not a tenant, and the title to the crop remained in the landlord. Reynolds, under such a contract as the answer set up, had the right to demand of the landlord only the balance of the proceeds of the crop left after paying the debts due her for money and supplies furnished to enable him to make the crop. If she furnished the tenant a cow and calf or medicines and services of a physician when needed by him to enable him to live and make the crop, she would under the terms of the contract, as shown by

Bourland's testimony, be entitled to hold the crop for the payment of such debts. *Tinsley* v. *Craige,* 54 Ark. 346; *Hammock* v. *Creekmore,* 48 Ark. 263; *Parks* v. *Webb,* 48 Ark. 293.

It follows from this that in our opinion the court erred in giving the instruction asked by the plaintiffs, and which is set out in the statement of facts, for that instruction told the jury as a matter of law that Mrs. Bourland had no right to hold the proceeds of the crop for the payment of the cow and calf sold by her or for the medical supplies furnished. If the contract provided that the employee was to receive only what was left of the proceeds of one-half of the crop after paying all debts due by him to the landlord, whether needed to enable him to make a crop or not, then Mrs. Bourland would have the right to hold the crop for any debt due from Reynolds to her. But if, as the answer alleged, the contract provided that Reynolds was to get one-half of the crop after paying for supplies furnished by Mrs. Bourland to him for the purpose of enabling him to make the crop, it would then be a question of fact whether he needed the cow and the calf or the other supplies furnished to enable him to make a crop, and whether they were furnished for that purpose or not; for, under such a contract, the landlord could deduct only supplies furnished to enable the tenant to make his crop. But, as milk is a common and useful article of diet, and as probably the cheapest way for a farmer to obtain it is to own a milch cow, such animals might be a part of the supplies needed by a tenant and his family to enable him to make a crop, just as provisions would be needed; while, on the other hand, if he bought them for speculation only, they would not be supplies for making a crop. So medical supplies and attention, when furnished or paid for by the landlord, might be necessary supplies, if needed to enable the tenant to go ahead with his work. But, under the evidence in this case, the questions arising concerning these matters were questions of fact which should have been submitted to the jury under proper instructions. The law relating to cases of this kind was very clearly stated in case of *Tinsley* v. *Craige,* 54 Ark. 347, and in *Hammock* v. *Creekmore* and *Parks* v. *Webb,* above cited.

We concur in the argument of counsel for appellees that the employee had the right to mortgage his interest in the crop; but

if, as the answer alleged, his interest was only what was left after paying all debts due the landlord for money or supplies to make the crop, the mortgagee can get no more than the employee could get. But, as the mortgage was valid to that extent, the instruction asked by the appellants was wrong, and was properly refused.

Counsel for appellees contend that the bill of exceptions does not show that it contains all the instructions given, but there is nothing in it that indicates that other instructions were given, and it would be a violent presumption to suppose that the other instructions could cure the defect of the one given, for it definitely stated that certain claims of the landlord must not be considered by the jury, which instruction, we think, under the evidence here was erroneous.

For the reasons stated the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

HILL, C. J., not participating.

Decree affirmed.

HILL, C. J., absent and not participating.

GUNTER v. STATE.

79 432
85 361

Opinion delivered June 25, 1906.

1. BURGLARY—CHICKEN HOUSE.—Entry of a chicken house is within the meaning of Kirby's Digest, § 1603, defining burglary as "the unlawful entering a house, tenement, railway car or other building, boat, vessel or water craft, in the night time, with the intent to commit a felony." (Page 433.)
2. SAME—SUFFICIENCY OF PROOF.—Proof that chickens were taken from a chicken coop is insufficient to sustain a charge of burglary in breaking and entering a "chicken house." (Page 434.)
3. SAME—UNEXPLAINED POSSESSION OF STOLEN GOODS.—Unexplained possession of all or of a part of property recently stolen will warrant a conviction of larceny, and also of burglary where the larceny is proved to have occurred at the time of the breaking and entry of the house. (Page 434.)

Appeal from Sebastian Circuit Court; *Styles T. Rowe,* Judge; reversed in part.

T. S. Osborne, for appellant.

1. Possession of part of stolen property is not sufficient to convict. 48 Cal. 123; 41 Tex. 289; 40 Mich. 292.

2. The statute on burglary does not include a "chicken house." Kirby's Digest, § § 1603-1608; 1 Blackstone, § 3. Proof of breaking a chicken "coop" is not sufficient to sustain a charge of breaking a chicken "house."

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

1. Clearly, under the evidence, appellant, eliminating the slow process of time and the friendly services of the hen and the incubator, "raised" the chickens, as he says, in one night.

2. The statute will support an indictment for the burglary of a chicken house. 43 Ark. 349; 34 Cal. 242; 105 Ga. 814.

McCULLOCH, J. The defendant, Will Gunter, was tried and convicted under an indictment containing two counts, one count charging him with the crime of burglary in breaking and entering the chicken house of George Maledon, with intent to steal, take and carry away the personal property of said Maledon, and the other count charging him with the crime of grand larceny in stealing 33 chickens of the value of more than $10, the property of said Maledon.

The sufficiency of the indictment was not questioned below, but it is contended here that breaking and entering a "chicken house" does not constitute burglary. The statutes of this State defining the crime of burglary are as follows:

"Sec. 1603. Burglary is the unlawful entering a house, tenement, railway car or other building, boat, vessel or water craft, in the night time, with the intent to commit a felony.

Sec. 1604. The manner of breaking or entering is not material, further than it may show the intent of the offender.

"Sec. 1605. If any person shall, in the night time, willfully and maliciously, and with force, break or enter any house, tenement, boat, or other vessel or building, although not specially named herein, with the intent to commit any felony whatever, he shall be deemed guilty of burglary."

It will be seen that this definition is sufficiently comprehensive to embrace any kind of house or building—any structure which is of such a character as to fall within the ordinary acceptation of those words, and which is capable of sheltering man or property of any kind. 6 Cyc. pp. 191, 192. Under similar statutes in other States chicken houses are held to be within the statutes. *People* v. *Stickman,* 34 Cal. 242; *Gillock* v. *People,* 171 Ill. 307; *Williams* v. *State,* 105 Ga. 814; *Willis* v. *State,* 33 Tex. Cr. App. 168.

The indictment sufficiently charges the crime of burglary, but the evidence does not sustain that charge. The prosecuting witness, Maledon, testified that he missed 33 of his chickens, and found where they had been taken out of the "coop" the night before through a hole cut in the wire around the coop." He was not asked to describe the structure, and did not do so, further than to refer to it as a coop. Now, a chicken coop is not necessarily a house, and, as it was incumbent on the State to prove that a house or building was broken and entered, the crime of burglary was not established by this evidence. It is true that Mrs. Maledon was introduced as a witness to prove that she heard noises that night out where the chickens were kept, and the prosecuting attorney, propounding questions to her, referred to the place as the chicken house, but neither of the witnesses used that term in referring to the place where the chickens were kept.

The only evidence connecting the defendant with the commission of the crime was that Maledon, two or three days after the burglary, found and identified in his possession five of the stolen fowls. The defendant made no attempt to explain his possession of the recently stolen property. Unexplained possession of property recently stolen will warrant a conviction of larceny, and also of burglary where the larceny is proved to have occurred at the time of the breaking and entry of the house. 6 Cyc. pp 247, 248; *Malachi* v. *State,* 89 Ala. 134; *Robertson* v. *State,* 40 Fla. 509; *Lester* v. *State,* 106 Ga. 371; *Wilson* v. *U. S.,* 162 U. S. 613; *Magee* v. *People,* 139 Ill. 138; *State* v. *Dale,* 141 Mo. 284. Such evidence raises no presumption of law as to the guilt of the accused, but only warrants an inference of fact, of more or less weight according to the particular circumstances of each case, which the jury may draw therefrom

as to his guilt. It makes a question for the jury, and is sufficient to warrant conviction where it induces in the minds of the jury a belief, beyond a reasonable doubt, of the guilt of the accused.

It is urged by counsel that proof of possession of only a part of the property recently stolen is not sufficient to warrant conviction either of larceny or burglary. We find no such distinction either upon principle or in the adjudged cases. The rule is based upon the broad principle that where one is found in unexplained possession of the fruits of crime recently committed, guilty participation in the commission of the crime may be inferred therefrom, and the inference is just as reasonable and natural where only part of the property is found in the possession of the accused, as it is where all is found, if it is shown that all the property was taken at the same time. In either case where the possession is not explained, the inference of guilty participation in the commission of the crime may follow.

The instructions of the court declared the law in accordance with the views herein expressed, and we find no error therein. The judgment of conviction of the crime of larceny is affirmed; but the judgment of conviction for burglary is, on account of the insufficiency of the evidence to sustain the verdict, reversed and remanded for a new trial.

HILL, C. J., absent.

MASON v. BOHANNAN.

Opinion delivered June 25, 1906.

SALE OF CHATTELS—BREACH OF WARRANTY—REMEDY.—An action for damages, and not replevin, in the absence of fraud or concealment of facts, is the remedy for breach of an express warranty against incumbrances in a sale of chattels.

Appeal from Madison Circuit Court; *John N. Tillman*, Judge; affirmed.

Action of replevin by Goldman Mason against George Bohannan to recover possession of a horse and damages for detention. Judgment for defendant, and plaintiff appealed.

Harris & Ivie, for appellant.

1. Upon the sale of a chattel by one in possession, the law implies a warranty of title, and the seller is answerable to the purchaser if it be taken from him by one having a better title than the seller, whether the latter knew of his defect of title or not. 19 Ark. 447. The court should have directed a verdict for appellant, since the evidence was not legally sufficient to sustain a verdict for appellee. 57 Ark. 431. The burden was on the appellee to show that he was not to be held for the mare's season, and also that he had been discharged by special agreement from the implied warranty. 17 L. R. A. 545.

2. The first and second instructions were so broad and unqualified in their terms as to mislead the jury. 18 Ark. 521.

Appellee, *pro se.*

This court will not interfere with the verdict, unless the evidence fails to support, where the case was fairly submitted upon proper instructions. 46 Ark. 142; 49 Ark. 122.

McCULLOCH, J. Mason was formerly the owner of the horse in controversy, and exchanged it with Bohannon for a mare which the latter had received in a trade with one Powell, and upon which Ledbetter held a lien for the services of his jack. In the trade between Bohannan and Powell the latter agreed to pay the debt to Ledbetter and discharge the lien, but failed to do so, and Ledbetter attached the mare in the hands of Mason. It is undisputed that Bohannan informed Mason, at the time of the trade between them, that Ledbetter had held a lien on the mare, and that Powell had agreed to satisfy the same; and it is also undisputed that Bohannan did not know at that time, and so stated to Mason, whether or not Powell had in fact paid the debt. Mason claims, however, that Bohannan warranted the title of the mare against the incumbrance, but Bohannan denies this, and herein lies the point of difference between them.

Under this state of the case the court instructed the jury, in substance, that if it was agreed between the plaintiff and defendant that the latter should not be liable for the incumbrance

on the mare, then the plaintiff could not recover; but, unless the jury should find that they made such agreement, the verdict should be for the plaintiff for recovery of the horse which he delivered to defendant in exchange for the mare. This instruction was too favorable to the plaintiff. In sales of chattels the law implies a warranty of title against incumbrances on the part of the seller. 2 Mechem on Sales, § § 1302, 1304. But for breach of an express warranty against incumbrances the remedy, in the absence of fraud or concealment of facts, is to sue for the amount of damages sustained by reason of such incumbrances. 2 Mechem on Sales, § 1797. However, the verdict was for the defendant upon these instructions; and, as there was evidence sufficient to support the verdict, the plaintiff can not complain.

HILL, C. J., absent.

Judgment is affirmed.

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

Opinion delivered June 25, 1906.

1. MASTER AND SERVANT—NEGLIGENCE—BURDEN OF PROOF.—While a master is required to use ordinary care to furnish his servant a safe place for work, and to discover defects therein and repair them, the burden is upon the injured servant to show negligence in this regard, which will not be inferred merely from the occurrence of the injury. (Page 439.)

2. SAME—DEFECTIVE LADDER.—A servant, employed at work upon a defective ladder, is not entitled to recover damages for an injury received in a fall therefrom if the defect in the ladder was unknown to the master, and was not of such character that it ought to have been known to the master in the exercise of reasonable care. (Page 441.)

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

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

There is no testimony in the record legally sufficient to sus-

tain the verdict. The burden was upon the plaintiff throughout to make out his case by a preponderance of the evidence, first, that he received his injuries by the accident of which he complains; second, that it occurred by reason of some defect in the ladder he was using; and, third, that this defect was known to defendant, or that its ignorance was due to negligence in failing to inspect or exercise proper care. In neither event is there any presumption against the company, but, on the contrary, the presumption is that it has done its duty in the matter of appliances furnished; and when that is overcome by proof that they were defective the further presumption arises that it had no notice of the defect, and was not negligently ignorant of it. 51 Ark. 468; 46 Ark. 555; 84 S. W. 797; 44 Ark. 529.

J. H. Harrod and *Trimble, Robinson & Trimble,* for appellee.

Review the testimony and contend that the evidence shows that the ladder was defective; that the defect was unknown to plaintiff; that it was known to the defendant, or should have been known by it in the exercise of reasonable care; and the defect caused plaintiff's injuries. The evidence was legally sufficient to sustain the verdict.

McCULLOCH, J. The plaintiff, J. B. Andrews, was employed by the defendant, St. Louis, Iron Mountain & Southern Railway Company, as assistant pump repairer, and sues to recover damages on account of an injury he received in falling from a ladder which he was descending on the side of a water tank. He was instructed by his superior to change the valves in the tank, and in doing so it became necessary to ascend the ladder to the top and go down to the bottom of the tank. After discharging all the water from the tank, he and his helper went into it and changed the valves, and when he started down the ladder on the outside the third round of the ladder from the top gave way under his handhold, and he fell to the ground, a distance of about 36 feet, and was seriously injured.

The plaintiff, on the witness stand, described the occurrence, after receiving instructions to take his helper and change the valves of the tank, as follows: "I went over and got my tool sack, and changed my clothes, and we went up on top of the tank; then went down to the bottom, and took out the old valve, and put in a new one. After we were through, I picked up my

tool sack in my left hand, and started down. The third round pulled off, and I fell between 30 and 36 feet. I remember being in the air with a piece of the round in my right hand. Don't remember hitting the ground. The first I remember was when they had me over at the hospital." He introduced no evidence as to the condition of the ladder at the time of the injury, but rested the case upon his own statement as above quoted.

The defendant introduced as a witness R. F. Cook, foreman of the water department, who was the plaintiff's immediate superior, and he testified as to the condition of the ladder. He said that he went up this ladder on the same day and a short time before plaintiff's injury, and found it in good condition, and that he caused the ladder to be removed about two weeks later and that the timbers were perfectly sound and in good condition except that the third round or step from the top had been pulled off, and also that the two bottom steps were off. He explained that the steps of the ladder were mitred into the supports or side-beam, as well as nailed, and that he ascertained from examination of the ladder immediately after plaintiff's injury that where the step which had been pulled off under plaintiff's grasp joined the side-beam or support, the lower side of the mitre joint was split out, showing a fresh break. The ladder had been in use about four years.

The complaint alleges that the step of the ladder was rotten, dangerous and unsafe, and that the defendant was guilty of negligence in not keeping the same in safe condition, so as to furnish the plaintiff, its servant, a "safe place in which to work." This allegation was denied, and the case was put to the jury upon this issue and under correct and appropriate instructions.

Does the evidence warrant a finding of negligence on the part of the defendant in failing to furnish its servant a safe place in which to work? The law of the case is plain. It is the duty of the master to exercise care in furnishing a reasonably safe place in which the servant is required to work, and to exercise ordinary care in discovering defects and in repairing them. The burden is upon the injured servant to show negligence on the part of the master in this regard before recovery can be had for the injury. Nor can negligence be inferred merely from the occurrence of

the injury. *St. Louis, I. M. & S. Ry. Co.* v. *Rice,* 51 Ark. 467; *Fordyce* v. *Key,* 74 Ark. 19.

Learned counsel for appellee concede in their argument here that the evidence must have affirmatively established four elements of the plaintiff's cause of action before a recovery can be sustained, viz.:

(a). That the ladder was defective.

(b). That the defect was unknown to the plaintiff.

(c). That the defect was known to the defendant, or should have been known by it in the exercise of reasonable care.

(d). That the defect caused plaintiff's injuries.

The plaintiff contented himself below with proof that the round of the ladder parted from its support beneath his grasp, and was insufficient to support his weight. The jury might have inferred from this that the ladder was defective because it failed to support his handhold, but does it prove that the defect was known to the defendant, or should have been known by it in the exercise of reasonable diligence? We think not. There is no evidence at all that the ladder had any appearance of being defective. On the contrary, the undisputed testimony establishes the fact that the timbers were perfectly sound, and that the break at the place where the round parted from the mitre-joint in the side-beam was a fresh split. The foreman testified that he ascended and descended the ladder a short while before the injury, and that it held up his weight, and appeared to be in good condition. The plaintiff himself and his helper had ascended the ladder in safety immediately before the injury without observing any defect, and the plaintiff in descending had stood upon this round of the ladder without breaking it. There was apparently no warning whatever of the danger, or of any apparent dangerous condition—nothing to indicate to the servants of the defendant whose duty it was to inspect the appliances for defects that this ladder was defective in any particular. Then how can it be said that the defendant was negligent in failing to discover the weakened condition of the ladder? It is quite true that there may have been a defect which weakened the ladder not observable by ocular inspection, but which could have been discovered by other tests. For instance, the person inspecting could have placed additional weights

on the rounds of the ladder, or might have subjected them to violent and sudden wrenches so as to test the strength; but in this case we are dealing only with the question of reasonable care in discovering defects, and there is no evidence at all that the defect was such as must have been discovered if reasonable care had been exercised. No one who went up and down the ladder saw any defect in it; and after it had failed to sustain the plaintiff's handhold and broke beneath his grasp, still no defect was apparent. The case is quite unlike one where defects are found after the injury caused thereby which must have been discovered if a careful inspection had been made. In such a case the jury would be warranted in finding either that no inspection was made, or that no effort was made to repair the defect after discovering it; but in the case before us the evidence does not show such a defect as must have been discovered in advance of the injury on a reasonably careful inspection. The jury are not permitted to indulge in presumptions. Upon a charge of negligence of this sort there must be proof, otherwise the injury complained of must be held to have resulted from an accident for which no one is legally liable to respond in damages. Such seems to have been this case. The evidence shows no more than that plaintiff's injury resulted from an accident.

Great stress is laid by counsel on the fact that Cook, the foreman, testified that the two bottom steps of the ladder were gone, and they argue that this justified the jury in finding negligence on the part of the company in failing to discover the weakened condition of the upper round of the ladder which pulled off. Cook was asked to explain why the bottom steps or rounds of the ladder were off, and he said: "Well, they had been broken off; most everybody around a tank will put their feet upon the steps or something like that—just thin, worn off." Now, it matters little how the bottom steps came off. There is positive testimony that the other parts of the ladder appeared to be safe and sound, and none to contradict it. The fact that the two bottom steps had been worn off was not sufficient to warrant the inference that the other parts were defective, when there was no evidence at all that the other parts appeared to be defective. We can not say, solely from the fact that the two steps were worn off by more frequent use, that the defendant was guilty of negligence in fail-

ing to discover defects in other parts of the ladder which were not apparent to ordinary observation. To do so would be to presume negligence where none was proved.

We are therefore of the opinion that the verdict is not supported by the evidence, and the judgment is reversed, and the cause remanded for a new trial.

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BUCKNER v. SUGG.

Opinion delivered June 25, 1906.

1. TAXATION—UNSURVEYED LAND.—Land that is private property is subject to taxation, under Kirby's Digest, § 6873, though it does not appear upon the public surveys. (Page 445.)
2. SAME—VALIDITY OF ASSESSMENT.—In order to make a valid assessment and sale of land for taxes, the land must be described with such certainty as will fully apprise the owner and the public generally what lands are to be offered for sale in case the tax be not paid. (Page 445.)
3. SAME—PRIVATE SURVEY.—A description of land in a tax assessment as the south half of a certain section within a designated township and range, though not appearing upon the Government surveys nor upon any recorded plat, may be aided by extrinsic evidence of facts which connect the description with the particular tract sought to be charged. Thus it may be shown that the land in question had been surveyed by the county surveyor by extension of the lines of the original public survey, and that it was popularly known by the description thus afforded. (Page 446.)

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

STATEMENT BY THE COURT.

The plaintiffs, H. A. Suggs and others, are the owners of fractional section 7, township 15 north, range 13 east, in Mississippi County, containing 358 acres, as shown by the original government survey, and bordering upon Buford's Lake, a body of water meandered and platted upon said public survey.

The land in controversy was formerly within the bed of said

lake, which became uncovered many years ago by gradual recession of the waters, and is claimed by the owners of said section 7 by virtue of their riparian rights as owners of the adjoining lands. If the lines of the public survey had been extended so as to embrace this land, it would be properly described, according to said survey, as the south half of section 12 in township 15 north, range 12 east. For more than twenty years prior to the commencement of this suit it has been commonly known and designated by that description, and in the year 1893 the lines thereof were run and established by the county surveyor. It was regularly assessed for levee taxes of the St. Francis Levee District under the description named above (south half of section 12, township 15 north, range 12 east), and in 1897 was sold for levee taxes under that description by a commissioner of the chancery court under the decree of that court foreclosing the tax lien of the levee district. The defendant, George Buckner, claims title to said land under said sale, and the plaintiffs brought this suit in equity against the defendant to cancel said claim as a cloud upon their title to said section 7 and the land in controversy joined thereto by reliction.

The complaint alleges that the south half of section 12 was sold under a levee decree rendered in 1897 for the levee taxes of 1895 to J. T. Lasley, and by him conveyed to the defendant, George Buckner, and that the assessment for levee taxes and decree based thereon are void, because the land was "unsurveyed land lying within Buford's Lake, and was not subject to levee taxation of any kind."

The defendant made answer, admitting that he claimed title to said land under said decree and sale for levee taxes, and alleging that said decree and sale were in all respects regular and valid, and that the title to said land passed thereunder to the purchaser at said sale.

During the progress of the suit all the owners of the other lands fronting Buford's Lake, as originally meandered, were brought in as parties.

Upon final hearing of the cause a decree was rendered declaring said sale for levee taxes to be void and canceling the defendant's said claim of title thereunder as a cloud upon the titles of the owners of the lands fronting on the lake.

The defendant appealed to this court.

D. F. Taylor and *Murphy, Coleman & Lewis,* for appellant.

1. The complaint alleges that the assessment for levee taxes and the decree based thereon are void because the land was unsurveyed land lying within Buford's Lake, and was not subject to levee taxes nor taxation of any kind. This is the sole issue. "All property, whether real or personal, in this State * * * shall be subject to taxation." Kirby's Digest, § 6873.

2. As to the sufficiency of the description, it is shown that the section was surveyed and subdivided by the county surveyor in 1893, and all its lines established, and that it had been popularly known as "section 12" for more than 20 years. The description employed was not only pertinent and accurate, but, in view of the facts, was the only description which would notify the owner and the public of what land was being assessed and the charge against it, and was sufficient. Cooley on Taxation (2 Ed.), 404-405; *Ib.* (3 Ed.), 740; *Ib.* (3 Ed.), 747; 27 Am. & Eng. Enc. Law (2 Ed.), 685, note 1 and cases cited; 99 U. S. 441; 71 Md. 20; 85 Minn. 518; 61 Me. 203; 17 N. H. 426; 71 Ala. 529; 23 Cal. 163; 33 Cal. 152; 15 R. I. 48; 58 Pa. 266; 42 N. J. L. 401; 194 Ill. 24; 86 Md. 440; 34 Minn. 67; 45 Minn. 502; 64 Ark. 580; 66 Ark. 422; 59 Ark. 22; 40 Ark. 237; 68 Ark. 544; 73 Ark. 221; 76 Ark. 261; 53 Ark. 114; Kirby's Digest, § § 6976, 6980, 6989.

Driver & Harrison, for appellee.

If the land was subject to taxation, it was not as "section 12," but as section 7 and in an adjoining range. The reliction could not stand separate and apart from the land to which it is added, but becomes a part of the whole, and governed by the same description. 1 Am. & Eng. Enc. Law (2 Ed.), 469; 84 Mo. 353. This court will take judicial knowledge that section 12, in township 15 north, range 12 east, does not exist, and has never existed. 34 Ark. 224; 28 Ark. 378. It follows that there was nothing to be taxed and nothing to be obtained by a purchaser under a pretended sale. A description sufficient to convey title as between vendor and vendee may not be sufficient in a tax proceeding. 38 Minn. 384. See also 50 Ark. 484. A description in a tax proceeding which is inherently and fatally defective can not

be helped out by extrinsic evidence. 3 N. D. 107; 23 Tex. 36; 21 Cal. 291; 60 Ark. 460.

McCULLOCH, J., (after stating the facts.) Appellant contends that the sole question raised by the pleadings is that the land in controversy was not subject to taxation because it "was unsurveyed land lying within Buford's Lake." The complaint sets forth all the facts concerning the location, etc., of the land, and therefore presents for our consideration, not only the question just stated, but also the further one, now insisted upon by appellee, that the description of the land was so imperfect that the assessment and sale were void.

The first-named question is easily disposed of in favor of the validity of the assessment and sale by reference merely to the fact that the land was private property, even though unsurveyed, and was, under the statutes of the State, subject to State and county taxes, as well as levee taxes. The statute provides that "all property, whether real or personal, in this State," except certain kinds which are declared to be exempt, shall be subject to taxation. Kirby's Digest, § 6873. The act creating the St. Francis Levee District provides that all lands situated within the district shall be subject to levee taxes. Act Feb. 15, 1893, § 7.

Was the description sufficiently certain and definite to put the owner of the land on notice and authorize a valid assessment and sale?

It is well settled, not only by the decisions of this court, but by the adjudged cases in the courts of other States, as far as we can discover, that, in order to make a valid assessment and sale of land for taxes, the land must be described with certainty upon the assessment rolls and in all subsequent proceedings for the enforcement of payment of the tax. The chief reason for this requirement is that the owner may have information of the charge upon his property. It has sometimes been said that a description that would be sufficient in a conveyance between individuals would generally be sufficient in assessments for taxation. We do not, however, consider that a safe test. The description in tax proceedings must be such as will fully apprise the owner, without recourse to the superior knowledge peculiar to him as owner, that the particular tract of his land is sought to be charged with a tax lien. It must be such as will notify the public what lands

are to be offered for sale in case the tax be not paid. 1 Cooley on Taxation (3 Ed.), p. 742; *Keely* v. *Sanders,* 99 U. S. 441.

The lands now within the meandered bounds of the lake have not been officially surveyed and platted, though the lines were run by the county surveyor by extension of the lines of the original public survey, and the tract in question has been popularly known by the description thus afforded. The controlling question in this case, therefore, is whether a description otherwise than by reference to plats of the original public survey or to other recorded plats properly identifying the tracts or lots of land can be aided by extrinsic evidence of facts which serve to connect the description with the particular tract or lot sought to be charged. The affirmative of this proposition seems to be established by the great weight of authority. Many of the courts have gone further, in support of this view, than we have felt willing to go, but an examination of the following cases will serve to illustrate the established doctrine: *Cooper* v. *Holmes,* 71 Md. 20; *Textor* v. *Shipley,* 86 Md. 440; *French* v. *Patterson,* 61 Me. 203; *Smith* v. *Messer,* 17 N. H. 426; *Driggers* v. *Cassady,* 71 Ala. 529; *People* v. *Leet,* 23 Cal. 161; *Hopkins* v. *Young,* 15 R. I. 48; *State* v. *Woodbridge,* 42 N. J. L. 401; *Stewart* v. *Colter,* 31 Minn. 385; *Godfrey* v. *Valentine,* 45 Minn. 502; *Marsh* v. *Nelson,* 101 Pa. St. 51.

This court is already committed to the rule that evidence *aliunde* is admissible to connect the land with the description used in the assessment list and other tax proceedings. In *Lonergan* v. *Baber,* 59 Ark. 15, the court said: "It is true that an assessment which does not identify the land is said to be void, but evidence *aliunde* is admissible to identify." In *Kelly* v. *Salinger,* 53 Ark. 114, the court held that a description in an assessment which designated the land by lot numbers upon an unrecorded private plat was sufficient to identify it.

Applying the established rule that a description in tax proceeding is sufficient which informs the owner and the public with certainty what particular tract of land is sought to be charged, how can it reasonably be said that this description is deficient, or that it fails to give such information? The land is shown to have been popularly known and designated by this description. That description can not possibly be applied to any

other tract of land. Aside from the popular interpretation of this description, it is not reasonably susceptible of any other interpretation than that it was meant to designate a tract of land bounded by extended lines of the public survey.

In *Chestnut* v. *Harris,* 64 Ark. 580, the court upheld a tax sale of land described by the abbreviation "N. E. Sec. 24, T. 13, R. 7, 40 acres." The court said: "The statutes of this State provide that each tract or lot of real property shall be so described in the assessment thereof for taxation as to identify and distinguish it from any other tracts or parts of tracts; and the same shall be described, if practicable, according to section, or subdivisions thereof, and congressional townships. They recognize the survey of the United States, and the division of lands, according thereto, into townships and ranges, and sections and parts of sections, and that a description according to such survey will be good and sufficient. For this reason it has been held that a description of land for assessment by the abbreviations commonly used to designate government subdivisions would be sufficient. * * * They are not reasonably susceptible of any other interpretation."

This court held, in *Towell* v. *Etter,* 69 Ark. 34, that a description of an original tract of riparian land according to the plat of the public survey included the accretions thereto, so that a sale for levee taxes under the original description carried title to the accretion. We are not, however, vexed in the case at bar with the question of double assessment of the land in controversy. If it be found that the description used in the tax proceedings is sufficient to identify the land, the decree in the condemnation suit is conclusive of the fact that the taxes claimed were legally assessed and had never been paid. The sole question for determination in testing the effect of the sale is that of the sufficiency of the description.

We think that the description was, when aided by evidence that the land has been surveyed and is popularly known and designated thereby, sufficient to form the basis of a valid assessment and sale for levee taxes.

The chancellor was, therefore, in error in holding that the sale was void.

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

ARKANSAS & LOUISIANA RAILWAY COMPANY v. LEE.

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Opinion delivered July 2, 1906.

1. TELEGRAPH COMPANIES—DAMAGES FOR MENTAL ANGUISH.—Under Kirby's Digest, § 7947, providing that "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," a cause of action arises in this State where negligence occurred in transmitting a message from a point in this State to a point in another State. (Page 451.)

2. SAME—ACCEPTANCE OF MESSAGE FOR DELIVERY.—Delivery of a telegraphic message to the operator's assistant, who was in charge of the office, and received the message for transmission and accepted the toll therefor, was sufficient to bind the telegraph company to transmit the message. (Page 453.)

3. SAME—SUNDAY LAW.—Where a telegraph company received a message for transmission on Sunday, a cause of action for failure to receive, transmit or deliver such message is based not on contract but on the statute (Kirby's Digest, § 7947), and it is no defense that the contract was entered into on a Sunday. (Page 453.)

Appeal from Howard Circuit Court; *James S. Steel*, Judge; affirmed.

STATEMENT BY THE COURT.

On Sunday, January 17, 1904, the following message to John W. Lee was delivered to an agent of the Arkansas & Louisiana Railway Company, hereinafter referred to as the railway company, reading as follows:

"Pa died last night. Wire me what time you can reach here.

"W. D. LEE."

The railway company does a telegraph business for hire. It has a line of railroad and telegraph from Nashville to Hope, and at Hope the operator is common to the railroad company and the Western Union Telegraph Company, to which company the railroad company delivers all messages going beyond Hope. Meadows was station agent and telegraph operator at Nashville. O. N. Lee was station clerk under Meadows, but was not an operator. John W. Lee is a brother of W. D. Lee. Taking the evidence most favorable to support the verdict, these are the estab-

lished facts of the case: The message was delivered to O. N. Lee about 8:30 a. m. Sunday. O. N. Lee said the operator was not there, but would be there in about an hour, and he received the message and placed it on the operator's hook for transmission. The Sunday hours at Nashville were a few minutes before and after the arrival and departure of the trains. The train left at 8:30 a. m. and returned on Sunday at 6:30; on week days days there was another train reaching Nashville at about 1 p. m. O. N. Lee was at the station and in charge thereof from 8 o'clock until ten or fifteen minutes after the train left, and the operator had not appeared up to that time. The operator had sat up late the night before, and was asleep in a hotel across the street from the station at this time. W. D. Lee heard that his message had not been transmitted, and went to the station about 11 o'clock, and the operator was not there, but O. N. Lee told him it had been transmitted within ten minutes of its receipt. This statement was denied by O. N. Lee, but he does not deny the absence of the operator at the time of W. D. Lee's visit. The Nashville operator testifies that he reached the station between 9:30 and 10, and at once tried to raise the Hope operator, but could not until about 11 o'clock. The Hope operator says that Nashville did not call that office between 9:30 and 10; and that 10 o'clock was closing time there, but, owing to the nature of the message, it was received when sent by the Nashville office, at 10:57 a. m. The joint agent at Hope received the message at 10:57, and it was received at Shreveport, La., at 11:50. The time required for transmission from Hope to Shreveport is about one minute. At Shreveport it was delayed until 3:25, when it was received at Leesville from Shreveport. The reason for this delay was that the operators were usually given from 11:30 to 3 o'clock, by the dispatchers on Sundays.

The operator at Leesville ascertained that John W. Lee had left town, and he located him over long distance telephone, and gave him the message a few minutes after its receipt by him. John W. Lee started for Nashville on the first train after receiving the message, and telephoned from Shreveport to his brother that he had started, and would get to Nashville as soon as possible. He got to Nashville at 6:30 p. m. Monday. His father had been buried that afternoon. Had he received the telegram

any time prior to 1:20 p. m. Sunday, he would have reached Nashville no later than 1 P. M. on Monday, in time for his father's funeral. He sent no communication after notifying his brother from Shreveport that he was on the way. John W. Lee sued both companies, and recovered a verdict for $300 against them jointly, and the companies have appealed.

W. C. Rodgers and *B. S. Johnson,* for appellant railway company.

1. Appellee is a resident and citizen of Louisiana. The message was for delivery to him in that State. He can not maintain an action under the mental anguish statute. 97 Ala. 126; 10 Lea (Tenn.), 352; 60 Miss. 977; 33 Kan. 83; 89 Tenn. 235; 143 Mass. 301; 61 Kan. 667; 70 N. H. 5; 85 Fed. 943; 74 Miss. 782; 95 Ala. 337; 113 Ala. 402; 50 Ark. 155; 67 Ark. 295; *Western Union Telegraph Co.* v. *Ford,* 77 Ark. 531. Whatever is a defense to an action of this kind in the State where the cause of action accrued is a defense in the State of the forum. 68 N. H. 382; 66 Ill. App. 173.

2. There is no proof of negligence on the part of appellant railway company. Its line extends no further than Hope, Ark., and it is in proof that its agent forwarded the message as soon as he could get the Western Union at that point.

3. There ought to be no recovery against the railway company because the message was not given to the operator, but to a station clerk who knew nothing of the telegraph business, and who informed the sender that the operator was not in the office. No request was made to call the operator, nor did the sender do so herself, which she could easily have done by telephone. 36 Ark. 371; 48 Ark. 106; 76 Ark. 356; 3 Cliff. (U. S. C. C.), 184; 3 Houst. (Del.), 233; 12 Fed. Cas. No. 6914; 105 Iowa, 335; 170 Ill. 645; 84 Tenn. 161; 83 Pa. St. 22. The railway company is under no legal duty to know the office hours of the various offices of the Western Union, neither is it responsible for delay in transmission of messages caused thereby. 103 Ind. 505; 24 Fed. 119; 31 S. W. 211; 66 S. W. 17; Crosswell, Electricity, § § 421, 422; 97 Ga. 338; 31 S. W. 210; 43 S. W. 1058; 66 S. W. 292.

4. The jury were entitled to an instruction as to whether

or not the Sunday hours of appellant railway at Nashville were reasonable. 73 Ark. 205; 107 Ky. 600.

5. The contract, having been made on Sunday, is void.

Rose, Hemingway, Cantrell & Loughborough, for appellant Western Union Telegraph Co.

The telegraph company exercised diligence in forwarding the message. Its Sunday hours were reasonable, and the message reached Shreveport without unreasonable delay. If there was any negligence, it occurred in Louisiana, where no recovery can be had for mental anguish.

W. D. Lee and *Feazel & Bishop,* for appellee.

1. The law of the place where the contract is made determines the rights and liabilities of the parties. It enters into and becomes a part of the contract. 25 Ark. 261; 40 Ark. 423; 135 Mo. 661; 5 Ind. App. 89; 63 Minn. 196; 100 Va. 459.

2. There was evidence of negligence on the part of the railway company, and the jury's verdict on that point is conclusive.

3. The sender had no authority over the absent operator, owed no duty to call him nor to request that he be called. That duty was on the station clerk.

4. Appellants are not relieved on the ground that the transactions occurred on Sunday. The statute fixes the liability for the breach of duty to the public as common carriers of messages. 70 Am. St. Rep. 205; 30 Am. St. Rep. 23.

HILL, C. J., (after stating the facts.) 1. It is argued that the "mental anguish" statute does not reach to this case; that there was a contract to deliver the message in Louisiana; that a failure to promptly deliver in Louisiana was the cause of action, and this statute was not in force there, and hence from a failure to obey it without the State no cause of action arose. The facts do not support the argument.

The statute in question predicates the action on "negligence in receiving, transmitting or delivering messages." Kirby's Digest, § 7947. If this action was based on negligence in the delivery of the message, it would have to be dismissed for want of evidence to sustain it. The undisputed facts in that regard are: The message was received at Shreveport, La., from Hope, Ark., at 11:50 A. M.; that the Sunday rest hours began at 11:30

A. M. and extended to 3 P. M.; that this was a reasonable regulation has not and can not be gainsaid; that the message was received at Leesville from Shreveport at 3:25 P. M.; that the train which Mr. Lee would have taken, had he received the message in time, left Leesville at 1:20 P. M.; that the operator promptly ascertained Mr. Lee's whereabouts in another town, to which he had gone on train leaving Leesville at 1:20, and delivered the message over long distance telephone, and this promptness and kindness of the operator enabled him to catch the next train. The Western Union received the message at Hope, Ark., at 10:57, and, while it required only one minute to transmit it, yet it failed to reach Shreveport until 11:50. Although called upon for an explanation, the operator is unable to account for this delay. Had the Hope operator promptly transmitted the message, it is clear that it would have reached Shreveport before 11:30, the beginning of the Sunday rest hours, and would have reached Mr. Lee in ample time to have enabled him to have attended his father's funeral. The only evidence of negligence against the Western Union, and there is this substantial negligence against it, occurred in transmitting from Hope to Shreveport. The evidence leaves but little doubt that the operator at Nashville did not come to his office until near eleven o'clock, although the Sunday office hours were between eight and nine o'clock, and the message was delivered to the station clerk in charge of the office within those hours. Hence the railway company's negligence was in transmitting from Nashville to Hope. In *W. U. Tel. Co.* v. *Ford,* 77 Ark. 531, this court recently decided where a message was sent from Missouri into Arkansas, and there was negligence in failing to deliver in Arkansas, that the cause of action arose in Arkansas, and this statute was applicable. That case is controlling here. The negligence was not in the delivery in Louisiana, but in the transmission in Arkansas, and therefore the cause of action arose in Arkansas, and the statute applies.

2. The next argument presented is that there was no proof of negligence against the railway company in sending the message. The discussion of the preceding proposition develops the opinion of the court that there was abundant evidence, in fact, practically undisputed evidence, of great negligence in both the

Nashville and Hope operators. The jury could not well have returned a verdict other than the one they did return, so far as the question of negligence is concerned.

3. It is insisted that there should be no recovery because the message was delivered to the station clerk, who informed the sender that the operator would not be there for an hour. The station clerk was assistant to the agent, who was also operator; he was in charge of the office, and received the message for transmission, and accepted the toll therefor. A statement of these facts is sufficient to answer this argument.

4. It is insisted that because the message was sent on Sunday there can be no recovery, on the theory that a contract made on Sunday is void, and no cause of action can grow out of it. If the company had refused to receive the message because it was Sunday, and it would not compel its employees to labor on the Sabbath, or if this action was based on a contract, then the company could raise the question it desires to raise herein; but that question can not enter into this case because the action is purely on the statute, and the action created by the statute is for negligence in receiving, transmitting and delivering a telegram. When a message is received for transmission by the proper agents of the telegraph company, for negligence in these particulars aforesaid a cause of action is created, and it is upon that cause of action, and not any contractual rights, that this action is predicated.

Other questions have been presented in argument, and have been fully considered; but, as they present no questions of law applicable to the facts, a discussion of them would not be profitable.

Judgment is affirmed.

CASTEVENS v. STATE.

Opinion delivered July 2, 1906.

1. INSTRUCTION—ASSUMPTION OF DISPUTED FACT.—Where the court, in a prosecution for larceny of a bicycle, fully instructed the jury that they must not convict unless they were satisfied of defendant's guilt beyond a reasonable doubt, an instruction that, "in arriving at

the value of the bicycle, you are not to consider the value of the wheel in its present condition. but you must base your verdict upon its value at the time it was stolen" was not erroneous as assuming that the wheel was stolen by defendant. (Page 455.)

2. CRIMINAL LAW—ERROR IN ADMITTING EVIDENCE—PREJUDICE.—Under Kirby's Digest, § 2229, providing that no judgment in a criminal case shall "be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits," a conviction will not be set aside for error in admitting hearsay evidence of a fact which was proved by competent evidence. (Page 455.)

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

C. V. Teague, for appellant.

1. It was error to instruct the jury that in arriving at the value of the bicycle they were not to consider its value at the time of the trial, but must base their verdict upon its value at the time it was stolen—thereby assuming that there had been a larceny of a bicycle, and that the one in court was the one that had been stolen. 14 Ark. 286; *Ib.* 530; 16 Ark. 568, 593; 18 Ark. 521; 20 Ark. 171; 24 Ark. 540; 36 Ark. 117.

2. The court erred in admitting hearsay testimony.

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

1. The hearsay testimony complained of was improperly admitted; but, in view of the fact that five other witnesses positively identified the wheel, it can not be said to have prejudiced the appellant.

2. Taken alone, the instruction complained of was objectionable; but, when read in connection with other instructions given, the error was cured. 69 Ark. 558.

HILL, C. J. Appellant was tried and convicted on the charge of stealing a bicycle, the property of Cleveland Smith.

The State's evidence tended to prove that a bicycle was stolen from Smith, that it was found in possession of appellant, that it had been mutilated by appellant to change its appearance, and that it was over the value of ten dollars. A bicycle found in possession of appellant was brought into court, and witnesses identified it as Smith's by various marks and peculiarities distinguishing it, one of which was a wire nail inserted in a broken

rivet in the chain. The evidence of the appellant tended to prove that he had bought the wheel in question before Cleveland Smith lost his, that it was not the Cleveland Smith wheel, that it was of little value in its present condition, and if in good condition was worth less than ten dollars. Two errors are alleged to have been committed.

1. The court gave this instruction: "You are instructed that, in arriving at the value of the bicycle, you are not to consider the value of the wheel in its present condition, but you must base your verdict upon its value at the time it was stolen."

This instruction is criticised as assuming that there had been larceny of a bicycle, and that the one in court was the stolen one. Standing alone, it does carry such impression; but, read in connection with the other instructions, that impression is removed. The jury were fully instructed that they must not convict unless they were satisfied beyond a reasonable doubt that the wheel was stolen, and that appellant was the person who actually stole it. The jury were cautioned against attaching undue force to unexplained possession of recently stolen goods and in other ways the rights of the appellant were carefully preserved, and the true issue sent to the jury. This instruction only went to the ascertainment of the grade of larceny in the event the appellant was found guilty. While this should have been more clearly shown, yet, taken in connection with the other instructions, it is sufficiently plain to save it from misleading a jury of average intelligence.

2. Ben Rush, a witness for the State, had worked for Cleveland Smith's father, and had ridden Cleveland's wheel, and he was called to inspect the wheel in court. He could not positively identify it, but said it looked like Cleveland's, and he found a nail in the chain. He said that at one time he had found Cleveland with his wheel broken down, and the next time he saw the wheel he (Cleveland) had pieced the chain with a nail. His failure to positively identify it as Smith's was fully brought out on cross-examination. On re-direct this occurred: "You mean to say that you did not know the nail was there before it was stolen?" "No, sir; I did not know it was there; just had Cleveland's word for it." Appellant moved the court to exclude what Cleveland had said, and the court refused. The court should have excluded

it, but is it prejudicial error? Rush had previously stated that he knew the wheel had broken down, and had said in that connection that Cleveland pieced it with a nail. Then the cross-examination and this re-direct examination developed the fact that he had intermingled a statement from Cleveland with his own knowledge. This broke the force of his evidence on the identification from the nail. Of course, the court should have pointed out the hearsay, and told the jury to disregard it. Cleveland Smith had testified in detail about fixing the nail in the link of the chain, and this evidence merely showed that the witness derived his knowledge of the nail from Smith, and not from his own observation.

The Criminal Code fixes the errors of law appearing to a defendant's prejudice which constitute cause for reversal, which, so far as pertinent here, is as follows:

"An error of the circuit court in admitting or rejecting important evidence." Kirby's Digest, § 2605.

This evidence, as shown, could not be considered important. It is further provided in the Criminal Code that no indictment is insufficient, nor can the trial, judgment or other proceeding thereto be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits. Kirby's Digest, § 2229. Applying this provision to the two errors found, it is held that they did not prejudice any substantial rights of the appellant on the merits of his case, and the judgment is affirmed.

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TEMPLETON v. EQUITABLE MANUFACTURING COMPANY.

Opinion delivered July 2, 1906.

1. SALE—DELIVERY TO CARRIER—RESCISSON.—Where an order for a bill of goods directed the vendor to deliver the goods to a carrier either at a distributing point or at the factory point of the vendor, and the goods were so delivered at the factory point in due course of business and in apt time to a railroad company properly consigned

to the vendee, the title passed to the vendee, and subsequent delay of the carrier in transporting the goods or a portion thereof afforded no cause for rescission of the contract. (Page 458.)

2. SAME—EFFECT OF NONDELIVERY OF BILL OF LADING.—Where goods sold were sent by railroad consigned to the vendees, and the bill of lading was not negotiated, the title passed to the vendees on delivery to the carrier, even though the bill of lading was not sent to the vendees. (Page 459.)

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

F. T. Vaughan, for appellants.

1. The contract, when construed in the light of the testimony, including the letters of appellee, was intended to be executory. Appellants had the right, in season, to return the jewelry and rescind the contract by putting the appellee *in statu quo.* 4 Ark. 467; 5 Ark. 395; 25 Ark. 196. Delivery of the show case was an essential inducement to the order, and failure to deliver it, or unreasonable delay therein, authorized appellants to rescind. 35 Ark. 483, 489; 24 Am. & Eng. Enc. Law, 1073; *Ib.* 1077-8-9; 121 U. S. 255; 73 Ark. 584.

2. To constitute delivery to the vendee by delivery to a common carrier, the carrier must be one selected by the vendee, and delivery to it made in pursuance to specific directions on the part of the vendee. If the vendor selects the carrier, it is his agent and not that of the vendee. 24 Am. & Eng. Enc. Law, 1071; 27 N. Y. App. Div. 22; 3 Johns. (N. Y.), 534; 44 Ark. 556. See also Benj. Sales (7 Ed.), 958 *et seq.*

Boyd & Kerby, for appellee.

Shipping directions were given by appellants. The place of delivery is the place of sale. Upon consignment of the goods and delivery to the common carrier, title vested in the consignee. 38 Ark. 615; 44 Ark. 556; 43 Ark. 353; 51 Ark. 133; 23 Ark. 244; 62 Ark. 592.

HILL, C. J. The appellee is engaged in the jewelry business, and appellants, Templeton & Adams, are merchants at Kerr, in Lonoke County. Their freight station is the town of Lonoke. The appellee's place of business is Iowa City, Ia., and its factory is at Alliance, Ohio. Appellee sold appellants a lot of jewelry, and a written contract was entered into between them. One

clause is as follows: "On your approval of this order please deliver to us at your earliest convenience f. o. b. transportation companies, either at the distributing point or at the factory point, the above assortment of goods on the terms and conditions herein set forth and no other." The "above assortment of goods" began with: "1 revolving show case free with the order." The show case was shown to be a material part of the contract and an inducing element. The goods, except the show case, were duly received at Lonoke, but appellants would not take them until the show case came. The uncontradicted evidence is that the show case was promptly delivered to a railroad company at Alliance, Ohio, the factory point; a bill of lading was issued to the appellee showing the show case was consigned to the appellants at Lonoke. This bill of lading was not sent to appellants. After waiting more than a reasonable time for the show case to reach them after the other goods arrived, the appellants had the jewelry shipped back. Later the show case came, and appellants would not receive it. Appellee did not accept the returned goods, and say they are held subject to appellants' orders, presumably by the express company, as they were returned by express, charges prepaid.

The appellee sued for contract price of the jewelry, $150, and recovered judgment, and appellants bring the case here.

It is seen from the foregoing statement that the only point in the case is whether the delivery of the show case to the railroad company at Alliance, Ohio, was a delivery to Templeton & Adams. If it was a delivery to them, then appellee had a right to stand on its contract, and refuse to accept the goods tendered back in rescission of the contract. If it was not a good delivery, then Templeton & Adams were within their rights in rescinding the contract after waiting a reasonable length of time to receive the show case, a material part of the goods to be furnished under it.

If a vendor undertakes to make delivery to a distant place, the carrier becomes the agent of the vendor, and the property will not pass until actual delivery; if the goods are to be delivered to a carrier specially designated by the vendee, the carrier becomes the agent of the vendee, and delivery to it is delivery to the vendee; if the contract is silent as to the mode of delivery, then a delivery by the vendor to a common carrier in the usual

and ordinary course of business constitutes delivery to the vendee; where no carrier is specified, and a choice is open to the shipper, the selection of any one in good faith in the due course of business is sufficient. The effect of the delivery in proper manner to the carrier is to transfer the title and to fix the time and place when the title passes. Mechem on Sales, § § 736, 739. This subject has recently been considered by this court in *Gottlieb* v. *Rinaldo,* 78 Ark. 123, and *Garner* v. *St. Louis, I. M. & S. Ry. Co., ante,* page 353. This contract specified that the delivery to appellants was to be to a transportation company at appellee's distributing or factory point. The undisputed evidence is that it was delivered at the factory point in the due course of business in apt time to a railroad company properly consigned to appellants pursuant to the direction in the contract. Therefore it follows that the delay in actually receiving the show case at Lonoke was the delay of the agent of Templeton & Adams, the railroad company; and consequently afforded no cause of rescission against the vendor. Templeton & Adams could have contracted for delivery at Lonoke, and it is probable, judging from their conduct, that they so understood their contract; but it is not so written. Unfortunately for them, they contracted that this delivery should be made to them free on board the transportation companies, either at the distributing point or at the factory point; and that was done, and the default was the default of the railroad after the title of the show case passed to them.

It is said that appellee did not send appellants the bill of lading, and therefore the title did not pass. The bill of lading should have been sent, but it was not, and Templeton & Adams made no demand for it. It was settled in *Nebraska Meal Mills* v. *St. Louis S. W. Ry. Co.,* 64 Ark. 169, that a carrier is justified in delivering to the consignee pursuant to the shipping directions in the bill of lading, even though the bill of lading is in fact attached to a draft sent for collection, if the latter fact is not known to the carrier. Under the bill of lading in this case the carrier would have been justified in delivering to Templeton & Adams without forwarding the bill of lading. In other words, the failure to send the bill of lading to Templeton & Adams put no obstacle to the delivery of the goods to them. While a bill

of lading is both a receipt and a contract, and is a muniment of title *(Garner* v. *St. Louis, I. M. & S. Ry. Co., supra),* yet it had no influence in this case, as the goods were not sent to shipper's order, but consigned directly to Templeton & Adams, and the bill of lading was not negotiated.

The case turns simply on whether the show case was delivered to Templeton & Adams at Alliance, Ohio, when there delivered to the common carrier. The contract so stipulated, and it is not for the courts to change it.

The judgment is affirmed.

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BEENE v. STATE.

Opinion delivered July 2, 1906.

1. CRIMINAL LAW—PRESENCE OF DEFENDANT.—Where the record in a murder case recites the presence of the defendant in person, and that the trial jury, after hearing the evidence, the court's instructions and the argument of counsel, retired to consider their verdict, and afterwards came into court and returned a verdict of guilty, the record will, in the absence of any showing to the contrary, be construed to mean that defendant was present when the verdict was returned. (Page 464.)
2. HOMICIDE—INSTRUCTION AS TO MURDER—HARMLESS ERROR.—An instruction, in a murder case, that the jury may find defendant guilty of murder in the second degree if they find that he killed the deceased willfully, feloniously and with malice aforethought, but without premeditation and deliberation, though erroneous in not telling them that the absence of either premeditation or deliberation would reduce the offense, is not prejudicial if the jury were further told that both premeditation and deliberation must be found to sustain a verdict of murder in the first degree. (Page 464.)
3. SAME—SPECIFIC INTENT.—While the law requires, in murder in the first degree, that there be a specific intent to take life in the mind of the slayer before the act of killing is done, it is not necessary that this intention be conceived for any particular length of time before the killing. (Page 465.)

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

J. B. Moore, for appellant.

1. The record fails to show affirmatively that the appellant was present in court when the jury returned into court and delivered its verdict. The indictment being for a felony, he was entitled to be present when any step was to be taken affecting his life or liberty. Kirby's Digest, § 2339; 5 Ark. 431; 10 Ark. 325; 19 Ark. 209; 24 Ark. 627; 44 Ark. 332; 50 Ark. 492; 62 Ark. 537; 66 Ark. 208.

2. The third instruction was erroneous, its effect being to require the jury to find the absence of both premeditation and deliberation before they could find him guilty of murder in the second degree.

3. The second and fourth instructions are abstract and improper under the facts. The evidence does not show that deliberate and premeditated intent specifically to take the life of deceased required by law to sustain a conviction for murder in the first degree.

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

1. The evidence points unerringly to murder in the first degree. It is not surprising that the jury refused to accept appellant's attempt to explain it away as an accident. Their verdict will not be disturbed.

2. The error in defining murder in the second degree was harmless. 52 Ark. 345; 30 Ark. 328; 70 Ark. 272. If appellant thought he was entitled to an instruction on murder in the second degree, he should have asked for a proper instruction. 74 Ark. 444.

3. The record affirmatively shows the presence of appellant in court when the case went to the jury, and the presumption, in the absence of evidence to the contrary, is that he remained present.

BATTLE, J. The grand jury of Union County, at the March, 1906, term of the Union Circuit Court, returned an indictment against Charlie Beene, accusing him of murder in the first degree. He pleaded not guilty, was tried, and found guilty as charged.

The evidence adduced in the trial before the jury, which supported the verdict, tended to prove, substantially, the following facts: The defendant and Susie Beene were husband and

wife. They had many quarrels, and he frequently threatened to kill her. On or about the 14th day of December, 1905, in the evening about 7:30 o'clock, the defendant, wife and two daughters were seated in front of a fire. The wife said to him, as a witness related it: " 'Charlie, I will have to quit cutting wood. My arm hurts me.' And he says: 'If you do, you had better get your duds and leave.' And she says: 'Well, I can't cut no more wood.' And he says: 'Shut up!' And he hit her in the mouth witth his fist. She got up, and says: 'Charlie, you hit me.' And he caught her and threw her down by the fire place, and me and Eddie Bell pulled him off of her, and then he threw her down near the foot of the bed behind the front door, and we pulled him off again, and he went to the rack, and got his gun and taken the squirrel shot out, and loaded it with buck shot." He then walked out of the room in which they had been sitting—walked out backwards—at the same time holding the gun with the hammer cocked under his left arm. His wife followed, and went to the water bucket, and started to get a drink of water, and had the dipper in her hand, when he said to her "Get back," and, she refusing, he shot her. In so doing he did not put the gun to his shoulder, but held it, as witness expressed it, "under his arm, sort o'." She fell. He ran into the house, got his hat and coat, said that he did not intend to kill her, kissed her, and left, going for her neighbors and a doctor. Soon after she was shot she said to a neighbor that she was "bound" to die. When told that the defendant had gone for a doctor, and had said he had shot her accidentally, she replied, "No, he did not shoot me accidentally; he told me he was going to kill me." She lived about an hour, and died. This statement was made, substantially, by more than one witness.

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

"2. The jury are instructed that if they find from the evidence in this case beyond a reasonable doubt that the defendant, Charlie Beene, in the El Dorado District of Union County, Arkansas, unlawfully, wilfully, feloniously, with malice aforethought, and after premeditation and deliberation, killed Susan Beene by shooting her with a gun, as alleged in the indictment, you will find the defendant guilty of murder in the first degree.

"3. The jury are instructed that if they find from the evidence in this case, beyond a reasonable doubt, that the defendant, Charlie Beene, in the El Dorado District of Union County, Arkansas, within three years before the return of the indictment herein into court, unlawfully, wilfully, feloniously and with malice aforethought, but without premeditation and deliberation, shot and killed Susan Beene with a gun, as alleged in the indictment, you will find the defendant guilty of murder in the second degree, and assess his punishment at imprisonment in the penitentiary of the State of Arkansas for some period not less than five nor more than twenty-one years.

"4. The jury are instructed that, in order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that this intention be conceived for any particular length of time before the killing. It may be formed deliberately and executed in a very brief space of time. If it was the conception of a moment, but the result of premeditation and deliberation, reason being on its throne, it would be sufficient. The law fixes no time in which such specific intent to take life must be formed, but leaves its existence to be determined by the jury from the evidence."

The defendant insists that the verdict of the jury should be set aside and a new trial granted to him for the following reasons: (1) "That the record does not affirmatively show that appellant (defendant) was present when and at the time the jury returned into court, and the trial was resumed to hear their report, and at the time the verdict herein was rendered, as required by the statute and the adjudications upon the same by this court.

(2) "That the court erred in giving over appellant's exceptions the third instruction asked by the appellee, * * * wherein the jury were expressly told that if they believed, beyond a reasonable doubt, that the defendant shot and killed the deceased, unlawfully, wilfully, feloniously and with malice aforethought, but without premeditation and deliberation, etc., then they may find him guilty of murder in the second degree, that is to say, in effect, that the jury must find the absence of both premeditation and deliberation before they could reduce the crime to murder in the second degree, whereas we contend that the

finding of the absence of either one of these elements is sufficient.

(3) "That the court erred in giving the second and fourth instructions upon murder in the first degree * * * because they were abstract and improper under the evidence adduced in this cause.

4. "Because the verdict is not supported by the evidence."

As to the first contention, the record is as follows: "Comes H. S. Powell, Esq., prosecuting attorney, and comes the defendant, Charlie Beene, in his proper person in custody of the sheriff, and by his attorneys, and comes also the trial jury herein, and, after hearing the rest of the evidence introduced in this case, the instructions given by the court and the argument of the counsel, retire to their room in charge of a sworn officer to consider their verdict, and afterwards came into court and read the following, towit: 'We, the jury, find the defendant, Charlie Beene, guilty of murder in the first degree. [Signed] W. N. HAYES, Foreman.' "

The object of this record, as it appears to us, is to show that the defendant was present when the proceedings mentioned took place. Prisoners, as a general rule, are brought into court only for the purpose of witnessing proceedings in their cases. The defendant came, and then the proceedings followed, among which was the return of the verdict. The proceedings following his presence plainly indicate the purpose for which he was brought into court; and it is apparent that the idea the record intends to express is that he was present when the verdict was returned, and we so construe it. There is nothing said in the motion for a new trial about his being absent when the verdict was returned.

Appellant's second contention is substantially correct. *Cannon* v. *State,* 60 Ark. 564. But the court instructed the jury that "if they find from the evidence in this case, beyond a reasonable doubt, that the defendant, Charlie Beene, * * * unlawfully, wilfully, feloniously, with malice aforethought, and after premeditation and deliberation, killed Susan Beene by shooting her with a gun, as alleged in the indictment, you will find the defendant guilty of murder in the first degree." The jury found him guilty of murder in the first degree, and necessarily found that the killing was done after premeditation and deliberation;

and, so finding, the instruction objected to was not prejudicial.

The appellant's objection to the second and fourth instructions upon murder in the first degree, which is stated in his third contention, is not tenable. There was evidence upon which to base them, and it was sufficient to sustain the verdict of the jury.

Judgment affirmed.

WOOD, J., thinks that appellant was guilty of murder in the second degree, and that this court should so find and direct that his punishment be assessed accordingly.

MYAR v. POE.

Opinion delivered July 2, 1906.

1. CORPORATION—FILING ANNUAL CERTIFICATE—POWERS OF VICE-PRESIDENT.—Under Kirby's Digest, § § 848, 859, requiring the president and secretary of business corporations to file annually a certificate showing the amount of capital paid, the value of its real and personal property, including credits, the amount of its debts, the name and number of shares of each stockholder, etc., such certificate may be filed by the vice-president and secretary, where the president is absent from the county. (Page 468.)
2. CORPORATION—BY-LAW.—A provision in the articles of association of a corporation for the election of a vice-president is a by-law within Kirby's Digest, § 843, providing that the directors of a corporation shall choose a president, secretary and treasurer and "such other officers as the by-laws of the corporation shall prescribe." (Page 469.)

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

Morris M. Cohn, for appellant.

1. This is a penal suit, or, at least, a suit *ex delicto* to enforce a statutory liability. The justice of the peace had no jurisdiction, and the circuit court acquired none on appeal. Kirby's Digest, § § 848, 859; art 7, § 40, Const.; 101 U. S. 188; 113 U. S. 452; Thompson, Liability of Directors, 455, 456; *Ib.* 416;

Ib. 425; 146 U. S. 567; 64 Ark. 271; 37 Mich. 416; 12 Met. (Mass.), 249; Mechem, Agency, § 539; 68 Ark. 440; 146 U. S. 674; 114 Fed. 290; 96 N. Y. 323; 113 U. S. 457; 35 Ark. 622; 39 Ark. 463; 52 Ark. 240; 62 Ark. 360; 56 Ark. 592; 48 Ark. 301; 7 Ark. 172; 43 Ark. 375; 197 U. S. 154.

2. The action was premature. The primary liability is on the corporation, which ought to be enforced before seeking to impose a secondary liability. 93 U. S. 228; 113 U. S. 302; 3 Bradw. (Ill. App.), 191; *Ib.* 202; 24 Ga. 273; 41 Fed. 459; 34 Ark. 323; 71 Ark. 1; 20 Wall. 520, and authorities *supra.*

3. The intent of the law was fully complied with when a report for the year ending July 1, 1903, was signed, verified and filed by the vice-president of the company. 4 Thomp. Corp. § 4687. No issue is raised as to the correctness of the reports. 3 Thomp. Corp. § 4235; 26 Pac. 812. See also 58 Hun (N. Y.), 87; 29 Barb. (N. Y.), 196.

E. B. Kinsworthy and *Marshall & Coffman,* for appellee.

1. The statute is not penal. 68 Ark. 433, and authorities cited; 10 Cyc. 854-5-6. The liability therefore must be contractual. 3 Thomp. Corp. § 4164; 76 Fed. 695; 61 Minn. 375; 11 Neb. 243; 45 N. W. 923; 118 Mass. 295; 176 U. S. 599; 14 S. C. 494.

2. The statement filed July, 1, 1903, did not comply with the law, because it was not signed and sworn to by the president and secretary; because it did not show the condition of the business on that date, and because the affidavit does not show that it is a true and correct statement of the business on that date. 79 N. Y. Sup. 437; 56 *Id.* 542; 65 *Id.* 391; 50 *Id.* 265; 67 How. Practice, 204; 40 N. Y. Sup. 1081; 79 Fed. 919; 86 Fed. 443; 47 N. Y. Sup. 302.

BATTLE, J. Franklin Bros. Company was a corporation organized under the laws of Arkansas. Its domicil and place of business was Little Rock, Arkansas. Henry W. Myar was its president; J. P. Franklin, vice-president; Joe A. Franklin, secretary, and Oscar Davis, treasurer.

Sections 848 and 859 of Kirby's Digest are respectively as follows:

"Sec. 848. The president and secretary of every corporation organized under the provisions of this act shall annually

make a certificate showing the condition of affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or July next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal property; the cash value of its credits; the amounts of its debts; the name and number of shares of each stockholder, which certificate shall be deposited on or before the 15th of February, or of August, with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose.

"Sec. 859. If the president or secretary of such corporation shall neglect or refuse to comply with the provisions of section 848 and to perform the duties required of them respectively, the person so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal."

A. B. Poe brought an action against Franklin Bros. Company, H. W. Myar and J. A. Franklin, before a justice of the peace of Pulaski County. He stated in his complaint that "he is a creditor of Franklin Bros. Company, a corporation duly organized and doing business under the laws of Arkansas, with its offices and domicil in Pulaski County. That plaintiff's debt amounts to $150, all of which has been incurred during the calendar year 1904. That defendants are and have been for the last two years or more president and secretary respectively of said corporation, and as such officers it became their duty to annually file with the clerk of the Pulaski County Court a verified statement. showing the condition of the affairs of said corporation on the first day of January, or of July, next preceding time of filing same. That they have wholly failed and refused to file such statement, and have been in default thereof for two years last past until July 7, 1904, and that plaintiff's debt was incurred by said corporation during the period of such default. Plaintiff alleges that said defendants are jointly and severally liable to plaintiff for its said debt." And he asked for judgment against the defendants for its debt, interest and costs.

Plaintiff recovered judgment before the justice of the peace, and defendants appealed to the circuit court.

Myar filed an answer in the circuit court, denying the allegations of the complaint.

The court, sitting as a jury and trying the issues in the case, found the facts and law as follows: "The court finds that Franklin Bros. Company was a corporation organized under the laws of Arkansas; that H. W. Myar was president; that the annual statements of said corporation were filed February 12, 1902, July 1, 1903, and July 4, 1904; that the statement filed July 1, 1903, was signed and sworn to by J. P. Franklin, vice-president, and J. A. Franklin, secretary; that the indebtedness sued for was contracted between January 1, 1904, and May 1, 1904; that the statement filed July 1, 1903, was not sufficient to relieve H. W. Myar; that he is liable for the amount of ($137.60) one hundred and thirty-seven dollars and sixty cents, with interest from July 1, 1904, that being the date of the filing of this suit in Justice Wilson's court."

The court thereupon rendered judgment in favor of plaintiff against Myar for $146.55 for his debt and damages; and Myar appealed.

At the time the statement was filed on July 1, 1903, Myar, the president, was absent at Camden, in this State, and J. P. Franklin, the vice-president of the company, was discharging the duties of president. It was his duty to act as president, and perform the duties which devolve upon that office; and his discharge of such duties, in the absence of Myar, had the same effect as the performance of them by the president; and the filing of the statement on July 1, 1903, was a compliance with section 848 of Kirby's Digest. *Smith* v. *Smith,* 62 Ill. 493; *Pond* v. *National Mortgage, etc., Co.,* 6 Kan. App. 718; *Colman* v. *West Virginia Oil, etc., Co.,* 25 W. Va. 148. The statute did not require the president and secretary to file another statement before the first of July, 1904, and they were not in default when the debt to appellee was contracted, it having been contracted between January 1, 1904, and May 1, 1904; and they are not liable for it. The correctness of the statement filed July 1, 1903, is not questioned in this action, but is virtually conceded.

Reversed and remanded for a new trial.

ON REHEARING.

Opinion delivered July 23, 1906.

BATTLE, J. Appellee, in his motion for re-consideration, insists that J. P. Franklin was not, under the statute, or by-laws of the Franklin Bros. Company, vice-president of the company; and that the statute provides that the directors of a corporation shall choose a president, secretary and treasurer and "such other officers as the by-laws of the corporation shall prescribe" (Kirby's Digest, § 843), and the Franklin Bros. Company had no by-laws. The undisputed facts show that J. P. Franklin was vice-president. This fact was not questioned in the trial court. But appellee argues that the directors of the company were not authorized by the statute or the by-laws of the company to elect him vice-president. This is not true. The articles of association of the company provide for the election of a vice-president. This is a by-law within the meaning of the statute authorizing the election of a vice-president. It is not essential to the validity of a by-law that it be enacted in any particular form. The statutes or the articles of association of the company do not prescribe any. In the absence of such requirements, it may be adopted "by the uniform course of proceedings of a corporation, as well as by an express vote manifested in writing. It has been said, speaking with reference to the question whether a certain by-law had been enacted, 'even if there was no record, or the record was deficient, we consider it settled by the authorities that the enactment of a by-law need not necessarily be in writing, but may be inferred from facts proved.'" *Lockwood* v. *Mechanics' Nat. Bank*, 11 Am. Rep. 253, 267; *Bank of Holly Springs* v. *Pinson*, 58 Miss. 421; 1 Thompson's Com. on the Law of Corporations, § 943, and cases cited; 1 Cook on Corporations (4 Ed.), § 4a and cases cited. But, as the by-law in this case is in writing, it is not necessary for us to go to that extent.

Motion for re-consideration is overruled.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. MCNEIL.

Opinion delivered July 2, 1906.

1. CARRIER—BILL OF LADING—NOTICE OF DAMAGES.—Damages to live stock suffered by reason of a carrier's delay in furnishing cars for shipment are not covered by a stipulation in the bill of lading "that, as a condition precedent to the collection of any damages for any loss or injury to live stock covered by this contract," the shipper will give notice in writing of the claim therefor to the company's agents or officers before the stock is removed. *St. Louis, I. M. & S. Ry. Co.* v. *Law*, 68 Ark. 218, followed. (Page 473.)

2. APPEAL—EXCEPTION—WAIVER.—An exception to testimony, not incorporated in the motion for new trial, is waived. (Page 473.)

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

S. H. West and *J. C. Hawthorne*, for appellant.

1. The complaint did not allege damages for failure to furnish the car, nor that notice was given of intention to claim damages for such failure. It was therefore error to admit evidence, over defendant's objection, tending to prove damages accruing before the hogs were loaded. 71 Ark. 197; 29 Ark. 372; 70 Ark. 232; 75 Ark. 465; 59 Ark. 165.

2. The sixth clause of the contract is a reasonable regulation, and the third instruction asked by defendant, based thereon, should have been given. The letter of plaintiff, written eighteen days after the hogs were sold, was in no sense a compliance with this clause. 73 Ark. 112; 57 Ark. 112; *Ib.* 127; 23 Am. & Eng. R. Cas. 684; 16 *Ib.* 257.

J. H. Hill, for appellee.

BATTLE, J. "On the 31st day of December, 1903, the plaintiffs instituted this action, and alleged that on the 12th day of November, 1903, they shipped one carload of hogs from Rector, Arkansas, to St. Louis, Missouri; that they were delivered to the defendant in good condition, and on account of the carelessness and negligence of its agents in transporting the car they were damaged in the sum of $50, on account of the depreciation in prices and shrinkage.

"They further alleged that on the 16th day of December, 1903, they delivered a carload of hogs in good condition at

Rector, Arkansas, for shipment to St. Louis, Mo., and on account of unusual delay and carelessness, and on account of an insecure car, six of the hogs were lost.

"The defendant answered the first paragraph of the plaintiffs' complaint, and denied that it or its agents were guilty of negligence in transporting the carload of hogs, and denied that the plaintiffs were damaged in the sum of $50 or any other sum by reason of delay caused by the defendant, and alleged that at the time of the shipment of said hogs it did not carry freight to St. Louis, Missouri, and delivered the hogs in question to its connecting carrier at Delta, Missouri. It received the car on the 12th day of November, 1903, and delivered it ten hours later to its connecting carrier.

"The defendant answered the second paragraph, and denied that the shipment of the hogs was delayed, or that the car they were shipped in was insecure, and denied that six of the hogs, or any other number, were lost, and alleged that they delivered the hogs in question to its connecting carrier at Delta, Missouri, ten hours after they were received by it.

"The defendant filed an amendment to its answer, in which it alleged that at the time the stock was delivered to it there was an agreement entered into, whereby it was agreed that in the event of the loss or damage to the hogs the plaintiffs should give a written notice of their demand for damages to the agent of the defendant before the stock was removed, or within one day after the delivery of the stock, to the end that the damage to the same might be examined and ascertained; that no notice was given until long after the hogs had been disposed of."

J. N. McNeil, one of the plaintiffs, testified that on Saturday, the 7th day of November, 1903, plaintiffs demanded that defendant furnish them with a car at Rector, a station on its railway, on Tuesday following, for the transportation of a carload of hogs from that station to St. Louis, Mo. On Tuesday morning, the 10th day of November, 1903, they delivered to the defendant in its stockpen at Rector a load of hogs for shipment. The hogs remained there in the open pen until Thursday following, about 4 o'clock, p. m., when they were loaded on defendant's car and shipped. Witness testified, over the objection of the defendant, that plaintiffs were damaged by the failure to ship the hogs on

Tuesday and the delay until Thursday following; that there was a shrinkage in the weight of each hog while in the stock pen of three to six pounds for each day's delay; and that plaintiff's damage by reason of the delay in the shipment was at least $50.

The bill of lading given by the defendant to plaintiffs for the hogs was read as evidence. It shows that one hundred and ten hogs of plaintiffs were shipped by the defendant on the 12th of November, 1903. It has the following stipulation: "That, as a condition precedent to the collection of any damages for any loss or injury to livestock covered by this contract, the second party (plaintiffs) will give notice in writing of the claim therefor to some general officer, or to the nearest station agent of the first party (railroad company), or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims."

Other witnesses, among them Howard Allen, testified.

The defendant asked the court, and it refused to instruct the jury, in part, as follows:

"3. You are instructed that, under the sixth clause of the contract under which contract the shipments were made, it is incumbent upon the plaintiffs, should loss or damage occur in the shipment, to give notice to defendant on the delivery line, in writing, of such claim within one day; and if you find that such notice was not given, then you will find for the defendant."

The jury returned a verdict in favor of the plaintiffs for $40.

The defendant filed a motion for a new trial, one of the reasons for which is as follows: "That the court erred in permitting witness Howard Allen to testify as to the damages sustained on account of the defendant's failure to furnish a car immediately." We do not find that Allen testified to the effect stated.

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

The stipulation in the bill of lading which provides that appellees shall not be entitled to recover damages to the hogs unless they give to the carrier notice in writing of their intention to claim damages does not apply to the damages incurred in this case by the failure to furnish a car in time. It is expressly confined to damages *covered* by the bill of lading, and damages incurred while the hogs were in a stock pen awaiting shipment are not covered by it. *St. L., I. M. & S. Ry. Co.* v. *Law,* 68 Ark. 218. The latter damages were the principal part, if not all, of the damages recoverable in this action. The instruction asked for by appellant, copied above, if it had been given, would probably have defeated the recovery of any damages, it applying to all damages, and was properly refused.

The exception to the testimony of McNeil, not having been incorporated in the motion for a new trial, was waived. 1 Crawford, Arkansas Digest, App. & Error, iv, b.

Judgment affirmed

SHIREY *v.* SHIREY.

Opinion delivered July 2, 1906.

1. DIVORCE—ALLOWANCE OF SUIT MONEY AND ALIMONY—RES JUDICATA.—The fact that alimony and suit money *pendente lite* were allowed in a former suit for divorce is no reason why a similar allowance should not to be made in a second suit for divorce. (Page 474.)
2. APPEAL—FINAL JUDGMENT.—A judgment allowing suit money and alimony during the pendency of the suit for divorce is a final judgment, from which an appeal will lie. (Page 474.)

Appeal from Lawrence Chancery Court; *George T. Humphries,* Chancellor; affirmed.

STATEMENT BY THE COURT.

A. W. Shirey, appellant, brought suit for divorce against

Fair Belle Shirey, appellee, February 26, 1906. He alleged in his complaint such indignities to his person as to render his condition intolerable. Appellee answered March 19, 1906, and denied specifically the allegations of the complaint. She also on same day filed her written motion for "suit money" and alimony pending the suit for divorce. She alleges that she is without means of support and without money to pay attorney's fees and costs for obtaining the depositions of witnesses by whom she expects to prove the allegations of her complaint, etc. She alleges that appellant is worth the sum of $200,000, as she is advised, and prays for a reasonable amount to be allowed her for the purposes indicated *supra.*

The appellant filed his response February 22, 1906, denying that appellee was without means, and that he was worth the amount alleged by appellee, and alleging that there was a suit for divorce pending in the same court, embracing the same subject-matter, and that appellant had already paid a large sum of money for support and attorney's fees, etc., under decree of the court in that suit, and he alleges that appellee is therefore not entitled to any further sum for such purpose.

The court, after hearing evidence on the issue raised by the motion and response, ordered that the appellant pay to appellee $250 as attorney's fees, and $50 to be paid to the clerk, to be used for expenses in conducting the suit, and the further sum of $25 per month, beginning from the date of the order, for appellee's temporary alimony, and the appellant appealed.

Campbell & Suits and *W. E. Beloate,* for appellant.

Cunningham & Smith, for appellee.

WOOD, J., (after stating the facts.) It is unnecessary to discuss the evidence which was the basis of the court's order. We have examined it, and think it is amply sufficient to sustain the court's finding.

The divorce proceeding in which the former order was made allowing suit money and alimony, it appears, was dismissed after the allowance had been made and the judgment therefor had been affirmed by this court. This is an allowance in another and subsequent suit for divorce instituted by appellee after the prior suit had been dismissed.

The judgment of the court allowing suit money and alimony

during the pendency of the suit for divorce is a final judgment on that matter, from which an appeal will lie. *Hecht* v. *Hecht,* 28 Ark. 92; *Countz* v. *Countz,* 30 Ark. 73; *Glenn* v. *Glenn,* 44 Ark. 46.

The judgment is therefore affirmed.

The petition for alimony, attorney's fees and costs in this court is overruled, except as to the $11.50 paid by her to the clerk.

HARTFORD FIRE INSURANCE COMPANY *v.* ENOCH.

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Opinion delivered July 2, 1906.

1. APPEAL—SECOND TRIAL—LAW OF THE CASE.—Where on appeal or writ of error a law case is reversed and remanded for new trial, and the facts developed on the second trial remain the same as they were on the first trial, the holding of the Supreme Court on questions of fact binds the trial court upon a second trial; but if the facts proved on the second trial are different, then the lower court may apply a different rule of law. (Page 479.)
2. INSURANCE—PROOF OF LOSS—OBJECTIONS.—Where an insurer objected to the proof of loss because it included property not included in the policy, and the assured prepared and registered to the insurer another proof of loss, which was received by the insurer without objection, the insurer waived any objections to the second proof by retaining it without objection. (Page 481.)
3. SAME—INSURABLE INTEREST.—One who has purchased personal property subject to a lien for the purchase money has an insurable interest therein. (Page 482.)
4. SAME—WAIVER OF FORFEITURE.—Where an insurance company accepts proofs of loss with knowledge that the assured has made a misrepresentation in the policy which would work a forfeiture, it will be held to have waived such forfeiture. (Page 483.)
5. SAME.—A condition in a fire insurance policy that the policy shall be void unless the insurer is the sole and unconditional owner may be waived by the insurer. (Page 483.)

6. SAME—INTEREST.—Interest is computable on a fire insurance policy from the date the policv is made payable. (Page 483.)

Appeal from Howard Circuit Court; *James S. Steel,* Judge; affirmed.

STATEMENT BY THE COURT.

This is a suit by appellee on a standard policy of fire insurance. The complaint alleged the issuance of the policy, the loss, a compliance by appellee with the requirements of the policy as to notice and proof of loss, and prayed for judgment in the sum of $1,250, the amount of the policy with interest.

Appellant answered, denying all material allegations, and set up "that the policy in suit provides, *inter alia,* that the entire policy shall be void and of no force if the interest of the insured be other than unconditional and sole ownership, and that the interest of said S. Enoch, to whom said policy was issued at the time of the alleged fire, was not an unconditional and sole ownership. That the policy also provided that if the building should be located on ground not owned by assured in fee simple the policy should be void, and that plaintiff was not the owner in fee simple of the land upon which the building was located."

Appellant also set up a plea of *res judicata,* alleging "that, by the judgment and determination of the Supreme Court, the policy of insurance was declared and adjudged void, and that the requirements to furnish proof of loss had not been waived. Appellant, to support the plea of *res judicata,* introduced the opinion and mandate of this court on the former appeal. *Hartford Fire Insurance Co.* v. *Enoch,* 72 Ark. 47.

In that opinion, among other things, we said (p. 51): "It was shown that appellee purchased a large portion of the property insured, and destroyed by fire, conditionally; that the vendor retained title to the same until the purchase money was fully paid; and that it had not been paid. The evidence tended to prove that these facts as to the ownership of the property were discovered by appellant after the fire." We further said: "Appellee was not the absolute and unconditional owner of a part of the property insured, and the policy, according to its own terms, is void. But appellee contends that this condition was waived. The burden was upon him to prove such waiver.

There could have been no waiver unless appellant at the time of the alleged waiver knew or had notice that the policy was forfeited on account of the failure of the condition. The evidence adduced for the purpose of showing a waiver was to the effect that appellant was informed that there was a lien on property for unpaid purchase money, and thereafter demanded additional proof of loss, which was furnished. That was not sufficient. The lien might have existed, and appellee might nevertheless have been the absolute and unconditional owner of the property. The evidence wholly fails to show a waiver. Reversed and remanded for new trial."

The court overruled the plea of *res judicata.*

W. C. Rodgers, for appellant.

1. The circuit court erred in refusing to treat the question of the validity of the policy sued on as *res judicata,* for both the validity of the policy and the question of waiving its invalidity are *res judicatae.* 56 Ark. 170; 33 Ark. 161; 26 Ark. 17; 63 Ark. 141; 80 Fed. 686; 27 Ohio St. 233; 20 Ohio St. 315; 94 U. S. 506; 64 Md. 199; 119 Ill. 30; 77 Ga. 7; 27 N. J. Eq. 505; 70 Ga. 475; 55 Ark. 609; 67 Minn. 48; 89 Va. 503; 80 Wis. 459; 54 Minn. 75; 168 U. S. 451; 4 S. D. 487; 53 Pac. 6; 117 Ind. 26; 50 Pac. 424, and numerous other authorities.

2. The proof of loss in evidence does not state the interest "of all others" in the property. Compliance with the stipulations in the policy as to proof of loss is a condition precedent to the right of recovery. 6 T. R. 710; 13 Me. 265; 49 Me. 282; 7 Cowen, 462; 85 Md. 289; 20 Wis. 217; 48 Kan. 239; 96 Ia. 39; 60 Ark. 532; 64 Ark. 590; 65 Ark. 54; 1 Ark. Law Rep. 67; 87 Fed. 118; 43 Ind. 418; 91 Md. 596; 78 Cal. 468. And the court erred in refusing the tenth instruction asked by defendant. That correct proof of loss is required after submitting insufficient proof does not dispense with the necessity of proof.

3. The twelfth instruction should have been given. Contracts to insure the property of another are against public policy and void. 15 Wall. 643; 104 U. S. 775; 97 Va. 74; 92 Mich. 584; 76 Tex. 400; 9 Fed. 249; 46 Mich. 473; 104 Ga. 446.

4. It was error to refuse the eleventh instruction. 68 Minn. 373; 2 Wood, Ins. § 450.

5. The sixth instruction erred as to the date from which interest would run.

D. B. Sain and *Feazel & Bishop,* for appellee.

1. On former appeal the policy was not declared void. The extent of that adjudication was that the evidence in that case failed to show a waiver. When a case is reversed and remanded for a new trial, without any specific directions, the parties are placed where they were before there was any trial, and the lower court is free to proceed with the second trial as though there had been no trial. 29 Ark. 85; 16 Ark. 181; 70 Ark. 196; 31 Am. St. Rep. 198; 54 Am. Dec. 449; 58 Am. Dec. 296. Appellee was not precluded from introducing on the second trial any new evidence he had on the question of waiver. 71 Ark. 292. The decision of an appellate court, rendered upon a given state of facts, becomes the law of the case only as applicable to those facts. On a new trial, if evidence is introduced establishing a new state of facts, the lower court is not bound by the decision. 46 Pac. 79; 45 Pac. 1000; 146 Ill. 71; 17 Col. 105; 134 Ind. 614; 26 Kan. 472; 33 S. W. 828; 2 Am. St. Rep. 814; 87 Am. St. Rep. 332; 65 *Ib.* 251; 59 *Ib.* 467; 29 *Ib.* 578; 46 *Ib.* 786.

2. The conditions avoiding the policy were waived by the company. Appellee's testimony is uncontradicted that he informed the agent that the title to the vehicles lay in Skillern until all the purchase money was paid. Knowledge of the agent must be imputed to the company. 65 Ark. 54; 62 Ark. 348; 52 Ark. 11; 53 Ark. 215. With this knowledge in its possession the proof shows it collected the premium, received the benefits accruing to it, has not returned nor offered to return the premium. It is in no position to ask relief. Cases *supra;* 65 Am. St. Rep. 717; 88 *Ib.* 986; 8 *Ib.* 384. Demanding further proof, with full knowledge of the facts constituting the forfeiture, estops appellant from setting up those facts as a defense. 53 Ark. 494; 67 Ark. 584.

3. The fourth instruction asked for by appellant was properly refused. If the proof of loss was unsatisfactory, appellant should have pointed out the defects, and, failing therein, a strict

compliance with the terms of the policy was waived. 33 Am. St. Rep. 838; 31 *Ib.* 786; 33 *Ib.* 29.

4. The twelfth instruction, though abstractly good, was properly refused, because appellee had an insurable interest. 58 Am. St. Rep. 719; 63 *Ib.* 499; 28 *Ib.* 548; 12 Wend. 507; 19 Pa. St. 45; 4 Mass. 330; 21 Pa. St. 513; 17 *Ib.* 429. See also 74 Me. 537; 25 Minn. 229.

5. Concede error in 6th instruction, and offer to remit excess of interest.

W. C. Rodgers, for appellant in reply.

There is no pretense that the additional evidence on which appellee relies could not have been produced at the first trial. It was his duty to do so, and a refusal to do so implies bad faith. Where a policy is void for failure of assured to keep the contract on his part, the company is not required to return the premium nor to tender it. 74 Ark. 507. It was held on former appeal that want of ownership in the assured vitiates the policy. See also 63 Ark. 187.

WOOD, J., (after stating the facts.) Appellant contends: 1. That this court decided on a former appeal that the policy in suit was void, and that its invalidity had not been waived, and that therefore its plea of *res judicata* should have been sustained.

In *Robinson* v. *Thornton,* 46 Pac. 79, it is held (quoting syllabus) that "where a judgment is reversed on appeal, and remanded for new trial, the holding of the appellate court on a question of fact, based on the evidence in the record, is not conclusive as to such question on a subsequent trial on new evidence." "The rule of the law of the case has no application to questions of fact, and nothing said on a former appeal as to the facts can bind the trial court upon a second trial, or be conclusive upon a second appeal. Where the facts appearing upon a second appeal are the same as those upon a former appeal, the legal effect of the facts is determined by the decision on a former appeal, which is the law of the case for the second appeal." *Benson* v. *Hartwell,* 103 Cal. 163; *Wallace* v. *Sisson,* 45 Pac. 1000; *Eckert* v. *Brinkley,* 134 Ind. 614.

When on an appeal or writ of error a cause is reversed and remanded for new trial, the case stands as if no action had been

taken by the lower court. *Harrison* v. *Trader,* 29 Ark. 85; *Heard* v. *Ewan,* 73 Ark. 513. If the facts developed on second trial remain the same as they were on the first trial, the lower court must be governed in applying the law to the facts by the principles announced by this court in that case as controlling. If the facts are different, then the lower court may apply a different rule of law. It follows that the trial court did not err in overruling the plea of *res judicata,* and in refusing requests by appellant for instructions covering same proposition as set up in plea. The proof as to the title to the property in the present case was the same as on a former trial, and therefore what we said on the former appeal as to the policy being void on account of the false warranty by appellee that he was the sole and unconditional owner of the property insured was and is the law on that subject. But, on the question of whether or not this condition that avoided the policy and worked a forfeiture was waived by appellants, the proof was different. On the first trial, the proof as to waiver showed that appellant was informed that there was a lien on the property for unpaid purchase money, and that thereafter appellant demanded additional proof of loss. We said that was not sufficient, because the lien might have existed, and appellee still have been the sole and unconditional owner of the property insured. But in the present case there was testimony that appellant was informed and knew, after the loss occurred, that appellee did not have the absolute and unconditional title to the property, and after acquiring such knowledge that it demanded "further proofs" of loss.

There was testimony in this case also to show that appellee informed the agent of the insurance company who issued the policy, and at the time it was issued, that the title to the vehicles insured was not in him. There was no such testimony as this in the former trial. Therefore what we said on the first appeal about there being no waiver of the forfeiture is not applicable. *Lovewell* v. *Bowen,* 75 Ark. 452.

The case of *Hill* v. *Draper,* 63 Ark. 141, which learned counsel for appellants relies upon, does not support him, and is not in conflict with the rule here announced. That was a chancery proceeding. On the first appeal a pure question of law was passed upon, the judgment of the lower court was "reversed, and the

cause remanded with instructions to overrule the demurrer." Upon the second appeal the merits were passed upon, and the cause was "remanded for further proceedings consistent with the opinion delivered" on the first appeal, and on the third appeal this court simply held that the proceedings of the last trial were not consistent with the decree of this court on the first appeal, and with its decree and directions on the second appeal. The cause was never "reversed and remanded for new trial," and the question had been completely adjudicated by this court upon its merits, and the last reversal was because the proceedings of the lower court were inconsistent with such adjudication.

2. The evidence as to "proofs of loss" being furnished is that appellee made out his proof of loss, swore to it and registered it to the company at Hartford on January 26, 1901 (the fire occurred January 3, 1901), and received a receipt therefor. Afterwards, when the adjuster told appellee's attorney that the proof of loss was insufficient, he made out another, had appellee to swear to it, and likewise registered it to the company. The last "proof of loss" bears date February 13, 1901. Appellee also obtained registered receipt for this. So far as the record discloses, no objection was ever made to the form of this proof of loss, and appellee was never advised or informed that the company did not accept same as a full compliance with the requirements of the policy. No defects in it were pointed out to appellee. Appellant contends that the proofs of loss do not comply with the requirements of the policy, because in one of them appellee does not state to whom the property belongs, and in the other he swears "that no one has any interest in said property except as follows: J. W. Cottingham holds a note for $75 for balance of purchase money of lot, and I have deed to same. A. L. Skillern has my promissory note for $420 and interest for balance of the purchase money due on surreys, hacks and buggies." These objections to the proofs of loss can not avail appellants. Appellee had his attorney to prepare proofs of loss, and forwarded same to the company. He did this evidently because he desired and intended to comply with the terms of the policy in this respect. The company, sometime after receiving the first proof of loss, notified appellee, through his attorney, that it was insufficient in that it "included property not included in the pol-

icy." Appellee thereupon had his attorney to prepare and register another proof of loss which the registry receipt shows that appellant received, and it is not shown that any objection was made to this, presumably for the reason that appellee in his last proof of loss had overcome the only objection made to the first, to the entire satisfaction of the company. In *Gould* v. *Dwellinghouse Insurance Co.,* 134 Pa. St. 570, 19 Am. St. Rep. 717, it is held that if the insured in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy in respect to proofs of loss, good faith requires that the insurer shall promptly notify him of objections thereto, so as to give him the opportunity to obviate them, and mere silence may so mislead him to his disadvantage as to be of itself sufficient evidence of waiver by estoppel." See notes to this case in 19 Am. St. Rep.; *Whitmore* v. *Dwellinghouse Ins. Co.,* 148 Pa. St. 406, 33 Am. St. Rep. 838, and notes; *Walsh* v. *London Assurance Corporation,* 151 Pa. St. 607, 31 Am. St. Rep. 786. See also *Burlington Ins. Co.* v. *Lowery,* 61 Ark. 108, on a question somewhat analogous. In other cases it is held that "an insurance company waives objections to proofs of loss by retaining them without pointing out specific objections to them." *Ins. Co. of No. America* v. *McDowell,* 50 Ill. 120, 99 Am. Dec. 497; *Weed* v. *Hamburg, etc., Ins. Co.,* 133 N. Y. 394; *Davis Shoe Co.* v. *Kittanning Ins. Co.,* 138 Pa. St. 73, 21 Am. St. Rep. 904, note; *Vangindertaelen* v. *Phoenix Ins. Co.,* 82 Wis. 112, 33 Am. St. Rep. 29, and note.

The court did not err in refusing appellant's request for instruction number 12 (Reporter set forth in note).* As an abstract proposition of law, it was correct; but it had no application here, for appellee, although not the absolute owner, had an insurable interest in the property covered by this policy. *Holbrook* v. *Ins. Co.,* 25 Minn. 229; *Reed* v. *Williamsburg City Fire Ins. Co.,* 74 Me. 537. See *Tyler* v. *Aetna Ins. Co.,* 12 Wend. 507; *Berry* v. *American Central Ins. Co.,* 132 N. Y. 49; *Strong* v. *Manufacturers' Ins. Co.,* 10 Pick. 40, 20 Am. Dec. 507, note, pp. 570, 571; *Merritt* v. *Farmers Ins. Co.,* 42 Ia. 13; *Williams*

*Request for instruction No. 12 was as follows:

"12. The jury are instructed that the plaintiff could not in any event recover for insurance on property which he did not own." (Rep.)

v. *Roger Williams Ins. Co.,* 107 Mass. 377-79; *Hartford Fire Ins. Co.* v. *Keating,* 86 Md. 130, 63 Am. St. Rep. 499, note.

Request for instruction number 11 (Reporter set out in note)† was in conflict with the doctrine announced by this court in *German Insurance Company* v. *Gibson,* 53 Ark. 494. See also *Planters Ins. Co.* v. *Loyd,* 67 Ark. 584; *People's Mutual Ins. Co.* v. *Goyne, ante* p. 315.

The court did not err in refusing request for instruction number 6 for appellant, and in giving it with the added words (Reporter set out in note)‡. The instruction as amended by the court and given was based upon the evidence, and is in conformity with the doctrine announced by this court in *Insurance Co.* v. *Brodie,* 52 Ark. 11; *Sprott* v. *Insurance Co.,* 53 Ark. 215; *German Ins. Co.* v. *Humphrey,* 62 Ark. 348; *Phoenix Ins. Co.* v. *Flemming,* 65 Ark. 54; *People's Mut. Ins. Co.* v. *Goyne, supra; Security Mutual Ins. Co.* v. *Woodson, ante* p. 266.

We find no reversible error in the granting or refusing requests for instructions, except the sixth mentioned below. The sixth instruction, given on behalf of the appellee, directing the jury to calculate the interest from the date of the fire, is erroneous. Interest should have been computed from the date the policy is made payable, which in the present case is 60 days after the proof of loss. *Southern Insurance Co.* v. *White,* 58 Ark. 227. The proof of loss, as shown by the registry receipt, was

†Instruction number 11, requested by appellant and refused by the court, was as follows:

"11. The jury are instructed that a requirement of amended proofs of loss by the defendant insurance company, or its agents authorized to represent it in adjusting losses, will not preclude the company from relying on the invalidity of the policy sued on by reason of any requirement therein that the property mentioned in the policy belongs to the assured as the sole and unconditional owner." (Rep.)

‡Instruction number 6 asked by appellant was as follows:

"6. Where a policy of insurance provides that it shall be void in the event the insurer is not the sole and unconditional owner of the property covered thereby, such sole and unconditional ownership in the assured is a condition precedent to a right of recovery."

The court refused to give instruction No. 6 as asked, but added the following words: "And, unless you believe by a preponderance of the evidence that same was waived by defendant, you should find for defendant." (Rep.)

given to the company on the 13th of February, 1901. Interest therefore should have been calculated from April 13, 1901.

Appellee offers to remit the excess of interest over the proper amount. The clerk will therefore enter the proper remittitur, and the judgment for the residue will be affirmed.

HILL, C. J., (dissenting.) The appellee's testimony showed that an adjuster of appellant company came to Nashville after the fire to investigate and adjust the loss, that he was informed of the condition of the title to the surreys, buggies, etc., and that in a subsequent conversation the adjuster told appellee's representative that the first proof of loss which had been sent in was not sufficient, as it included property that was not included in the policy, and that further proofs would have to be furnished. The appellee did furnish thereafter correct proofs. This statement of the adjuster should not be sufficient to work an estoppel against the company proving the contract of insurance had been violated by appellee. The adjuster was on an investigating tour, gathering all facts necessary and proper to pass on the claim, and most likely the course of the company would not be determined till his report was in. He volunteered to point out an insufficiency in the proof of loss, in order that it might be corrected and the claim not defeated on any ground connected with a defect in the proofs. An estoppel should be invoked covering any other defect in the proofs of loss than the one mentioned by the adjuster, but I do not think the estoppel should, from this mere statement, be invoked against defending the action on its merits.

This is the view I took of the case on the hearing, but I did not formally dissent; but on the rehearing my impressions have been deepened, and I have concluded to file this dissent.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. REAGAN.

Opinion delivered July 2, 1906.

1. CONTRACT TO FURNISH TRANSPORTATION—DAMAGES.—Where a railway company undertook to furnish free transportation to its hospital to

its employees in case of injury, and delayed doing so, the employee can not recover for pain and suffering caused by the delay under such circumstances if he had it in his own power to avoid such increase of injury by paying his fare. (Page 488.)

2. SAME.—Where a railroad company undertook to furnish free transportation to an employee, and failed to do so, the employee can recover only those damages which are the natural and proximate consequences of the breach; thus where the employee had the money with which to purchase a ticket, the natural and ordinary damages which would result from a breach of the contract would be the price of the transportation agreed to be furnished. (Page 489.)

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

STATEMENT BY THE COURT.

John Reagan was, in 1904, a section foreman in charge of section No. 50 on defendant's road. This section was located at and near Stephens, Ouachita County. On the 8th day of February, 1904, while riding on a handcar in the course of his duties, Reagan was injured by the explosion of a torpedo which had been placed on the track to warn passing trains. The injury was caused by a piece of tin from the torpedo striking the leg of defendant with such force that it penetrated the flesh and lodged between the two bones of the leg. Reagan went to the local surgeon at Camden, who gave him the following certificate:

"This is to certify that John Reagan is badly, and must go to hospital at Tyler, Texas.

[Signed] "G. W. HUDSON, Local Surgeon."

The word "hurt" or "injured" was evidently omitted from this certificate by mistake, but the meaning thereof is plain.

Reagan boarded the train with this certificate, but the conductor informed him that he could not receive it in lieu of a pass, and that he must procure a pass or ticket from the proper person or pay fare. Reagan then told the conductor he would go to Stephens, the next station, where he lived, and was allowed to do so. Reagan got off the train at Stephens, and sent a telegram to Davis, the roadmaster, asking him to furnish him a pass for transportation to Tyler. By a series of accidents this pass was not received until the 12th of February. After the pass was received Reagan went to the hospital at Tyler, Texas. But there

was some delay in performing the operation to remove the piece of tin, and the tin was not taken out of his leg until about 24 hours after his arrival. When the operation was performed, the leg had become badly swollen and poisoned by the tin, which was imbedded between the two bones of his leg. About a pint of clotted blood and pus was removed from the leg. The wound healed slowly, and Reagan was confined at the hospital about four weeks on account of the injury, and had not fully recovered from the effects of the injury at the time of the trial.

He brought an action against the defendant company to recover damages caused by delay in furnishing transportation to the hospital at Tyler and by delay in operating after his arrival. The defendant filed an answer, and on the trial the evidence showed a certain amount was deducted by the company from the wages of its employees as a fund to maintain a hospital for injured employees of defendant. This and other facts proved tended to show that there was a contract between the defendant and its employees that if the employee was injured while in the service of the company it would furnish prompt transportation to its hospital and treatment there free of charge.

The court, among other instructions, gave the following instruction to the jury:

"You are instructed that, if you believe from the evidence that the plaintiff was delayed in receiving transportation which he had a right to expect from the facts in this case, if such facts are proved, he is entitled to recover for whatever suffering and pain there may have been caused by reason of the delay in furnishing him transportation, notwithstanding he may have been able to pay his transportation."

And refused to give the following instruction asked by the defendant:

"1. The jury are instructed that if they find from the evidence that the plaintiff was injured while in the service of the defendant company, and was entitled, by virtue of an implied contract with defendant, to be transported, free of charge, to its hospital at Tyler, Texas, for treatment, and that defendant failed or neglected to promptly furnish transportation to plaintiff to go to the hospital, and by reason thereof plaintiff's injury was increased, and you further find that the plaintiff had the means by

which he could have paid his way and thereby reached the hospital promptly, it was his duty to have done so, and thereby avoided increased injury; and if you find he did have the means, and failed or neglected to use it, he can not recover any sum as damages which resulted from the delay of defendant in furnishing him transportation to the hospital."

There was a verdict and judgment in favor of plaintiff for the sum of $2,000, and the defendant appealed.

S. H. West and *Gaughan & Sifford,* for appellant.

1. As now pending, this is a suit for breach of contract, in no way sounding in tort. The question, therefore, whether appellee had the means to pay for transportation to the hospital at Tyler promptly was pertinent, and the court should have admitted testimony to prove it, and should also have given the first instruction asked by appellant. Sedgwick on Dam. (8 Ed.), § § 201, 202, 205-6, 209; 39 Ark. 347; 15 Fed. 57.

2. It was error to instruct the jury that, if appellee was delayed in receiving transportation which he had a right to expect, he was entitled to recover for suffering and pain caused by such delay, notwithstanding he may have been able to pay his transportation. *Supra.*

Scott & Head, for appellee.

1. It was for the breach of duty on the part of appellant in failing to send appellee with reasonable promptness to its hospital that this action was brought. When appellant each month deducted 40 cents from appellee's wages, it contracted with, and owed the duty to, appellee to carry him promptly, when injured, to its hospital. 54 S. W. 791. By the payment of the monthly assessments he has paid to be carried to the hospital when injured, and was in all respects the same as a passenger who has paid for and is entitled to a ticket. This case is controlled by 65 Ark. 175.

2. The first instruction asked by appellant fails to take into consideration whether or not appellee failed to take reasonable measures *within his knowledge* to diminish his loss.

RIDDICK, J., (after stating the facts.) This is an appeal from a judgment for the sum of $2,000 rendered against the defendant company for failure to furnish the plaintiff prompt

transportation to its hospital, and prompt treatment after his arrival.

The presiding judge instructed the jury that if there was an agreement by the company in case of injury to furnish the plaintiff transportation to its hospital, and it failed to do so, plaintiff was entitled to recover whatever suffering and pain there may have been caused to plaintiff by reason of the delay in furnishing him transportation, notwithstanding he may have been able to pay for such transportation. Now, a ticket from Stephens, Arkansas, where plaintiff lived, to Tyler, Texas, where the hospital of defendant was located, cost but six dollars, and the defendant company offered evidence to show that plaintiff had at all times an ample supply of money to have paid for this transportation, he had desired to do so, and that, when he arrived at the hospital, he had over $3,000 cash in his possession. Instead of paying his fare and compelling the company to restore the amount paid afterwards, he chose to wait for the pass. This delay no doubt acted unfavorably upon his wound, and was the cause of considerable suffering on the part of plaintiff: but, as he had it in his power to have avoided this delay and injury by buying a ticket, we think it was his duty to have done so. Suppose the company had never furnished him a ticket, could he, with $3,000 in his pocket, have been justified in refusing to spend six dollars for a ticket and in allowing his leg to mortify so that amputation would be necessary? and, if he did so, could he justly demand of the company compensation for the loss of a leg? It was the duty of plaintiff, when the company failed to carry out its contract, to do what he reasonably could to avoid further injury to himself, and we are of the opinion that he can not recover for pain and suffering caused by the delay under such circumstances, for he had it in his power to have avoided such injury. *Hall* v. *Memphis & C. R. Co.,* 15 Fed. 57; *Louisville & Nashville R. Co.* v. *Spink,* 104 Ga. 692.

The decision of this court in the case of *Hot Springs Ry. Co.* v. *Deloney,* 65 Ark. 177, does not conflict with our conclusion here, for that was a case of an unlawful ejection of a passenger at a point between stations. In such cases there is an element of tort, and the court said that the passenger could recover "for the loss of time and trouble in having to walk back

to Hot Springs, and such humiliation as he was made to undergo by being put off," but that he could not recover damages for mental anguish caused by the resulting delay in reaching his sick brother, and the judgment was reversed on account of an improper instruction on that point.

But this case has none of the elements of a tort, for plaintiff was not ejected from the train. He does not complain that the conductor at the time he boarded the train at Camden refused to carry him beyond Stephens, for he had neither pass nor ticket, and did not offer to pay fare. He got off at Stephens, and for the first time notified the defendant company that he needed a pass to go to Tyler. He claims only that the defendant was bound under its contract to furnish him transportation to the hospital when thus notified. We may concede that this contention was well taken, but it does not follow that plaintiff can recover for pain and suffering caused by delay in reaching the hospital. It must be remembered that the railway company was under no obligation to enter into a contract of the kind set up by this plaintiff. The law requires railway companies to carry passengers who present themselves at the proper time and place and tender the amount required for transportation of passengers. A breach of a contract of that kind by ejecting a passenger who has paid his fare is a violation of a duty which the company owes to the public for which the passenger ejected may recover his damages in an action for tort. But in this case the law did not require the companay to enter into a contract to carry its employees to a hospital when injured. In refusing to perform such a contract the company was guilty of no breach of duty to the public, nor of any tort. The damages must be assessed as in ordinary cases of breach of contract, and only such damages can be recovered as are the natural and proximate consequences of the defendant's breach of the contract. *Louisville & Nashville R. Co.* v. *Spink,* 104 Ga. 692; 3 Sutherland on Damages, § 899.

When a party has the money with which to purchase a ticket, the natural and ordinary damages which would result from a breach of a contract to give him free transportation would be the price of the transportation agreed to be furnished. If plaintiff in this case had the money with which to have purchased a ticket, we see no reason why he should be allowed to recover damages

for failing to furnish a ticket, beyond the price of the ticket. For if, having the money to buy a ticket, he voluntarily exposed himself to this additional pain and suffering, rather than pay the price of a ticket, his suffering caused by the delay is as much due to his own inaction as to that of the defendant, and he ought not to be allowed to hold the defendant liable for pain and suffering that he could have avoided by such a slight expenditure on his part.

We are therefore of the opinion that the court erred in refusing to allow evidence that plaintiff had money with which he could have bought a ticket to Tyler. He also, we think, erred not only in giving the instruction to which we have referred, bu in refusing to give instruction number one asked by the defendant, which stated the law substantially as set forth in this opinion.

Judgment reversed, and cause remanded for a new trial.

STRANGE v. BODCAW LUMBER COMPANY.

Opinion delivered July 2, 1906.

1. NEGLIGENCE—POND BESIDE HIGHWAY.—Where defendant company built a dam whereby the water was backed up along an unguarded public road, its liability to one whose horse was drowned thereby must depend, not upon the condition of the road itself, but upon the fact that the water which defendant placed along the road was so dangerous to travel that barriers were necessary to protect the public against danger, and that the failure of defendant to erect them caused the injury. (Page 494.)
2. SAME—LIABILITY OF PERSON BUILDING POND.—One who causes a deep pond to be constructed, either by making an excavation, or by erecting a dam, adjacent to a highway owes to the public the duty to erect and maintain barriers or guard rails or whatever else may be reasonably necessary to protect the public against the danger he has so created; and if, by reason of a failure to discharge this duty, a traveler along the highway or his property is injured, the traveler or owner of the propery can recover damages for the injury, unless his own carelessness, or that of his agent in charge of the property, contributed to the injury. (Page 495.)

3. SAME—EFFECT OF PERMISSION BY COUNTY JUDGE.—It is no defense, where a pond was constructed along a public highway, and a horse driven on the highway was drowned therein, that the pond was placed there by permission of the county judge, as he can not authorize acts dangerous to the public, nor relieve one from the consequences of his negligence. (Page 496.)

4. SAME—DEFENSE.—It is no defense, where a pond was constructed beside a highway and a horse was drowned therein, that the defendant who constructed the pond had no authority to enter on the highway to erect guard rails or barriers. (Page 496.)

5. SAME—INSTRUCTIONS AS TO DUTY TO PUBLIC.—In defining the duty of one who constructs a dangerous pond along a highway the court should not, as matter of law, charge that he must erect guard rails, but should charge that he must do what was reasonably necessary to protect the public from danger, leaving it to the jury to determine whether such guard rails were, under the circumstances, necessary. (Page 496.)

6. SAME—CONCURRENT CAUSES OF INJURY.—Where plaintiff's horse, while being driven along the highway, became frightened at a pair of goats, and backed off the highway, and was drowned in a pond constructed by defendant, the latter can not escape liability for its negligence because the accident would not have happened if the horse had not become frightened. (Page 497.)

7. PLEADING—IMMATERIAL AVERMENTS.—Where a complaint improperly sets out the evidence or a history of the transactions leading up to the essential or issuable facts, instead of alleging the latter merely, the court should not charge the jury that such immaterial allegations must be proved. (Page 498.)

Appeal from Lafayette Circuit Court; *Charles W. Smith*, Judge; reversed.

STATEMENT BY THE COURT.

The facts in this case are stated in the opinion. On the trial the circuit judge gave among other instructions the following over the objection of the plaintiff, and to the giving of each of which the plaintiff duly saved exceptions at the time:

"5. The jury are instructed that, though they should believe from a preponderance of the evidence that there were defects in said roadway, and that the alleged accident was rendered possible thereby, yet, if they believe that the proximate cause of said accident was that said horse became frightened at a pair of goats driven to a sled by one Leo Couch, and that, but for said horse

becoming so frightened at said goats so driven to a sled, said accident would not have happened, your verdict should be for the defendant.

"7. The jury are instructed that if they believe from a preponderance of the testimony that the roadway where said accident is alleged to have happened was in a reasonably good and safe condition, and that, but for the fact that said horse became frightened at the pair of goats and sled driven by Leo Couch, said horse and buggy would have gone safely over said roadway without accident, then their verdict should be for the defendant."

Searcy & Parks and *W. E. Atkinson,* for appellant.

1. The erection of the pond against and on both sides of the road is admitted, and that it rendered travel dangerous is proved. It is a public nuisance. 1 Wood, Nuisance, § 248; *Ib.* § § 74, 293, 266, 271, 345, 273-8, 290; 2 *Ib.* § 680; Cooley on Torts, 660; *Ib.* 619.

2. If the highway was rendered dangerous by the erection of the pond, one of the things reasonably to be expected and guarded against was the shying of horses. 2 Cush. 608; 20 S. E. 565.

3. The first instruction given for appellee erred in the enumeration of allegations, including therein as material, allegations which were not charged in the complaint, others that were admitted, and others that were not material, while it ignores the real cause of action.

4. It was also error to instruct the jury to find for the defendant if they found the accident was caused, not by defects in the roadway, but because the horse became frightened, etc., and backed off the roadway into the water. 1 Jaggard on Torts, 68; *Ib.* 70; 8 C. C. A. 109, 114; Cooley on Torts, 70; 16 L. R. A. 197.

Moore & Moore, for appellee.

1. Where two or more causes operate, resulting in an accident, the proximate cause must be understood to be that which in a natural sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. If it can not be said that the result would inevitably have occurred by reason of defendant's negligence, plaintiff has not made out his

case. 1 Shearm. & Redf. on Neg. § 3 and note 3. See further as to proximate cause, cases in point, 9 B. & S. 303; Webb's Pollock on Torts, 46; 12 L. R. A. 432; 16 *Ib.* 106; 18 *Ib.* 100; 51 Me. 127; 38 Me. 207; 97 Mass. 266; 100 Mass. 49; 8 L. R. A. 82; 6 L. R. A. 194; 65 Tex. 274; 34 S. E. 778; 7 Wall. (U. S.), 52; 56 Ark. 287; *Ib.* 390; 58 Ark. 157.

2. The instructions given for appellee are on the theory that if the proximate cause of the injury was not the condition of the roadway nor the non-protection of the traveling public, but some cause separate therefrom, the verdict should be for the defendant. This is the law.

3. Even if some of the instructions are considered as surplusage, yet the evidence sustains the verdict, and the judgment should be affirmed. 54 Ark. 289; 56 Ark. 594; 62 Ark. 289.

RIDDICK, J., (after stating the facts.) This is an action by F. A. Strange against the Bodcaw Lumber Company to recover $100 of the company as damages for causing the death of plaintiff's horse.

The company owns a sawmill plant near the town of Stamps in Lafayette County of this State. The town was west of the mill plant, and a public road that entered the town from the east passed not far from the mill and crossed a small stream called Crooked Creek before reaching the town. In 1893 the lumber company made a large pond by constructing a dam across the valley of this creek. The public road crossed the road above where the dam was constructed. To prevent the water from overflowing the public road, the road was straightened, and a roadbed several feet high was constructed across the valley of this stream with a bridge across the channel of the creek. This work was done by the lumber company with the consent of the county judge and with the assistance of the road overseer. This elevated roadbed was about twenty feet wide, and near the creek was over ten feet high. After the company had erected its dam across the creek the water backed up around this public road, and at places was eight or ten feet deep on both sides of the road. When the roadbed was first constructed, posts with connecting rails were placed along the edge of the roadbed to prevent wagons and teams from running off the dump into the pond. But, as the roadbed was raised from time to time by placing loads of

dirt and sawdust thereon, the surface of the roadbed was finally raised about the rails, so that nothing but the posts were left above the surface of the roadway. After this roadbed was constructed, it was under the control of the road overseer as one of the public roads of the county until, by an extension of the limits of the town of Stamps, it came within the limits of the town, and passed to the control of town authorities as a public street.

On the 5th of September, 1904, while this road or street was in this condition, Alvin Strange, a brother of the plaintiff, drove the horse of plaintiff to the town of Stamps to attend services at a church. In the buggy with him were his sister and another young lady. It was night, and while they were crossing this road and approaching the bridge over the creek the horse became frightened at a pair of goats hitched to a sled which a boy had driven upon the bridge. The horse, on being frightened by the goats, began to back, and before he could be stopped he backed the buggy over the side of the roadbed into the water, which was at that place about ten feet deep. The occupants of the buggy got out and escaped, but the horse was drowned. The plaintiff, as the owner of the horse, brought this action against the mill company, as before stated, to recover damages for the death of his horse. The jury returned a verdict for the defendant, and judgment was rendered accordingly, and the appeal taken by the plaintiff brings the case before us for review.

We will state at the outset that the defendant can not be held responsible for the condition of the roadway itself. It can not be held responsible for the fact that the road at this point was elevated on an embankment several feet high, for this was a public road, and defendant had no right to reduce the height of this embankment or to change it. In order for the plaintiff to recover, he must show that the water which defendant placed around and against this road was so dangerous to travel that barriers were necessary to protect the public against the danger, and that the failure of the defendant to erect them caused the injury.

The law is now well settled that it is unlawful to make an excavation or to put a dangerous obstruction of any kind adjoining

a public highway, and leave it in a condition to endanger the safety of those who are traveling thereon and who themselves are in the exercise of ordinary care. When one makes an excavation of that kind on his own grounds adjoining the public highway, he should exercise due care to protect the public against the danger to accidents caused by such excavations, and, if necessary, should erect a fence or guard rails for that purpose. This question was discussed and the law clearly stated in the case of *Beck* v. *Carter,* 68 N. Y. 283. See also *Barnes* v. *Ward,* 9 C. B. (Eng.), 392; *Hadley* v. *Taylor,* L. R. 1 C. P. 53; 1 Wood on Nuisances (3 Ed.), § 271, and cases cited.

The rule would be the same if one, after making an excavation adjoining the public highway, should fill it with water, and thus make a deep pond adjoining the highway. If such pond was dangerous to travelers on the highway who were exercising ordinary care, it would be the duty of the owner to erect barriers or guard rails or do whatever might be necessary to protect the public against the danger he had created. And his duty would be the same whether the pond was caused by making an excavation adjoining the highway and filling it with water, or by damming a stream which crossed the highway, thus causing the water to back up on both sides of the highway. In either case it would be his duty to so exercise his own rights as to avoid injury to the public; and if the danger was such that it could be foreseen that a fence or railing was required to guard the public against danger, it would be the duty of the owner to put them up.

Now, in this case it is admitted that the defendant constructed an embankment across a stream, and thus backed up the water on both sides of the public highway where it crossed the valley of the stream. If the presence of this water added nothing of danger to travelers on the highway who themselves exercised ordinary care, then the defendant was guilty of no wrong, and was not responsible for this injury. But if the water made the road more hazardous to travelers, it became the duty of the defendant company to do what was reasonably necessary to guard the public against danger caused by this act of damming the stream. If the danger was such that guard rails were required to protect travelers, they should not only have been provided, but kept in repair so as to serve the purpose intended. And if, by reason of the

failure of the company in this respect, a traveler along the public highway or his property was injured, the traveler or owner of the property can recover damages for the injury, unless his own carelessness, or that of his agent in charge of the property, contributed to the injury.

The case then turns first on the question of whether the presence of this water on either side of the public road was a source of danger to travelers on the highway who themselves exercised due care. If this was so, it was the duty of the company to erect guard rails or do whatever was reasonably necessary to protect the public against the danger; and if it failed to do so, and by reason of such negligence the plaintiff's horse was drowned, the company is liable, unless the driver of the horse was guilty of negligence contributing to the injury.

The fact that the pond was put there by permission of the county judge does not alter the case, for the permission of the county judge can not authorize acts dangerous to the public, or relieve the defendant from the consequences of its own negligence. Nor is it any defense for defendant to say that it had no authority to enter on the public highway to erect guard rails or barriers. If the danger to travel on the highway from this pond was of such a nature as to make it necessary to erect barriers to protect the public from danger, then the defendant would either have to erect the barriers or drain the pond. But it is not shown that it applied for permission to erect barriers, nor is there any ground to believe that a request of that kind would have been denied had it been made to the proper authorities, so we need not speculate upon what would have been the position of defendant if, before the accident happened, it had applied for permission to erect barriers between the pond and the highway, and this permission had been refused.

The instructions given by the court at the request of the plaintiff were somewhat too stringent, for, if the pond was shown to be dangerous to travel, the instructions declared as a matter of law that the defendant should erect guard rails, while in our opinion if the pond was dangerous to travel on the highway the defendant was then required to do what was reasonably necessary to protect the public from this danger, and it was for the jury to say whether, under the circumstances, guard rails should

have been erected or not, and whether such injury might have been foreseen and avoided.

On the other hand, the fifth instruction and other instructions given at the request of the defendant were too favorable to defendant, for they told the jury that if the proximate cause of the accident was that the horse became frightened at a pair of goats hitched to a sled, and that, "but for said horse becoming frightened at the goats driven to the sled, the accident would not have happened," they should find for defendant. As the undisputed evidence shows clearly that the accident would not have happened but for the fact that the horse became frightened at the goats, this fifth instruction was virtually an instruction to find for the defendant. The fact that the horse became frightened at the goats was no doubt one cause of the injury, but that did not necessarily relieve the defendant from liability. The horse did not run away. He began to back and became to a certain extent uncontrollable, but he did not get completely beyond the control of the driver until the buggy was backed over the edge of the roadway and went into the pond, dragging the horse after it. Horses, when frightened, often back away from the object that alarms them, but on being encouraged by their driver frequently regain their composure and move on again. So, under the facts of this case, it was for the jury to say whether, if there had been guard rails or something to prevent the buggy from going into the pond, this accident would have happened. If, notwithstanding the fright of the horse, the accident would not have happened if there had been guard rails, and if the absence of guard rails was due to the fault of the defendant, then its negligence as well as the fright of the horse is a proximate cause of the injury. If that was so, then, as the plaintiff was not responsible for the presence of the goats on the bridge, or the fright of the horse, he can recover if the driver in charge of the horse was guilty of no negligence contributing to the injury. We are therefore of the opinion that the fifth instruction and some of the other instructions given for the defendant were misleading and erroneous. *St. Louis, I. M. & S. Ry. Co.* v. *Aven,* 61 Ark. 141.

Counsel for the defendant have cited *Hill* v. *New River,* 9 B. & S. 303, and other cases which hold under similar instructions that no recovery can be had for the reason that the fright of the

horse, and not the absence of barriers, is the proximate cause of the injury. But these cases were considered by this court in case of *St. Louis, I. M. & S. Ry. Co.* v. *Aven,* cited above, where it was held that the fright of the horse and the absence of barriers were both causes directly contributing to the injury; and if one of these contributing causes was due to the fault of the defendant, the plaintiff could recover for the injury caused thereby, when he himself was free from negligence. This case is stronger for the plaintiff for the reason that the horse was not in this case running away nor completely beyond the control of the driver, but was only backing away from the object that alarmed him.

The first instruction given for the defendant was too long and involved, and submitted questions to the jury, some of which were not controverted, and others immaterial. It is true that there was some excuse for this instruction, in that it followed, to some extent, the statement in the complaint, which contains a number of allegations which were unnecessary to make in the complaint. The complaint should allege the substantive or issuable facts, and it is unnecessary to set out the evidence, or a history of the transactions leading up to the essential or issuable facts. Bliss on Code Plead. (3 Ed.), § 206. But the fact that matters of evidence and other unnecessary allegations were set out in the complaint does not justify the court in telling the jury that such allegations must be proved when they are immaterial. Among other allegations which the instruction told the jury that the plaintiff must prove to make out his case was that "the defendant erected across the stream and overflowed ground a bridge and dump and roadway," and continued up to the time of the accident "to maintain and have supervision of the keeping up of said dump and highway," etc. But this was not correct, for the right to recover in this case depends, not on whether the defendant constructed and maintained this roadway, but on whether it, by banking this water around a public highway, created a danger to the public, and then negligently failed to take proper precautions to guard the public against injury.

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

HARRIS v. UMSTED.

Opinion delivered July 2, 1906.

1. PARTNERSHIP AND TENANCY IN COMMON DISTINGUISHED.—By an agreement to buy a chattel jointly, without anything said as to a joint sale of the property and division of the profits, a tenancy in common is created, and not a partnership. (Page 501.)
2. TENANCY IN COMMON—EFFECT OF SALE.—Where two persons owned a chattel jointly, and one of them sold it and received the proceeds, the other can ratify the sale and recover his share of the proceeds. (Page 502.)
3. EQUITY JURISDICTION—WAIVER OF OBJECTION.—The right of a defendant to object to the jurisdiction of equity is waived by a failure to move to transfer to the law court. (Page 502.)
4. TENANCY IN COMMON—CONSTRUCTION OF AGREEMENT.—Where two pearl buyers agreed to go together to a distant village and purchase a certain pearl in common, and accordingly went there, but failed to buy the pearl, and one of them, without the other's knowledge, went back the next day and bought the pearl, and the other, after learning of the purchase, waited more than a year, and until the pearl had been resold for a large advance, before claiming an interest in its proceeds, a finding of the chancellor that the agreement did not extent beyond the day on which it was made will be sustained. (Page 502.)

Appeal from Jackson Chancery Court; *George H. Humphries,* Chancellor; affirmed.

Jno. W. & Jos. M. Stayton and *Charles T. Coleman,* for appellant.

1. The evidence in this case establishes a partnership agreement. 22 Am. & Eng. Enc. Law (2 Ed.), 13; *Ib.* 41; 37 Ark. 308; 131 Fed. 124; 130 Fed. 475. Having agreed to engage in the joint venture, each owed the utmost good faith to the other, and neither could surreptitiously circumvent the other. If he should, the law would hold him to account for the profits, if any, and withhold from him the right to demand contribution for losses. 22 Am. & Eng. Enc. Law (2 Ed.), 115; 53 Ark. 152.

2. The conceded facts establish a resulting trust in favor of appellant. Wherever one person is placed in such relation to another, by the act or consent of that other, or of the act of a third person, or of the law, that he becomes interested for him or with him in any subject of property or business, he

is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated. 49 Ark. 245; 121 Fed. 620, and authorities cited.

Stuckey & Stuckey and *J. M. Bell,* for appellee.

1. Appellant's own evidence does not establish a partnership, which is a thing created by contract, never by operation of law, and must have a valid consideration to support it. George on Part. § § 2, 5. No money was paid, no capital nor labor employed, nor skill displayed to further a common cause. *Ib.* § 19; *Ib.* § 9. If a purchase had been made pursuant to an agreement as stated by appellant, that would have made them tenants in common, not partners. 22 Ark. 381.

2. A contract must necessarily exist before a resulting trust can be established. 9 Ark. 518. The evidence shows that the avoidance of competition was the sole purpose of the agreement, and that the contract that they were not to bid against each other, was for that day only. The negotiations were preliminary, and should not be confused with the contract itself. 7 Am. & Eng. Enc. Law (2 Ed.), 39. Such a contract was illegal and void. Kirby's Digest, § 1976. And the courts will not lend their aid to enforce it. 25 Ark. 210; 30 Ark. 431; 32 Ark. 620; 48 Ark. 489; 92 S. W. 865.

RIDDICK, J. This is a suit in equity brought by Walter Harris against Thos. P. Umsted to recover one-half of the profits arising from the purchase and sale of a pearl. Harris and Umsted both lived in Newport, Arkansas. Harris was a pearl buyer, engaged in the business of buying and selling pearls. Umsted was a member of the firm of T. P. Umsted & Co., composed of himself and his brother, G. B. Umsted, which firm was engaged in the same business. During the morning of June 6, 1902, Harris and T. P. Umsted each received at Newport information by telephone that one DeVault, of Bradford, had found near there in White River a valuable pearl which he desired to sell. Each of these parties learned also that the other had received this information, and was desiring to buy this pearl. Bradford, where the owner of the pearl lived, was about twenty miles from Newport, and, as the morning train going south from Newport had passed before they received the information

about the pearl, they were compelled, in order to reach Bradford that day, to go by horse and buggy. To avoid a race between them from Newport to Bradford and subsequent competition in buying the pearl, they agreed to go together in a buggy to Bradford, and to purchase the pearl, together, or jointly, if it could be obtained at a fair price. They went to Bradford, but failed to obtain the pearl. The owner at first demanded over $2,000 for the pearl, but finally offered to take as low as $1,350, while Harris and Umsted offered $1,300 for it. That was the highest price offered, and they returned to Newport without having purchased the pearl. Next day Umsted returned to Bradford on the train, and purchased the pearl, paying therefor $1,410. On the day following this purchase Harris was informed of the purchase by Umsted, and he asked Umsted if he, Harris, was not interested in the purchase. Umsted replied that he did not understand it that way, that he had purchased the pearl for the firm of T. P. Umsted & Co. It was over a year afterwards before Harris mentioned the subject to Umsted again. He then tendered Umsted one-half of the money he had paid for the pearl, and notified him that he claimed a one-half interest in the proceeds of the sale of the pearl. In the meantime Umsted & Co. had sold the pearl in New York city for $6,700, and the fact that the pearl had been sold for a large sum had become generally known in Newport, and Harris knew it at the time he made the tender.

The chancellor found that there was not sufficient evidence to sustain the allegations of the complaint, and dismissed the complaint for want of equity. The appeal of plaintiff brings the case before us for review.

If we take the evidence of the plaintiff himself as true, it is doubtful if it is sufficient to support the allegation in his complaint that he and the defendant "formed a copartnership between them for the purpose of buying and selling a valuable pearl." It is true that he testified that they agreed to go down to Bradford and "buy it together." And, in response to the question of his own counsel as to whether they agreed to buy the "pearl in partnership," he responded "Yes." But his testimony shows only an agreement to go to Bradford and buy the pearl together; in other words, to become joint purchasers of the pearl. But an agreement by two or more persons to buy a piece of property

together does not amount to an agreement to form a partnership when there is no agreement for a joint sale of the property and a sharing of the profits. Nothing was said by these parties about selling the pearl and sharing the profits, and, if the testimony of this witness be taken as literally true, and they had purchased the pearl under that agreement, they would have owned the pearl in common, but not as partners. *Baldwin* v. *Burrows,* 47 N. Y. 199; *Stevens* v. *McKibben,* 15 C. C. A. (U. S.), 498.

But the question of partnership is not very material in this case, for, if these parties were owners of this pearl in common, and one of them sold it and received the proceeds thereof, the other can ratify the sale and recover his share of the proceeds.

While the action was brought in a court of equity, no motion to transfer the case to the law court was made, and the right to object to the jurisdiction of the court of equity to hear the case was thus waived. *Cribbs* v. *Walker,* 74 Ark. 104-122.

The main question in the case is whether the agreement which these parties made to purchase the pearl together or in common extended beyond the time of the trip to Bradford, on which occasion it was made. After considering the matter, a majority of us are of the opinion that the evidence supports the finding of the chancellor that this agreement did not extend beyond that day. These parties made the agreement on that occasion to prevent competition between them, and to enable them to buy the pearl at a lower price, as they were the only two buyers going to Bradford that day. But there were other pearl buyers at Newport and Memphis who had been informed that the pearl was for sale, and there was no special reason why these parties should prolong their agreement to buy together beyond this trip, for such an agreement would not keep the other parties from bidding.

The testimony of Harris, it is true, tends to support the allegations of his complaint that he and Umsted agreed to purchase the pearl together, and that the agreement was not limited to the particular occasion on which they went to Bradford for that purpose. But this testimony is contradicted by that of Umsted, who states positively that the only agreement made was that they would not bid against each other on that occasion, and that, if either bought the pearl on that trip, it should be for the

benefit of both. As the pearl was not bought at that time, the agreement to purchase together, according to the testimony of Umsted, came to an end. The long delay of Harris in making a definite claim to an interest in the pearl is also a circumstance to be considered. Although he knew within 24 hours after the purchase of the pearl by Umsted that Umsted denied his right to an interest therein, he made no definite claim to an interest, nor offered to pay any part of the price, until over a year afterwards, when it was known that the pearl had been sold for a large price. This conduct is a circumstance against his present claim.

The case, as we see it, turns on a question of fact where the evidence is conflicting; but, taken as a whole, it seems to favor the finding of the chancellor. The judgment is therefore affirmed.

HILL, C. J., (concurring). Taken as a whole, the evidence convinces me that a partnership in handling the pearl was contemplated by both Harris and Umsted, and that Umsted's conduct and statement led Harris into delaying the purchase, believing Umsted would not be his competitor, and that they would profit by waiting, instead of purchasing, when only the sum of $50 split the trade, and that Umsted took advantage of thus leading Harris away from a joint purchase and acquired the pearl himself. There was no partnership between them, for nothing was done under the agreement therefor, but there was a right to a partnership in the venture; but to acquire that right Harris must offer to share, not only the initial cost of the venture, but the effort and money to make it a success, and also to share the possible losses. According to his own statement, he did nothing beyond a bare assertion of his right until fifteen months after the purchase, and twelve months after the sale, when he tendered one-half of the initial cost. This is insufficient to let him in on the profits.

Umsted was much in the case of the "merchantman seeking goodly pearls, who, when he found one pearl of great price, went and sold all that he had and bought it." To make a success in securing a profit on this "pearl of great price," distant markets had to be sought; consequent labor, expenses and intelligent effort were required. Harris offered to share none of these

burdens until long after the enterprise proved a great success, and herein is the essential weakness of his case. As there was no partnership in fact, but a right to one, according to his testimony, Harris should not only have promptly asserted his right on learning that Umsted had acquired the pearl, but should have followed that assertion by *bona fide* offers to do his share of the work and to bear his share of the expenses and losses, and then enforced his rights by suit within a reasonable time, if his rights were denied after he offered to share the burdens. Right to participate in a venture of this kind can not be preserved by a bare assertion of such right. The party must put himself in position to become poorer as well as richer by the enterprise. He can not rest on bare assertion, and wait till the efforts and money of the other party demonstrated the success or failure of the enterprise, and then enforce his right in the partnership if it has proved a profitable enterprise. Harris never put himself in position to become liable for the losses, should the enterprise prove disastrous, and he can not be permitted to sit by and wait and then compel Umsted to bear all the losses or halve the profits —according to the turn of the speculation.

Mr. Justice WOOD concurs herein.

MARION COUNTY v. ESTES.

79 504
190 375

Opinion delivered July 2, 1906.

1. CIRCUIT COURT—APPEAL FROM COUNTY COURT.—Appeals are allowed to the circuit court from all final orders and judgments of the county court, and on such appeals the circuit court proceeds to try such cases *de novo* as other cases at law. (Page 505.)
2. APPEAL—CONCLUSIVENESS OF FINDING OF COURT.—Under Kirby's Digest, § 4402, providing that the county court may fix a reasonable compensation to the jailer for feeding the county prisoners, a finding of the circuit court, on appeal from the county court, that seventy-five cents per diem was a reasonable compensation therefor will not be disturbed on appeal therefrom if based upon legally sufficient evidence. (Page 505.)

Appeal from Marion Circuit Court; *E. G. Mitchell,* Judge; affirmed.

Woods Bros., for appellant.

The evidence fully shows that the county court did not abuse its discretion in fixing the compensation of the jailer, and that the allowance was equal to the value of the services rendered. Kirby's Digest, § § 3399, 4402, 1375, 1452, 1453, 1454, 3518; 64 Ark. 162; 47 Ark. 80; 44 Ark. 437; 34 Ark. 395.

McCULLOCH, J. Appellee, H. R. Estes, was jailer of Marion County, and this is a controversy as to the amount of his compensation chargeable against the county for feeding prisoners. He presented an account claiming 75 cents per day for feeding each prisoner, but the county court allowed only fifty cents per day. He appealed to the circuit court, where, on conflicting testimony as to reasonable compensation, the amount claimed was allowed him. Judgment was entered accordingly, and the county appealed.

The statute provides that "whenever any person committed to jail upon any criminal process, under any law of this State, shall declare on oath that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner the food necessary for his support, for which he shall be allowed a reasonable compensation, to be fixed by the county court." Kirby's Digest, § 4402.

Appeals are allowed from all final orders and judgments of the county court to the circuit court (Kirby's Digest, § 1487), and on such appeals the circuit court proceeds to try the case *de novo* as other cases at law. Kirby's Digest, § 1492; *Phillips County* v. *Lee County,* 34 Ark. 240; *Dodson* v. *Fort Smith,* 33 Ark. 508; Ex parte *Levy,* 43 Ark. 42; *Freeman* v. *Lazarus,* 61 Ark. 247.

The evidence was conflicting, but the findings and judgment of the circuit court are sustained by evidence legally sufficient, and we do not feel at liberty to disturb them.

Affirmed.

ARK-MO ZINC COMPANY v. PATTERSON.

Opinion delivered July 2, 1906.

1. CONTRACT—PERFORMANCE.—Where the parties to a contract for the construction of a manufacturing plant agreed that, after its completion, it should be tested, and should show a capacity to do certain work, no recovery can be had thereunder if on completion the test failed to show a substantial compliance with the requirements of the contract. (Page 513.)
2. SAME—CONSTRUCTION.—Where, in a contract for the erection of a manufacturing plant, it was stipulated that the plant should be built by plaintiff under the direction of a referee selected by defendant, the fact that such referee was present during the progress of the work and failed to exercise his right of disapproval while the work progressed did not estop defendant from rejecting the completed plant, where the contract stipulated for the right of acceptance or rejection on final test after completion of the work. (Page 516.)
3. SAME—BREACH—RECOVERY OF PAYMENTS.—Where a contract whereby plaintiff agreed to erect a manufacturing plant for defendant stipulated that defendant should make partial payments during the progress of the work, which were made, and that the work might be accepted or rejected after completion if it failed to come up to the requirements of the contract, the amounts so advanced, with interest from the dates of payments, are recoverable on the work being rejected for failure to comply with the contract. (Page 516.)

Appeal from Marion Chancery Court; *T. H. Humphreys*, Chancellor; reversed.

STATEMENT BY THE COURT.

The plaintiff, G. M. Patterson, instituted this suit in the chancery court of Marion County against the defendant, Ark-Mo Zinc Company, a New Jersey corporation doing business in this State, to recover the contract price for the erection of a concentrating and ore-dressing plant at the "Climax" zinc mine in Marion County, owned and operated by the defendant, and to enforce a statutory mechanics' lien therefor. An unpaid balance of $892.33 is claimed on the original contract price, and the further sum of $781.36 for extras, making a total of $1,673.69 alleged to be due and unpaid.

The contract between the parties, whereby the plaintiff undertook to construct the plant, contained the following clauses, viz.:

"1. The second party shall furnish, build, erect, install, complete and place in good running order, satisfactory to first party, the said plant, according to the specifications and blue prints hereto annexed, and by reference thereto herein is made a part hereof, and second party shall furthermore furnish and install all machinery, lumber, hardware and other material, together with all labor necessary to complete the said plant.

"2. The same shall be furnished in a good, workmanlike and substantial manner to the satisfaction and under the direction of W. N. Allen, or under such other person as first party shall select for that purpose, to be certified under the hand of the said W. N. Allen or by first party. * * *

"6. Should any dispute arise concerning the true construction or meaning of the specifications, the same shall be decided by the said W. N. Allen, or such other person appointed by him or by first party in good standing, and his decision shall be final and conclusive. * * *

"8. After completion of the plant and upon due notice by second party to first party or to said W. N. Allen, given personally or by registered letter at least ten days prior to a day to be therein fixed, the said plant shall be tested by being operated continuously for a period of five days under the control and direction of the said W. N. Allen, or any person appointed by first party as hereinbefore provided. The test must show to the satisfaction of the said W. N. Allen, or such other person appointed by the first party, that the plant as a whole has been built in conformity to this agreement, and that it will crush and properly clean in ten hours or less at least fifty tons of ore from the said mine, or ore of a similar character to that of said mine. * * *

"10. First party shall pay to second party, as the sealing and delivery of this contract and the bond hereto attached, $500. First party shall pay second party $2,000 when said plant, including the machinery, lumber, hardware and all parts thereof, are delivered on the property of the Ark-Mo Zinc Company at said Climax mine. $599.53 shall be paid when the plant is completed and accepted and turned over to the owners in good condition, and the balance, $1,000, after the said last payment and acceptance."

The specifications attached to the contract set forth in detail

the kind of machinery to be furnished and the manner in which the plant should be constructed, and concluded with the following provisions, viz.:

"Contractor to furnish all machinery, lumber, labor and other material necessary to complete said mill. The contractor will be and is bound to give an approved bond in the sum of the total contract price of the mill, to secure the faithful performance of his part of the contract. Contractor to start up mill and run same for a period of five days to demonstrate the correctness of his work. Owners of mill to furnish crusher, feeders and engineer. These specifications and two blue print drawings comprise a complete mill, tried and running, whether every item is specified or whether shown in blue-print details. The said concentrating and ore-dressing plant is to be finished on or before the 15th day of July, 1902, or as early as possible for the contractor to do so, it being understood that the day fixed is a later day than the one estimated upon during preliminary negotiations. If the said plant is not finished at the time mentioned, then the said contractor shall pay as liquidated damages the sum of $7.50 per day for each day's delay after said day."

The defendant filed its answer denying that the plaintiff had complied with the contract by constructing the plant in accordance with the terms of the contract and specifications, alleging that the plant had not come up to the test provided in the contract; that it was so defective as to be practically of no use, and was not satisfactory to said W. N. Allen or defendant, and had been rejected, and that defendant had paid to the plaintiff the sum of $3,207.20 on said contract price. The answer was made a cross-complaint against the plaintiff and the sureties on his bond, with prayer for recovery of said sum advanced and also damages on account of the plaintiff's alleged failure to comply with the contract. Alleged defects in the plant are set forth in detail in the answer as follows:

"The boiler is improperly and defectively set, the inside walls in the fire box having fallen in, and being in a dangerous condition; that all steam connections are faulty and so arranged that, when it became necessary to close down any one department of the mill, all must be closed; the engine is defective in its connections, and did not work at all satisfactorily, and had a decided

pound in the cylinder, and would wear it out in a very short time. The follower catches and hammers at each revolution. The rolls are not set on a solid foundation, and are insecure and dangerous. The crusher is not set on a solid foundation or anchored, and is not true upon its base, and is insecure and dangerous. The screen is hung insecurely, and is dangerous. The main line shaft is not properly set, and is unable to stand the strain that operation would cause. The elevator is improperly constructed, and permits a constant waste of ore. The ore bin is improperly constructed, and would not sustain the weight it was intended to sustain, and is broken. The hoister house is improperly and insecurely constructed; the vibrations, when the hoister is in operation, being so great that it renders it difficult for the hoisterman to perform his duties. The steam connections on the hoister are so leaky that it is impossible to operate it on account of escaping steam, without wrapping the joints with cloth; and the building is improperly and defectively constructed. That it will not crush and properly clean in ten hours or less at least 50 tons of ore from appellant's mine, or ore of a similar character to that of said mine, and that there are many other defects in the construction of said plant. That, after a test of said plant by appellee and said plant being defective and not according to contract, the same was rejected, and was not satisfactory to said W. N. Allen or appellant, and, although promptly notified of such defects the appellee refused to remedy same, and said plant was closed and tendered to appellee, and appellant still tenders same to them."

The chancellor made the following findings of the facts, viz.:

"W. N. Allen, the director of the work, was on the ground about three days out of the week while the work was progressing, according to his own evidence, and more of the time according to the weight of evidence. The machinery was of the kind and quality provided for in the contract. There were some defects in the construction of the building and installation of the machinery, and some changes and modifications in the plans and specifications, yet upon the whole there was a substantial compliance with the contract on the part of the contractor. The changes and modifications of the plans and specifications con-

sisted in roofing the building shingle fashion instead of being batted, a slight change in the location, a decrease in the size of the jig room of four feet and two inches in the fifth cell of the jig. Any of these changes could be observed by a casual observer. The defects consisted of the floor lacking sufficient bracing, thickness of the floor and failure to bat the hoister house; the failure to put a mudsill lengthwise under the support to the ore room; the failure to line the mouth of the elevator and three pipes with iron; the failure to place a fourth girder, box and fixtures in the thirteen-foot space to support the main shaft; the failure to exactly plumb the piles in the piling foundation under the jig room; the failure to place sufficient piling under the west wall of the boiler and engine room, and to set the crusher on a solid foundation, and to sufficiently line the fire box under the boiler. None of these defects were intentional or willful on the part of the contractor, and most of them could be seen and detected during the construction of the plant by a person competent to direct the construction of a mill and receive same. The jig was constructed in the manner provided in the contract, except the fifth cell, which was a little smaller, but the fifth cell neither takes from nor adds to the capacity of the mill. I find from the whole evidence that it was the duty of respondent to furnish water necessary to operate the mills, which it has never done; that both parties are in possession of the mill; that the capacity of a mill is largely due to the number of jigs and water supply. This contract provides for only one jig. The mill was not completed for thirty days after the time provided by the contract. After the mill was completed, respondent expended $700 or thereabouts trying to get a water supply without insisting or even requesting or demanding that the contractor furnish water. The respondent has never received the mill, and both parties are in possession thereof, contending that the failure of the mill in the attempted tests to properly perform its functions and come up to the required running capacity is due to the neglect and failure of each other."

A decree was rendered in favor of the plaintiff for the amount claimed, after deducting the sum of $225 which was allowed to the defendant as liquidated damages of $7.50 per day on account of delay in completion of the plant. The defendant appealed.

Seawel & Seawel, for appellant.

1. Substantial performance permits only such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, may be remedied without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deductions from the contract price. 64 Ark. 34; 9 Cyc. 603; 6 *Ib.* 57, 58; 30 Am. & Eng. Enc. Law (2 Ed.), 11224.

2. There was no waiver of substantial performance. 51 Pa. St. 473; 3 Ia. 209; 3 Ark. 324, 336; 4 Quebec, 451, and cases *supra.*

3. If the defects were unsubstantial and capable of remedy, the burden of proving the cost thereof was on the appellee. 163 N. Y. 220 *et seq.;* 6 Cyc. 98, and cases cited; 30 Am. & Eng. Enc. Law (2 Ed.), 1224.

4. Having contracted to construct the mill to the satisfaction of appellant, same to be certified by appellant or agent, a substantial performance on the part of appellee would not be sufficient to entitle him to recover. 48 Ark. 522; 68 Ark. 187; 50 Mich. 565; 24 Fed. 893; 11 Hun (N. Y.), 70; 108 Pa. St. 291; 66 Wis. 218; 68 Mich. 101; 120 Pa. St. 69; 43 Ill. 445; 76 Va. 604; 95 Cal. 626; 22 Barb. (N. Y.), 606; 99 Mass. 183; 173 Mass. 356; 7 Gray (Mass.), 139. See also 6 Cyc. 70-77; 30 Am. & Eng. Enc. Law (2 Ed.), 1244, 1237, 1283, and cases cited; 77 Hun (N. Y.), 337.

5. The mill was worthless; its capacity less than the contract specified; would not properly clean ore; and rescission was the proper remedy. 111 Ia. 426; 30 Am. & Eng. Enc. Law (2 Ed.), 1274; 2 Ark. 388; 6 Cyc. 75; 94 Ia. 607; *Ib.* 713; 61 Ark. 315; 54 Ark. 423; 66 Ark. 433; 6 Cyc. 63, 24, 27, *et seq.,* 75; 30 Am. & Eng. Enc. Law (2 Ed.), 1212, 1226.

G. H. Perry, for appellee.

1. By the terms of sections two and six of the contract, Allen was in effect made the architect whose duty it was to supervise the construction of the work and pass upon the character of the material being used therein from the beginning and from time to time as the work progressed. 5 L. R. A. 270. Standing in this relation, not only are his decisions, made in good faith

and without concealment of defects by the builder, binding on the appellant, but, if he failed to make objection to the work, his approval may be presumed. 39 Ohio, St. 1; 97 U. S. 398; 109 U. S. 618; 114 U. S. 549; 52 Pa. 217; 84 Ill. 226; 14 Gratt. 308; 33 Wis. 332; 1 Beach, Mod. Law Cont. 141. The question is, not whether the work was done to the entire satisfaction of W. N. Allen, but whether it was done in a good, workmanlike and substantial manner. 5 L. R. A. 554; 63 N. Y.; 102 N. Y. 87; 88 N. Y. 648; 80 N. Y. 312; 62 N. Y. 226. And if the contract has been substantially complied with, the refusal of Allen to give his certificate could not defeat the action, because such refusal would be unreasonable. 17 N. Y. 176; 26 N. Y. 26; 44 N. Y. 145; 88 N. Y. 648; 34 U. S. (9 Pet.), 328; 4 Hun, 652; 21 Hun, 121; Beach, Mod. Law Cont. § 100.

2. In building contracts, substantial performance is all that is required. 80 N. Y. 317, and cases cited; 62 N. Y. 256; 81 N. Y. 211; 50 N. Y. 145; 88 N. Y. 648; 28 N. Y. Supp. 160; 6 Cyc. 57, and citations; 5 Lawson, Rights, Rem. and Pr. § 2487; 1 Beach, Mod. Law Cont. 140. Whether there has been a substantial performance is a question of fact. 6 Cyc. 58. And the chancellor's finding will not be disturbed unless it is against the preponderance of the evidence. 41 Ark. 294; 50 Ark. 185; 49 Ark. 465; 24 Ark. 431; 44 Ark. 216; 55 Ark. 112; 68 Ark. 134; *Ib.* 314; 68 Ark. 287; 71 Ark. 105; 73 Ark. 479.

3. The burden of proving the cost of remedying unsubstantial defects was on appellant. 32 S. W. 571, 573; 81 N. Y. 211; 50 N. Y. 666; *Ib.* 145; 123 N. Y. 385; 25 N. E. 418; 79 Ia. 40; 80 N. Y. 312; 62 N. Y. 264.

4. A certificate from Allen was not necessary to entitle appellee to recover. Authorities *supra.*

5. The contract provides for only one jig, specifying its dimensions, and the chancellor properly held that appellant was entitled to only such capacity as one jig, properly constructed, would handle with sufficient water supply. 52 N. Y. Supp. 747; 54 N. E. 661; 160 N. Y. 72. A contract to furnish a plant does not include water. Black, Law Dict. "Plant."

6. If there was a substantial performance, appellant's remedy was by plea in recoupment, and not in rescission of the contract. 32 S. W. 571; *Ib.* 24; 64 Ark. 34; 88 N. Y. 648; Floyd's Law of Building, § 29.

McCULLOCH, J., (after stating the facts.) The chancellor found from the evidence certain defects in the constructed plant, but declared that there had been, on the part of the contractor, who seeks to recover the balance of the contract price, a substantial performance of the contract. He declared the law applicable to the facts found to exist, as follows:

"The owner has no right to rescind a contract for the construction of a concentrating plant where the contract provides for partial payments as the work progresses, and large payments are made when the owner has provided for and actually placed a director on the ground to supervise the work. In such case the owner is estopped from pleading a rescission of the contract, but must stand on the contract, and be satisfied with damages for failure to do the work in a skillful and workmanlike manner; and especially is this the law when said owner pays sub-contractors for material used in the construction of the plant after the plant has been completed, as it has done in this case."

We are unable to agree with him either as to findings of facts or as to the declarations of law. It is undoubtedly the law that, in the absence of an agreement to the contrary, a substantial performance is all that is required to authorize a recovery of the contract price, less the additional cost of a literal compliance with the contract. But it has been held by this court that (quoting the syllabus of *Hot Springs Ry. Co.* v. *Maher,* 48 Ark. 522) "where parties agree that all questions relating to quality, quantity, or manner of construction of work to be done shall be decided by an engineer in charge of the work, and that his decision shall be final and conclusive, his decision can not be questioned by either party except for fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment." This decision is followed in the later case of *Ozan Lumber Company* v. *Haynes,* 68 Ark. 185, and is in line with the authorities generally. 30 Am. & Eng. Enc. Law, p. 1237; *Kihlberg* v. *U. S.,* 97 U. S. 398; *Martinsburg & Potomac Ry. Co.* v. *March,* 114 U. S. 549; *Chicago, S. F. & C. R. Co.* v. *Price,* 138 U. S. 185; *Sweeney* v. *U. S.* 109 U. S. 618; *National Contracting Co.* v. *Commonwealth,* 183 Mass. 89; *Bentley* v. *Davidson,* 74 Wis. 420.

The contract in this case provides that, upon completion of

the work, "the test must show to the satisfaction of the said W. N. Allen, or such other person appointed by first party, that the plant as a whole has been built in conformity to this agreement, and that it will crush and properly clean in ten hours or less at least fifty tons of ore from the said mine, or ore of a similar character to that of said mine." This is a valid feature of the contract, and is binding upon the parties; but an arbitrary and capricious expression of dissatisfaction will not prevent recovery, and by some courts it is held that such stipulations require only the performance of the work by the contractor in such a manner as ought to satisfy the owner. 30 Am. & Eng. Enc. Law, p. 1236; *Williams Co.* v. *Standard Brass Co.,* 173 Mass. 356; *Electric Lighting Co.* v. *Elder,* 115 Ala. 138; *Singerly* v. *Thayer,* 108 Pa. St. 291; *Howard* v. *Smedly,* 140 Pa. St. 81; *Exhaust Ventilator Co.* v. *C., M. & C. P. R. Co.,* 66 Wis. 218; *Duplex Boiler Co.* v. *Garden,* 101 N. Y. 387; Lloyd on Buildings, § 22.

The law upon the question is, we think, correctly stated by Chief Justice Brickell, speaking for the Supreme Court of Alabama, in *Electric Lighting Co.* v. *Elder,* 115 Ala. 138, as follows:

"There is no reason of public policy which prevents parties to a contract for the performance of work from agreeing that the decision of one or the other, or a third person, as to the sufficiency of the performance shall be conclusive. Having voluntarily assumed the obligations and risks of a contract, these legal rights and liabilities are to be determined solely according to its provisions. Where the decision is left to a third person, the authorities almost universally hold that his action, in the absence of fraud, or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, is conclusive upon the parties. So, where, by the terms of a contract to do a piece of work or perform services, the excellence of which is not a mere matter of taste or fancy, or to furnish a piece of machinery or other article, the suitableness of which involves a question of mechanical fitness to do certain work or accomplish a certain purpose, the one party warrants the work or article to be satisfactory to the other, the weight of authority is, though the cases are not entirely harmonious, that there can be no recovery when the employer or purchaser is in good faith dissatisfied. And

this is true where there is no express warranty that the work or article shall be satisfactory, but a provision making the payment contingent upon its being satisfactory."

W. N. Allen, the person who, under the terms of the contract, was selected to give direction to the work and to whose satisfaction the plant should be constructed, was a stockholder in appellant corporation and manager of the Climax mine where the plant was to be operated; and, under the view which we take of the evidence, it is unnecessary to decide whether he should be treated as a disinterested referee or as a party to the contract, or to decide which of the rules of law hereinbefore announced should be applied to his refusal to accept the plant. Upon a careful consideration of the evidence, we are forced to the conclusion that it does not establish a substantial performance of the contract on the part of the contractor, or that the completed plant met the requirements of the test stipulated in the contract. Nor do we think that the chancellor's special finding of facts as to defects in the plant justify his general conclusion that there was a substantial compliance. He found that "the defects consisted in the floor lacking sufficient bracing, thickness of floor and failure to bat the hoister house; failure to put a mudsill lengthwise under the support to the ore-room; failure to line the mouth of the elevator and three pipes with iron; the failure to place a fourth girder, box and fixtures in the thirteen-foot space to support the main shaft; the failure to exactly plumb the piles in the foundation under the jig room; the failure to place sufficient piling under the west wall of the boiler and engine room, and to set the crusher on a solid foundation, and to sufficiently line the fire box under the boiler." A large number of witnesses introduced by appellant testified that these defects and numerous others, particularly in the foundation of each of the several buildings, rendered the whole plant insecure and worthless. These witnesses, who appear to be men of intelligence and with more or less experience on the subject, testified in detail concerning the defects in the plant, and that it wholly failed, on the final test, to perform the desired work. The effects of these defects in the plant are summarized in the following language of one of the witnesses, and is supported by the testimony of all the numerous witnesses introduced by appellant: "It was impossible to operate the mill con-

tinually on account of the choking of the spouts leading from the first roll to the elevator, and on account of the crusher being set so insecurely that the vibrations caused the taps holding the boxes on the crusher to become loose, and the jig was utterly unable to separate the sand from the ore, the ore now in the jack bin having a large per cent. of sand in it. The elevator showed a constant waste of fine ore, due to imperfect construction."

Appellee Patterson and a number of witnesses introduced by him testified that the plant was constructed substantially according to contract, but that the final test failed solely because of an insufficient supply of water. While there is a sharp conflict in the evidence, we are of the opinion that the contention of appellant is supported by a decided preponderance.

The chancellor found that the plant was never accepted by appellant, and was not approved by Allen upon the final test. His finding on this point is sustained by the evidence.

It is contended, however, on behalf of appellee, that Allen was present during the progress of the work, that by his failure to exercise his right of disapproval while the work progressed he is deemed to have approved it, and that appellant is thereby estopped from rejecting the completed plant. This may be a correct statement of the law applicable to some building contracts, but can not be applied in this case where the contract stipulates for the right of acceptance or rejection on final test after completion of the plant, which is expressly warranted to perform certain work. *Brownell Imp. Co.* v. *Critchfield,* 197 Ill. 61; *Cornish-Curtis-Green Co.* v. *Dairy Association,* 82 Minn. 215; *Beharrell* v. *Quimby,* 162 Mass. 571. The contract in this case did not call for an approval or rejection by Allen until the final test should be made, and appellant was not estopped by his failure to disapprove before completion of the plant. Nor did the payment by appellant of bills for material used in construction of the plant operate as a waiver of the right to reject the whole plant. It follows from what we have said that appellee is not entitled to recover anything, and the decree in his favor was erroneous.

Appellant is entitled to recover the amounts advanced and paid to appellee on the contract price with interest from dates of payment, but we find no satisfactory evidence to justify an as-

sessment of damages for the failure of appellee to construct the plant.

The decree is reversed, and the cause remanded with directions to enter a decree dismissing the plaintiff's complaint for want of equity and in favor of the defendant for recovery of the amounts paid to appellee with interest from the respective dates of payment.

STATE v. INTERNATIONAL HARVESTER COMPANY.

Opinion delivered July 2, 1906.

1. PENAL STATUTES—CONSTRUCTION.—Penal statutes and statutes which impose burdens and liabilities unknown at common law must be strictly construed in favor of those upon whom the burden is sought to be imposed; and nothing will be taken as intended that is not clearly expressed. (Page 521.)
2. ANTI-TRUST ACT—FAILURE OF CORPORATION TO MAKE AFFIDAVIT.—The anti-trust act of January 23, 1905, § 7, which provides that it shall be the duty of the Secretary of State to address to the president, secretary or treasurer of each incorporated company doing business in this State a letter of inquiry as to whether such corporation "has all or any part of its interest or business in or with any trust, combination or association of persons or stockholders as named in the preceding provisions of the act, and to require an answer under oath," and that, on refusal of the corporation to make the required oath, the prosecuting attorney shall proceed against the corporation "for the recovery of the money forfeit provided for in this act," etc., does not impose a penalty upon such corporation or their officers for failure to make answer to such inquiry, nor declare that such failure shall constitute a public offense. (Page 522.)

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

Robert L. Rogers, Attorney General, and *Lewis Rhoton,* for appellant; *DeE. Bradshaw* and *T. E. Helm,* of counsel.

Anti-trust acts are enacted in the exercise of the police power of the State, and are not unconstitutional. 152 Mo. 46; 61 O.

St. 547; 104 Tenn. 715; 19 Tex. 1; 44 S. W. 940. The State may permit foreign corporations to do business in the State on such terms as it sees proper, or it may deny them the right altogether. 66 Ark. 466; 8 Wall. 168; 57 Ark. 33; Murfree on Foreign Corporations, 2; Noyes on Intercorporate Relations, § 414. The proceedings under the Anti-Trust Act should be by complaint and civil action to recover a penalty. 69 Ark. 363; *Ib.* 134; 55 *Id.* 200; 56 *Id.* 166; 58 *Id.* 39; 59 *Id.* 165. The overcharge cases were prosecuted by civil suits, and not by indictment. 60 Ark. 221; 49 *Ib.* 455.

Rose, Hemingway, Cantrell & Loughborough, and *Baldy Vinson* and *June P. Wooten,* for appellees.

Penal statutes are to be construed strictly. Sutherland on Stat. Int. § 208; Endlich on Int. of Stat. § 329, p. 452; 6 Ark. 131; 40 Ark. 99; 59 Ark. 344. No case within penal statute unless completely within its words. 56 Ark. 47; 64 Ark. 284; 66 Ark. 472. The statute does not in express terms require corporations to answer inquiries made by the Secretary of State, and a failure to do so is not made an offense, either on the part of the officer or on the part of the corporation. In construing penal statutes all doubts will be resolved in favor of defendant. 70 Ark. 331. Statutes imposing burdens unknown to the common law are construed strictly in favor of those upon whom such burdens are imposed. 59 Ark. 344.

McCULLOCH, J. This action is against appellee, a foreign corporation doing business in this State, to recover the penalty for an alleged violation of the act of January 23, 1905, providing for the punishment of pools, trusts and conspiracies to control prices, in failing to file an answer under oath to the written inquiry required by section 7 of that statute to be propounded to all corporations doing business in the State. The section in question is as follows:

"Section 7. It shall be the duty of the Secretary of State, on or about the first day of July each year, to address to the president, secretary or treasurer of each incorporated company doing business in this State a letter of inquiry as to whether the said corporation has all or any part of its interest or business in or with any trust, combination or association of persons or stockholders as named in the preceding provisions of this act, and to

require an answer, under oath, of the president, secretary or treasurer, or any director of said company. A form of affidavit shall be inclosed in said letter of inquiry as follows:

"AFFIDAVIT.

STATE OF ARKANSAS,

County of.....

"I,....., do solemnly swear that I am the..... (president, secretary, treasurer or director) of the corporation known and styled....., duly incorporated under the laws of.....on the.....day of....., and now transacting or conducting business in the State of Arkansas, and that I am duly authorized to represent said corporation in making this affidavit; and I do further solemnly swear that said ....., known and styled as aforesaid, has not since the .....day.....(naming the day upon which this act is to take effect) created, entered into or become a member of or a party to, and was not on the.....day of.....nor at any day since that date, and is not now, a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, either in this State or elsewhere, to regulate or fix in this State, or elsewhere, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination or confederation, to fix or limit in this State or elsewhere the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own, any trust certificates, and, for any corporation, agent, officer or employee or for the directors

or stockholders of any corporation, has not entered into and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured products thereof, in the hands of any trustee or trustees, with intent to fix or limit the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.

.....

"(President, Secretary, Treasurer or Director.)

"Subscribed and sworn to before me, a.....within and for the County of....., this.....day of....., 1.....

[SEAL]

"And on refusal to make oath in answer to said inquiry, or on failure to do so, within thirty days from the mailing thereof, the Secretary of State shall certify said fact to the prosecuting attorney of the county wherein said corporation is located or has its agent or principal place of business, and it shall be the duty of such prosecuting attorney, at his earliest practicable moment, in the name of the State and at the relation of said prosecuting attorney, to proceed against said corporation, if a domestic corporation, for the recovery of the money forfeit provided for in this act, and also for the forfeiture of its charter certificates of incorporation. If a foreign corporation, to proceed against such corporation for the recovery of the money forfeit provided for in this act, and to forfeit its right to do business in this State. Provided, that within sixty days after the passage of this act all foreign corporations desiring to do business in this State shall file a new bond, as the statute directs; and such sureties and bondsmen shall be liable for the penalties and forfeitures, including costs, provided for in this act." Acts 1905, § 7, p. 6.

It is contended in behalf of the prosecution that doing business in the State by the corporation after failure or refusal to file the affidavit constitutes a violation of the statute, and falls within sections two and three thereof, which provide, as punish-

ment for any violation of this act, a forfeiture of a sum of money not less than $200 nor more than $5,000 for each offense, and also forfeiture of corporate rights and franchises. Counsel for defendant argue that this section creates no offense, and amounts merely to a mandatory direction to the Secretary of State to demand the affidavits from corporations doing business in the State, and to the prosecuting attorneys to institute, against corporations failing to furnish the affidavit, proceedings to recover the penalties prescribed for violation of other sections of the act prohibiting the formation of monopolies, pools, trusts and conspiracies to control prices.

It will be observed that the section in question does not, in express terms, require corporations to make answer to the inquiries, but it does provide that the Secretary of State shall send by mail to each corporation "a letter of inquiry as to whether the said corporation has all or any part of its interest or business in or with any trust, combination or association of persons or stockholders as named in the preceding provisions of this act, and to require an answer under oath of the president, secretary or treasurer or any director of said company." Nor does it declare that the failure of such officers of a corporation shall constitute an offense on their part, or on the part of the corporation itself.

If we should say, as contended by learned counsel for appellant, that the act does require an answer to such inquiry by the officers of the corporation, and makes the failure of such officers to comply therewith an offense on the part of the corporation itself, we would plainly be reading into the statute something which the Legislature did not see fit to place there. The principle that penal statutes, and statutes which impose burdens and liabilities unknown at common law, must be strictly construed in favor of those upon whom the burden is sought to be imposed, and that nothing will be taken as intended that is not clearly expressed, has been so often declared that it is elemental. *Hughes* v. *State,* 6 Ark. 131; *Grace* v. *State,* 40 Ark. 97; *Stout* v. *State,* 43 Ark. 414; *Casey* v. *State,* 53 Ark. 334; *Watkins* v. *Griffith,* 59 Ark. 344; *Little Rock & Ft. S. Railway Co.* v. *Oppenheimer,* 64 Ark. 271; *State* v. *Lancashire Insurance Co.,* 66 Ark. 466; *State* v. *Arkadelphia Lumber Co.,* 70 Ark. 329; *Brown* v. *Haselman, ante,* page 213; Sutherland on Statutory Inter. § 208.

The section in question is substantially a copy of an Illinois statute on the same subject except that the latter, instead of requiring the State's attorney to proceed against the corporation "for recovery of the money forfeit provided for this act," etc., provides that he shall "proceed against such corporation for the recovery of a penalty of $50 for each day after such refusal to make oath within the thirty days from the mailing of said notice." The Illinois Supreme Court in *People* v. *Butler Street Foundry,* 201 Ill. 236, construed that statute to make the failure of a corporation to file the affidavit in reply to the letter of inquiry an offense, and to prescribe a penalty of $50 for each day after such failure or refusal. That case is pressed upon our attention by learned counsel for the State as decisive of the question now presented for our consideration. The question of construction of the statute on this point does not appear to have been raised in the argument of counsel in the Illinois case, and received only a passing notice in the opinion; other questions raised in the case being urged as controlling. But the difference just noted in the phraseology of the two statutes warrants a radically different construction. It is plain, from the language used in the Illinois statute, that the framers thereof intended to make the failure or refusal to furnish the affidavit after demand a punishable offense. The brief discussion of this point in the opinion in the Illinois case would seem to lead to a construction that the mere failure to furnish the affidavit, without doing business in the State thereafter or being guilty of any other act in the State, is an offense. We are not willing to concede that this is sound, though it is unnecessary to discuss that question here, as counsel for the State argue that an offense is committed by the corporation only by attempting to do business after failure to furnish the affidavit. This concession on the part of learned counsel that the doing of business in the State after failure to furnish the affidavit is an essential element of the offense furnishes, we think, one of the strongest arguments that can be made against their contention that this section of the statute prescribes a penalty. The statute is silent as to doing business after such failure, and the Secretary of State is required, immediately after the expiration of the thirty days allowed for filing the affidavit, to certify the fact to the prosecuting attorney, and

that officer is required "at his earliest practical moment" to proceed against the corporation for the recovery of the money forfeit, etc. Proceed for what offense? The doing of business before the corporation has done any more business or had time to do any? That contention leads to an absurdity. The fact that the Secretary of State is required to immediately certify the failure to file the affidavit, and the prosecuting attorney to immediately institute proceedings, evidently means that the corporation should be proceeded against for some act already committed which is declared by the statute to be unlawful—not some act thereafter to be committed.

We conclude that the complaint set forth no cause of action against the defendant, and the circuit court properly sustained a demurrer thereto.

Affirmed.

NATIONAL SURETY COMPANY v. LONG.

79 523
89 100

Opinion delivered July 2, 1906.

1. BUILDING CONTRACT—DISCHARGE OF SURETY.—A stipulation in the bond of a surety company guarantying the performance of a building contractor's undertaking that the obligee should pay only 75 per cent. of the value of the work done and materials furnished and incorporated in the building was for the protection of the surety as well as the obligee; and where the latter disregarded it by paying 100 per cent. instead, the former was discharged from liability. (Page 528.)
2. SAME—DELAY IN NOTIFYING SURETY—EFFECT.—Where the bond of a surety company guarantying the performance of a building contract provided that the company should "not be liable for any damages on account of delay in the performance of any work or the furnishing of any material unless the principal shall, without reasonable excuse, purposely and premeditatedly delay the completion beyond the time limited by the contract," and that, if the principal should fail in any matter, the obligee should immediately notify the company in writing, the company was not discharged because the obligee waited twelve days after the principal's default in completing the work before notifying the company thereof. (Page 532.)

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

STATEMENT BY THE COURT.

The complaint of Long alleges that on May 23, 1901, he made a written contract with one Humphreys, by which the latter agreed to furnish the material and erect a brick building and to complete the same on or before September 1, 1901, "for which Long was to pay him $6,600, and it further alleged that the National Surety Company had, by its bond (dated May 28, 1901) guarantied the faithful performance of Humphreys' contract. As a breach, it is alleged that, although Long paid Humphreys $4,908.58, the latter never did complete the house, but that on September 9, 1901," he abandoned it, and left the country, and that plaintiff had to expend more than $4,671.41 to complete the building.

The plaintiff joined as defendants with the National Surety Company T. L. Humphreys, American Bonding & Trust Co., J. S. Whiting and S. M. Whiting.

The National Surety Company for its separate answer denied all liability on the bond, and set up that, under the contract between Long and Humphreys, the latter agreed to complete the building by September 1, 1901, and that plaintiff did not notify this defendant of Humphreys' failure to complete the building by September 1, 1901, until September 12, 1901, and that Long had paid to Humphreys more than three-fourths of the work done and materials furnished and incorporated into the building.

The written contract contained the following stipulations: "The said party of the second part agrees to complete said building by the 1st day of September, 1901, and the said party of the second part further agrees that, in case he fails to complete said building by the 15th day of September, 1901, he shall pay to the said party of the first part as liquidated damages the sum of $5 for each and every day or part of a day that said building remains incompleted after said time; that sum being the actual loss accruing to the party of the first part by said delay."

The contract was attached to the bond, and was expressly made a part of it.

The bond contains the following stipulations: "If at any time the above-named principal shall in any manner fail, neglect, or refuse to keep, do or perform any matter or thing at the time and in the manner in said contract set forth and specified to be by said principal kept, done or performed, the obligee shall immediately so notify the company in writing, by registered letter, prepaid, addressed to the company at its principal office in the city of New York.

"If at any time it appears that the above-named principal has abandoned the work, or will not be able, or does not intend, to carry out or perform the contract, the obligee shall immediately so notify the company in writing by registered letter, prepaid, addressed to the company at its principal offices in the city of New York, and the company shall have the right, at its option, to assume such contract and to sublet or complete the same, and, if it so elect, all moneys due or to become due thereafter under said contract, including percentages agreed to be withheld until completion, shall, as the same shall become due and payable under the terms of said contract, be paid to the company, regardless of any assignment or transfer thereof by the principal.

"The failure, neglect, or refusal of the obligee to keep, strictly observe and fully perform any matter or thing in this bond or in said contract stipulated and agreed to be done, kept or performed by the obligee, at the time and in the manner so specified, shall relieve the company from all liability under this bond."

The evidence shows that the building was not more than three-fourths completed on September 12, 1901, and that less than this had been done on September 1, 1901. That on September 12, 1901, Long notified this defendant that Humphreys had abandoned the work, and that the building, which was to have been completed by September 1, 1901, had not been completed.

The written contract between the parties contained the following:

"The said party of the first part agrees to pay to the party of the second part for said work the sum of six thousand six hundred dollars ($6,600), the contract price, to be paid in installments according to written estimates to be made by the architect

or the superintendent as the work progresses, payments to be made not oftener than as allowed in the bond, and said installments are to be seventy-five per cent. of the value of the work done and materials furnished and incorporated in the building, the remaining twenty-five per cent. of said contract price to be paid by the party of the first part to the party of the second part in ten days after the building is completed and accepted."

The evidence shows there was no architect or superintendent employed, but that Long acted as such on his own behalf. Long testified in his own behalf that he paid Humphreys $4,908; that that was a little less than three-fourths of the amount of the contract price, that the work and labor done the last time he paid Humphreys was $3,200, and that this did not embrace the material on the ground; that the material on the ground amounted to $1,600 or $1,700; and then said that the work and material when Humphreys left amounted to $6,600, and that he had to pay for about $1,700 worth of lumber above what he had paid Humphreys for material which Humphreys had bought. All the other evidence shows that a less amount of work has been done when Humphreys left and abandoned the building. There was also evidence to show that the building could have been completed at the time Humphreys abandoned it for $2.885.

W. S. McCain, for appellant.

1. A failure to have estimates made and to withhold the reserve releases the surety, even where it is not so provided in the bond. 49 Col. 131; 57 Fed. 179; 52 N. W. 1110; 91 Cal. 233; 67 N. W. 913; 2 Keen. 638; 105 Wis. 445; 54 Pac. 1122; 23 Mo. 251; 68 Conn. 495; 36 Minn. 439; 11 S. W. 608; 62 Mo. App. 69. But in this it was stipulated that appellee hold 25 per cent. in reserve for the benefit of the surety company. His failure to do so released the latter from its bond. 73 Ark. 473; 50 Ark. 229; 34 Ark. 80; 59 Ark. 47.

2. Under the stipulations in the bond, it was appellee's duty to notify appellant not later than September 1, 1901, of Humphreys' failure to comply with his contract. Notice mailed on September 12th was not a compliance with the bond. 60 C. C. A. 623. On this point that decision is *res judicata.* 168 U. S. 48; 193 U. S. 553; 1 Crawford's Digest, § 163, and cases cited;

1 Freeman, Judg. § 249; 20 Ark. 85; Cooley's Const. Lim. 47. But even if the question be treated as *res nova,* this court can not reach the conclusion that notice given on September 12 was "immediate" within the stipulation of the bond. 20 Ark. 583; 23 Ark. 205; 1 Pet. 583; 99 Wis. 447. See, also, 13 Conn. 28; 43 Ill. 155; 29 Pa. St. 198; 75 Mo. App. 349.

S. H. Mann and *P. D. McCulloch,* for appellee.

1. That the decision of the Circuit Court of Appeals is not *res judicata,* is settled by the authorities. 210 Ill. 342; 108 Tenn. 670; 15 Ohio St. 464; 7 Wall. 82; 125 U. S. 555; 150 U. S. 349.

2. The contract did not require appellee to employ an architect or superintendent. The mere fact that payments were made without certificates of an architect was not such a departure from the terms of the contract as to relieve the surety, where the payments did not exceed the amount stipulated in the contract and bond. 148 N. Y. 241; 69 Ark. 126; 34 Ore. 555. In this case the appellant is not an accommodation but a paid surety, and the contract—proposed by the company and embodying its language—must be liberally construed. *United States* v. *American Surety Co.,* U. S. Sup. Court (advance sheets) citing 95 U. S. 673; 127 U. S. 661; 4 H. L. Cas. 484; 170 U. S. 130; 139 N. Y. 266; 27 Wash. 429; 57 S. C. 459; Stearns on Surety, 321.

3. On the question of "immediate" notice, the clause requiring notice of failure or refusal of the contractor to perform the contract, has no reference to the time of performance, where it does not appear that the surety was prejudiced by the delay in giving notice. Under the ninth clause of the bond the company was concerned in no delay not purposely and premeditatedly occasioned by the contractor. *Ubi supra.*

The question whether or not the notice given was "immediate" within the meaning of the bond, was one of fact for the jury to decide. 186 U. S. 342; 71 N. H. 362; 27 Wash. 429; 136 Ala. 379; 86 Ala. 559; 47 Conn. 553; 56 Vt. 374; 49 La. Ann. 636; 46 Ia. 631; 100 Ill. 644; 62 Neb. 673; 31 Gratt. (Va.), 362; 62 O. St. 529; 126 Pa. St. 317; 32 Wash. 132; 28 Ind. App. 437; 164 Mass. 382; 135 N. Y. 298; 98 Pa. St. 280; 27 Ore. 146; 88 Wis. 589; 140 N. Y. 25; 124 Mo. 204; 160 N. Y. 595; 100 N. Y. 417; 170 Mass. 173; 80 Ia. 56.

CARMICHAEL, Special Judge, (after stating the facts.) A majority of the court are of the opinion that the undisputed evidence shows that Long did not notify the National Surety Company within the time in which he was required to do so by the contract and bond. The time for the completion of the building was September 1, 1901, and the evidence shows that the appellee knew, sometime prior to that date, that the contractor would not complete the building by that date, and the bond specially provided that, if at any time it appeared that the contractor would not be able to complete the building by that time, the appellee would immediately notify the surety company. We think, as a matter of law, the notification on September 12 did not meet the requirements of the contract and bond, that the default of Long in not notifying the surety company within the time required was a substantial breach of the contract, and that he can not maintain an action against the other contracting party. As was said in this case, when in the Federal court, in the 125 Fed. Reporter, page 892: "This bond contains mutual covenants of the parties; covenants by the surety company that Humphreys, the principal, should construct the building, and keep it free from liens; covenants by the plaintiff that, if Humphreys was unable or failed to perform the contract in the time and manner therein specified, he would immediately notify the surety, and that the latter might then take the contractor's place. The plaintiff failed to keep his covenant before the surety company had in any way failed to comply with those which it had made. On this account he can not enforce the fulfillment of the covenant of the defendant. He who commits the first substantial breach of the contract can not maintain an action against the other contracting party for a subsequent failure on his part to perform;" citing many authorities. *National Surety Co.* v. *Long*, 60 C. C. A. 623.

Long agreed in his contract that he would pay to Humphreys in installments, according to written estimates to be made by an architect or superintendent as the work progressed, 75 per cent. of the value of the work done and materials furnished and incorporated in the building." The evidence clearly shows that he failed to keep this part of his contract. He states himself that at the time Humphreys left there was $1,600 to $1,700 worth of

material on the ground, and that the work done and materials furnished and incorporated into the building, together with the amount of lumber on the ground, amounted to only $6,600, or the contract price. Giving him the benefit of the smallest amount, or $1,600 worth of material on the ground, and subtract this amount from the $6,600, the contract price, and the total amount on which he says he based the 75 per cent. which he paid to the contractor Humphreys would leave only $5,000 for work and material which had been incorporated into the building. 75 per cent. of $5,000 is only $3,750, showing that he had overpaid Humphreys the sum of $1,148 at that time, or, taking his other statement that there was $3,200 for work, labor and material in the building, not embracing the material on the ground which amounted to $1,670 the two aggregating, that is the work, labor and material not embracing the material on the ground and the $1,670 for the material on the ground, would only make a total of $4,870, which would include everything, work, labor and material incorporated into the building and the material on the ground, so that a payment of $4,908 was more than 100 per cent. of the work, labor and material incorporated into the building and material on the ground. This clearly shows that Long either wilfully, or from a misconception of the meaning of his contract, or out of generosity to Humphreys, paid much more than he was entitled to pay under his contract and bond. We think his conduct in this regard released the surety company, because it affected the liability of the surety, and the clause in reference to this was not intended solely for the protection of the owner. As was said by Judge RIDDICK in *Lawhon* v. *Toors,* 73 Ark., page 476: "Counsel for Lawhon contends with much earnestness that this provision of the contract in reference to the reservation of a portion of the contract price until after the performance of the contract was intended solely for the protection of the owner, and that the failure to retain it did not affect the liability of the surety. If this was a new question, it might be worthy of some consideration, but it is now well settled that, if a stipulation of that kind in a building contract be waived without the consent of the surety, it operates to discharge him from liability on his bond for the performance of the contract."

To quote the language of Lord Langsdale in *Calvert* v. *Lon-*

don Dock Company, 2 Keen (Eng. Chan.), 644, the payment of the money before the completion of the contract was calculated to make it easier for the contractor "to complete the work if he acted with prudence and good faith; but it also took away that peculiar sort of pressure which by the contract was intended to be applied to him." So we think in this case that the retention of 25 per cent. of the work done and material incorporated into the building would have been an effective incentive to compel the contractor to complete his work, while an overpayment was a temptation to abandon his work, to the injury of this surety. If there would have been any peculiar pressure upon the contractor in holding back part of the contract price, *a fortiori* it would have have increased the pressure to hold back part of the price of the work already done. The contractor had a present interest in the work already done and incorporated into the building, when he would only have had a prospective interest in the part of the contract price retained.

We have not overlooked the fact that the appellant in this case is not an accommodation surety, but is a paid surety, and we recognize the difference between them (*Remington* v. *Fidelity & Dep. Co.,* 27 Wash. 429; *Walker* v. *Holtzclaw,* 57 S. C. 459); but we hold that a paid surety is only bound by the stipulations of his contract of suretyship.

The evidence is not sufficient on this point to sustain the verdict. Where there is nothing to do but make additions of figures, and the verdict is contrary to the results so obtained, the verdict is not supported by the evidence.

Reversed and remanded.

HILL, C. J., and RIDDICK, J., dissent.

HILL, C. J., (dissenting.) 1. The bond provides: "The company shall not be liable for any damages on account of delay in the performance of any work or the furnishing of any material, unless the principal shall, without reasonable excuse, purposely and premeditatedly delay the completion beyond the time limited by the contract, and in no event shall the liability of the company on account of delay exceed a sum equal to five per cent. of the penal sum of this bond." Having expressly stipulated that delays, except a delay purposely and premeditatedly caused, should

not create a liability on the bond, it seem to me that the surety company can not in good grace say that because it was not notified of delay it is released. The undisputed evidence is that the notice was given the next day after appellee learned that the contractor had abandoned the work; that was the first time the surety company was interested, the abandonment falling within the clause of purposely and premeditatedly delaying the work and other clauses of the contract. To permit a bondsman to stipulate that delay in the work shall not create a liability against him, and then to release him because he was not notified of the delay, is a proposition which does not meet my concurrence.

2. The reversal on the facts is also, in my opinion, erroneous. I fully concur in the rule that where a mathematical calculation demonstrates that there is no basis for an action, although such action is sustained by witnesses swearing against matters demonstrably otherwise, then such evidence is not substantial evidence sufficient to sustain a verdict. A familiar illustration of this principle is where a witness with good eyesight and hearing in plain daylight looks along a level and straight railroad track and says he does not see nor hear an approaching train as it bears down on him till he is struck. Then his evidence against such an impossibility of failing to see and hear is not substantial evidence, and will not sustain a verdict. But, as I understand this case, such is far from the facts. If the material and work done were worth no more than the contract price, then the calculation made would demonstrate the correctness of the court's position. But it is evident that this was a case of a contractor far underbidding the actual value of the work undertaken. It required $3,032 more to complete the building than the contract price called for. Appellee and two contractors testified to the state of the building when it was abandoned. They variously estimate it from 65 to 75 per centum finished. If this testimony was treating the contract price as the basis to make the estimate from, then the majority of the court is right; if they were referring to the real value of the building, then manifestly the majority is in error.

As the two contractors were called to explain how much the whole building was worth and estimates they made to complete it, the fair construction is that they were referring to the real

value of the work and material, and not what may have been the contract price.

This question was submitted to the jury under an instruction given at instance of appellant; and I respectfully dissent from the holding that there are not facts enough to sustain the verdict.

ON REHEARING.

Opinion delivered October 15, 1906.

J. H. CARMICHAEL, Special Judge. A majority of the court in the former opinion in this case held that the date for the completion of the building under the contract and bond was September 1, 1901, and that a failure on the part of the appellee to notify the surety company that the contractor would be unable to complete the building by that date, and a notification sent to said surety company on the 12th of September, 1901, was too late, and prevented a recovery by the appellee.

While Mr. Justice BATTLE and the writer adhere strictly to the opinions expressed in the original opinion, Mr. Justice WOOD, after careful research, has decided to concur with Chief Justice HILL on this point, and hence a majority of the court now concur on this point with the views expressed by Chief Justice HILL, but a majority of the court are still of the opinion that under the evidence, as set out in the record, there was a substantial breach of the contract and bond by the appellee herein, as set out and expressed on other points in the original opinion, and therefore, feeling that no injustice would be done by a reversal of the case, the motion for rehearing is denied.

Mr. Justice BATTLE. I think the action should be dismissed.

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p79 550

WOMAN'S CHRISTIAN NATIONAL LIBRARY ASSOCIATION v. FORDYCE.

Opinion delivered December 10, 1905.

EJECTMENT—SUFFICIENCY OF COMPLAINT.—A complaint in ejectment which alleges that plaintiff is the owner and entitled to possession, and that defendant is in possession wrongfully, states a good cause of action.

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

The plaintiff, the Woman's Christian National Library Association, a corporation, brought this action against S. W. Fordyce and Charles H. McKee.

The complaint charges in effect that Mrs. E. B. Hotchkiss and a number of other ladies, being desirous of founding a free public library in the city of Hot Springs, and of making donations of funds as a matter of purely public charity, for the purpose of securing, providing and obtaining a suitable and attractive building, where the literature and books of such a library might be permanently lodged, donated the sum of $100 to be used for the purpose of paying for certain lots in Hot Springs to be used for such purpose only. In order to secure the right to enter the property, which then belonged to the United States Government, they petitioned Congress to permit a corporation which they had organized as charitable trustee to receive title to said property, to enter same for a free public library; setting forth in their petition that they had organized a corporation having for its object the establishment of a free public library and reading room; that its objects were purely public and charitable, and contemplated, for the free use of the thousands of sick who are constantly in attendance at the Springs, commodious rooms, a large library and newspapers, etc. Their petition concluded by asking that an act be passed granting to said association this property "to be held by them while it shall be so used." That Congress, upon receiving their petition, appointed a committee and adopted their report, which is entitled "Lot at Hot Springs, Ark., for use of Woman's Library Association." That the report shows that Congress understood the object was "to erect a building thereon for so laudable a purpose as that of furnishing a free library and reading room to the thousands of sick, rich and poor, constantly in attendance at the Springs from every quarter of the country." The Congressional committee in its report also seemed to understand that these ladies expected to donate these lots, as it says: "Your committee, believing said association to be sincere in its work of charity, has concluded that the Government in its generosity ought to aid it to the extent of donating the

grounds for its building." That the act of Congress authorized the Association to enter "for the uses and purposes of such Association." The complaint then alleges that thereupon the said corporation used the money donated for said charitable purpose expressly to make entry of said land, and received a patent which alludes to said act. The complaint sets forth the articles of incorporation of the Association, which include the petition to the circuit court alleging that the object of the Association was "for the purpose of establishing, providing and keeping, in the City of Hot Springs, Garland County, Ark., a library for the free use of the public generally, and soliciting and receiving donations and aid for said purposes." The articles of the Association provide: "They (the officers) shall not make any contract or bill with any one that shall operate as a lien or mortgage on the building or library of the Association."

Articles ten and eleven of the Association provide as follows:

"10. The object of this association shall be to provide books, newspapers and magazines of such character as will afford instruction and diversion, but such books and papers as are demoralizing in their tendency or subversive of religion shall not be admitted.

"11. The object of this association is to provide a suitable and attractive building where the literature of the association may be permanently lodged, and where suitable lecture rooms on such subjects as are not in field of political or theological controversy, and other entertainments not in conflict with the objects of the Association may be given."

That the corporation is and was a mere trustee of the naked legal title to said property for a public charitable use, and has never had any beneficial interest in the same, or any interest which could be taken, sold or appropriated to satisfy any judgment obtained against said corporation for the torts of its agents. That the defendants have possession of said property without right, claiming to own the same by virtue of a sale under execution for the enforcement of a judgment for damages rendered for an alleged tortious act of said corporation on account of injuries inflicted by one Murray, who was excavating said property under contract, and by means of a blast which injured

defendant's grantor, who was plaintiff in said suit and purchaser at said execution sale. That the funds donated to purchase the lots are about to be diverted. That the plaintiffs are willing to carry out the charitable object.

The complaint concludes with prayer for recovery of possession and all further and general relief.

A demurrer to the complaint was sustained. Plaintiff has appealed.

R. G. Davies, for appellant.

The court erred in sustaining the demurrer to the complaint. Even if appellant had not itself been a charitable corporation, but a mere naked trustee, the trust funds could not be held liable for the torts of the corporation's agents. 1 L. R. A. 417. It was not, however, necessary that there be any trustee at all. 95 U. S. 303. The evidence discloses the trust, and that is sufficient. 113 Pa. St. 269. Further, that the trust fund was not subject to the claim of appellees, see Elliott, Priv. Corp. § 19; Fr. Void Jud. Sales, § 35; 27 Am. & Eng. Enc. Law, 50, 51. The trustee had no power to sell where it would prejudice the object of the charity. 17 Ark. 488. A deed was unnecessary where the property was dedicated to public use. 9 Am. & Eng. Enc. Law, 38. The articles of association plainly show that the corporation was a trustee. *Cf.* Sand. & H. Dig. § § 1392, 1426. The fact that dues were collected does not alter this. 86 Pa. App. 306. Further, upon the proposition that the corporation was really a trustee, see 19 Ala. 814; 35 Pa. 316; 4 Ga. 404; 7 Vt. 243; 3 Lead. Cas. R. Prop. 374; 10 Allen, 169; 34 N. J. Eq. 321; 86 Pa. St. 306. s. c. 5 W. N. C. 196; s. c. 3 Lead. Cas. Real Prop. 339, 340, 341; 14 Allen, 539, s. c. 2 Am. & Eng. Lead. Cas. Eq. 18, 24, 25. Further, on the propositions that the corporation was a mere trustee, and that the trust funds are not liable, see: 31 L. R. A., 227; 60 Fed. 365; 41 Ark. 271; 1 Wh. & Tud. Lead. Cas. Eq. 802; Freeman, Ex. § 109; Freeman, Judg. § 356; 93 Am. Dec. 346; 27 Am. & Eng. Enc. Law, 107; 11 Vt. 283; 120 Mass. 432; 60 Fed. 365; 15 N. Y. 620; s. c. 13 N. E. 781; 18 Fed. 221; 32 Pac. 1012; Ell. Priv. Corp., § 19; 4 Wheat. 518; 22 Am. Dec. 236; 31 L. R. A. 227; 26 Am. Dec. 446; 38 Am. Rep. 298. Cases in 86 Ga. 486 and 12 S. C. 882 are not applicable.

Wood & Henderson, for appellees.

The appellant was not a public or charitable corporation. 14 Allen, 556; 3 Pom. Eq. Jur. § 1020, *et seq.*; Perry, Tr. § § 697, 710; 44 Conn. 60, s. c. 26 Am. Rep. 424; 132 Mass. 211, s. c. 39 Am. Rep. 445; 29 N. J. Eq. 36; 1 McG. & C. 286; L. R. 9 Ir. 246; 2 Oh. 649; 19 L. R. A. 413; 29 N. J. Eq. 32; 35 Atl. 1064; 42 N. E. 1130; 15 N. E. 505; 107 U. S. 174; 111 Mass. 267; Thomps. Corp. § § 8143, *et seq.*; 4 Wheat. 516; 12 Ark. 353; Sand. & H. Dig. § 1419; Thomps. Corp. § 6466. The property was not excepted by the statutes (Sand. & H. Dig. § § 3049, 3053, 3054) from execution, and must therefore be subject to same. Thomps. Corp. § 7847; 75 Am. Dec. 518; 26 Am. Dec. 561; Fr. Ex. § 348; 57 Ga. 340, 346; 5 Ired. L. 297; 12 L. R. A. 852; 13 L. R. A. 668; 69 Ark. 68; 57 Ark. 445; 62 Ark. 481. A trust cannot be engrafted by parol upon the property, as against creditors of the legal owners. Sand. & H. Dig. § 3480; 57 Ark. 637; 67 Ark. 530; 59 Ark. 71. Appellant was liable for the negligence which is the foundation of appellees' claim. Sand. & H. Dig. § § 1419, 1393, 1397; 12 R. I. 411, s. c. 34 Am. Rep. 675; 12 S. E. 882; 31 L. R. A. 227; 60 Fed. 365; 29 Am. Rep. 17; 36 Am. Rep. 17; 32 Am. Rep. 408; 37 Am. St. Rep. 24; 10 N. Y. Supp. 115; 28 Atl. 32; 4 Oh. 399; 36 Am. Rep. 508; 51 Am. Dec. 284; 18 Am. St. Rep. 284; 53 Ind. 337; 3 Md. 431.

Wood & Henderson, Ratcliffe & Fletcher, for appellee, on motion to reconsider.

The court erred in holding that appellant holds only a naked legal title to the property. 1 Beach, Trusts, § 554; Tied. Real Prop. § 515; 4 Wheat. 636; Mech. Ag. § 733; 86 Ga. 486; 2 Beach, Trusts, § § 402, 407; 1 Lewin, Trusts, 221; 83 N. C. 65; 17 Ark. 483; 86 Pa. St. 306; 57 Ark. 445; 145 Ill. 628; 151 Mass. 365; 69 Ark. 68; 56 Ark. 354; 50 Ark. 141.

R. G. Davies, for appellant.

Trust funds are not liable for the trustee's tort. 86 Ga. 486; 60 Pa. St. 30; 3 W. & S. 27; 2 Grant, 75; 183 Mass. 126; 68 Ohio St. 236; 7 Ohio St. 114.

HILL, C. J. The Reporter will state the facts showing the object and purposes of the corporation, its organization and

plan, and the history of the acquisition of the property in question.

The court holds on the facts presented that the property in controversy was acquired by the appellant corporation for the purpose of establishing and maintaining thereupon a reading room and library for the benefit of the members of the corporation and "of the multitude of people who visit" the city of Hot Springs "in search of health and pleasure." Uuder these facts, is such property subject to sale under execution on a judgment rendered against the corporation for a tort? The judgment was recovered for an injury received by reason of a blast, while excavating upon the property under a contract calling for such excavation.

In section 3049, Sand. & H. Dig., is an enumeration of property subject to execution, which includes all real estate whereof the defendant or any person for his use was seized in law or equity at the time of the rendition of the judgment. Sections 3052-3055 exempt from execution property which would otherwise fall within the prior section. Such property as this is not *eo nomine* within the exception, and the question arises whether it is within the definition of property subject to execution. That brings into consideration the nature of the title held by the corporation.

It is insisted that this is a charitable trust, and on the other hand that it is not. "Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire them applied." 2 Perry on Trusts, § 687.

The Statute of 43 Eliz., c. 4 (1601), was the culmination of the law of England on the question of charitable trusts, and has generally been followed by construction or statute in this country. 1 Beach, Trusts and Trustees, § 320. Therein are enumerated the various objects and purposes of charitable trusts. Libraries are not specifically mentioned, but the maintenance of various educational institutions and scholarships and like objects of benevolence and public utility are enumerated; and it has been uniformly held that there are many such trusts not within the strict letter of the statute, but which fall within its spirit, equity

and analogy, and are considered charitable trusts. 2 Perry on Trusts, § 692; Hill on Trustees, p. 453.

Public libraries fall within the spirit and analogy of charitable trusts. 2 Perry on Trusts, § 700, and authorities in note *a*; *Donohugh's Appeal,* 86 Pa. St. 306; *Crerar* v. *Williams,* 145 Ill. 625; *Corey Library* v. *Bliss.* 151 Mass. 365; 1 Beach on Trusts, § 317.

The nature of these trusts is thus expressed: 'In distinction from an express private trust, which, by the definition, is designated for the benefit of one or more individuals, the trust for charitable purposes is a public trust, and from the nature of the case the benficiaries are, to a greater or less extent, unknown or indefinite. 1 Beach, Trusts and Trustees, § 322.

The charitable trusts may be administered by a corporation organized for that purpose, and it becomes a mere agency for the handling of the trust property. 1 Beach, Trusts and Trustees, § 334.

This corporation belongs to this class, and holds only a naked legal title to the property, the beneficial interest being owned by the public. "While, as a general rule, all legal estates in land are subject to execution, the rule is not applicable to the detriment of persons for whose benefit the legal estate may be held. It is only when the holder of the legal title has some beneficial interest that it can be sold under execution. If he is a mere trustee, or if, for any reason, he holds the bare legal title for the benefit of another, an execution sale against him transfers no interest whatever." 2 Freeman on Executions, § 173.

In *Grissom* v. *Hill,* 17 Ark. 483, it was held that where there was a deed to trustees for a public charity, with or without a prohibition in the deed against a sale, if the sale would defeat the object of the charity, the trustees would have no power to sell, and their sale would pass no title. It was further held that the trustees could not indirectly do what they could not do directly, and that sales made in pursuance of judgments growing out of improvement contracts could not operate to take the property away from the trustee. Certainly, if the trustees could not defeat the trust by default in contractual obligation, they should not be allowed to defeat it by default

in not exercising proper care whereby parties were injured through negligence.

In the Grissom-Hill case a sale under a mechanics' lien on a church house was defeated on this principle. It was further said in that case that charitable trust property was not secured from all transfers by operation of law; that, unless exempted, it would be subject to sale for taxes and other public charges, because provision for the support of the Government was paramount. The Constitution of 1874 removed this possibility of defeating public charities, and expressly exempted libraries and other public charities from taxation. Art. 16, § 5.

Therefore, it follows that the property in question was not subject to execution and sale, and the appellees derived no title through the sale.

The judgment is reversed, and remanded with directions to overrule the demurrer and for further proceedings.

WOOD, J., disqualified. MCCULLOCH, J., not participating.

ON REHEARING.

Opinion delivered March 11, 1905.

HILL, C. J. On the rehearing the court has made an exhaustive investigation of the authorities touching the liability of charitable corporations to judgment and subjection of their property to execution for the torts of their officers or employees.

The weight of English and American authority is that charitable corporations are not liable for the negligence of their officers, agents and employees. *McDonald* v. *Hospital,* 120 Mass. 432; *Benton* v. *Hospital,* 140 Mass. 13; *Union Pacific Ry.* v. *Artist,* 60 Fed. Rep. 365; *Downes* v. *Harper Hospital,* 101 Mich. 556; *Williams* v. *Industrial School* (Ky.), 23 L. R. A. 200, and exhaustive note reviewing authorities; *Perry* v. *House of Refuge,* (Md.), 52 Am. Rep. 495; *Hearns* v. *Waterbury Hospital* (Conn.), 31 L. R. A. 224; *Van Tassell* v. *Hospital,* 15 N. Y. Sup. 620; *Collins* v. *Hospital,* 69 N. Y. Sup. 106; *Fire Ins. Patrol* v. *Boyd,* 120 Pa. St. 624; *Murtaugh* v. *St. Louis,* 44 Mo. 479; *Duncan* v. *Freidlater,* 6 Clark & F. 894; *Halliday*

v. *St. Leonard's Vestry,* 11 C. B. N. S. 192; *Herriott's Hospital* v. *Ross,* 12 Clark & F. 507.

The cases supporting the liability to suit and judgment are collated and discussed by the Rhode Island court in *Glavin* v. *Rhode Island,* 12 R. I. 411, s. c. 34 Am. Rep. 675. Another line of cases is found in *Powers* v. *Massachusetts Homeopathic Hospital,* 109 Fed. Rep. 294, affirming the same case in 101 Fed. Rep. 896.

Judge Lowell, speaking for the Federal Court of Appeals of the first circuit, drew a distinction in classes of negligence, in some holding the charitable corporations were liable, for instance, in negligently selecting its officers or agents, or negligently overflowing neighboring land, while in others they were not liable.

The case at bar comes in different aspect from any of the cases examined. Here the question of liability to judgment has been determined by the rendition of judgment, and the judgment is not here for review. Therefore the best light to be thrown on this case is from those jurisdictions where such judgments are properly obtainable, in order to ascertain what may be subjected to its satisfaction; in the other jurisdictions the question cannot arise. Judge Lowell, in the Powers case, *supra,* said:

"There is no less impropriety in diverting funds impressed with a trust for the benefit of individuals than in diverting those impressed with a trust for a public charity. Yet the effectual though indirect liability of a private trust fund for the torts of those concerned in its management is undoubtedly recognized. It is true that a suit can not be maintained against a trustee, as such, for torts committed in the management of the trust property. The suit is brought against the trustee as an individual. The judgment and execution were against him individually. When these are satisfied, however, the trustee is reimbursed from the trust estate, unless individually at fault. (Citing authorities.) The trust fund is protected from immediate levy to satisfy the execution, not because of its complete immunity, but rather from technical reasons connected with the legal estate of the trustee in the property. Its technical immunity affords it no ultimate protection. * * * The merely technical immunity of a pri-

vate trust fund from execution upon a judgment recovered in an action of tort affords no real reason for the real immunity of the funds of a charitable corporation where the technical considerations do not apply. That the funds of a public charity may be diverted to pay for some torts committed in the administration of the fund has often been decided."

He further limits the charge against a trust fund to a fund unconnected with the trust property.

The Rhode Island court in the Glavin case, *supra,* said: "We also understand that the doctrine is that the corporate funds can be applied, notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts, and is incident to them. We do not understand, however, that the corporate property is all equally applicable. For instance, in the case of *Mersey Docks* v. *Gibbs,* (11 H. of L. 686), it was not decided that the docks themselves could be resorted to, but only the unapplied funds which the board then had or might afterwards acquire. So in the case at bar it may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it can not be diverted to payment of damages."

Thus it is seen that, owing to its strict dedication to the trust, the domicil of the charity is not subject to process, or, as Judge Lowell puts it, there is a technical immunity of the trust property itself from execution. This immunity of trust property from execution was the controlling thought in the original opinion in this case, and is supported by these authorities, additional to those there referred to. 1 Black on Judgments, 420, 421; 2 Freeman on Judgments, 357, 368; 17 Am. & Eng. Enc. Law (2 Ed.), p. 778; 2 Freeman on Executions, § 172.

Therefore, it follows that this immunity of the property strictly dedicated to the charity is an insurmountable obstacle to execution, even in those jurisdictions where judgments for torts are permitted, and where satisfaction may be had for them out of funds belonging to the charity. The reason given in some of the cases denying liability to suit is that, should judgment be rendered, the property would not be subject to it, and therefore it is unavailing to permit judgment.

It has been insisted that the judgment concludes this question;

but, as shown, the judgment only concludes a liability to be worked out of assets not immune from execution, in the jurisdictions where the corporations are subject to judgment.

From the very nature of the issues involved in the suit for the damages there could be no issue as to what property should be subject to a possible judgment therein sought to be recovered.

The Supreme Court of the United States said: "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and; even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *So. Pac. Rd.* v. *U. S.*, 168 U. S. 1. This is considered the first rule on this subject, and the second is thus stated: "A judgment rendered by a court of competent jurisdiction on its merits is a bar to any future suit, between the same parties or their privies, upon the same cause of action, so long as it remains unreversed." 2 Black on Judgments, § 504.

In the suit terminating in judgment here there could not possibly have been "distinctly put in issue" the subjection of this property to an execution on the judgment then sought to be recovered; and there could by no possibility have been a trial therein on the merits as to the liability of this property to the judgment then sought to be obtained. A judgment does not operate upon property which is by law exempt from seizure and sale. 1 Black, Judgments, § 424; 2 Freeman, Judgments, § 355; *Cole* v. *Green*, 21 Ill. 104; *Green* v. *Marks*, 25 Ill. 221; *City of Davenport* v. *Peoria Ins. Co.*, 27 Ia. 277.

It is also well settled that when the property is not subject to execution, the execution sale passes no title. *Smith* v. *McCann*, 65 U. S. 398; *Brooker* v. *Carlile*, 77 Ky. 154; *Earle* v. *Washburn*, 89 Mass. 95; *Hancock* v. *Brinker*, 6 Ky. 247; 2 Freeman, Executions, § § 172, 173.

In *Washburn* v. *Earle, supra*, the case arose, as this one, after a judgment in it against a church society, as to whether an execution sale had passed the property to the purchaser, and it

was held that the property was not subject to the claim of the judgment creditors, that there could be as to them no fraudulent conveyance of it, and that the execution sale had passed no title. This case is similar to *Grissom* v. *Hill,* 17 Ark. 483, where the contest arose after judgment, and it was held, owing to the trust created under which the church property was held, that no title passed by execution sale. There was another question in that case as to the restraint on the alienation of the property, and the decision rested on both grounds, and each of those were asserted successfully against the judgment creditor, who was asserting title acquired by execution sale of the church property.

From these authorities it is clear that the judgment has not concluded any question as to what property is subject to it.

Finding the property in controversy dedicated to the purpose of the charity, according to the allegations of the complaint, its intended domicil in fact, it is considered that an execution on the judgment in question passed no title to the purchaser.

The motion is denied.

Mr. Justice BATTLE concurs in this opinion; Mr. Justice RIDDICK concurs in the judgment.

Mr. Justice MCCULLOCH dissents, and Mr. Justice WOOD is disqualified, and did not participate.

RIDDICK, J., (concurring.) The question presented to the court by this appeal arises on a demurrer to the complaint. It has given us some trouble to decide, and it seems to me that the chief cause of this trouble is that counsel for plaintiff has undertaken in the complaint to set out, not only what may be termed the essential or ultimate facts, but also the evidence by which he expects to prove those facts, and in addition thereto he has anticipated the defense, and makes a suggestion as to what that will be. Now, while the rule may be to some extent different in equity, at law it is only necessary to set out in the complaint the essential facts which go to make the plaintiff's case. It is neither proper nor necessary to set out facts which are only evidence of the essential facts. "It would," says Prof. Bliss, "be folly to take issue on the latter; they are relevant but not issuable facts, for the facts in issue may be stated truly, though sustained by other evidence than that anticipated by the pleader." Bliss, Code Plead. (2 Ed.), 206.

The same thing may be said to the suggestion contained in the complaint as to the defense that may be made to this action, for "at law one is never expected to state matters which should come from the other side; it is sufficient for each party to make out his own case." Bliss, Code Plead. (2 Ed.), § 200.

The petition of certain women to Congress to be allowed to purchase the lots sued for, the report of a committee of Congress on that petition, the act of Congress passed to permit the sale of the property, the articles of incorporation of plaintiff granted under the laws of this State, the constitution of the association, are all set out at length in the complaint, besides a statement in reference to the probable claim to the lots that may be set up by defendants. These matters are all obviously improper in the complaint, and should not have been inserted. But they are mere surplusage, and do not affect the decision here, for, where a complaint is otherwise sufficient, the fact that it contains irrelevant and redundant matter does not make it bad on demurrer. What we have to determine here is whether, disregarding the surplusage, the complaint is sufficient in substance. If it is, the demurrer should be overruled.

The main objection made to the complaint in this case is that it does not state facts sufficient to constitute a cause of action. It is then a matter of no moment that the complaint may be awkwardly drawn, and contains irrelevant and redundant matter that ought not to have been put in, for these matters can be corrected by motion.

"On a demurrer to a complaint as defective in that it does not state facts sufficient to constitute a cause of action, the complaint must be liberally construed, and all its allegations for the purpose of the demurrer taken as true. And such demurrer can be sustained only where the complaint presents defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action whatever." 6 Am. & Eng. Enc. Law, 546, and cases cited.

This is an action of ejectment, and, speaking of that kind of an action, this court, in *Fagg* v. *Martin,* 53 Ark. 453, said that "it was sufficient for the plaintiff to allege in his complaint his ownership of the land, and exhibit the deeds and evidence of title upon which he relied."

Now, if the facts alleged in the complaint are true, the plaintiff holds the legal title to this property. The complaint alleges that plaintiff is a mere trustee, and holds only the bare legal title to this property, and holds that for charitable purposes alone, but it alleges that it has the right to the possession of the property. In addition to this, plaintiff exhibits the patent from the Government, upon which it relies, showing title to the land sued for. Taking the allegations of the complaint as true, it seems to me that it shows a cause of action. *Fagg* v. *Martin, supra.* So far as the complaint undertakes to anticipate the defense, and to suggest what the claim of the defendants will be, I think that is nothing more than surplusage, and should be disregarded. It will be time enough to consider that matter when the issue is made by the answer of the defendants. The allusion in the complaint to what plaintiff supposes will be the defense is too vague and indefinite to justify us in undertaking to pass on the merits of the case as it is now presented. While therefore I concur in the opinion of the Chief Justice that the demurrer should have been overruled, I express no opinion as to whether the title which the plaintiff shows in its complaint could be cut off by a judgment against plaintiff for tort and an execution and sale of such property thereunder; for it seems to me that those questions are not yet before us.

To repeat, the question here is whether, rejecting the surplusage contained in the complaint, the material allegations thereof, when taken to be true, show that plaintiff was entitled to recover possession of the land described. I think they do, and for that reason only concur in the judgment of reversal.

McCULLOCH, J., (dissenting.) I did not participate in the original consideration of this case, but on the petition for rehearing have considered it, and am unable to concur in the views of the majority of the court. I think that the judgment rendered against appellant establishing the liability is enforceable, and that the property in controversy was properly sold to satisfy the judgment.

Appellant is a corporation organized for benevolent purposes under the provisions of subdivision IX of chap. 31, Kirby's Digest. A section of the statute on that subject reads as follows:

"Such corporations shall have such powers of suing and being sued, buying, holding and selling property, real and personal, and of otherwise carrying out the purposes and objects of their organization as are possessed by other corporations, and which may be necessary to their efficient management and the promotion of their purposes." Kirby's Digest, § 943.

The preamble to the constitution recites that the purpose of the association is for "organizing a reading room and library for our own benefit and that of the multitude of people who visit our city in search of health and pleasure." The constitution provides, among other things, that "ladies may become members by signing the constitution and paying an initiation fee of $2 annually and 25 cents monthly dues; that any gentleman who pays the sum of $50 at any one time shall be entitled to honorary life membership in the association; that any one who pays the sum of $250 shall be constituted a life patron, and shall be entitled to all the privileges of membership except voting in business meetings; that gentlemen may become associate members of the association by the annual payment of $5."

The patent issued by the United States to appellant conveying the lots in controversy is absolute in terms, and conveys the title in fee simple without reservation or condition, except a proviso in accordance with the form usually adopted in patents to lands in the vicinity of the celebrated Hot Springs, prohibiting the grantee and its successors and assigns "from ever boring thereon for hot water."

I think that, according to the decided weight of authority, corporations organized as agencies purely for charitable or like purposes are not liable for torts of their servants. 1 Jaggard on Torts, pp. 187, 188; 6 Cyc., p. 975; *McDonald* v. *Mass. General Hospital,* 120 Mass. 432; *Powers* v. *Mass. Homeopathic Hospital,* 109 Fed. 294; *Perry* v. *House of Refuge,* 63 Md. 20.

But we are precluded from inquiry as to liability of appellant by the judgment of a court of competent jurisdiction adjudging its liability. The only question is whether or not the judgment can be enforced against the property of appellant. It seems to me that the statute conferring upon such corporations the power to sue and imposing upon them liability is conclusive of the question of the right of a creditor to enforce payment of his debt out

of the property of the corporation after the liability has been established by a court of competent jurisdiction.

The general rule is that all property is subject to sale under execution for payment of debt. Our statute so declares: Kirby's Digest, § 3228. This applies to corporations as well as individuals. Judge Thompson says: "The *jus disponendi* is involved in the very idea of property, and it is well said that, in the absence of some express legal exemption, it is an inseparable incident to property, legal or equitable, that it should be liable to the debts of the owners, as it is to his alienation." 6 Thomp. on Corp. § 7847.

Judge Freeman in his work on Executions, vol. 2, § 172, states the general rule with reference to property subject to execution, thus:

"It is ordinarily sufficient to inquire whether the interest sought to be sold is real property, and, if so, whether the defendant in execution has a legal estate therein. These questions being answered in the affirmative, the property or the defendant's interest therein must be regarded as subject to execution unless it falls within some exception hereinafter stated. The right to subject real property to execution is not dependent upon the character or capacity of the person, whether natural or artificial, to whom it may belong, except that they must be persons against whom a judgment may properly be enforced and its payment coerced; and they must have a beneficial interest in the property, and not hold it merely upon some trust, public or private."

This leads us to a consideration of the question whether the appellant, or its property which was sold under execution, falls within any of the recognized exceptions to the general rule making all property of individuals and corporations subject to execution.

This court held in *Grissom* v. *Hill*, 17 Ark. 483, that the trustees of a church, under a deed which provided that the "lot of land is never to be sold or to be used in any other way only for the use of a church," could not create a charge upon the lot by contract for the erection of a house thereon, so as to authorize the mechanic to obtain a lien and sell the lot in payment thereof. But in the case at bar, the conveyance under which the library

association obtained title contained no restriction, limitation nor condition. It is absolute in form, and conveys the title in fee simple. It is true that the act of Congress authorizing the patent to be issued upon payment of the appraised valuation of the lot recites the reasons therefor, but it imposes no conditions upon the use of the property.

In the case of *Wright* v. *Morgan,* 191 U. S. 55, where lands were patended to the city of Denver pursuant to an act of Congress "to enable the city of Denver to purchase certain lands in Colorado for a cemetery" at the minimum price, "to be held and used for a burial place for said city and vicinity," and where by a subsequent act the city was authorized to "vacate the use of said lands, or any portion thereof, as a cemetery, for a public park or grounds," it was held that the title was absolute, and that the city had the power to alienate the lands so patented. The court, speaking through Mr. Justice Holmes, said: "If the legal title was in the city, it was an absolute title. In view of the extreme unwillingness of courts to admit the existence of a common-law condition, even when the word *condition* is used, it needs no argument to show that there was no condition or limitation here. Little more needs to be said to show that the act of Congress did not make the land inalienable at common law. We need not consider whether the act could have that effect upon land within a State, when the conveyance was absolute, and was made to a citizen or instrumentality of the State; we express no opinion upon the point. It is enough that it did not purport so to restrict the ordinary incidents to title. We should require the clearest expression of such an unusual restriction before we should admit that it was imposed, especially in an ordinary sale for cash. Here the act probably meant no more than to explain the motive for a sale at the minimum price."

The authorities on this subject are fully cited and exhaustively discussed by Mr. Justice White in *Stuart* v. *Easton,* 170 U. S. 383, where it is held that a mere declaration of purpose contained in a patent did not have the effect of qualifying or limiting the estate granted thereby.

It is not to be denied that where the naked legal title to property is held in trust it can not be sold under execution issued on a judgment against the trustee; but that rule does not apply here.

The legal title, and the beneficial interest as well, were vested in the library association, the legal entity against which the judgment was obtained, and there is no beneficial interest separable from the corporate association. The public had no interest in the property or in its use, save such as the corporation, acting through its members and officers, might see fit to bestow from time to time. As is well said by counsel for appellees in their brief: "The association is not a mere agency. It is the thing itself, instituted and organized on its own motion, with all the powers pertaining thereto which an individual would have if he should undertake such an enterprise."

Churches and like associations and corporations, though in a limited sense agencies of the public, are governed by the ordinary rules of law controlling the rights of individuals and other corporations. 2 Kent. Com. § 274; *Robertson* v. *Bullions,* 11 N. Y. 243; *Presbyterian Congregation* v. *Cole,* 2 Grant's (Pa.) Cases, 75; *Fadness* v. *Braundborg,* 73 Wis. 257.

In *Presbyterian Congregation* v. *Cole, supra,* it was held, that a church house was subject to execution, the court saying: "Churches are intended for public benefit; but this is a part of the public interest that is committed exclusively to private enterprise, and governed by the rules and remedies that belong to private relations, and it may well be questioned whether it would be for the public benefit to allow them to disregard their contracts."

Learned counsel for appellant has not cited us to a single authority holding that the property of an association of this kind can not be sold under execution. None are cited in the opinion of the Chief Justice, and I have been unable to find any; therefore I am persuaded that there are none, and that there is no substantial reason why the property of this association should form an exception to the rule that all property is liable to execution against the owner.

The case of *Powers* v. *Mass. Hom. Hospital,* 109 Fed. 294, relied on, apparently, with much confidence in the opinion of the majority, merely holds that "a patient in a public hospital, chartered as a charitable corporation, although under private management, can not recover from such corporation for injuries resulting from the negligence of a nurse employed in its hospital," a

doctrine in line with the decided weight of authority that such corporations are not liable in suits founded upon torts of its servants.

Nor, to my mind, can any support to the views of the majority be found in the case of *Glavin* v. *Rhode Island,* 12 R. I. 411, where it is held that such a corporation is liable for torts committed by its servants. I am unable to see how, from a doctrine that such a corporation *is* liable in judgment for its torts, a theory can be worked out that its property *is not* liable to sale under execution issued upon the judgment.

I am therefore of the opinion that the property was legally sold under execution, and that the purchasers at the sale took a good title.

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FORDYCE v. WOMAN'S CHRISTIAN NATIONAL LIBRARY ASSOCIATION.

Opinion delivered July 2, 1906.

1. CHARITY—PUBLIC LIBRARY.—An association formed for the purpose of founding a free public library, having no capital stock and no provision for making dividends or profits, is a public charity. (Page 555.)
2. PATENT—CONVEYANCE FOR LIBRARY—EFFECT.—Where a library association was formed for the purpose of establishing, providing and keeping a library for the free use of the public generally, and lots were conveyed by the United States by a patent absolute on its face, under an act of Congress authorizing the association to purchase for the uses and purposes of the association, a fee simple was created, and not a base or qualified fee. (Page 557.)
3. BASE FEE—EFFECT.—A base or qualified fee, during its continuance, has all the incidents of a fee simple, being descendible and assignable, and liable to seizure and sale under execution. (Page 557.)

4. CHARITY—EXEMPTION OF PROPERTY.—The property of a charity can not be sold under execution issued on a judgment rendered for the nonfeasance, misfeasance or malfeasance of its agents or trustees. (Page 557.)
5. SAME—EFFECT OF JUDGMENT AGAINST.—Though a charitable association permitted a judgment to go against it upon a claim for alleged negligence of its trustees which it might have successfully defended, such judgment merely settles the amount of the claim, and does not conclude the question as to the liability of its property to seizure under execution. (Page 565.)

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

STATEMENT BY THE COURT.

On the 29th day of June, 1881, several ladies filed a petition in the Garland Circuit Court, praying that they might be incorporated under the name of the "Woman's Christian National Library Association" "for the purpose of establishing, providing and keeping in the City of Hot Springs, Garland County, Arkansas, a library for the free use of the public generally, and of soliciting and receiving donations and aid for said purposes."

The constitution presented with the petition was preceded by the following preamble:

"We whose names are annexed, desiring to form an association to organize a reading-room and library for our own benefit, and that of the multitude of people who visit our city in search of health and pleasure, do pledge ourselves to be governed by the following constitution:"

Then follow provisions as to membership: Any lady might become a member by paying an initiation fee of two dollars annually and twenty-five cents monthly dues. Persons of either sex might become honorary members for life on payment of $50; and any one might become a "life patron" on payment of $250.

The object of the association was further stated as follows:

"The object of this association shall be to provide books, newspapers and magazines of such character as will afford instruction and diversion; but such books and papers as are demoralizing in their tendency or subversive of religion shall not be admitted;" also to provide a suitable and attractive building

where the literature of the association may be permanently lodged, and where suitable lectures on such subjects as are not in the field of political or theological controversy and other entertainment not in conflict with the objects of the association may be given."

Having been duly incorporated, application was made by the association to Congress for leave to erect a library building on the Government reservation at Hot Springs. This was refused; but Congress passed an act approved July 8, 1882, authorizing the association to purchase "for the uses and purposes of such association" lots 11 and 12 in block 127 in the city of Hot Springs. 22 Statutes at Large, 155.

These lots, having been previously appraised by the United States, were now entered by the association on payment of $100, and a patent was accordingly issued by the President. The patent contains no limitation or condition except one forbidding the boring for hot water on the lots conveyed.

Preparatory to building a house on these lots for the proposed library, the association employed one Murray to excavate the rock on the mountain side, so as to secure a proper foundation; and while this work was in progress, resort was had to blasting, whereby one Thomas had his leg broken by a shattered piece of rock thrown out into the street. To recover damages for this injury, Thomas brought suit against the association in the United States Circuit Court held at Little Rock, in which he recovered a judgment for $7,642 on the 21st of December, 1893. Execution having issued on this judgment, the lots were sold under it, and were bought by Wood & Henderson for $5,000, and in due time they received the marshal's deed therefor. Wood & Henderson afterwards conveyed the lots to the appellants, Fordyce and McKee.

On the 21st of June, 1902, the Library Association brought an action in the Garland Circuit Court against Fordyce and McKee to recover the lots, alleging that the association was merely a trustee, holding them for a public and charitable use, having no beneficial interest that could be seized or sold under execution to satisfy a judgment against the association for the negligence or torts of its agent; and that the defendants intended

to divert the property from its charitable uses, and to apply it to the uses of a street car line.

The defendants demurred; the demurrer was sustained, and the plaintiff appealed to this court, which reversed the judgment of the court below; but as there was not a full bench, and the judges were not agreed as to the grounds of reversal, the merits of the cause were not fully passed upon. See *Woman's Christian National Library Association* v. *Fordyce, ante,* p. 532.

On a second trial in the court below the plaintiff recovered a judgment for the lots and $200 for damages by reason of their detention; and defendants appealed.

Wood & Henderson and *Ratcliffe & Fletcher,* for appellants.

1. The purposes of the association are set out in its constitution and the preamble thereto, and from the undisputed record it is clear that it is not a public charitable association, within the meaning of that term. It is liable for the torts of its agents and employees, and its property, whether domicil or otherwise, is subject to execution therefor. 119 Mass. 1; 165 Mass. 280; 129 Mass. 367; 146 Mass. 163; 2 Grant's (Pa.) Cases, 75; 11 N. Y. 243; 73 Wis. 257; 2 Kent, Com. § 274. Conceded that where the public is directly interested in the operation of a corporation, and would be greatly inconvenienced by the sale of its property, as in cases of bridges, canals, docks, etc., the property can not be sold under execution; but there is a marked distinction between that class of corporations and those in which the public is but indirectly interested, such as mining and manufacturing, coal and iron companies, library, literary societies, schools, etc., and it is well settled that the entire property of the latter class may be sold. 60 Pa. St. 30 and cases cited; 29 Am. St. Rep. 514.

The association, being incorporated, under the statute, Kirby's Digest, § § 937-943, stands upon the same basis with other associations incorporated under this statute, with the same powers and corresponding liabilities.

2. The question of liability of the property of the association for debt of this kind is *res judicata,* that question hav-

ing been decided by the U. S. court in Thomas *v.* Library Association. Allowance of judgment against such a corporation is an adjudication of the fact that its property is liable. 109 Fed. 300.

3. The exceptions to the introduction of the petition, report and proceedings of Congress prior to issuance of patent should have been sustained. The act of Congress and the patent are plain and unambiguous, showing that the association was permitted to purchase at minimum price; but neither a trust nor a condition is attached to the grant. 191 U. S. 55; 170 U. S. 383.

4. The verdict for damages is clearly excessive.

R. G. Davies, for appellee.

The charity under investigation in this case falls fairly within all four of the objects cited in 10 Vesey, 532, viz.: (1) Relief of the indigent in various ways. Money, provisions, education, medical assistance, etc. (2) The advancement of learning. (3) The advancement of religion, and (4) the advancement of objects of general public utility. *Porter's Case,* 1 Coke, 24, A.

2. As to the question of *res judicata*: the doctrine of estoppel is limited to facts directly in issue, and does not extend to facts which may be in controversy, but which rest in evidence and are collateral. It must appear that the matter set up in bar was in issue in the former suit. Freeman on Judg. § 257. *Ib.* § 258. Proceedings subsequent to judgment form distinct issues of themselves. *Ib.* § 327; 174 Pa. St. 355; 131 N. Y. 80. A judgment creditor has no *jus in re.* 17 Am. & Eng. Enc. Law, 770; *Ib.* 778. See also 42 Ark. 305; 1 Black on Judg. § 424; *Ib.* § 420; Freeman on Judg. 355; *Ib.* § 356; 21 Ill. 104; 25 Ill. 221; 27 Ill. 277; 2 Freeman on Judg. § 357; 14 Ia. 400; 105 N. Y. 7; 53 Am. Dec. 701, note.

3. Authorities cited by appellants in support of their contention that the property of appellee is liable do not apply to the facts in this case, or refer to trading or other corporations which were in no proper sense public charities.

U. M. ROSE, Special Judge. (after stating the facts.) 1. We are convinced that this is a case of a charitable trust. We are referred to the decision in *Old South Society* v. *Crocker,* 119 Mass. 1; but that is not in point. In that case the court found that a trust was declared for "the beneficiaries, which were the grantees themselves and such as they should associate to themselves." The court was influenced by the further limitation in the deed "to their heirs and successors," implying "that the grantor contemplated a permanence of association of the *cestuis que trust.*" The court added: "Gifts for the erection of a house of public worship, or for the uses of the ministry, may constitute a public charity, if there is no definite body, for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. To give it the character of a public charity, there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large, or some part thereof, or an indefinite class of persons." Page 22.

In this case one of the objects of the association is to "organize a reading-room and library for our own benefit, and that of the multitude of people who visit our city in search of health and pleasure." This clause does designate an indefinite class of persons. It is plain enough that the phrase "for our own benefit" is not to be understood as confined to the persons who signed the petition for a charter, but was intended to embrace all persons who should thereafter contribute to the support of the library by becoming members of the association. This was also an indefinite class of persons. It certainly does not change the nature of the charity that the members of the association may also enjoy the privileges of the library along with other beneficiaries. It is clear from the rules as to the admission of new members that the object is to increase the utility of the association by an appeal to the public for an extension of its influence and for its support.

The English statute of 43 Eliz., c. 4, is in force in this State. In it schools and free schools are mentioned, but not libraries. The statute was, however, only remedial and ancillary, and did not affect in any wise the jurisdiction of the chancery court as it previously existed. *Ould* v. *Washington Hospital,* 95 U. S. 303; *Biscoe* v. *Thweatt,* 74 Ark. 545.

That a free public library is a charity, there has never been any doubt. *Duggan* v. *Slocum,* 83 Fed. 244; *Pickering* v. *Shotwell,* 10 Pa. St. 23; *Cottman* v. *Grace,* 41 Hun, 345; *Fairbanks* v. *Lamson,* 99 Mass. 533; *Drury* v. *Natick,* 10 Allen, 169; *Jones* v. *Habersham,* 107 U. S. 189. The importance of a public library at a great health resort where many invalids congregate in search of health, often despondent and sad-hearted from the effects of disease, loneliness and melancholy forebodings, can not be questioned. We may suppose that of those who go there for pleasure the majority will not be indifferent to the pleasure to be derived from reading. A distinguished writer of the eighteenth century has said: "An author may be considered as a merciful substitute to the legislature. He acts, not by punishing crimes, but by preventing them."

A public library not only tends to the diffusion of knowledge, but also to public improvement in morals. The charter of the association in this case provides that demoralizing books shall not be admitted into the library; but if that clause had been omitted, the result would have been the same. This principle of selection, in ordinary public libraries, operates automatically, since men and women having children to bring up, and many other persons having the public good at heart, will not patronize or help support a library in which pernicious books form a part. It goes without saying that whatever contributes to the advance of public morals and that of civilization tends to the support of law and order and the prevention of crime.

The Library Association is organized purely for charitable purposes. It has no capital stock, no provision for making dividends or profits, and is as unselfish as any enterprise can be. *McDonald* v. *Mass. General Hospital,* 120 Mass. 432, 21 Am. R. 529. Whatever it receives from any source it holds in trust for the purposes mentioned in its charter; that is, for sustaining the library and "increasing its benefits to the public by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public charity. Its affairs are conducted for a great public purpose." *Id; Powers* v. *Mass. Homeopathic Hospital,* 109 Fed. 299.

By our Constitution "buildings, grounds and materials used exclusively for public charity" are exempt from taxation. Art.

16, § 5. See also Kirby's Digest, § 6887. Further, in order to encourage institutions of that kind, and to diffuse their usefulness through all time, ample provision is made by statute for the incorporation of charities. Kirby's Digest, § 937.

By our statute cities of the first and second-class are "empowered to establish and maintain public libraries," and to levy a tax for that purpose. Kirby's Digest, § 5543.

2. It seems clear that the patent to the Library Association conveyed an estate in fee simple. To create a limitation or a condition, the intent must be clearly shown; and the mere expression of a purpose in a conveyance will not debase a fee. *Stuart* v. *Easton,* 170 U. S. 394, 399; *Wright* v. *Morgan,* 191 *Id.* 55. This question has been discussed, but we do not perceive its relevancy; for if the patent had conveyed an estate subject to a condition or limitation, there would have been an estate in the patentee until the limitation attached or the condition was enforced. A base or qualified fee during its continuance has all the incidents of a fee simple. It is descendible and assignable, and the owner, while his title continues, has the same right to the exclusive use and enjoyment of the land, and as complete dominion over it, as though he held it in fee simple. 16 Cyc. 603. Such an estate would be as liable to seizure and sale under execution as if it were a larger estate. In order to see whether the Library Association is a charitable one or not, we need not examine the patent; but we must look to its charter to discover to what uses its property is dedicated.

3. The authorities on the subject of liability of charities for the negligence of agents or employees are extremely divergent. There are at least four classes of cases:

1. Cases holding that the property of a charity can not be sold under execution. Of these we shall speak presently.

2. Cases construing charities unfavorably, and assimilating them to private corporations organized for profit, as in the cases of *Presbyterian Congregation* v. *Colt,* 2 Grant's Cases, 75, and *Davis* v. *Central Congregational Society,* 129 Mass. 372.

3. Cases holding that trustees of a charity, though not answerable for the negligence of its agents, are liable for want of ordinary care in their selection. This seems to be a compromise between two irreconcilable principles. Such was the

case of *Hearns* v. *Waterbury Hospital,* 66 Conn. 98.

The case of *Union Pacific Ry. Co.* v. *Artist,* 60 Fed. 365, is not in point. In that case it was held that a hospital maintained by a railroad company for the free treatment of its employees, supported partly by the monthly contributions of all its employees and partly by the company, and not maintained for profit, is a charitable institution; and that the company is not responsible for injuries caused by improper treatment by a physician or attendants employed in the hospital by the railway company by which the plaintiff, an employee of the company, was injured, where the master had exercised ordinary care in selecting such physician or attendants. Various similar cases are to be found in the books; and several are cited in *Powers* v. *Massachusetts Homeopathic Hospital,* 109 Fed. 300, 47 C. C. A. 122. They are all railway cases; and railway companies are not charitable corporations. If in any one of these cases the judgment of the trial court against the company had remained unreversed, and an execution issued upon it had been levied on the hospital buildings of the railway company, then the question now under discussion might have been presented; but such was not the case in any of them.

4. Cases holding that on a judgment against a charitable organization the grounds and buildings of the defendant can not be sold under execution, but that any of its unappropriated funds may be applied to the satisfaction of the judgment. Such was the case of *Glavin* v. *Rhode Island Hospital,* 12 R. I. 411, 34 Am. R. 675, decided on the authority of *Mersey Docks* v. *Gibbs,* 11 H. L. 686, though that was not a case of a charity, but was a suit against a public board, charged with the duty of keeping certain docks in order, for negligence in performing their public duties. As we shall see, no such suit could be sustained in this State.

The decision in the Glavin case seems also to be based on a compromise. The court said that the buildings and grounds of the hospital were "subject to so strict a dedication that it [they] could not be diverted to the payment of damages." But "funds which were applicable generally to the use of the hospital" might be so diverted. And yet it would seem plain that funds not invested in buildings and grounds would be as strictly dedicated to public uses as any other species of property. Chari-

ties must have funds on hand to meet expenses. They can not live on the wind, and that which takes away the means of living takes away life. All sums received by a charity, from whatever source, "are held upon the same trust as those which are the gifts of pure benevolence." *McDonald* v. *Massachusetts General Hospital,* 120 Mass. 435. "The donations, if any are ever made, must be used according to the terms of the gift." *Benton* v. *Boston City Hospital,* 140 Mass. 17.

We are of opinion that in this State the property of a charity can not be sold under execution issued on a judgment rendered for the nonfeasance, misfeasance, or malfeasance of its agents or trustees.

It would be difficult to overestimate the benefits that have been derived, directly and indirectly, from charities having their origin in private benevolence. Our common school system and all laws for the relief of the poor and destitute in England and in this country have had no other source. 2 Perry, Trusts, § 691. Consequently, charities are much favored in the law, and they are upheld wherever possible. *Duggan* v. *Slocum,* 83 Fed. 244; *Ould* v. *Washington Hospital,* 95 U. S. 303. The same rule was applied in the Roman law. I Domat. Title 1, § 2, XIV. And it is from that law that our doctrine of charities is largely derived. 2 Story, Eq. § 1137.

A hundred years ago Lord Eldon said: "It has been urged for the defendants, and 200 years ago it would have been urged with great effect, that no distinction ought to be made in the proceedings between a charity and an individual. But at this time it is much too late, with reference to a great many doctrines, to insist upon that; for the court does hold out relief to charities under circumstances in which it would not give relief against defendants in ordinary cases." *Atty. General* v. *Jackson,* 11 Ves. 367. So in a charity case if the bill prays the wrong relief the court will give the proper relief. *Atty. General* v. *Whiteley, Id.* 246. Thus in *Atty. General* v. *Mayor of Stamford,* 2 Swanst. 591, a bill affecting a charity was dismissed; but the court of its own motion entered a decree establishing the charity. In this respect charity cases differ from all others. *Atty. General* v. *Jeanes,* 1 Atk. 355; *Atty. General* v. *Bucknall, 2 Id.* 328.

Being public utilities of a very high order, charities are

intimately associated with the State, which exercises over them through its courts a watchful supervision, so that their property, funds and revenues shall not be diverted to any improper purpose, and that trustees and agents shall perform the duties assigned to them with honesty and fidelity, and for the best advantage of the charitable uses designated by the donor or donors. For these ends the chancery courts have an original and an inherent jurisdiction. *Vidal* v. *Girard,* 2 How. 195. If the estate is misapplied, the remedy is not forfeiture, but a suit to enforce a trust. *Brown* v. *Meeting Street Baptist Society,* 9 R. I. 186. It is the duty of the courts to correct all abuses in the management of the trust, and to preserve the property. *Stanley* v. *Colt,* 5 Wall. 169. The trustees can always be required to account for the distribution of the funds, and they can be dealt with by the court for any bad faith or breach of the trust. 2 Perry, Trusts, § 712, 719. If a donor makes a gift for a particular charity, and appoints no trustee, the charity will not fail; for the court will appoint a trustee. *Reeve* v. *Atty. General,* 3 Hare, 191. So, if the devise is to a corporation not yet in existence, it will pass to one that may be afterward organized. *Inglis* v. *Trustees,* 3 Pet. 99. Devises for charitable purposes that are void at law are often sustained in chancery. 2 Story, Eq. § 1170. Where a literal execution of a charitable devise becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose. *Id.* § 1169. The court will supply all defects of conveyances where the donor has capacity to convey unless the mode of donation contravenes some statutory provision. *Id.* § 1171.

The chancery court has jurisdiction over the trustees of charities, as it has over all trustees, to see that they do not commit a breach of their trust, or apply the fund in bad faith, or to purposes that are not charitable. 2 Perry, Trusts, § 719. So intimate is the connection between the State and organized charities that it is the duty of the Attorney General to intervene in all cases where there is a violation of duty by the trustees that endangers or impairs the charity. *Id.* § 744. And in such cases strict rules of practice can not be insisted upon. *Id.* A public charity is not within the rule as to perpetuities. *Biscoe* v. *Thweatt,* 74 Ark. 546.

The doctrine of liability of the principal for the acts of his agent performed within the scope of his authority, as expressed in the maximum *respondeat superior,* is not of universal application. It does not apply either to the State or the Federal government. *Belknap* v. *Schild,* 161 U. S. 17; Broom, Leg. Max. p. 865.

With us a municipal corporation is not liable in a civil action to one who is injured by reason of a defective street, although the statute requires that the municipality shall keep the streets in good repair. *Arkadelphia* v. *Windham,* 49 Ark. 139; *Ft. Smith* v. *York,* 52 *Id.* 84. The same rule applies to counties. *Granger* v. *Pulaski County,* 26 *Id.* 37. So of school districts and other *quasi* public corporations. *School District* v. *Williams,* 38 *Id.* 454; *Collier* v. *Ft. Smith,* 73 Ark. 447.

The reason given for the exemption of the property of cities, counties and other public corporations from sale under execution is that they are public agencies of the State. The State itself is merely a trustee for the public good. It has no other excuse for being. Counties, towns, school districts and similar public bodies, being a part of the machinery of the State government, hold their property of whatever kind subject to the same trusts, so that it can not be diverted to individual uses, the whole object of the government being to confer the greatest good on the greatest number.

In this work charities are important helpers and co-workers, relieving the State of a large part of its burdens. In every community there are schools, colleges, hospitals and churches that are fruitful in good works that could not be performed by the State with the aid of any number of policemen or that of a standing army. In their several ways charities are more efficient in promoting the public good than the State could be acting without their aid. Whatever privileges or exemptions may be granted to such charities by the State are not gratuities; for without schools, hospitals, churches and libraries we should soon relapse into a state of semi-barbarism, which would not be for the public good.

The immunity of the property of a charity from sale under execution rests on special grounds. The property of a corporation organized solely for charitable purposes is exclusively dedi-

cated to public uses, as much so as the streets and alleys of a town or city; for this purpose the corporation is a mere trustee. *Benton* v. *Boston City Hospital,* 140 Mass. 13, 18. It is of primary importance to the public that the trust shall be perpetuated. The trustees of the corporation are usually unsalaried agents, devoting their time and labor to the use and benefit of the public. For their own wrongs and misdeeds they are personally answerable, just as are the physician and the attendants in a hospital. If the doctrine of *respondeat superior* is applied to them, it follows that, along with their other powers, they possess an implied power to destroy, by a willful violation of their duties, by collusion, or by negligence, the public interests that they are selected to preserve. Any conclusion that tends to support that view must leave out of consideration the public; that is to say, the party most deeply interested. To say that the trustees may by their negligence destroy the charity is simply to say that they may do indirectly and by inadvertence what they can not do directly. The doctrine that the principle of *respondeat superior* has no application in this class of cases when the trustees willfully abuse their authority, and that it does apply in a single species of negligence, would seem to be merely the result of another effort to find a compromise. Nor do we think that an illogical compromise of that sort would tend to the public advantage. A judge or a jury might be convinced, after a case of negligence had occurred, that due judgment and discretion had not been used in the selection of experts and other agents, when perhaps they themselves, if put to it in a similar case, would do no better, and might do worse; and it seems to us that if our schools, churches, hospitals, and other charities could be sold out on such vague matters of opinion, about which men would naturally differ, the result would be extremely unfortunate. In *Fire Ins. Patrol* v. *Boyd,* 120 Pa. St. 624, 6 Am. St. 745, the court, as to this question, decided that the charity was not liable, saying:

"It would be carrying the doctrine of *respondeat superior* to an unreasonable and dangerous length. That doctrine is, at best, as I once before observed, a hard rule. I trust and believe it will never be extended to the sweeping away of public charities; to the misapplication of funds, specially contributed for a public charitable purpose, to objects not contemplated by the donors.

I think it may be safely assumed that private trustees, having the control of money contributed for a specific charity, could not, in case of a tort committed by any one of their members, apply the funds in their hands to the payment of a judgment recovered therefor. A public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise. This doctrine is hoary with antiquity, and prevails alike in this county and in England, where it originated as early as the reign of Edward V, and it was announced in the year book of that period."

This point was involved in *Heriot's Hospital* v. *Ross,* 12 Cl. & F. 507. In that case Lord Cottenham said: "It is obvious that it would be a direct violation, in all cases, of the purposes of a trust, if this could be done; for there is not any person who ever created a trust that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose." Lord Brougham said: "The charge is, that the governors of the hospital have illegally and improperly done the act in question; and therefore, because the trustees have violated the statute, therefore—what? not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct. The finding on this point is wrong, and the decree of the court below must be reversed." Lord Campbell said: "It seems to have been thought that if charity trustees have been guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. This is contrary to all reason, justice and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would, in that case, be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. * * * Damages are to be paid from the pocket of the wrongdoer, not from a trust fund. A doctrine so strange as the court below has laid down in

the present case ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it. No foreign or constitutional writer can be referred to for such a purpose." In *Fire Ins. Patrol* v. *Boyd, supra,* the court said: "Not only is a trustee for a public or private use not permitted to misapply the trust funds committed to his care, but, if he convert them to his own use, the law punishes him as a thief. How much better than a thief would be the law itself, were it to apply the trust's funds, contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustee? The latter is legally responsible for his own wrongful acts."

It is true that some of the courts have treated this case as having been overruled by that of *Mersey Docks* v. *Gibbs;* but that was not a case of a charity, but one of a public corporation supported by government funds, purely a government agency. It is true that Lord Brougham, in his remarks in the Heriot's Hospital case, speaks of charities and public corporations as if they were governed by the same rules; an error that has led to much confusion. In England the rules relating to charities and to public corporations were not the same. The case of *Mersey Docks* v. *Gibbs,* relates only to public corporations; and the decision in the Heriot's Hospital case has never been overruled. Moreover, the decision in *Mersey Docks* v. *Gibbs* has never been the law in this State; and, as we have seen, has been several times overruled by this court. With us public corporations and charities are, however, governed by the same rules as to the matter now under consideration, because the doctrine of *respondeat superior* does not apply to either.

The principle upon which the law proceeds in cases of this sort is well expressed in *Downes* v. *Harper Hospital,* 101 Mich. 559, 60 N. W. 42:

"If, in the proper execution of the trust, a trustee or an employee commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it

from the purpose for which it was given, or for which the act of the Legislature authorized the title to be vested in the defendant. It certainly follows that the fund can not be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary."

Various other cases to the same effect are cited in the opinion delivered in this cause on the former appeal.

"A valid vested estate in trust (for charitable purposes) can never lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right as well as the duty of the sovereign, by its courts and public officers, as also by the Legislature (if needed), to have the charities properly administered." *Girard* v. *Philadelphia,* 7 Wall. 15.

"With regard to the liability of charitable corporations or their trustees for the negligence of their agents or employees, there is some difference of opinion, but the decided weight of authority denies such liability; this on two grounds; first, that if this liability were admitted, the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was in nowise responsible; second, that since the trustees can not divert the funds by their direct act from the purposes for which they were donated, such funds can not be indirectly diverted by the tortious or negligent acts of the managers of the funds or their agents or employees." 5 Am. & Eng. Enc. Law (2 Ed.), p. 923.

4. Then the question arises whether the present suit is debarred by the judgment rendered in favor of Thomas under which the lands were sold.

If a defendant permits a judgment to go against him which he might have successfully defended, he may still claim his homestead and other exemptions. Though a judgment is rendered against a railway company, yet its franchise or other property necessary to the operation of its road can not be sold under execution, because that would interfere with the public good. *East Alabama Ry. Co.* v. *Doe,* 114 U. S. 340; 1 Freeman, Ex. § 179. The fact that a city or county is by statute liable to be sued does

not necessarily imply that its property may be taken in execution. This has been repeatedly decided. *Commissioners* v. *Martin,* 4 Mich. 557; *Waltham* v. *Kemper,* 55 Ill. 346; *White* v. *Bond County,* 58 Ill. 297; *Bussell* v. *Steuben,* 57 *Id.* 35; *Hill* v. *Boston,* 122 Mass. 352. The judgment is conclusive of the amount of the debt or demand, but it does not conclude the question as to the liability of any property to seizure under it. That is a question that may never arise. If it does arise, it will be collateral and subsequent.

The statute provides that corporations for benevolent purposes "shall have such powers of suing and being sued * * * as may be necessary to their efficient management and the promotion of their purposes." Kirby's Digest, § 943. This provision, so far from supporting the contention of the appellants, indicates with sufficient clearness that the efficient management and promotion of the purposes of the charity are to be kept steadily in view. If this were not the case, there would be no difference between charitable corporations and those organized for purposes of private gain.

But if the latter clause of the above section of the statute had been omitted, the result, in our opinion, would not be different. It is familiar law that the property of a municipal corporation is not subject to execution, although it may be sued, and in a proper case judgment may be rendered against it. "It is the settled doctrine of the law that not only the public property, but also the taxes and public revenues of such corporations can not be seized under execution against them either in the treasury or when in transit to it." 1 Dill. Mun. Corp. § 100. Neither can such property be subjected to garnishment. *Burnham* v. *Fond du Lac,* 15 Wis. 193, 82 Am. Dec. 668. The reason is that "municipal corporations are instituted by the supreme authority of the State for the public good." Dill. Mun. Corp., *supra.*

Such being the case, let us see where the doctrine of liability of the property of charitable organizations to levy and sale under execution would lead us. In every city of any considerable size may be found one or more hospitals organized and maintained by the city for charitable purposes and one or more hospitals maintained by private benevolence, under the control of trustees appointed or elected as the donors may direct or the

statute may require. But a devise to a city for charitable purposes is valid. *McDonogh* v. *Murdoch,* 15 How, 367; *Perin* v. *Carey,* 24 *Id.* 465. Let us suppose then that a city had two hospitals, one created and supported out of the municipal revenues and another dependent upon a charitable gift and the donations of private individuals, both under the control of the city as a trustee. According to the doctrine contended for in behalf of the appellants, the former could not be sold under execution because it belonged to the city, and the latter could be thus sold because the city was only a trustee; and this, notwithstanding both were charities instituted "for the public good." Such a distinction can not be supported except by ignoring the general public interests common to both of these cases. The question is not as to who holds the property in trust, which is merely a personal consideration, a matter of policy and expediency; but it relates to the objects for which all charitable uses are created, and on account of which they are highly favored by law. A discrimination based, not on the character of the trust, but on the character of the trustee, would be false and misleading.

The property of a public corporation, such as a railroad or bridge company, essential to the exercise of its corporate franchise and the performance of its duties toward the public, can not, without statutory authority, be sold to satisfy a common-law judgment, either on execution, or in pursuance of an order or decree of court. *Overton Bridge Co.* v. *Means,* 33 Neb. 857, 29 Am. St. 514 and note and cases cited; *Ammant* v. *Turnpike Road,* 13 S. & R. 210, 15 Am. Dec. 593.

Exemption laws apply to judgments rendered in favor of the State, though the State is not mentioned in them. *State* v. *Williford,* 36 Ark. 155.

We need not dwell further on these matters. Almost every point arising in this case has been decided by this court on full consideration.

Grissom v. *Hill,* 17 Ark. 483, was a much stronger case than that now under consideration, since in that instance the property had been sold on a judgment under the Mechanics' Lien Law in which it was specifically described and condemned. English, Dig. St. p. 715, § 12. Moreover, the Mechanics' Lien Law is liberally construed. *Murray* v. *Rapley,* 30 Ark. 568; *White* v.

Chaffin, 32 *Id.* 69; *Anderson* v. *Seamans,* 49 Ark. 478. In that case there could be no doubt but that the trustees of the church had authority to erect a building for public worship; but the court held that they had no power to charge the property of the charity with a lien that might destroy the charity itself.

The facts in the case were these:

Hill had conveyed a lot in a town to trustees for the benefit of a church. The deed contained in the habendum the following phrase: "But said lot of land is never to be sold, or to be used in any other way only for the use of a church, for the benefit of said Protestant Church." The lot was afterwards sold in a proceeding instituted by Grissom to enforce a mechanics' lien for work and materials furnished for the purpose of building a church on the lot, and was bought by him. Grissom entered into possession, and excluded Hill and the trustees of the church. Hill filed a bill in chancery against Grissom and the trustees, setting up the above facts, and praying that the title of the trustees be declared forfeited and revested in him, and that the title of Grissom be set aside and declared void; and it was so decreed. Grissom alone appealed. The clause in the deed above mentioned cut no figure in the case whatever; and what was said in the opinion as to the effect of the deed was pure surplusage, because the trustees acquiesced in the decree rendered in the court below and did not appeal. This court said explicitly:

"The trustees having acquiesced in the decree of the court below, all controversy as to their rights as between them and Hill must be regarded as at an end, and the questions to be determined upon this appeal arise between Grissom and Hill. * * * But whether this is technically an estate upon conditions, such as, upon failure to observe the conditions on the part of the trustees, the lot will absolutely revert to the donor, and thereby cut off, on account of the acts of the trustees, the beneficial interests of the *cestuis que trust*—the denomination for whose use the trust was created—*it is not necessary to decide,* as no one is representing or claiming anything for them on this appeal, unless it be Hill. * * * That Hill, who made the grant for the use of the church, and who was entitled to have the property appropriated to the charitable uses of the church, had the right to apply

to equity to set aside the sale to Grissom, and divest his title and possession, there can be but little question. On this appeal *no other question is properly presented;* and, inasmuch as the appellant has no cause of complaint, the decree must be affirmed."

The deed being, then, out of the way, the ground of the decision is clearly stated:

"If the trustees could, by improvident contracts, involve the property in debt, and thereby subject it to be sold under execution, the intention of the donor might be defeated in that way as well as by a voluntary sale on their part; because the purchaser could appropriate the lot and church in either case to his own private purposes, and prevent the use of it for religious purposes; as it seems was done in this case. *The trustees would hardly be allowed to do indirectly that which they have no power to do directly.*"

It may be said that under this ruling hard cases must occur. They will not, however, be so numerous as those arising under the law exempting towns, cities and school districts from liability for the negligence or torts of their agents committed within the scope of their authority. On the other hand, still harder cases would occur under the opposite rule, by which the will of charitable donors would be defeated, and the public interest would be thwarted.

Very many of the greatest charities of the present day have grown from very obscure and feeble beginnings. If they had been sold out in their infancy for some trivial sum on account of the carelessness of an agent or the mistake of a trustee, thus preventing the constantly accumulating benefits of centuries, it could not be truthfully said that the public good was promoted by the sacrifice. Moreover, the offending agent or trustee is always personally liable for his own torts or acts of negligence.

Much of the time of our courts is rightfully taken up with the enforcement of contracts and the collection of debts; but the State, which is not exclusively a collection agency for creditors, has many other interests to look after; and the principle of *respondeat superior,* like other legal principles, has its limitations.

The decision in *Grissom* v. *Hill* was rendered just a half century ago. It is not supported by all the authorities. Neither is any other view of this question supported by all the authori-

ties; indeed the diversity of opinion on this subject is probably not exceeded in any branch of the law. To attempt to reconcile the adjudications would be a hopeless task. *Grissom* v. *Hill* is sustained by many of the most respectable adjudications to be found in the books, and, as we believe, by a large majority of them. We believe that the case of *Grissom* v. *Hill* was rightly decided; but, if we thought otherwise, we should think it inexpedient to reverse a rule of property so long acquiesced in. The Legislature can change the rule, if it likes; but it has shown no desire to do so. On the contrary, the tendency to foster and protect charities has become stronger. As stated in *Grissom* v. *Hill,* they were subject to taxation when that case was decided. Now they are expressly exempted by a constitutional provision. Const., art. 16, § 5. The discrimination is sharp and decisive; because the Legislature is prohibited from passing any law exempting any other property than as provided in the Constitution. *Id.* § 6.

5. As to the allowance of $200 by the court below for damages for detention of the lots, the judgment must be modified by cancelling this allowance for want of evidence to support it. Subject to this modification, the judgment is in all things affirmed.

McCULLOCH, J., dissents.

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79 570
186 389

MAYO v. MAYO.

Opinion delivered July 2, 1906.

1. EVIDENCE—WRITTEN AGREEMENT—SEPARATE ORAL AGREEMENT.— Where parties entered into a written agreement touching certain matters, parol evidence is admissible to prove a contemporaneous oral agreement concerning other matters. (Page 574.)

2. ADMINISTRATION—DELAY IN APPLYING TO SELL LAND.—Where the devisees of a testator at his death agreed that the executor should take charge of the lands of the estate and cultivate same with a view to paying off the debts, and dividing the residue among the devisees, delay thereafter for 12 years on the part of the executor and creditors in applying for an order to sell the lands of the estate to pay debts did not constitute laches. (Page 575.)

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

Thomas & Lee, H. A. & J. R. Parker, and *N. W. Norton*, for appellants.

1. Heirs, having the legal title, are not required to act in order to protect it. They can not be kept out of their inheritance unreasonably by the laches of creditors in subjecting the lands to the payment of probated claims. 73 Ark. 440; 37 Ark. 155; 47 Ark. 475; 48 Ark. 277; 54 Ark. 65; 56 Ark. 633; 63 Ark. 405; 70 Ark. 185. The alleged assignment of dower and homestead to Mrs. Mayo was no excuse for delay to enforce the debts. 64 Ark. 1; Kirby's Digest, § § 2711 to 2715. See also 52 Ark. 193; 60 Ark. 461; 29 Ark. 418; 56 Ark. 532. If the executor and creditors had notice, they neglected their duty in failing to defend against the proceeding; if they had none, they were not bound, and by showing the irregularity in the proceeding they could have had the order quashed on certiorari. 52 Ark. 213. Such an untimely assignment of homestead was held void collaterally. 66 Ark. 23.

2. A contract can not rest partly in parol and partly in writing. 29 Ark. 544, and cases cited. All the agreements, etc., made by the heirs at their meeting after the funeral which were not in writing signed by the parties were void; likewise all former conversations, agreements and suggestions. 24 Ark. 210; 35 Ark. 156; 21 Ark. 69.

Manning, Moore & Bayne and *T. K. Riddick,* for appellee.

1. The findings of fact by the court will not be disturbed if there is evidence to support them. 60 Ark. 250; 53 Ark. 161.

2. Under the terms of the will it is plain that the testator earnestly desired that his debts be paid in full, and to that end he conferred upon his executors a large discretion. In view of the very large indebtedness, the heirs necessarily understood that the attempt to pay the debts by leasing out the property involved a long period of time. They can not complain of delay to which they themselves agreed. Where the executor is one of the devisees, he can not take advantage of the delay. 63 Ark. 405; 70 Ark. 185.

3. The decree of the probate court allotting dower and

homestead can not be collaterally attacked. 52 Ark. 340; 49 Ark. 397; 57 Ark. 423; 50 Ark. 188; 55 Ark. 37; 57 Ark. 49; 55 Ark. 398; Kirby's Digest § § 4424, 4425, and notes. See also 63 Ark. 513; 80 S. W. 884; 25 Ark. 60. The existence of the dower and homestead right was, in itself, a sufficient reason for the executor and creditors not having sold the lands covered thereby. 54 Ark. 65; 64 Ark. 1.

4. The will creates an express trust in favor of creditors. 71 S. W. 669; 19 Am. & Eng. Enc. Law (2 Ed.), 1306 and authorities cited in note 3.

C. F. GREENLEE, Special Judge. This is an action commenced in December, 1902, by appellants against appellee, to recover lands which descended to them from their ancestor, W. M. Mayo, who died in October, 1890, leaving him surviving, his widow, Jane E. Mayo, and seven children—F. A. Mayo, R. D. Mayo, Laura M. Boyce (nee Mayo), Nannie J. Bond (nee Mayo), Wm. J. Mayo, Fannie M. Black (nee Mayo), and Lily M. Black (nee Mayo).

W. M. Mayo left a will, in which he said: "It is my desire that all my debts be paid as my executors may think to be the best for the interest of my estate, either by selling of my property, either personal or real estate, in the way and manner and time they may think, or by running and leasing the same at their discretion for the same purpose. After my debts are paid, I desire one-third of my both real and personal estate property to be allotted by three commissioners to my beloved wife during her natural life; and at her death the same is to go to my children, or, if any of them be dead, to their children in the same proportion they would be entitled to; and the balance of my property, both real and personal estate property, I desire to be equally divided between my children or their children, if any of them be dead previous to the division; the same to be allotted by commissioners appointed by the judge of the probate court of Monroe County. * * * And I hereby appoint my beloved sons, F. A. Mayo and R. D. Mayo, to be the executors of this, my last will and testament, and, having full and complete confidence in their integrity and capacity, I hereby declare that it is my will and desire that they shall not be required to give any security for the performance of the executorship, or [nor] shall they be required to

make any reports to any court of their transactions in the executorship, or [nor] shall any order of any court be required for the selling or conveying of any property of mine, either real or personal property; that they, my executors, F. A. Mayo or R. D. Mayo, shall have full power to manage, control, bargain, sell or convey any of my property, both real and personal property, to pay my debts, support and educate my beloved children."

The testator was the owner of 2510 acres of land in Monroe County, of which there were about 1100 acres cleared and in a state of cultivation. He was heavily in debt. Claims amounting to more than $20,000 were probated against the estate. At the time of the death of W. M. Mayo, all his children were of age, and the next day after his funeral said children met at the home of the testator, and entered into a written agreement, which is as follows:

"Be it known: That whereas W. M. Mayo departed this life, having made his last will and testament in which he named and appointed F. A. Mayo and R. D. Mayo his executors, without bond or security, and whereas the said F. A. Mayo is not eligible to the office of said executorship on account of being a non-resident, and whereas, we, being the heirs at law of the said Wm. M. Mayo, desire that the said R. D. Mayo shall qualify as sole executor of the will of Wm. M. Mayo, and that he shall as such executor prepare said estate for division among the heirs, we and each of us agree and direct the said R. D. Mayo, as executor aforesaid, to sell, exchange or dispose of the personal property belonging to the estate in any manner he may think best, and to purchase property in payment of debts due the estate, and at his discretion to compromise and settle, in any way he may deem best, all demands due the estate, and also to carry out, in any manner he may deem best, all agreements made by his testator with any and all his tenants and laborers, as to furnishing supplies or otherwise, and also to purchase and sell cotton or other produce from said tenants or laborers in payment of the claims due the estate and sell same in any manner or place he may deem best, and to the end of these directions and instructions we agree to only exact ordinary diligence from the said executor aforesaid, and we further agree to hold him liable for gross negligence in the management of the affairs of said estate.

"Witness our hands and seals this, the 28th day of October, 1890.

"F. A. MAYO,
"FANNIE M. BLACK,
"LILIE M. BLACK,
"NANNIE J. BOND,
"W. J. MAYO,
"LAURA M. BOYCE."

On the same day the heirs and most of the creditors discussed among themselves the amount of the indebtedness against the estate, the value of the lands and the best method to adopt for paying the debts. Not one of them thought that the lands would sell for enough to pay the debts, and appellee stated that he desired to manage the estate as they thought best, and that he would sell, lease or "run" the lands just as they wished. The undisputed evidence was that all the heirs, without a dissenting voice, at that time agreed that appellee should not sell the lands, but that he should lease or run them and undertake to pay the debts out of the rents and profits thereof. The creditors who were present agreed to this course of conduct, and those creditors who were not present were notified of the agreement, and they consented thereto.

Within a few days after this consultation among the heirs and agreement among them for the management of the lands, appellee qualified as sole executor, took charge of the lands, and undertook to pay the debts out of the rents and profits; but, by reason of a succession of disastrous overflows, appellee did not make much more than enough to keep up necessary repairs on the place and pay the taxes. It was shown by the proof that at no time from the date that appellee took possession until the institution of this action would the lands have sold for enough to pay the debts, and that frequently and repeatedly, during all this time, appellee advised and consulted with the heirs and creditors about the management of the estate, and the heirs acquiesced fully in what he was doing.

Counsel for appellants earnestly contend that the testimony introduced by appellee to prove the agreement above referred to is incompetent, under the rule that parol testimony is inadmissible to contradict, vary or control a written agreement. The testi-

mony complained of does not in any way violate, vary, attempt to control, or even explain, the terms of the written paper. It does not affect the written paper, but relates to a different matter entirely. It relates to the course of conduct to be adopted by the executor whereby the debts of the estate could be paid, and, if possible, something be left for the heirs. The agreement was not a contract in the ordinary sense of the term, but it was an election or decision on the part of the heirs, made known to the executor, about what he should do with the lands, how he should handle them to the best interest of all concerned. They agreed that the debts should be paid by leasing, instead of selling, the lands. We are of the opinion that the trial court did not err in admitting the testimony.

The question to be determined in this case is, whether or not the executor and creditors have been guilty of such laches as to bar the right to subject the lands possessed by the testator at the time of his death to the satisfaction of debts probated against the estate.

It is settled law in this State that creditors, executors and administrators must apply for the subjection of land to the payment of debts within a reasonable time, and if, without sufficient cause, they fail to do so, their rights in that respect will be barred. *Brogan* v. *Brogan,* 63 Ark. 405; *Roth* v. *Holland,* 56 Ark. 633; *Killough* v. *Hinton,* 54 Ark. 65; *Brown* v. *Hanauer,* 48 Ark. 277; *Graves* v. *Pinchback,* 47 Ark. 475; *James* v. *Gibson,* 73 Ark. 440; *Black* v. *Robinson,* 70 Ark. 185; *Mays* v. *Rogers,* 37 Ark. 155. The reason for the rule is given in *Mays* v. *Rogers, supra,* to be that "this charge upon real estate is not a perpetual one, which may be enforced by the administrator after any lapse of time. The heirs should not be forever deterred from making improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate. The power of the administrator must be exercised in a reasonable time, and will be lost by gross laches or unreasonable delay."

In *Roth* v. *Holland, supra,* it was stated: "But we think it the manifest policy of our laws * * * that a delay for more than seven years is not reasonable, and therefore defeats the right of a creditor or an administrator in his behalf, unless there is something to excuse the delays." In this case the appellee did

not make an effort to subject the lands to sale for the payment of debts until the expiration of almost twelve years after he qualified as executor.

The circuit judge, sitting as a jury, found:

"That on or about the 28th day of October, 1890, a few days after the death of the testator, W. M. Mayo, there was a meeting of the heirs at the house of the late W. M. Mayo, at which meeting a conference was had by all of them, except Mrs. L. M. Boyce, who was represented there in that conference by her husband, W. H. Boyce; that all of the heirs were of lawful age. * * * That all the parties to that conference, as heirs and as creditors and as representatives of other creditors, agreed that it was to the best interest of the heirs, as well as the creditors, of the estate of W. M. Mayo that the property should not be sold, but that R. D. Mayo should qualify as executor, and take charge of the lands and personal property thereof, and that he should cultivate and farm the lands in the hope and belief that, by the farming and cultivation of said land, the debts might ultimately be paid, and some part or all the lands of the estate saved to the heirs. That, in pursuance of the agreement, R. D. Mayo, the defendant, took charge of the estate as executor, and cultivated and farmed the lands in controversy. * * * That frequently and repeatedly from 1890 to the date when this suit was brought, the executor talked to and consulted with the heirs as to the conduct of the affairs of the estate, and no objection or complaint was made known to the executor. That the first notice which the creditors of the estate or the executor had of any objection to the continuance of the first agreement was the institution of this action. That the executor had been managing and operating the lands of the estate under the will and the agreement aforesaid with the heirs and creditors of the estate. That, by reason of this agreement and the continuation thereof, the creditors delayed subjecting the lands to the payment of their debts. The court therefore finds that there was a reasonable cause for the delay on the part of the executor and creditors in subjecting the lands of the estate to sale to pay debts probated against said estate."

The facts found by the trial court are supported by the evidence. From the undisputed testimony in this case, we are of

the opinion that neither the creditors nor the executor have been guilty of such laches as to bar the right to subject the lands to sale for the satisfaction of debts probated against the estate of W. M. Mayo.

The judgment is therefore affirmed.

MATTHEWS v. TAYLOR.

Opinion delivered July 9, 1906.

1. ADMINISTRATION—APPOINTMENT OF AUDITOR—PRACTICE.—Kirby's Digest, § 144, regulating the reference of probate accounts to auditors, in providing that the auditors "shall be governed according to the rules laid down for the government of a master in chancery in auditing accounts," did not contemplate that the probate court in such case, or the circuit court on appeal therein, should be turned into a chancery court, or that on appeal to the Supreme Court the trial in the case should be *de novo* as in chancery cases. (Page 577.)
2. APPEAL—CONCLUSIVENESS OF VERDICT OR FINDING.—The only question presented as to the facts on appeal in law cases is whether the evidence is legally sufficient to sustain the verdict or finding. (Page 578.)

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

Stevens & Stevens, for appellant.

1. The auditor's report is erroneous, and the administrator should be charged in accordance with the statement of the account as viewed by him.

2. When the probate court appoints an auditor, he is governed by the rules laid down for masters in chancery. Kirby's Digest, § § 144, 6326-6341. On appeal, the practice in chancery appeals should apply, and the cause be heard *de novo* and decided according to the weight of evidence.

A. S. Kilgore and *C. W. McKay*, for appellee.

HILL, C. J. Q. P. Matthews, the appellant, was appointed

administrator of the estate of John H. Bolger, deceased, and filed an annual account, which was confirmed. He filed a second annual account, which was met by exceptions from the appellee and others, creditors of the Bolger estate. The probate court, pursuant to section 144, Kirby's Digest, referred the account and exceptions to an auditor. The auditor took testimony on the matters in issue, and restated the account, charging the administrator with $1,531.41 as against $614.64, the amount the administrator charged against himself. The auditor also filed a statement of the account as viewed by the administrator under the evidence in accordance with section 6333, Kirby's Digest. According to this statement, the administrator should be charged with $580.65. The administrator excepted to various findings of the auditor, and the exceptions were heard on the evidence adduced before the auditor by the probate court, and the auditor's account was confirmed and entered of record as provided in section 147, Kirby's Digest. The administrator appealed to the circuit court. The case was heard in the circuit court, by agreement, on the account stated by the auditor, the exceptions of the administrator and creditors to that account and the evidence taken before the auditor and reduced to writing under his direction. The circuit court held that the amount found by the auditor was the correct amount, and adjudged accordingly; and the administrator appeals to this court.

The appellant insisted that this cause should be determined as chancery appeals are determined in this court, on the weight of evidence, and not as a mere review of errors as in law appeals.

Section 144, Kirby's Digest, prescribing the reference to an auditor of accounts and exceptions, says: "And such auditor shall be governed according to the rules laid down for the government of a master in chancery in auditing accounts." Subsequent sections assimilate the proceedings to sections 6326-6341, the statutes governing masters in chancery. The argument is made that, as it is expressly provided that the practice shall be governed by the rules laid down for the government of accounts stated by masters in chancery, the appeal from the circuit court should be treated as a chancery appeal, and the trial here be *de novo*.

In considering the nature of appeals in probate matters, Judge Woerner says: "On appeal to a court not of last resort,

the appellate court proceeds as if it had original jurisdiction of the matter brought before it by appeal, which vacates and annuls, for the purposes of such trial, the judgment of the court below. Such appeals, removing a cause from an inferior court to a superior court for the purpose of obtaining trials *de novo,* are unknown to the common law, and can only be prosecuted when expressly given by statute. * * * It is a settled rule that the issue tried in the appellate court must be the same, and no other, than that which was tried in the court below, and that the appellate court will grant such relief, and such only, as the court below should have given. It acquires no jurisdiction of a subject-matter by the appeal of which the court appealed from had none; but in matters of practice follows its own rules." 2 Woerner on Administrations, § 550.

It follows from this statement of the status of the appellate tribunal that the circuit court, when exercising its appellate jurisdiction over the probate court, is proceeding as if it had original jurisdiction over the subject-matter, and is empowered to do all things the probate court could do in the matter, and none other than the probate court could do; but that is a question of power, not of practice. Its practice is its own, shaped, of course, to fit the probate subject. It does not follow that statutes assimilating probate practice to chancery practice, which doubtless confer like powers on the circuit court on appeal in such matters, turn the circuit court into a chancery court when hearing such appeals.

In *Schuman* v. *Sanderson,* 73 Ark. 187, it was argued that in election contests, where the evidence must be taken by depositions, this court had the same opportunity to weigh the evidence that the circuit judge had, and that no conclusiveness should be attached to his findings as is done in cases where circuit judge or jury hears the witnesses orally. The court there pointed out the inherent difference between appeals in law and equity cases, and concluded as follows: "These questions for review from law courts are only questions of law, and they must be reviewed and ruled on in the trial court before review here. There is no trial *de novo* in such cases, as in chancery appeals. The only question presented in appeals in law cases on the facts is whether the evidence is legally sufficient to sustain the verdict or finding. Therefore the inquiry in this case is merely whether there is in

each instance evidence legally sufficient to sustain the findings, and the finding must be sustained if there is such evidence, notwithstanding a decided preponderance may be against it." Applying this settled rule to the facts of this case, the issue here is narrowed to a review of whether upon each matter presented the evidence is legally sufficient to sustain the finding of the circuit court, irrespective of the weight of evidence upon the point in issue.

It would serve no useful purpose to review the numerous items and accounts in controversy and the evidence bearing thereupon. The court has gone over each item carefully, and weighed the evidence to sustain each finding of the auditor, whose report has been accepted by both probate judge and the circuit judge, and the court fails to find it without legally sufficient evidence to sustain it, and that is as far as the court can go into it, and therefore the judgment is affirmed.

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BIRCH v. WALWORTH.

Opinion delivered July 9, 1906.

TAX SALES—RECORD OF DELINQUENT LANDS—CERTIFICATE.—Under Kirby's Digest, § 7086, requiring the county clerk to record the list of delinquent lands with a notice and certificate stating in what paper said list was published, the date of publication, and for what length of time the same was published, failure of the clerk to record such list with notice and certificate before the day of sale avoids all sales made by the collector on that day. *Hunt* v. *Gardner*, 74 Ark. 583, followed.

Appeal from Desha Chancery Court; *Marcus L. Hawkins*, Chancellor; affirmed.

Suit by Sarah Walworth and others against T. W. Birch and others to quiet title. Defendants relied upon a tax title. Decree was for plaintiffs, and defendants have appealed.

J. W. Dickinson, for appellants.

Baldy Vinson, for appellees.

1. A charge of $13.72 as taxes, penalty and costs imposed upon country property assessed at $300 is excessive. 56 Ark. 93; 61 Ark. 36.

2. There is no proof of publication of the list of delinquent lands, as required by statute. Kirby's Digest, § 7086; 65 Ark. 218; *Ib.* 595.

HILL, C. J. Appellants rely upon a tax title based on a tax sale of June 11, 1894. It was attacked, *inter alia,* for failure of the clerk to make the certificate required by section 7086, Kirby's Digest. The certificate found in the transcript complies with the certificate therein first mentioned, but the second certificate, the one to be at the foot of the record, stating in what newspaper published, etc., is not there found. In another connection a certificate containing the substance of this requirement is found, but it is dated 13th of June, 1894, and that is fatal. *Hunt* v. *Gardner,* 74 Ark. 583, covers the point entirely.

Appellants claim that appellees do not show an interest in the land at time of sale, and hence are not qualified to attack the tax title. The evidence of this title is record except as to two deeds, and their existence and the inability of appellees to produce them were proved by parol evidence. The evidence is not at all strong nor satisfactory; but doubtless the best attainable under the circumstances, and, in the absence of any countervailing evidence, is sufficient to sustain the chancellor's finding. Other questions are presented, but, as these are decisive of the case, it is unnecessary to discuss them.

Judgment affirmed.

GIBERSON *v.* WILSON.

Opinion delivered July 9, 1906.

1. APPEAL—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding will not be set aside unless against the weight of evidence. (Page 583.)

2. TRIAL—STIPULATION AS TO ISSUE.—In an "adverse suit," authorized by Rev. Stat. U. S. § § 2325, 2326, to settle conflicting rights in a mining claim, it is competent for the parties to stipulate that the sole issue

to be tried shall be the one therein stated, and such stipulation dispenses with the need of proof of any facts other than on the point in issue. (Page 583.)

Appeal from Marion Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

W. S. Chastain and *John B. Jones,* for appellant.

1. The location of appellees was void for failure to mark the same on the ground, so that its boundaries could be readily traced. 72 Ark. 215, and cases cited.

2. Notwithstanding the waiver by the parties and their submission of the cause upon a single issue, the court is not bound by such agreement in a case where the matter to be determined is the right to a patent under the laws of the United States. The court is not authorized to decree that appellees had a valid location, when no location was either alleged or proved.

3. There is no proof of resumption of work in good faith in 1899, as contemplated by the act of Congress. On the contrary, it shows that their work for years had been fraudulent.

Horton & South, for appellees.

1. If the complaint was defective, appellant should have moved to make it more definite and certain. Failing in this, and having answered on the merits, the defect was waived. Kirby's Digest, § 6147; 71 Ark. 562; 60 Ark. 39.

2. The burden is on him who attacks the validity of a location to show that it is invalid. Barringer & Adams, Mines & Mining, 301, 302, 312, 313; Lindley on Mines, § 636 and note No. 2; *Ib.* 643; 1 Morrison, Min. Rep. 32; 6 *Ib.* 305. It was competent and proper practice for the parties by agreement to narrow the issues to a single one of fact. Parties are bound by admissions in pleadings and by recitals of a judgment. 14 Ark. 167. Such agreement, made a part of the decree, is as binding as an admission in pleadings. Evidence is not admissible to disprove an admission of a party in his pleadings. 32 Ark. 470; 7 Am. & Eng. Enc. Law (1 Ed.), 2, and cases cited; 5 *Ib.* 381, 382.

3. This case is to determine who has the superior equity in the land, as tested by the laws of this State, and the effect the

decision may have as to who shall procure a patent is not for this court to consider.

4. On the question of resumption of work in 1899, the finding of the chancellor, while not conclusive upon this court, is at least persuasive. 41 Ark. 292; 42 Ark. 246; 43 Ark. 308; 44 Ark. 216. And the chancellor was justified in his findings, as appears by the evidence.

HILL, C. J. This is an "adverse suit" authorized by sections 2325, 2326, Rev. St. of the United States, to settle conflicting rights in a mining claim.

The complaint did not contain all the allegations necessary to make out a case for the plaintiff, but did contain general allegations sufficient to make the complaint a proper basis for a good complaint, if objection had been taken to its form. It was answered on the merits, and then this stipulation entered into: "And both parties in open court waived all other points raised in the pleadings, and submitted the cause to the court upon the sole issue as to whether or not plaintiffs under their said location had resumed work on said claim in the year 1899, and after the forfeiture in 1898, and before the location under which the defendant claims title, which was made June 20, 1899." On the sole issue tried before the court there was a conflict, and such a conflict that it can not be said that the chancellor's findings are against the weight of the evidence.

The appellant contends that the evidence fails to show that the plaintiff made out all the necessary proof to entitle him to patent under the laws of the United States, and that this stipulation would not do away with the necessary allegations and proof of all facts necessary to make out a case entitling him to a patent.

The nature of these suits is fully explained in *Blackburn* v. *Portland Gold Mining Co.,* 175 U. S. 571, and *Shoshone Mining Co.* v. *Ritter,* 177 U. S. 505. The Congress has not attempted to regulate the practice in the State courts in these cases. It merely has relegated the litigation to the courts, instead of litigating the questions before the departments, as formerly.

Treating the case as any other litigated matter between individuals, the stipulation was binding, and not improper practice. It is entirely competent for parties to a litigation to stipulate that the only issue is the one therein stated. Such is the

whole object of pleading, to eliminate the undisputed matters and narrow the issue to the material point of difference. This stipulation merely performed that office, and necessarily implied that all other facts necessary on either side to make out the respective contentions were undisputed. Taking this view of the case, it was not necessary for plaintiff to prove facts other than on the point of issue. Whether the United States land officers will accept a judgment based on an issue thus limited is a matter for their consideration, not for this court.

There is nothing to indicate that the issue was a feigned one for the fraudulent purpose of deceiving either the court or land department of the Government.

The judgment is affirmed.

VAUGHAN v. KENDALL (1).
VAUGHAN v MOORE (2).
VAUGHAN v. HAMILTON (3).

Opinion delivered July 9, 1906.

1. COLLECTOR OF TAXES—POWER OF LEGISLATURE.—Const. 1874, art. 7, § 46, in providing that the qualified electors of each county shall elect one sheriff, who shall be *ex officio* collector of taxes unless otherwise provided by law, contemplated that the sheriff should be collector only until the Legislature otherwise provided. (Page 590.)
2. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—An election or appointment to office creates no contract between the officer and the State such as is protected by the prohibition of the Federal Constitution against impairing the obligation of contracts. (Page 591.)
3. SAME—DECREASE OF SALARY.—There is no prohibition in the Constitution of 1874 against decreasing the salary of a sheriff or collector of taxes during his term of office. (Page 591.)
4. SAME—ACT CREATING COLLECTOR'S OFFICE.—The act of March 13, 1905, creating the office of tax collector for Madison County, and taking away from the sheriff of that county his duties and emoluments as *ex officio* collector in the middle of his term of office, is not unconstitutional. (Page 591.)

(1) Appeal from Madison Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

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

(3) Appeal from Madison Circuit Court; *J. S. Maples,* Judge; affirmed.

Although there are three different suits decided by this opinion, the issues are practically the same.

1. The first of these cases was brought by Ben Vaughan in the Madison Chancery Court against Lem Kendall, the county clerk of Madison County, A. E. Moore, auditor, and J. P. Hamilton.

Vaughan alleged that he was elected sheriff and *ex officio* tax collector of Madison County in 1904, and he duly qualified as such by taking the oath of office, and received from the Governor of the State his commission for the term of two years. That he gave bond for the collection of taxes prior to the first Monday in December, 1904, and proceeded to collect taxes for that year. That in November, 1905, he executed bond for collection of taxes for the year 1905, and that said bond was approved on the 23d day of November, 1905, and that he was entitled to exercise the functions of the office of collector of taxes of Madison County until his term as sheriff should expire on October 31, 1906. He charged that Hamilton without authority was claiming to exercise, and was exercising, the duties and functions of the office of collector, and that in so doing he was interfering and threatening to interfere with plaintiff in discharging his duties as such collector. That Hamilton had conspired with Kendall, county clerk, whereby it was agreed that the tax books for the year 1905 should be delivered to Hamilton, and that Hamilton also conspired with Moore, auditor, by which it was agreed that Moore should deliver to Hamilton the blank tax receipt record and blank poll tax receipts, and prayed a restraining order to prevent the defendants from carrying out their alleged agreements and conspiracy.

Hamilton answered, admitting the election of Vaughan as sheriff and *ex officio* collector at the time alleged in complaint and for the period of two years from October 31, 1904, and that Vaughan had been commissioned by the Governor, and had qualified as sheriff and collector on the 31st of October, 1904, and admitted that Vaughan had been acting as sheriff since said date.

Denied that during all of the time claimed by Vaughan he had been discharging the duties of collector, and denied that Vaughan was at that time discharging or entitled to discharge said duties. Denied that he, Hamilton, without right, or authority, was undertaking to exercise the duties and functions of collector of Madison County, and denied that he was interfering with Vaughan in the discharge of any duty incumbent upon Vaughan as collector. Denied that he had conspired with the defendant, Kendall or Moore, as alleged.

By further answer Hamilton alleged, that by an act of the General Assembly of the State of Arkansas, passed and approved on the 13th day of March, 1905, he was duly appointed and commissioned by the Governor of the State tax collector of Madison County, and on the 15th of March, 1905, duly qualified and took the oath provided by law. That he executed bond as such collector, and that the same was duly presented to the county judge of Madison County and approved by him on the 29th of March, 1905, and filed a copy with the county clerk and a duplicate copy with the Auditor of State, and that thereafter on the 29th of November, 1905, he duly qualified as such collector, and executed the bond required by law, and had the same approved and filed as required by law.

Kendall and Moore adopted the answer of Hamilton, so far as the same was applicable, and properly denied the allegations of the plaintiff's bill.

The plaintiff demurred to the separate answers of the defendants, and, the cause coming on for trial upon the pleadings, exhibits, testimony and demurrer, the court overruled the demurrer of plaintiff to the separate answer of the defendant, to which the plaintiff excepted, and the court found that at the time of its refusal to issue the temporary restraining order which was presented to and passed on by the chancellor in chambers on the 15th day of December, 1905, the tax records and receipts and all other paraphernalia of the office of the tax collector of Madison County were not in the possession of either Ben Vaughan, plaintiff, or defendant J. P. Hamilton, but were in the possession of Lem Kendall, county clerk of Madison County, and A. E. Moore Auditor of State, and found that since the 31st of December, 1905, Hamilton, without any fraud, force or conspiracy with

Kendall, clerk, or Moore, Auditor, or either of them, has obtained the possessions of all the tax books, real and personal, all the tax records, blank tax receipts and other paraphernalia rightfully belonging to the office of tax collector of Madison County for the collection of taxes due for the year 1905, and has ever since been and was then in possession of the same, and the court found that said tax books, records, receipts, and other paraphernalia of the office of tax collector of Madison County for the year 1905 were not then and had never been in the possession of Vaughan. And the court found that there was no equity in the plaintiff's bill, and dismissed it.

2. In the second suit, Vaughan against Moore, Auditor, the plaintiff sought by mandamus to compel the Auditor to deliver to him the blank books and receipt record and blank poll tax receipts, alleging substantially the same things as alleged in the suit brought in the Madison Chancery Court.

The defendant, Moore, demurred, and, the demurrer being sustained, plaintiff rested and appealed.

3. After the determination of these suits, one in the chancery court in Madison County, and the other in the circuit court of Pulaski County, Vaughan brought this suit in the Madison Circuit Court, against Hamilton, making substantially the same allegations as made in the other suits, and alleged that Hamilton had forcibly intruded himself into the office of tax collector of Madison County and was without right exercising the duties of collector. He asked that Hamilton be required to show by what authority he had assumed to exercise the duties of tax collector and by what authority he deprived the plaintiff of the emoluments of the office, that Hamilton be ousted from the office and that plaintiff be reinstated, and asked judgment against Hamilton for the emoluments of the office.

Hamilton answered, admitted the election of Vaughan as sheriff of Madison County on the 5th of September, 1904, for the term of two years, and that this term as sheriff began on the 31st day of October, 1904, and would end on the 31st day of October, 1906, and that by virtue of his election as sheriff Vaughan became *ex officio* collector, but he alleged that Vaughan was only entitled to exercise the functions of *ex officio* collector by virtue of his election as sheriff until the collection of taxes

for the said county was otherwise provided for by law, and Hamilton denied that Vaughan gave bond as required by law as collector of taxes prior to the first of December, 1904, and denied that he gave bond as collector for the collection of taxes for the year 1905, and denied that said alleged bond was approved as required by law, and denied the filing of said bond with the county clerk and Auditor. He further denied that he without right or authority of law forcibly intruded into the office of tax collector of Madison County, or that he was proceeding in violation of the rights of Vaughan to exercise the duties of tax collector, or that Vaughan was deprived of the right to enjoy any emoluments or perform any duty which he had a right to perform.

Hamilton, further answering, alleged that, under the authority of the act of March 13, 1905, creating the office of tax collector of Madison County, he was by the Governor on the 13th day of March, duly appointed and commissioned tax collector of Madison County. On the 15th day of March, 1905, he qualified, took the oath of office, gave bond, filed copies with the clerk and Auditor as required by law; and that, under the act referred to, he was appointed and commissioned tax collector of Madison County on the 26th day of December, 1905, duly qualified, took the oath of office required by law, gave bond for the collection of taxes for the year 1905 as required by law, which bond was duly approved by the county judge and filed in duplicate with the county clerk of Madison County, and Auditor of State. And that, in pursuance of the authority conferred upon him, he gave notice of the times and places for the collection of taxes for Madison County for the year 1905, and was then engaged in the collection of such taxes.

Vaughan filed his demurrer to Hamilton's answer, which, coming on to be heard, was by the court overruled, and plaintiff, resting upon the demurrer, appealed.

The act under which Hamilton was appointed tax collector of Madison County was as follows:

"An act to create the office of tax collector in Madison County, Arkansas, and for other purposes:

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. That the office of tax collector of Madison County is hereby created, which said officer shall be elected and shall qualify as other county officers, and shall hold his office for a term of two years, and give bond for the faithful performance of his duties, as now required by law; and shall receive as compensation for his services such fees as are now or may hereafter be allowed by law to *ex officio* collectors.

"Section 2. That the Governor shall appoint a tax collector, as herein provided, whose term shall expire October 31, 1906.

"Section 3. That this act shall take effect and be in force from and after October 31, 1905.

"Approved March 13, 1905."

Ivie & Harris and *Myers & Bratton,* for appellant.

1. This case calls for a construction of sec. 46, art. 7, Constitution of this State, and particularly of the clause, "unless otherwise provided by law."

It is elementary that a constitution operates prospectively; and construction must be in favor of prospective operation, unless a contrary intent is clearly established. 6 Am. & Eng. Enc. Law. (2 Ed.), 917, and authorities cited. Clearly, it is the meaning, and was the intent, of the Constitution that a sheriff should be elected who should be *ex officio* collector, unless *before the election* the Legislature had provided otherwise.

2. The office of collector is a constitutional office, created and having a term fixed by the Constitution. 37 Ark. 390. When appellant was elected to the office of sheriff, he was at the same time elected to the office of collector. They are separate and distinct offices. 33 Ark. 396; 57 Ark. 196. And if he did not forfeit his right to the office, it could not be taken from him, and any act that seeks to do so is unconstitutional and void. 10 Ark. 156; 61 Ark. 26; 1 Am. Rep. 422; 43 Am. Dec. 743; 26 Ark. 139; 46 L. R. A. 295; Cooley, Const. Lim. 277 and notes; Throop on Pub. Officers, § 20; 8 L. R. A. 228.

3. The length of a term of office is governed by the law as it existed at the time of the election. 148 N. Y. 677; 10 Wis. 532; Throop on Pub. Off. § 305; 10 Ind. 99; 23 Ill. 549; 54

Miss. 405; 7 Jones (N. C.), 545; 25 Am. Dec. 677; 44 Mo. 129.

4. Where one is elected, and, by virtue of such election, takes charge of an office, so long as he continues to act, claiming his right to act by virtue of his election, the law will not permit another forcibly, and independently of lawful proceedings and process, to intrude himself into the office. Hamilton should have proceeded by quo warranto. 34 Cal. 473; 26 Ark. 488; 23 Am. & Eng. Enc. Law (2 Ed.), 327; 48 Ark. 82; 17 Ark. 407; 60 Am. Dec. 771.

Johnson & Combs and *Walker & Walker,* for appellees.

1. The construction contended for by appellant is strained and untenable. The clause "unless otherwise provided by law" is notice to the sheriff that his tenure of the position of *ex officio* collector is dependent upon the will of the Legislature. Except as to the officers named therein, the Constitution contains no limitation in the matter of increasing or diminishing officers salaries. Art. 19, sec. 11, Const. 1874; 27 Ark. 176.

A public office is not a grant or contract, but is a trust or public agency. 32 Ark. 242; Throop on Pub. Officers, 1-4, 19; 19 Wall. 526; Beach on Cont. § 1643; 61 Ark. 25; 100 U. S. 528; 134 U. S. (33 Law Ed.), 825. An election or appointment to office creates no contract between the State and the officer which is protected by the clause of the Federal Constitution inhibiting the impairment of contracts. 40 Ark. 100.

The presumption of law is that an act of the Legislature is constitutional, and the courts will not declare an act unconstitutional unless there is a clear incompatibility between the act and the Constitution. 11 Ark. 481; Cooley's Const. Lim. 7 Ed. 242; *Ib.* 236 and note 1, and 237, note 2; *Ib.* 239; 25 Ark. 251; 39 Ark. 355; 76 Ark. 197.

2. The collectorship is but an incident to the office of sheriff. 37 Ark. 386.

HILL, C. J. These three appeals in different ways raise the same question, viz.: the validity of an act of the General Assembly, approved March 13, 1905, creating the office of collector of Madison County. Under this act J. P. Hamilton was appointed collector. Ben Vaughan had been elected sheriff, and had qualified as such and as *ex officio* collector. This act took the office

of collector away from him in the middle of his term, and authorized the Governor to appoint a collector. The act will be set out in the statement of facts.

The clause of the Constitution is as follows: "The qualified electors of each county shall elect one sheriff, who shall be *ex officio* collector of taxes unless otherwise provided by law." Art. 7, § 46. The natural meaning to be attached to this is that the sheriff shall be the collector until the Legislature otherwise provides. The sheriff takes office with this constitutional menace to his tenure on the collectorship staring him in the face, and has no legal cause of complaint if the Legislature exercises its power. It is contended that this clause should be construed to have reference to the status at the time the sheriff is elected, and should not affect his tenure of the collectorship, which was perfect when he was elected sheriff. Even if this construction was placed upon it, the appellant's case would not be helped. This could not be possibly taken as forbidding the Legislature to separate the offices, and the collectorship is an incident to the sheriff's office, which is not itself a constitutional office. *Falconer* v. *Shores,* 37 Ark. 386.

The election or appointment to office creates no contract between the officer and the State which is protected by the Federal constitutional inhibition against impairing the obligation of contracts. *Humphry* v. *Sadler,* 40 Ark. 100; *Vincenheller* v. *Reagan,* 69 Ark. 460; *Taylor* v. *Beckham,* 178 U. S. 548.

Certain offices have constitutional safeguards against decreasing salaries during the term of office, but the sheriff is not one of them, and *a fortiori* the collector is not. *Humphry* v. *Sadler,* 40 Ark. 100.

The Constitution "leaves the office of collector under legislative control." *Falconer* v. *Shores,* 37 Ark. 386.

The Legislature, having no constitutional inhibitions in its way, was sovereign in dealing with the office of collector of taxes, and, having the power to take it away from the sheriff in the middle of his term, proceeded to do so.

The judgments are affirmed.

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STINSON v. RAY.

Opinion delivered July 9, 1906.

REFORMATION OF INSTRUMENT—PROOF.—A deed will be reformed for mistake in drafting it where the mistake is proved by clear, unequivocal and decisive proof.

Appeal from Saline Chancery Court; *A. Curl,* Chancellor; judgment modified.

Mehaffy & Armistead, for appellant.

Appellee, *pro se.*

BATTLE, J. Elizabeth Ray brought this suit against E. Y. Stinson in the Saline Chancery Court to reform a deed executed by her to him on the 22d day of November, 1900.

In the month of November, 1900, plaintiff, in consideration of the sum of $250, agreed to sell and convey to the defendant certain real estate, situate in the town of Benton, in Saline County, Arkansas, described and bounded as follows: "Beginning at a point on the north line of block thirteen, in said town of Benton, twenty feet east of the northwest corner of said block, run thence east along the north line of said block twenty feet; thence south sixty-one and a half feet; thence west twenty feet; thence north sixty-one and a half feet to the place of beginning, on the north line of said block:" and at the same time agreed to convey to him a right of way extending from the street on the west side of block thirteen east a distance of forty feet, "and so as to cover the south side of the property she agreed to sell and convey, and to furnish an outlet from the south end of said property to Depot Street."

Plaintiff executed to the defendant a deed by which she conveyed to him the lot she agreed to sell and the right of way as a part thereof in fee simple, and described the same as follows: Commencing twenty (20) feet east of the northwest corner of block No. thirteen in Benton, Arkansas, thence running east twenty (20) feet, thence south sixty-nine and a half (69½) feet, thence west forty (40) feet to the west line of said block thirteen, thence north eight (8) feet, thence east twenty (20) feet, thence north sixty-one and one half feet to the place of beginning."

Upon the hearing of the cause the chancery court found "that in the drafting and writing of said deed the land to be conveyed thereby was erroneously described so as to embrace the property agreed to be sold, and in addition thereto an additional strip or parcel of land eight (8) feet wide, north and south, and extending from Market Street, otherwise called Depot Street, east forty (40) feet, and lying south of and adjacent to the land so agreed to be sold; that on the 22d day of November, 1900, the plaintiff, without knowledge of the fact that said deed embraced more land than she had contracted and agreed to sell to the defendant, executed the deed without the error having been corrected; that the deed so executed, and containing the error as to the land embraced therein, was filed for record in the office of the recorder of Saline County, Arkansas, and appears of record at page 76 in Book 'S' of the record of deeds of the county."

And adjudged and decreed:

"1. That the deed executed by the plaintiff, Elizabeth Ray, to the defendant, E. Y. Stinson, on the 22d day of November, 1900, and filed for record with the recorder of Saline County, Arkansas, on the 22d day of November, 1900, and appearing of record at page 76, of Book 'S,' of the records of deeds on file in the office of the recorder of said county, be and is so corrected as to embrace the following property, and none other, towit: Beginning at a point on the north line of block thirteen, in the town of Benton, in Saline County, Arkansas, twenty feet east of the northwest corner of said block; run thence east, along the north line of said block thirteen, twenty feet; thence south sixty-one and a half feet; thence west twenty feet; thence north sixty-one and a half feet to the north line of said block and the place of beginning. And that the defendant be and is enjoined from setting up, or claiming title to any property described in said deed, except that hereinabove designated.

"It is further considered, adjudged and decreed by the court that an alley six feet wide, extending from Market Street, otherwise called Depot Street, east forty feet, and lying south of and adjacent to the above-described tract or parcel of land, be opened by the plaintiff and kept perpetually open, as an outlet, and for the accommodation and use of the defendant and all others that

may have occasion and desire to use the same. And the same is hereby decreed to be a public alley."

The undisputed facts in the case show that the additional strip of land eight feet wide was to be used as an outlet, a way of ingress and egress to and from the lot conveyed, and for no other purpose. Plaintiff and defendant so understood and agreed. According to the terms of their agreement a right of way eight feet wide, north and south, and extending due east from Depot Street a distance of forty feet, and lying south of and adjacent to the land sold should have been conveyed. The draughtsman who drew the deed evidently did not understand the contract of the parties; and the grantor executed it without discovering the error. The evidence adduced at the hearing, clearly, unequivocally, and decisively proves these facts. For the law of the case see *McGuigan* v. *Gaines*, 71 Ark. 614; *Goerke* v. *Rodgers*, 75 Ark. 72.

The cause is remanded with directions to the chancery court to modify its decree in accordance with this opinion.

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HARPER v. STATE.

Opinion delivered July 9, 1906.

1. CONTINUANCES—DISCRETION OF COURT.—Continuances in criminal, as as in civil, cases are, as a general rule, within the sound discretion of the trial court, and a refusal to grant a continuance in a criminal case is never a ground for a new trial unless it is made to appear that such discretion has been abused to the prejudice of appellant. (Page 600.)

2. SAME.—A continuance will not be granted in a murder case at the defendant's instance on account of the absence of a witness who, if present, would testify that the State's principal witness had gone through the neighborhood where the killing occurred and had endeavored to incite people to join him in mob violence on defendant, and had made many threats of violence against defendant, if the State's witness on his cross-examination was not asked about such alleged conduct. (Page 600.)

3. EVIDENCE—THREATS.—Threats of violence toward defendant, alleged to have been made by deceased, unaccompanied with overt acts showing an intent to carry them into effect, are competent in a murder

case only to show deceased's character for violence and his disposition of mind toward defendant, to be considered in determining who was the aggressor. (Page 600.)

4. CONTINUANCE—CUMULATIVE TESTIMONY.—A continuance asked on account of the absence of witnesses whose testimony would have been merely cumulative was properly refused. (Page 601.)

5. APPEAL—HARMLESS ERROR.—A new trial will not be granted because the court assigned an erroneous reason for refusing a continuance if there was no prejudicial error in the refusal itself. (Page 602.)

6. EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS.—Where there was evidence that appellant, accused of murder, had entered into a conspiracy with his father and brother to kill deceased, the acts and declarations of his father and brother, done and made in furtherance of the conspiracy and while it was in progress, were competent. (Page 603.)

Appeal from Craighead Circuit Court; *Allen Hughes*, Judge; affirmed

STATEMENT BY THE COURT.

Appellant was indicted at the December term (December 20), 1905, of the circuit court for the Chickasawba District of Mississippi County for the murder of Eulick Knight. The indictment contained two counts, the first count charging him with murder in the first degree, and the second count charging him with being accessory before the fact to murder in the first degree, alleging that James and Ches. Harper murdered Eulick Knight, and that he aided and abetted and assisted therein.

The cause was continued on motion of appellant to February 12, 1906. On this day the venue was changed to the Craighead Circuit Court. When the case was called for trial in the Craighead Circuit Court on the 26th day of February, 1906, the appellant filed the following motion for continuance:

"Come the defendants, James Harper, Ches. Harper and Ves. Harper, and move the court for a continuance in this cause, and for cause state that they can not safely go to trial at the present term of this court on account of the absence of Frank Neely, Gabe Owens, Jesse Smotherman, Jack Sutton, Jack Biddle and Howard Cable. If Frank Neely and Gabe Owens were present, they would testify that the State's principal witness, Wm. Dycus, on the night of the third day after the killing of Eulick Knight, the crime for which these defendants stand indicted in this cause,

was going through the neighborhood in the vicinity where the said Eulick Knight was killed, trying to incite many citizens to join him in a mob to go to Osceola, about ten miles away, and where these defendants were at that time confined in jail, and take them out and mob them, and that the said Wm. Dycus was making and did make many threats of violence about each of these defendants, and showed great prejudice against each of them. If Jesse Smotherman were present, he would testify that, about one month before the killing of Eulick Knight, the said Eulick Knight borrowed a loaded pistol from Lum Carney, with which he said he meant to kill both Ves. and Jas. Harper within 48 hours. He would also testify that about three weeks before the killing, at a crossroads, the defendants Ches. Harper and Jas. Harper came in view and missed meeting Eulick Knight in the due course of their journey about 40 or 50 yards, that he saw Eulick Knight unbutton his vest and place his hand upon a six-shooter pistol, and say that he was going to kill both the said Ches. and Jas. Harper then and there. And, if Jack Sutton were present, defendants could prove the same material facts by him as above stated could be proved by Jesse Smotherman, and in addition thereto he would testify that he had seen the deceased, Eulick Knight, on two occasions within two months of this tragedy, with a loaded pistol, and had heard him make threats of violence against both Ves. and James Harper, and say that he would kill them both, and that at the May, 1905, term of the circuit court at Blytheville, the deceased, Eulick Knight, attempted violently to assault the defendant, James Harper, at a time when the said James Harper did not know of his presence, and was not aware that such attempted assault was being made, and that bystanders had to interfere, and did interfere, and held the said Eulick Knight to prevent his making a murderous assault on the defendant, James Harper. If Jack Biddle were present, he would testify that he heard Eulick Knight, within three months before his death, say that, if defendant Ves. Harper did not deed him a one-half interest in his tract of land, he would kill him like a damned dog. If Howard Cable were present, he would testify that he carried a note late in the evening before the killing of Eulick Knight the next morning from Eulick Knight to the defendant. That all of the above-mentioned acts of hostility and

threats of the said Eulick Knight were communicated to each of the defendants before the said Eulick Knight was killed. That these defendants were indicted and arraigned on the——day of December, 1905, and on the said day they caused to be issued subpoenas for each of the above-named witnesses. That Howard Cable, Jesse Smotherman and Frank Neely had been subpoenaed, and that Jack Sutton is temporarily absent in the State of Mississippi. That Frank Neely is sick and temporarily in a hospital in Memphis, Tenn. That Gabe Owens is temporarily absent, is at present at Owensboro, Ky. That Jesse Smotherman is sick at his home in Mississippi County, Arkansas, and is unable to attend the present term of this court. That Howard Cable, defendants are informed, is unable to be present because he has no money with which to pay his expenses; that Jack Biddle is temporarily absent, and is at present at Gates, Tenn. That these defendants can not prove the facts above set out by any other person except these witnesses named, and that all the facts above set out these affiants believe to be true, and that none of the said witnesses are absent by the consent, connivance or procurement of any of these defendants. That all of these defendants have been continuously confined in jail since their arrest in August, 1905; and if they are given until the next term of this court, they will be able to have service of process had on each of the above-named witnesses who are now out of the State of Arkansas, and have them in court to testify in their behalf. Defendants allege that each of the said witnesses are *bona fide* residents and citizens of Mississippi County, Arkansas, and that in a short while each of them will be back at his respective home in the neighborhood where they and these defendants reside, and where the killing of Eulick Knight took place. Wherefore these defendants pray that this cause be continued until the next term of this court, to the end that they may have a fair and full investigation of their cause."

The motion was duly verified.

In resisting the motion for continuance, the prosecuting attorney admitted that Jesse Smotherman was too sick to attend at that term of the court, but further on he stated to the court that, if the defendant were forced to a trial, he would have witness Smotherman present to testify for the defendant. It was also

admitted by counsel for the State that witness Frank Neely was out of the State. The prosecuting attorney offered to let attorneys for the defense read the motion for continuance as the deposition of the absent witnesses named therein, which offer was refused by attorneys for defendant.

The court overruled the motion, stating that it was "of the opinion that both sides were as ready for trial as they would be at another term, owing to the distance they had to come and the number of witnesses in attendance upon the court," and offered to permit attorneys for the defendant to read the motion for continuance as the despositions of the witnesses named therein. The court gave, as one reason why the motion was overruled, that attorneys for defendant had had time to take the depositions of the witnesses named who were absent on account of sickness, whereupon the attorneys for the defendant made affidavit that neither of them knew that witness Frank Neely was sick, or in a hospital in Memphis, Tenn., until the cause was called for trial at that term, and they renewed their application for continuance, and the court refused it, to which they excepted.

The motion for continuance was not read in evidence. The record recites: "At the close of the evidence nothing was said by any one about election, and the matter did not occur to the court until after the opening argument of the prosecuting attorney had been made, when election was immediately ordered and made." Also the following: "After the trial was concluded and the prosecuting attorney, L. C. Going, had made his opening speech to the jury, he made his election to try defendant on count one, charging the defendant with murder in the first degree." But following these recitals is another recital showing that the attorneys for defendant moved the court to have the district attorney to elect before the selection of the jury "on which count of the indictment he would go to trial." Still another recital following this shows that the attorneys for defendant moved the court to compel the prosecuting attorney, "after the selection of the jury and before the trial began, to elect on which count of the indictment he would put defendant to trial," which motion was by the court overruled.

The record recites that "during the opening argument of the prosecuting attorney" he argued at length the evidence tending to

show the connection of Ches. Harper and James Harper with the killing of Eulick Knight, and showing and tending to show a conspiracy on the part of the three Harpers to do the killing, saying, among other things, that "all of them were present and helped to do the killing, and that it was the dirtiest and most damnable conspiracy that was ever formed. That it made no difference which one of them did the killing, as they were all in a conspiracy, and all guilty alike." But the record further shows that: "No objection was made to this argument, nor was it called to the attention of the court in any way."

The testimony of William Dycus, who was the only eyewitness to the killing, and other witnesses on behalf of the State, tended to show that appellant killed Knight by lying in wait. The testimony on behalf of appellant tended to show the killing was done in self-defense.

Defendant was found guilty of murder in the first degree, and has appealed.

S. R. Simpson, for appellant.

1. Although the granting of a continuance is within the sound discretion of the court, yet it is error for which a case should be reversed if the court refuses a defendant's application for continuance where he has exercised due diligence and, without fault of his, is deprived of material testimony because of the absence of witnesses. Art. 2, § 10, Const. 1874; 71 Ark. 180; 57 Ark. 168; 60 Ark. 576; 42 Ark. 274. See, also, 20 Tex. App. 134; 18 *Ib.* 72; 19 Tex. 449; 43 Tex. 319; 2 S. W. 622; 1 S. W. 465; 5 S. W. 283; *Ib.* 826; *Ib.* 829; 7 S. W. 667; 8 S. W. 607; 22 So. 62; 55 S. W. 337. Defendant was entitled to the personal presence of his witnesses before the jury. Kirby's Digest, §2311, and cases cited; 50 Ark. 161. And defendant was entitled either to a continuance or to an admission from the State that the absent witnesses would testify as set out in the motion, and that *it was true.* 58 Ark. 519; 50 Ark. 161.

2. The court erred in refusing to compel the prosecuting attorney to elect, before the trial began, on which count of the indictment he would rely.

Robert L. Rogers, Attorney General, and *G. W. Hendricks,* for appellee.

The discretion of the trial court in the matter of continuances will not be disturbed except in case of abuse. 71 Ark. 65. Since the evidence of the witnesses for whom the continuance was sought was only cumulative, it was not error to refuse the continuance. *Ib.* 403.

WOOD, J., (after stating the facts.) 1. The court did not err in refusing to grant a continuance. "Continuances in criminal as well as civil cases are, as general rule, within the sound discretion of the trial court, and a refusal to grant a continuance in a criminal case is never a ground for a new trial unless it is made to appear that such discretion has been abused to the prejudice of the defendant." *Lane* v. *State,* 67 Ark. 293; *Puckett* v. *State,* 71 Ark. 62; *Allison* v. *State,* 74 Ark. 444, and many cases cited; 1 Crawford's Digest, Continuances, II, c.

As to the witness Frank Neely, conceding that due diligence was used to obtain his testimony, the refusal of the court to continue on account of his absence was not prejudicial error. Appellant expected to prove by him that the State's principal witness, William Dycus, had gone through the neighborhood where the killing occurred and had endeavored to incite people to join him in mob violence on appellant, and had made many threats of violence against him, and had thus manifested great prejudice against him. This would have been competent testimony as affecting the credibility of the witness Dycus. But Dycus was on the stand as a witness, and counsel for appellant did not lay the foundation for the introduction of such evidence by asking Dycus whether or not he did the things alleged in the motion for continuance calling his attention to the time and place. Had such questions been asked him, he might have answered in the affirmative. That would have ended the matter. Other proof would not have been necessary. As he was present, and knew whether or not he had engaged in the conduct, he should have been questioned on the subject. Appellant can not claim to be prejudiced by the refusal of the court to allow witnesses to testify to such conduct on the part of one of the witnesses, when the witness himself was not asked about it, and had not been given the opportunity to either affirm or deny the alleged conduct affecting his credibility as a witness. See section 3138, Kirby's Digest. It appears that appellant did ask this witness on

cross-examination if he had taken an interest in the prosecution against appellant, and if he and some other people "had made up money to employ" counsel in the case to prosecute appellant, and the witness answered that he had. So he may have answered affirmatively the other questions touching his alleged conduct looking to mob violence against appellant, had they been asked him. Appellant is not in a position to claim that he is prejudiced by the refusal of court to grant a continuance on account of the absence of Frank Neely.

By witness Smotherman appellant alleged that he expected to prove that about "one month before the killing of Eulick Knight, he (Knight) borrowed a pistol from Lum Carney with which he said he meant to kill both Ves. and James Harper within 48 hours." And again that "about three weeks before the killing, at a crossroads, the defendants Ches. Harper and James Harper came in view, and missed meeting Eulick Knight in the due course of their journey about forty or fifty yards, that he saw Eulick Knight unbutton his vest and place his hand upon a six-shooter pistol, and say that he was going to kill both the said Ches. and James Harper then and there." Certainly no prejudice could have resulted to appellant from the refusal of the court to continue the cause on account of the absence of this testimony. It would have shown no more than that deceased had great ill-will toward the Harpers, and that on sundry occasions he made threats of violence against them, and which threats he never put into execution, although it did not appear that there was anything to prevent or restrain him from so doing. The probative result of such testimony would have been bad temper and evil disposition on the part of Knight towards the Harpers manifested by threats simply, without any overt acts showing an intention to carry them out. They were only competent to show the character of Knight for violence, and his disposition of mind toward appellant, and thus were to be considered by the jury in determining who was the aggressor. *Palmore* v. *State,* 29 Ark. 248; *Brown* v. *State,* 55 Ark. 593. But for such purpose they were merely cumulative evidence. So likewise would have been the testimony of Sutton and Biddle, other witnesses named in motion.

The testimony of Felix Pursely for appellant was to the

effect that a few weeks before Knight was killed the witness heard him say that Ves. Harper had put a tenant on the place, that he (Knight) did not want him there, and that he was going to lick the tenant, and give him a certain number of hours to leave, and if he did not vacate he (Knight) was going to burn down the house. Another witness, Harlow Carwell, testified that "in June before the killing took place, in August, he heard Knight say that if Ves. Harper did not give him a deed to one-half that farm he or Ves. would sleep in the Hatcher graveyard." And the witness said that Knight's manner convinced him that he was in earnest, and he communicated the conversation to appellant. This, together with the testimony of appellant himself, and of William Dycus as to the quarrel on the evening prior to the morning of the fatal day, showed that appellant and Knight were living in a state of "undisguised hostility." So as to the purported testimony of the absent witness, Jesse Smotherman, appellant suffered no prejudice by a refusal to continue in order to enable him to procure it. However erroneous might be the reasons assigned by the court for refusing the continuance, we find no error prejudicial to appellant in the ruling itself.

2. The other ground urged for reversal is that the court erred in not compelling the prosecuting attorney to elect on which count of the indictment he would stand before the trial began; appellant contending in this connection that all of the testimony in relation to the acts and declarations of his father and brother were prejudicial to him, as likewise was the argument of counsel for the State that they were all in a conspiracy to kill Knight.

Whether the appellant's counsel moved the court to require the prosecuting attorney to elect on which count in the indictment he would proceed before the selection of the jury, and before the trial began, or after the evidence had been concluded and the prosecuting attorney had made his opening argument, it is impossible to determine from the recitals of the record. For these recitals on this point are contradictory and confusing. But we regard this as wholly immaterial in view of the testimony. The appellant admitted the killing, and there was abundant proof to warrant the conclusion that appellant and his father and brother had formed a conspiracy to kill Knight. Appellant himself says that, after the quarrel the evening before, he told his father and

brother what Knight had done and said, and called on them for protection, and his own evidence shows that they stayed at his house with him that night, after he had sent his wife away, and that they carried a pump shotgun over there. Appellant says he did the shooting with a "pump" gun. True, appellant says they had gone before Knight and Dycus came, and were not present when the killing occurred; but the circumstances as detailed by Dycus and other witnesses made it a question for the jury to say whether or not there was a conspiracy between appellant and his father and brother, Ches., to kill Knight. If there was a conspiracy, it was immaterial when the prosecuting attorney made his election, for the testimony as to the acts and declarations of his father and brother in furtherance of the conspiracy and while it was in progress, were competent (*Benton* v. *State,* 78 Ark. 284) on either count. Therefore we are of the opinion that no prejudice resulted from the failure of the prosecuting attorney to make his election before the trial began. In this view, the testimony of the witnesses and the argument of counsel which appellant sets up as his eleventh and twelfth grounds of the motion for new trial, and of which he so forcefully complains in his brief, could not avail him, even if his objections thereto had been made and duly preserved in the bill of exceptions.

The judgment is affirmed.

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ARKANSAS & TEXAS GRAIN COMPANY v. YOUNG & FRESCH GRAIN COMPANY.

Opinion delivered July 9, 1906.

1. SALE—VENDOR'S WAIVER OF VENDEE'S BREACH.—Where, in the purchase of a carload of corn to be delivered to a railroad company for transportation to the vendee, the vendor's liability was to cease when the corn was delivered in good condition to the carrier, the fact that the vendee was granted permission to inspect the corn at destination

before accepting it did not include the right to reject the corn because it was heated after delivery to the carrier, nor amount to a waiver of the vendor's right to claim damages for wrongful rejection of the corn. (Page 605.)

2. SAME—RESALE—WAIVER OF BREACH.—The fact that, after the vendee of a carload of corn rejected the corn, the vendor's agent resold the corn to the vendee at a reduced price did not waive the vendor's right to claim as damages the difference between the contract price and the price paid. (Page 605.)

3. SAME—BREACH—NOTICE OF INTENT TO RESELL.—If a vendor, before reselling goods wrongfully rejected by his vendee, be required to give the latter notice of his intention to resell and hold the latter liable for the difference in price, the vendee can not claim to have been injured if the resale was made to him. (Page 605.)

Appeal from Miller Circuit Court; *James S. Steel,* Judge, on exchange of circuits; affirmed.

L. A. Byrne, for appellant.

1. When appellee gave permission to inspect the corn before receiving it, this conferred the right to reject it; and if the right to inspect did not exist under the original contract of purchase, but was subsequently given, it was a waiver of the original contract.

2. When the appellee's manager came to Texarkana, took possession of and resold the corn, appellee was thereby estopped to assert this claim.

3. It was appellee's duty, before it could hold appellant for any balance after reselling the corn, to notify appellant of its intention to deal with the corn in this way. 53 Ark. 155; 2 Benjamin on Sales, Rev. Ed. 1023; 48 Mich. 224; 28 Ind. 365; 45 Ill. 76; 82 Ill. 524; 57 Ark. 266.

W. H. Arnold, for appellee.

RIDDICK, J. This is an appeal by the Arkansas & Texas Grain Company from a judgment rendered against it in favor of the Young & Fresch Grain Company for damages for breach of a contract to purchase two carloads of corn. The corn was shipped from St. Louis to defendant at Texarkana. The defendant, on arrival of the corn at Texarkana, refused to accept it unless first allowed to inspect it. This permission was granted, and defendant, after inspecting the corn, rejected it. Thereupon

plaintiff sent an agent from St. Louis, who took charge of the corn and resold it to defendant for a lower price, defendant having offered the best price that could be obtained in that market. But the corn had become heated and injured after shipment, and by reason of the refusal of defendant to accept, and the consequent delay, the corn had sustained further injury, and the price received was below the contract price, and plaintiffs brought this action to recover the difference. The case was submitted to the court sitting without a jury, and he found that the corn was of the kind ordered by defendant, and that it was in good condition at the time it was delivered to the railway company in St. Louis. The court further found that one of the conditions of the sale was that the liability of the plaintiff to defendant should cease when the corn was delivered in good condition to the railway company for transportation to Texarkana, and that by the terms of the contract the plaintiff was not responsible for the heating of the corn after delivery to the carrier. He therefore found in favor of plaintiff, and gave judgment against defendant for the sum of $180.

The evidence was sufficient to support the finding made by the court, which, like the verdict of a jury, is conclusive on all questions of fact upon which the evidence is conflicting. Nor do we find any error of law that requires a reversal of the judgment. The contention of appellant that the permission to inspect the corn included the right to reject can not be sustained. Plaintiff granted the right to inspect after the corn had already arrived at Texarkana because defendant refused to accept unless inspection was granted. This was done in an effort to induce defendant to accept the corn, and did not amount to a waiver of the right of plaintiff to claim damages for wrongful rejection. *Riendeau* v. *Bullock,* 147 N. Y. 269-275.

Neither did the fact that the agent of plaintiff came down to Texarkana and resold the corn to defendant amount in itself to a waiver of that right. It was his duty to obtain the best price possible; and as the best offer came from defendant, plaintiff did right in accepting the offer. The circumstances in proof justified the circuit court in finding that there was no waiver by plaintiff of the original contract, nor of its right to seek damages for breach of the contract. *Riendeau* v. *Bullock,* 147 N. Y. 269;

Lewis v. *Greider,* 51 N. Y. 237; *Moore* v. *Potter,* 155 N. Y. 481; Benjamin on Sales (Bennett's Ed.), 826. As the resale of the corn was made to the defendant company, there was no necessity to give formal notice of the intention to resell. Under such circumstances the defendant could be in no way injured by the want of such notice. Benjamin on Sales (Bennett's Ed.), p. 826; *Holland* v. *Rea,* 48 Mich. 218; *Clore* v. *Robinson,* 38 S. W. 687.

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

CRAWFORD *v.* BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

Opinion delivered July 9, 1906.

1. REAL ESTATE—CONVEYANCE BY LIFE TENANT—RIGHT OF REMAINDERMAN TO COMPLAIN.—Where a life estate in lands was devised to the devisor's widow for life with remainder to trustees for the use of devisor's heirs, and the widow conveyed a right of way through the lands for a levee, neither the trustees nor the *cestuis que use,* as holders of the remainder interest, can demand a cancellation of the conveyance by the life tenant, as the same does not affect their rights. (Page 608.)
2. LEVEE—TAKING LAND WITHOUT COMPENSATION—REMEDY.—After a public levee has been built, the only remedy of reimaindermen whose lands have been taken without compensation would be to recover damages for the taking and injury. (Page 608.)

Appeal from Lee Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

W. A. Compton, for appellants; *Carroll & McKellar,* of counsel.

Mrs. Taylor executed the deed, relying upon the assurance that the levee would be constructed so as to protect her plantation, and was justified in relying on the representation. 2 Pomeroy's Eq. Jur. (2 Ed.), § 876; 47 Ark. 335; 1 S. W. 610. Having con-

structed the levee so as to practically destroy the plantation, there was a total failure of consideration. Whether the case is viewed as one where no consideration passed to support the deed, or where the consideration failed, or execution procured through misrepresentation of a material fact, in either case plaintiffs are entitled to relief. 14 Mass. 282; 37 Miss. 671; 30 Ark. 687; 57 Wis. 460. Under the circumstances, and in view of the fact that appellants have received no compensation for the lands appropriated nor damages for the construction of the levee through the plantation, it amounts to the taking of private property for public use without just compensation, and appellants are entitled to a decree for compensation. 113 Tenn. 92; 13 Wall. 166; 188 U. S. 445. And their remedy is in chancery. Eden on Injunctions, 1; 1 Maddox, Chan. Prac. 106; 2 Story's Eq. Jur. § § 872-926; 6 Paige, 83; 12 Jur. N. S. 873: 7 Heisk. (Tenn.), 544; Lewis, Em. Dom. § 625a; 120 N. Y. 132.

H. F. Roleson, for appellee.

If Mrs. Taylor is only a life tenant, her deed conveys nothing more than such right as a life tenant can convey. If her deed was void, the remedy at law was plain, but no remedy in equity existed at the suit of contingent remaindermen to annul it. The remedy for damages was exclusive. Kirby's Digest, § 2903; 69 Ark. 104.

McCULLOCH, J. Julius A. Taylor, of Memphis, Tenn., owned a large plantation fronting on the Mississippi River, in Lee County, Arkansas, and, by his last will and testament devised it to his widow, Louise C. Taylor, during her life or widowhood, with power to dispose of same by last will, but with remainder over, in the event of her marriage or death intestate, to the children of said testator. Certain trustees were named in the will to hold the title to the property and manage the same in the event that the widow should die intestate or marry. Mrs. Taylor executed to the Board of Directors of St. Francis Levee District a deed for a nominal consideration, conveying a right of way through said plantation for a levee, and the levee was duly constructed.

W. J. Crawford and W. H. Carroll, the trustees under the will of Julius A. Taylor, instituted this suit in equity against said

board of directors to cancel said conveyance executed by Mrs. Taylor, and to recover damages caused by the construction of the levee through said plantation. They allege and undertake to prove that said conveyance was executed by Mrs. Taylor upon the representations made by certain officers of the board of directors to the effect that the levee would be constructed straight down the bank of the river, thus affording protection to said plantation against overflow; that it was not so constructed near the bank of the river, leaving the greater part of the land in cultivation in front of the levee and unprotected. They allege and prove that about 85 acres of valuable land on the plantation were taken and used in the construction of the levee, and that the remaining lands were greatly damaged. Mrs. Taylor was not a party to the suit.

The chancellor dismissed the complaint for want of equity, and the plaintiffs appealed.

There is no equity in the complaint, and the chancellor properly dismissed it.

Neither the trustees nor *cestuis que use,* as holders of the interest in remainder, can demand a cancellation of the conveyance executed by the life tenant, as the same does not affect their rights. They might have prevented the taking and damage to the land without compensation for their interest, but the levee has been built by the board of directors, and their only remedy would be to recover damages for the taking and injury. The execution of the conveyance did not cut off that right, and the remedy at law is complete and adequate.

Judgment affirmed.

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WATERS-PIERCE OIL COMPANY v. KNISEL.

Opinion delivered July 9, 1906.

79 608
188 518

1. EXPLOSIVES—CARE IN HANDLING.—One who undertakes to sell and deliver gasoline is held to exercise ordinary care in making such delivery, and will be liable for any injuries that are the natural or probable result of a want of such care. (Page 616.)

2. NEGLIGENCE—BURDEN OF PROOF.—The burden of proof is upon one who seeks to recover from another for injuries received on account of the latter's negligence. (Page 617.)

3. APPEAL—CONCLUSIVENESS OF VERDICT.—A case should not be reversed for want of testimony to support the verdict unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which could properly or reasonably be taken of the facts which the evidence tends to establish. (Page 621.)

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

STATEMENT BY THE COURT.

This is a suit brought by Martin Knisel in the Garland Circuit Court against the appellant, Waters-Pierce Oil Company, hereafter called the "oil company," Arkansas Gas Company, R. C. Chambers and Charles Walker, Ed Burke, and Sam and Leo Mayer, to recover damages on account of personal injuries alleged to have been caused by the joint negligence of the defendants in producing an explosion of gasoline vapor in a building called the "Turf Exchange" in Hot Springs on the 24th day of December, 1902.

It is alleged in the complaint that "the defendants, acting in concert through their agents, servants and employees, then and there wrongfully, unlawfully, carelessly and negligently proceded to transfer the gasoline from the vessel in which it was carried" to the Turf Exchange premises "and in so transferring said gasoline the defendants unlawfully, negligently and carelessly allowed a large quantity of said gasoline to leak, escape and run on and under the floor of the Turf Exchange building, and unlawfully, negligently and carelessly allowed said gasoline to explode and wreck said building, thereby inflicting serious and permanent injuries upon the person of the plaintiff, he being in said building at the time," and prays judgment for $10,000 on account of such injuries. The defendants filed separate answers, denying all the material allegations, and were represented by different counsel. A jury trial was had, and a verdict was rendered against the oil company alone, and it appeals to this court.

The physical and established facts, as disclosed by the record, are substantially as follows:

The building known as the "Turf Exchange" was located between Central Avenue and Exchange Street in the city of Hot Springs, about 40 feet wide and fronting east on Central Avenue. The building was two stories high. On the first floor was a large single room, which opened on Central Avenue, and extended back west to an open area which extended back of Exchange Street. Chambers and Walker, as co-partners under the firm name of Chambers & Walker, were lessees of the building, and they conducted a saloon in the front part, and Sam and Leo Mayer, as co-partners and sub-lessees of Chambers & Walker, ran what is called a "pool room" in the rear of the building, where pools on horse races were sold; the saloon and pool room being separated by a low partition or screen. Immediately in the rear of the pool room was an open space or area the full width of the building and extended back about 16 feet to a stone retaining wall some 12 inches thick on a line and parallel with Exchange Street. The top of this retaining wall was some 8 or 9 feet above the area, and practically on a level with the adjoining sidewalk on Exchange Street. On the top of this stone retaining wall was a close board or plank fence, some 6 or 7 feet high, with a door opening from Exchange Street to a small platform and stairway leading down to the floor or base of the open area. On the north side of the area there was a high board or plank fence; the south side was the wall of a building, and the east side was the rear end of the pool room, thus entirely enclosing this area, except a door leading into it from the rear end of the pool room, and a small stairway leading down into it from Exchange Street, as before mentioned. The floor or base of this open area was originally dirt, and practically level, slightly inclining to the north and east. In the northeast corner there was an open grate or drain opening for draining the area. There were also two small ventilator openings about on a level with the floor or base of the area opening into the space under the pool room.

There was a coal shed or house in the southwest corner of this area about 10 feet north and south by 6 feet east and west. Its west wall was a part of the stone retaining wall and the close board or plank fence on top of it. There was a doorway opening into the coal house through the board fence above the stone retaining wall near the stairway leading down to the area from

Exchange Street. The south wall was the wall of the building adjoining the area and the Turf Exchange building on the south. The north wall was made of plank, and the east wall was a double wall made in this way: there was scantling or studding 2 by 4 or 2 by 5 inches placed perpendicular, the usual distances some 2 or 3 feet apart along the east side of the coal house and planks three-fourths of an inch thick were placed horizontally close together and nailed to these studding on the east and west side of the same, the lower plank resting on the floor, thus making the thickness of the east wall 6 or 7 inches with the inner opening the width of the studding, 4 or 5 inches. The floor of the coal house was made of loose plank running north and south.

About a year or so before the explosion which caused the injuries complained of, a granitoid floor was placed over the entire area except that portion of it occupied by the coal house above described, thus making that part of the floor covered by the granitoid higher than the floor of the coal house, the thickness of the granitoid not being definitely disclosed by the record.

A short time before the explosion which caused the injuries complained of, the defendants Chambers & Walker entered into a contract with the defendant Arkansas Gas Co. to install on the premises at the Turf Exchange a gas generating machine to supply the entire Turf Exchange building with vapor illuminating gas generated from gasoline. This gas machine was installed by the gas company, and was accepted and put in operation by the defendants, Chambers & Walker, some four or five days before the explosion. This gasoline plant consisted of a small engine, generator, etc., a galvanized cylindrical iron storage tank for holding a supply of gasoline, about 18 inches in diameter, and about 6 feet 6 inches long, and would hold about 67 gallons of gasoline, with two small pipes connecting the engine and tank, one for the purpose of supplying the machine with gasoline to be converted into vapor illuminating gas, and the other to return from the machine to the tank any excess or surplus of gasoline conveyed by the other pipe from the tank to the machine; and also a line of pipe connecting the storage tank with a small iron receiving box placed in the sidewalk on Exchange Street outside of the retaining wall, and about 12 inches from said wall. The engine and generator were placed in a small house covered with

sheet iron and located in the southeast corner of the area next to the rear wall of the Turf Exchange building and the wall of the building adjoining on the south. This little engine house rested on blocks 2 or 3 inches above the granitoid floor, thus leaving an open space underneath. The space between the west wall of the engine house and the east wall of the coal house was 3 feet 3 inches. A storage tank was placed horizontally between the engine house and the coal house by cutting through the granitoid floor and excavating the soil beneath, so as to let about half of the diameter of the tank rest below the surface. It was then covered with two layers of brick laid on edge in cement, and the whole plastered over with cement, thus making a smooth arched mound and rising about 12 inches above the floor, which practically filled the space between the little engine house and the coal house. Near the south end of the tank there was inserted an upright iron pipe, called a T-pipe, 10 or 12 inches long and 1½ inches in diameter. Threads were cut on top of this pipe, and it was fitted with an iron cap, which could be easily screwed off or on the pipe. Inside the tank there was a float with an upright wooden stick less than an inch in diameter, which extended up through the upright T-pipe for the purpose of indicating the quantity of gasoline in the tank while it was being filled. With the cap of the upright T-pipe off, the end of this stick would rise as the gasoline was put into the tank. This pipe was to be kept closed except when it was desired to know how much gasoline was in the tank. The pipe connecting the storage tank with the receiving box placed near and outside the retaining wall was arranged as follows: the end of the line of pipe of the same inside diameter as the upright T-pipe on the storage tank was attached at right angles with the latter pipe where it joined the top of the tank and extended thence horizontally and obliquely with the tank from 3 to 3½ feet to very near the outside east wall of the coal house, thence up vertically through several shelves 6 feet 3 inches, thence at right angles with the tank through the east wall of the coal house and extending on through the coal house and stone retaining wall to a point about 12 inches beyond the outer edge of said wall and about 12 inches below the surface of the sidewalk on Exchange Street, thence vertically about 6 inches into the bottom of the receiving box, and

was there connected with a short receiving nipple or pipe about 5 inches long extending from the bottom of the receiving box to within about 2 inches of its top. This receiving box was about 6 inches long and 5 inches wide and 6-inches deep, with a hinged iron lid and lock for locking it when the box was not being used. The receiving box had also another open nipple or pipe extending through the bottom and extending up to within about 1 inch of the top of the box. The opening at the bottom of this nipple or pipe rested upon the earth immediately below the box. The box was sunk in the sidewalk about 12 inches outside of the stone retaining wall, and bricks were laid around it and covered with cement so as to leave the top of the box about 1 inch above the surface of the sidewalk. The sidewalk was not paved, but had a slight descent towards the street. The 1½-inch pipe connecting the storage tank with the receiving box was about 19½ feet long, 12 feet of which was horizontal, and 7 feet 6 inches vertical. The receiving box was thus placed, connecting with the 1½-inch pipe which extended from the receiving box to the storage tank, so the storage tank could be filled from time to time by passing the gasoline through the pipe opening in the receiving box on the sidewalk, and thus allowing it to run by gravitation through the line of pipe into the storage tank. Another small pipe, about half an inch in diameter was connected with the top of the tank, and extended horizontally to the outside wall of the little engine house, and thence up vertically about 3 feet. The upper end of this pipe was left open, but immediately above it a little metal hood was attached to the wall of the engine house so as to extend or hang over the open end of the pipe. The purpose of this pipe was to permit the escape of vapor gas which would rapidly form in the tank while the same was being filled with gasoline, because, if there were not such vent, the gas thus generated would prevent the free inflow of gasoline.

A few days before the explosion which occasioned the injuries the agent of the oil company, pursuant to an order received over the telephone, sent a barrel of gasoline to the Turf Exchange in charge of one Murray, its driver, for use in the gas plant. At that time the pipe extending from the storage tank had not been connected with the receiving box in the rear of the retaining wall on Exchange Street, and the barrel of gasoline was placed upon

the platform at the top of the steps leading down into the area, and a part of the gasoline emptied into the storage tank by means of a hose having what is called an iron goose-neck nozzle at one end, and the other end was placed in the barrel, and the gasoline was siphoned into the storage tank through the T-pipe. The inside diameter of the hose was one inch, and the nozzle three-fourths of an inch. A day or two after this, the storage tank was connected with the receiving box, and the balance of the first barrel of gasoline was put into the tank by placing the barrel on its side near the receiving box, and inserting a spigot three-fourths of an inch in diameter in the end of the barrel immediately over the funnel inserted in the small receiving pipe in the receiving box, thus allowing the gasoline to flow into the storage tank.

On the 24th day of December, 1902, some four or five days after the first barrel of gasoline had been delivered at the Turf Exchange, the oil company received over the telephone an order to deliver another barrel of gasoline at the Turf Exchange, with directions for the driver to go to the porter at the Turf Exchange building for the key to the receiving box, into which the gasoline was to be emptied. Thereupon a barrel containing 53 gallons of gasoline was loaded upon a wagon, and driven by the same driver, Murray, to the Turf Exchange premises on Exchange Street. Murray reached there with the oil at about 4:00 p. m. and called for the porter, a colored man by the name of Arthur Harris, who he was told would show him where to deliver the oil. The porter got the key and went with Murray to the receiving box and unlocked it. Murray had no funnel to insert into the receiving pipe, so he made one of a piece of manila wrapping paper about one foot square, and placed it in the receiving pipe of the box, and inserted one end of the same hose into the barrel on the wagon, and by sucking at the other end of the goose-neck started the gasoline to flowing into the funnel. About this time the porter, Arthur Harris, went down into the area to watch the indicator while the gasoline was being emptied into the tank, and before Murray finished drawing the gasoline from the barrel he was told to stop by some one down in the area, and he did so immediately, and went down into the area. When he reached there, the gasoline in quite a large stream some 8 or 10 inches wide was

flowing from under the north side of the little engine house, and moving in the direction of the open grated sink in the northeast corner of the area. A few moments after this, the explosion occurred. The porter, Arthur Harris, had been designated by Humphreys, the manager of the gas company, with the consent of Chambers & Walker, to see to the filling of the tank. He was instructed to watch the indicator in the T-pipe, and when it had risen to a certain point, indicating when the tank was full, to stop the filling. This was necessary because the person at the receiving box on the sidewalk directing the flow of the gasoline into the box could not see the tank below in the area on account of the plank fence resting on the retaining wall. The receiving box had been designated as the place where the gasoline was to be delivered and emptied into the storage tank by means of the pipe extending from the receiving box to the storage tank.

There was other testimony in the case, and that part of it which is considered material will be referred to hereafter.

Mehaffy & Armistead, and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Appellate courts are bound to reverse for any erroneous ruling below, which prevents a party from getting his case properly before the jury. 43 Ark. 104. Evidence improperly admitted must be treated as prejudicial unless there be something to show that it was not. 69 Ark. 653. Pecuniary interest, personal affection, hostility, sympathy, or animosity may always be shown to discredit a witness. 53 Ark. 388; 34 *Id.* 480; *Id.* 273. Where the evidence tends to sustain either of two inconsistent propositions, a verdict in favor of one party bound to maintain one of them against the other is wrong. 57 Ark. 402. Where there is no evidence at all or where it fails in some material link, a new trial will be granted. 34 Ark. 640. One furnishing gas is under no obligation to examine the pipes of the receiver. 3 Allen (Mass.), 343; 37 Atl. (Md.), 263; 24 R. I. 292; 52 Atl. 1078; 90 N. Y. App. Div. 166. To entitle plaintiff to recover, he must prove that defendant's negligence *caused* the injury, and not that it *might* have caused it. 75 Pac. (Kan.), 1047; 119 Fed. 572.

Wood & Henderson, for appellees.

No error was committed by the circuit court in refusing to allow the jury to be taken out to witness the experiment. 163 U. S. 662; 58 Atl. 678; 132 Ind. 168; 15 L. R. A. 221; 18 N. W. 827; 61 N. W. 992. The admission of such evidence is within the discretion of the court. Kirby's Digest, § 6197. Where the facts are such that reasonable men might differ as to whether the conduct in question was negligent, it is a question for the jury. 53 L. R. A. 143; 75 S. W. 1129; 58 Atl. 1082.

JOSEPH W. HOUSE, Special Judge, (after stating the facts.) Several questions are raised in the record as to alleged errors in not permitting certain witnesses to answer certain questions propounded to them by the appellant, the answers to which, it is contended, would have had a tendency to discredit or impeach such witnesses before the jury, and it is also contended by appellant that the trial court erred in giving certain instructions asked by appellee; but, in view of the opinion of the majority of the court, it is unnecessary to pass upon these questions. The real question to be considered and determined is as to whether the evidence is legally sufficient to sustain the verdict of the jury.

Under the facts in this case, it was the duty of the oil company to use ordinary care in transferring or emptying the gasoline delivered by it into the receiving box on Exchange Street; and if it failed to exercise such care, and the plaintiff was injured thereby, the oil company would be liable, if such injury was the direct result of such want of care, or if such injuries could have been reasonably anticipated or foreseen as the probable result of such want of care or negligent act; otherwise it would not be liable.

In *Derry* v. *Flitner,* 118 Mass. 131, the court said: "The rule is well settled, and is constantly applied in this commonwealth, that one who commits a tortious act is liable for an injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries that are caused directly and immediately by his acts, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. * * * The true inquiry is, whether the injury sustained was such as, according to common experience and the usual course of events, might be reasonably anticipated." In *Braun* v. *Craven,* 51 N. E. 657, the court said:

"That before the plaintiff can recover he must show a damage naturally and reasonably arising from the negligent act, and reasonably to be anticipated as the result." In *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304, the court said: "The legal damages that follow any wrong are only such as, according to common experience and the usual course of events, might reasonably be anticipated. The defendant's liability extends only to natural and probable consequences." In *Hoag* v. *Railroad Co.*, 85 Pa. St. 293, the court said: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his acts." In *Chicago, St. P., M. & O. Ry. Co.* v. *Elliott*, 5 C. C. A. 349, the court said: "An injury that is the natural and probable consequence of an act of negligence is actionable, but an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable."

The burden of proving that the oil company was negligent in transferring or emptying the gasoline into the receiving box was upon the plaintiff. Negligence is never presumed, but like any other fact must be proved. Hence it necessarily follows that to entitle the plaintiff to recover he must show that the oil company was negligent in the matter of the delivery of the gasoline into the receiving box, and that his injuries were the direct result of such negligent act, or that such injuries might in the usual course of things have been reasonably anticipated or foreseen.

It is contended by the appellee (plaintiff in the court below) that the oil company was negligent in emptying the gasoline into the receiving box, that in the use of a paper funnel it became crumpled and stopped the flow of the gasoline to some extent through the receiving pipe, and, therefore, a part of the gasoline flowed into the receiving box until it was filled to a point above the other small nipple or pipe in the receiving box, and then made its way down this little pipe to the earth, then following the track or line of pipe connecting the receiving box with the storage tank through the soil some 10 or 12 inches to the stone retaining wall, then through the retaining wall into the coal house, then it

flowed down the wall a foot or two to the left or old door with one end inserted in the retaining wall, the other end extending obliquely downward to or near the inner wall of the east side of the coal house, then to the bottom of the said inner wall, then through the double wall of the coal house, then on to the granitoid floor, then flowing between the south end of the mound covering the tank and the south wall of the open area, then under the engine house, coming out at the north end, continuing down to the grated sink in the northeast corner of the area, and in a few moments after the oil was seen thus flowing the explosion occurred, wrecking the pool room where the plaintiff was at the time with perhaps 150 or 200 other persons, and the plaintiff was injured as alleged.

The oil company controverts this contention. It denies that it was negligent in any way whatever in emptying the gasoline into the receiving box. It contends, first, that all the gasoline which was taken from the barrel was conveyed into the receiving pipe in the receiving box; second, that, even if the gasoline had flowed into the receiving box and above the opening of the other small nipple or pipe, in the very nature of things it could never have found its way into the open area as contended by appellee; third, that, even if it should have reached the area in this way, Murray, who delivered the gasoline for the oil company, could not have reasonably anticipated or foreseen such a result, and, therefore, the oil company is not liable for the injuries complained of; and, the oil company further contends that the gasoline which caused the explosion escaped from the T-pipe or from some leak in the engine or generator while in the process of being emptied into the receiving box; that gasoline is exceedingly volatile, and when subjected to great commotion, it readily forms a gas, and as it was turned into the receiving pipe to flow through the pipe connecting the receiving box with the storage tank, its tendency was to form a gas, which forced a part of the gasoline to flow or spurt out at the top of the T-pipe, and then run under the engine house and over the granitoid floor to the grated sink.

In the effort to sustain these conflicting theories, a great deal of testimony was taken on both sides, and to understand and give this testimony its proper bearing upon the issues thus

presented has entailed upon the court much time and care. It appears from the testimony that when the driver, Murray, reached the Turf Exchange premises with the second barrel of gasoline, there was 15 gallons in the storage tank, that after the explosion there was 40 gallons in it, thus showing that 25 gallons of the second delivery was in the tank. There was 53 gallons in the barrel. When it was returned there was 17½ gallons in it, thus showing that the driver Murray had drawn 35½ gallons from the barrel, 25 gallons of which was in the tank after the explosion, while 10½ gallons found its way into the open area, and its flow was seen coming from under the north end of the engine house and extended down to the opening in the northeast corner of the area. This was the gasoline which caused the explosion.

Now, the question is, how did the gasoline escape, and how did it reach the open area? The oil company introduced a number of witnesses showing that it had made two or more tests with tank and pipe like the one at the Turf Exchange under conditions as near as practicable the same as there, the only difference perhaps being in the temperature, and it was shown at all of these tests that when gasoline was emptied into the receiving box it would bubble or spurt out of the T-pipe at intervals at different heights from an inch to 2 feet high; that in putting in 25 gallons, 10 gallons of it would escape through the T-pipe. One of these tests was made publicly at the courthouse in Hot Springs at which everybody was invited, and among those present were the learned counsel for the appellee. On the other hand, the testimony shows that the gas company also made two or more tests of similar character, but the conditions were not the same as they existed at the Turf Exchange. At these tests, the bottom of the barrel was only raised high enough to siphon it out of the barrel into the receiving box. The hose used was 10 or 12 feet long. The bottom of the barrel from which the gasoline was taken was about a foot and a half higher than the tank, and on a level with the receiving box, thus showing that the gasoline in flowing from the barrel into the receiving box and into the tank through a hose 10 or 12 feet long only had a fall of about one foot and one half, while at the test made by the oil company the gasoline was taken from a barrel which stood in the wagon

some 2½ or 3 feet above the receiving box, and when it reached the receiving box it was conveyed through a line of pipe 19½ feet long, about 12 feet of which was horizontal and 7 feet 6 inches vertical, and adding to this the 2½ feet, the barrel stood above the receiving box, the gasoline had a fall of 10 feet. At the test made by the gas company, it was shown that no oil would escape from the T-pipe.

While we do not intend any harsh criticism as to the manner in which the tests were made by the gas company, it is perfectly obvious that they were not made under the same conditions as existed at the Turf Exchange, and can serve but little purpose in solving the question at issue. The height of the source of supply above the tank would have some effect on the flow of the gasoline. The higher the source of supply, the greater would be the weight of the column, and the gasoline would thereby be forced more rapidly into the storage tank, causing great commotion, and thus increase the tendency to form gasoline vapor or gas, and thereby force the gasoline out of the T-pipe. The oil company made further tests by pouring first about 20 gallons of water in the space occupied by the receiving box on the outside of the retaining wall, and none of it found its way into the coal house, but the water flowed south and west. Then, waiting about ten minutes, they discharged 20 gallons of water through a siphon against the retaining wall, the west side of the coal house. Then. waiting 10 minutes longer, 20 gallons were discharged against the inside of the east wall, and 20 gallons in the southeast corner of the coal house, thus making 60 gallons of water turned into the coal house, and none of it found its way to the granitoid pavement in the open area. There was a little coal in the coal house, the most of it slack.

On the other hand, the colored porter, Arthur Harris, testified in behalf of the appellee to the effect that when the driver Murray began to empty the gasoline into the receiving pipe, he (Harris) went down to the storage tank, took the cap off of the T-pipe, and sat right over it to watch the indicator so as to notify Murray when the tank was full; that he watched the indicator; that it never moved while he was there, and no gasoline came out of the T-pipe. The evidence tends to show, however, that after the explosion the indicator stick was in perfect order, and that in

putting in as much as 25 gallons of gasoline, the indicator stick would rise several inches.

It is contended, however, by appellee that the evidence only shows two places at which the gasoline could have escaped; one at the rceeiving box, the other at the T-pipe, and the porter, Arthur Harris, having testified that it did not escape at the T-pipe, the jury had a right to believe him, and that their finding is conclusive, and that the effect of this finding is to establish the fact that the gasoline escaped at the receiving box, and made its way to the granitoid floor.

If the determination of the question as to whether the evidence is legally sufficient to sustain the verdict depended solely upon the testimony of the porter, Arthur Harris, and the driver Murray, who testified that he exercised due care in transferring the gasoline from the barrel to the receiving box, that none of it escaped into the receiving box but all of it was emptied into the receiving pipe, our duty would be at an end. We should affirm the case upon the doctrine that this court will not disturb a verdict based upon the weight of evidence. But, in determining this question, we must look also to the physical facts disclosed by the record about which there is no dispute, and if, upon a full and fair consideration of these facts, to sustain the verdict would require the court to believe that which in the very nature of things could not be true, to believe that which is contrary to human experience and common observation, then it would be the duty of the court to reverse the case, upon the ground that the evidence is not sufficient to sustain the verdict.

It has been the settled policy of this court, in passing upon this question, to give the strongest probative force to all the testimony tending to support the verdict, and to indulge in every presumption which could be fairly drawn from such testimony, and when the evidence is conflicting, or when the facts are of such character that different minds might honestly draw different conclusions, the verdict of the jury is upheld. In other words, a case should not be reversed for the want of testimony to support the verdict unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which could be properly or reasonably taken of the facts the evidence tends to establish, and the court has no inclination or disposition to modify or

change this ruling. This doctrine is sanctioned and approved by the Supreme Court of the United States and by nearly or quite all of the courts of last resort in the States. It is, however, often difficult to apply a principle of law to the facts of any given case; hence the variety of expressions used by the courts such as:

"The case will not be reversed where there is a conflict in the evidence."

"A verdict will not be set aside if the evidence is legally sufficient to sustain it."

"A verdict will not be disturbed because it is against the weight of evidence."

"A verdict supported by the evidence is conclusive."

"A finding of the jury is conclusive, though against the weight of evidence."

"Where the evidence is not sufficient to support a verdict, a new trial will be awarded."

"Where there is no evidence to support the verdict, a new trial will be granted," and many other like expressions.

These expressions do not convey a concrete, definite idea which can be applied to every given case, but they all tend alike to the same result. The thought intended to be conveyed in them is that the jury should be permitted to return a verdict according to its own view of the facts, unless, upon an honest consideration of the whole evidence and giving effect to every inference to be fairly and reasonably drawn from it, the case is manifestly for the party asking a peremptory instruction. When a case reaches this point, it then becomes a question of law for the court, and not one of fact for the jury. *St. Louis, I. M. & S. Ry. Co.* v. *Martin,* 61 Ark. 549; *Hot Springs St. Rd. Co.* v. *Hildreth,* 72 Ark. 572.

In *St. Louis, I. M. & S. Ry. Co.* v. *Rice,* 51 Ark. at p. 476, Justice SANDELS, in delivering the opinion of the court, said: "It is the settled policy of this court to uphold the verdicts of juries where they have passed upon disputed matters of fact, provided the evidence be legally sufficient to support their finding. Of this it is the province of the court to judge."

In *Catlett* v. *Railway Company,* 57 Ark. 466, Chief Justice COCKRILL, speaking for the court, said: "The Constitution pro-

vides that 'judges shall not charge juries with regard to matters of fact, but shall declare the law.' Art. 7, § 23. This provision shears the judge of a part of his magisterial functions, but it confers no new power upon the jury. It was the jury's province, before this provision was ordained, to pass only upon questions of fact about which there was some real conflict in the testimony, or where more than one inference could reasonably be drawn from the evidence. The Constitution has not altered their province. It commands the judge to permit them to arrive at their conclusion without any suggestion from him as to his opinion about the facts. As Judge BATTLE expressed it in *Sharp* v. *State,* 51 Ark. 155, 'the manifest object of this prohibition was to give the parties to the trial the full benefit of the judgment of the jury as to facts, unbiased and unaffected by the opinion of judges.' If there is no evidence to sustain an issue of fact, the judge only declares the law when he tells the jury so. 'The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in legal idea.' The first lies within the province of the court, the last within the province of the jury."

Under these familiar rules, when all the evidence in this case is fairly considered and giving to it its strongest probative force and every inference which can be fairly drawn from it, we do not think the evidence is legally sufficient to support the verdict. While the evidence tends to show that the soil immediately below the small nipple or pipe in the receiving box through which it is contended the gasoline which caused the explosion passed was firm and solid, and it may be conceded that the soil immediately under this pipe and the soil filling around the receiving pipe from the receiving box to the stone retaining wall was open or porous, and it may be further conceded that ten or more gallons of gasoline found its way into the small nipple or pipe, yet, in the very nature of things, the gasoline which caused the explosion could not have passed along the line of pipe through or on the soil to the retaining wall, then through and down the wall to the loft or door, then along the loft or door to the east wall of the coal house, then down the wall to the board floor, then through the double wall of the coal house to the granitoid floor in the open area. Such a contention would be not only highly improbable, but it would be irrational and at war with the physi-

cal facts, and contrary to all human experience and common information. Hence, the testimony of Arthur Harris can have no probative force, when it is in direct conflict with the conceded or physical facts, and to believe it would involve an absurdity in reason and common experience.

This doctrine has been frequently applied. In *Continental Life Ins. Co.* v. *Yung* (Ind.), 3 Am. St. Rep. 630, the court said: "That the evidence which tends to support the finding may be contradicted does not justify this court in ordering a new trial. Where competent evidence appears in the record which, if believed, necessarily tends to support the finding, unless the evidence relied on is of such character as that to believe it would necessarily involve an absurdity in reason or an impossibility according to the very nature of things, this court can not say, however much such evidence may be opposed by other testimony, that it is conclusively contradicted."

The question has perhaps arisen more frequently in suits for personal injuries received at railroad crossings. Suppose the plaintiff in such a case testifies that his sense of sight and hearing are good, that just before stepping on the track he stopped, looked and listened for an approaching train, and neither saw nor heard one, that the day was clear and bright, and after stopping, looking and listening he immediately attempted to step on the track and was injured by the train, when the physical or conceded facts showed that the track at the place of the accident was straight and level for a distance of a quarter or half of a mile, and there was nothing to obstruct his view and nothing to prevent his hearing an approaching train. Could the court hesitate a moment to set aside a verdict based upon such testimony? Certainly not. Why? Because such evidence would be conclusively contradicted by the physical facts, and would be entitled to no probative force whatever. *Stafford* v. *Chippewa Valley Elec. R. Co.*, 110 Wis. 331; *Marland* v. *Pittsburg & L. E. R. Co.*, 123 Pa. 487, 490; *Myers* v. *B. & O. R. Co.*, 150 Pa. 386, 390; *Lake Erie & W. Rd. Co.* v. *Stick*, 143 Ind. 449, 459, 463; *Kelsay* v. *Missouri Pac. Ry. Co.*, 30 S. W. 339; *Payne* v. *Chicago & A. R. Co.*, 38 S. W. 308, 311, 312, 313, 314.

In *Payne* v. *Chicago & A. R. Co., supra,* 311-2-3, the court said: "The headlight was brightly burning. The bell was ring-

ing, and the train was on time. The engineer and fireman were at their respective posts. The train was making the usual noise, and the plaintiff was expecting that very train. But he, alone, of all others, when he went to cross the track, though a bright, active boy, with a good mind and eyesight, and acquainted with the locality and the dangers incident to crossing the track, though he listened, could not hear the whistle blown, nor the bell constantly ringing, nor the rumble of the train, nor see, with his good, young eyes, the blazing headlight of the train as it rapidly advanced upon him. Such testimony as this is so contrary to the daily experience of common life, so at war with the conceded and indisputable physical facts in this case, that neither courts nor juries can, without stultifying themselves, yield to it an iota of probative force or effect. It is a proposition too monstrously improbable for rational human belief. To argue to the contrary of this is to endeavor the transmutation of the impossible into possibility. * * * But in this instance it is plainly proved, beyond peradventure, that the statement of plaintiff 'that he did all in his power to ascertain whether there were any trains approaching,' etc., was not, and, indeed, could not, be true. This matter of denying probative force even to direct and affirmative testimony, when such testimony is plainly at war with the physical facts and surroundings, has passed into precedent. Thus, in the leading case of *Artz* v. *Railroad Co.*, 34 Iowa, 153, it is said: 'But it is urged by the appellee's counsel that the plaintiff testified that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or, at the very least, it made that a question of fact for the jury. The difficulty, however, with the position is that, the conceded or undisputed facts being true, this testimony can not, in the very nature of things, be true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify that, at the time, he looked, and did not see it shine. Could the testimony be true? The witness may have been told that it was necessary to prove in the case that he did look, and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so, and

this belief may have ripened into a conviction of its verity; and, possibly, he even may testify to it in the self-consciousness of integrity. But, after all, in the very nature of things, it can not be true, and hence can not, in the law, form any basis for a conflict upon which to rest a verdict.' "

The same doctrine has been frequently upheld in criminal cases where life or liberty was involved. Suppose a man was to be tried upon a charge of murder, and at the trial half a dozen witnesses were to swear that they witnessed the homicide through a solid brick or stone wall three feet thick, 100 feet long and 50 feet high with no openings in it; that the defendant was the aggressor; that he brought on the attack and stabbed or shot the deceased to death. In other words, that the killing was a cold-blooded murder. While, on the other hand, the defendant alone testified that the deceased was the aggressor; that he brought on the attack, and the killing was done in actual self-defense; and upon this testimony alone the defendant was convicted. Could such a verdict stand? Certainly not. Why so? Because the finding of the jury would be in direct conflict with the physical facts. The testimony of the six witnesses would have no probative force. It would not even amount to what is called "a scintilla of evidence," and the court could not sustain such a verdict without closing its eyes to reason and common experience, and stultifying itself. This it should not do. *State* v. *Anderson,* 1 S. W. 140; *State* v. *Turlington,* 15 S. W. 141.

So it is here. If it be conceded that the only two places where the gasoline could have escaped were at the receiving box and at the T-pipe, and the porter, Arthur Harris testified that it did not escape at the T-pipe, his testimony is not entitled to any credit because he is contradicted by the physical facts about which there can be no doubt.

In *State* v. *Turlington, supra,* 147, the court said: "All the other facts and circumstances point to the same conclusion. Defendant's words can not be believed, when contradicted, as they are, by the physical facts. Neither courts nor juries should be required to base their actions or beliefs on physical impossibilities."

This view of the case is strengthened by the other testimony in the case. In the first place, gasoline has a tendency to rapid

evaporation, and if it was poured into the small nipple or pipe in the receiving box it would have been rapidly absorbed and deflected through every crack and crevice over which it flowed, and the process of evaporation would have been so rapid that no part of it would have ever reached the granitoid floor. In the second place the experiments made by the oil company with pipe and tank and all equipment under substantially the same conditions as existed at the Turf Exchange on the day of the explosion show that, with the T-pipe uncovered, the gasoline would escape through it in greater or less quantities during the process of emptying it into the storage tank. And, in the third place, the pouring water in the coal house at the points where it is contended the oil passed and none of it reached the granitoid floor furnishes a very strong and potent reason that the gasoline poured into the small nipple or pipe in the receiving box could never have reached the granitoid floor below.

It follows from these views that this case must be reversed and remanded, and it is so ordered.

WOOD, J., disqualified.

APPENDIX

I.

OPINIONS NOT REPORTED.

Scott *v.* Scott; appeal from Sebastian Chancery Court, Greenwood District; J. Virgil Bourland, chancellor; affirmed May 14, 1906; per McCulloch, J.

Clark *v.* St. Louis, S. F. & N. O. Ry. Co.; appeal from Hempstead Circuit Court; Joel D. Conway, judge; reversed May 14, 1906; per Wood, J.

Connerly *v.* Inman; appeal from Chicot Circuit Court; Zachariah T. Wood, judge; reversed May 28, 1906; per Riddick, J.

Stark Grain Co. *v.* House; appeal from Miller Circuit Court; Joel D. Conway, judge; affirmed May 28, 1906; per Riddick, J.

St. Louis, I. M. & S. Ry. Co. *v.* Mize; appeal from Lee Circuit Court; Hance N. Hutton, judge; affirmed May 28, 1906; per Hill, C. J.

Johnson *v.* Smothers; appeal from Pulaski Circuit Court; affirmed. June 4, 1906; per Hill, C. J.

Kelley *v.* McDuffey; appeal from Phillips Circuit Court; Hance N. Hutton, judge; affirmed June 11, 1906; per McCulloch, J.

Western Coal & Mining Co. *v.* Honaker; appeal from Franklin Circuit Court; Jeptha H. Evans, judge; affirmed June 11, 1906; per Wod, J.

National Cooperage & Woodenware Co. *v.* Aydelott; appeal from Prairie Circuit Court; George M. Chapline, judge; affirmed June 11, 1906; per Hill, C. J.

Shackelford *v.* Williams; appeal from Pulaski Circuit Court; Edward W. Winfield, judge; affirmed June 18, 1906; per Wood, J.

Fitch *v.* Madison County Bank; appeal from Madison Chancery Court; T. H. Humphreys, chancellor; affirmed June 25, 1906; per Battle, J.

II.

CASES DISPOSED OF ON MOTION.

Ben Reynolds *v.* Mike Kelley; Boone Circuit Court; Jno. N. Tillman, judge, on exchange of circuits; settled and appeal dismissed May 14, 1906; *per curiam.*

W. T. Huddleston *et al.*, partners as W. N. Grammar *v.* A. Bauer & Company; Independence Circuit Court; F. D. Fulkerson, judge; appeal dismissed for non-compliance with rule nine, May 21, 1900; *per curiam.*

B. W. Greer *v.* J. F. Lyons and P. P Dowdy; White Chancery Court; Jesse C. Hart, chancellor; appeal dismissed for non-compliance with rule nine, May 21, 1906; *per curiam.*

T. B. Weathersby *v.* J. M. & Hattie E. Stewart; Lafayette Circuit Court; Charles W Smith, judge; appeal dismissed for non-compliance with rule nine, May 21, 1906; *per curiam.*

I. N. Easton, *Ex parte;* certiorari to Jefferson Circuit Court; Antonio B. Grace, judge; application for bail allowed, May 21, 1906; *per curiam.*

Rudson Sparks *v.* The State of Arkansas; Sevier Circuit Court; James S. Steel, judge; affirmed on motion of Attorney General, May 28, 1906; *per curiam.*

Brooks Griffin *v.* The State of Arkansas; Pulaski Circuit Court, First Division; Robert J. Lea, judge; affirmed on motion of Attorney General, May 28, 1906; *per curiam.*

H. L. Remmel *v.* Lewis E. Williams; Randolph Circuit Court; J. W. Meeks, judge; appeal dismissed for non-compliance with rule nine, May 28, 1906; *per curiam.*

W. B. Hurst *v.* Fayetteville Ice & Cold Storage Company *et al.;* Washington Chancery Court; T. H. Humphreys chancellor; appeal dismissed for non-compliance with rule nine, May 28, 1906; *per curiam.*

St. Louis Southwestern Railway Company *v.* Kelly Brothers; Lafayette Circuit Court; Charles W. Smith, judge; appeal dismissed for non-compliance with rule nine, June 4, 1906; *per curiam.*

G. W. Walker *v.* Walter Evans; Prairie Circuit Court; Geo. M. Chapline, judge; appeal dismissed for non-compliance with rule nine, June 11, 1906; *per curiam.*

North American Trust Company *v.* Malinda E. Chappell; Scott Chancery Court; J. Virgil Bourland, chancellor; appeal dismissed for non-compliance with rule nine, June 11, 1906; *per curiam.*

E. G. Connelly *v.* E. H. Rogers; Sebastian Circuit Court, Greenwood District; Styles T. Rowe, judge; affirmed as a delay case, with penalty, June 11, 1906; *per curiam.*

Wm. C. Macklin *et al. v.* Wm. T. Hardie; Chicot Chancery Court; Marcus L. Hawkins, chancellor; affirmed for non-compliance with rule nine, June 11, 1906; *per curiam.*

W. H. Tomlinson *v.* St. Louis, Iron Mountain & Southern Railway Company; Independence Circuit Court; F. D. Fulkerson, judge; appeal dismissed for non-compliance with rule nine, June 18, 1906; *per curiam.*

C. C. Taylor *v.* J. H. Findley *et al.;* Searcy Chancery Court; T. H. Humphreys, chancellor; appeal dismissed for non-compliance with rule nine, June 25, 1906; *per curiam.*

R. O. Durden *v.* J. M. Waller; Sebastian Circuit Court, Greenwood District; Styles T. Rowe, judge; appeal dismissed for non-compliance with rule nine, June 25, 1906; *per curiam.*

Henry Johns *v.* W. S. Pollard; Washington Circuit Court; John N. Tillman, judge; affirmed under rule seven, June 25, 1906; *per curiam.*

Lem Height *v.* Mrs. Mattie Henton; Crawford Circuit Court; Jeptha H. Evans, judge; affirmed as delay case, with penalty, June 25, 1906; *per curiam.*

George C. Griffith *v.* G. D. Holloway; White Circuit Court; Hance N. Hutton, judge; appeal dismissed for non-compliance with rule nine, July 2, 1906; *per curiam.*

W. W. Mitchell and E. R. Buster *v.* J. N. Lee; Bradley Circuit Court; Zachariah T Wood, judge; appeal dismissed for non-compliance with rule nine, July 9, 1906; *per curiam.*

INDEX

ACCOUNTS:

when account single. *Nunn* v. *McKnight,* 393.
effect of part payment on running and stated accounts. *Id.*

ACTION: See FORMER ACTION PENDING.

ADMINISTRATION:

statute for vesting decedent's estate, not exceeding $300, in widow and children held repealed. *Calhoun* v. *Moore,* 109.
order vesting decedent's land in widow held void. *Id.*
additional authentication of claim after assignment unnecessary when. *Collier* v. *Trice,* 414.
when delay in applying to sell land not laches. *Mayo* v. *Mayo,* 570.
practice as to appointment of auditor to audit accounts. *Mathews* v. *Taylor,* 577.

ADVERSE POSSESSION:

private way acquired by adverse possession when. *Clay* v. *Penzel,* 5.
continuous adverse possession for two years under void tax title confers title. *Dickinson* v. *Hardie,* 364.

AGENCY: See INSURANCE.

notice to agent is notice to principal when. *Carter* v. *Gray,* 273.
contract of employment of agent terminated by death. *Love* v. *Peel,* 366.
authority of agent not delegated. *Id.*
agent to sell not authorized to receive payment by cancellation of his own debt to the vendee. *Grooms* v. *Neff Harness Co.,* 401.
duty of one buying from agent to know limitations of his authority. *Id.*

APPEAL AND ERROR:

court's instructions presumed correct where appellant fails to set them out in his abstract. *Pewett* v. *Richardson,* 66.
practice to remand on reversal in equity if land title is involved. *Wilson* v. *Edwards,* 69.
presumption where evidence is not set forth in appellant's abstract. *Dobbins* v. *Little Rock Ry. & El. Co.,* 85.
presumption where only part of court's instructions are set out. *Id.*
one cannot complain of a consent decree. *Martin* v. *Houck Music Co.,* 95.
prejudicial error in murder case overcome by reduction of punishment when. *Sullins* v. *State,* 127.
exception waived by not including it in motion for new trial. *Stainback* v. *Henderson,* 176.
assignments of error not considered if not set forth in abstract. *Id.*

APPEAL AND ERROR:—*Continued.*

finding of fact based on evidence not brought up is conclusive. *Hollingsworth* v. *McAndrew,* 185.

presumption on appeal that administrator was regularly appointed. *Id.*

conclusiveness of judgement on former appeal. *Id.*

when requirement as to filing of mandate complied with. *Id.*

rule 14 as to filing mandate held mandatory. *Id.*

presumption where evidence is not brought up. *Hempstead County* v. *Phillips,* 263.

where the trial court assigned one reason for its action, it will not be presumed that it was governed by another reason. *Arkadelphia Lumber Co.* v. *Asman,* 284.

objection not raised below not considered. *Beard* v. *State,* 293.

erroneous admission of evidence not prejudicial when. *Walnut Ridge Merc. Co.* v. *Cohn,* 338.

when court's finding not conclusive. *Bromley* v. *Atwood,* 357.

finding of jury supposed by evidence when. *Grooms* v. *Neff Harness Co.,* 401.

no presumption that instruction inherently defective was cured by others. *Bourland* v. *McKnight,* 427.

judgment in criminal case not reversed for error in admitting evidence when. *Castevens* v. *State,* 453.

exception to testimony not incorporated in motion for new trial is waived. *St. Louis S. W. Ry. Co.* v. *McNeil,* 470.

judgment allowing suit money and alimony in divorce case held final and appealable. *Shively* v. *Shively,* 473.

conclusiveness of former opinion on second trial. *Hartford Fire Ins. Co.* v. *Enoch,* 475.

rule if facts proved on second trial are different. *Id.*

finding of fact of circuit court on appeal from county court held conclusive when. *Marion County* v. *Estes,* 504.

conclusiveness of chancellor's finding. *Giberson* v. *Wilson,* 581.

conclusiveness of verdict on appeal. *Waters-Pierce Oil Co.* v. *Knisel,* 608.

AUDITOR: See ADMINISTRATION.

BAILMENT:

lien in case of bailment for repair. *Martin* v. *Houck Music Co.,* 95.

BANKRUPTCY:

discharge in bankruptcy no defense unless pleaded. *Lovell* v. *Sneed,* 204.

BILLS AND NOTES:

bank held not innocent purchaser of notes. *Old National Bank of Ft. Wayne* v. *Marcy,* 149.

instruction as to bad faith of purchaser approved. *Id.*

sufficiency of notice of defense. *Id.*

BUILDING CONTRACT: See PRINCIPAL AND SURETY.

BURDEN OF PROOF: See MASTER AND SERVANT.

BURGLARY:

entry of chicken house held to be. *Gunter* v. *State*, 432.
aliter as to entry of chicken coop. *Id.*
effect of unexplained possession of stolen goods. *Id.*

CARRIERS:

not liable for failure to provide for an unforeseen amount of freight. *St. Louis S. W. Ry. Co.* v. *Leder*, 59.
passenger standing up in coach while train was being made up not negligent when. *St. Louis, I. M. & S. Ry. Co.* v. *Billingsley*, 335.
damages for pain and suffering of passenger held not excessive. *Id.*
when liability for freight begins. *Garner* v. *St. Louis, I. M. & S. Ry. Co.*, 353.
right of consignor to sue for loss of freight. *Id.*
delivery of chattels sold to carrier held to be delivery to vendee when. *Templeton* v. *Equitable Mfg. Co.*, 456.
delay of carrier not ground for rescission. *Id.*
effect of nondeliverv of bill of lading. *Id.*
damages to live stock caused by carrier's delay not covered by stipulation in bill of lading as to notice of damages being given before removal of stock. *St. Louis S. W. Ry. Co.* v. *McNeil*, 470.

CHARITIES:

association for founding public library held to constitute public charity. *Fordyce* v. *Woman's Christian National Lib. Assoc.*, 550.
property of charity exempt from execution for misfeasance or malfeasance of agent. *Id.*
effect of judgment against charity. *Id.*

CIRCUIT COURT:

jurisdiction of, in matters of tort. *Little Rock Traction & El. Co.* v. *Hicks*, 248.
appeal lies from county court, in which case trial is *de novo*. *Marion County* v. *Estes*.
finding of fact of circuit court on appeal held conclusive. *Id.*

COLLECTOR:

power of Legislature to separate offices of sheriff and collector. *Vaughan* v. *Kendall*, 584.

COMMISSIONERS OF ACCOUNTS:

legality of investigation made during term of circuit court. *Greenwood District of Sebastian County* v. *Heartsill*, 167.

COMPROMISE:

answer stricken out and compromise enforced when. *Ozark Ins. Co.* v. *Leatherwood,* 252.

CONFLICT OF LAWS:

exemption laws are subject to law of forum. *Stone* v. *Drake,* 384.
action against telegraph company to recover damages for mental anguish for negligence in transmitting message from point in this State to a point in another State held to lie in this State. *Arkansas & La. Ry. Co.* v. *Lee,* 448.

CONSPIRACY:

acts and declarations of conspirators admissible when. *Harper* v. *State,* 594.

CONSTITUTIONAL LAW:

constitutional question not decided if there is some other ground on which the case may be rested. *Martin* v. *State,* 236.
power of Legislature to create office of tax collector. *Vaughan* v. *Kendall,* 584.
election or appointment to office held to create no contract. *Id.*
power of Legislature to decrease sheriff's compensation. *Id.*

CONTINUANCE:

on permitting amendment of complaint changing the issue, the court, after granting five days postponement, may deny defendant a further continuance when. *St. Louis, I. M. & S. Ry. Co.* v. *Block,* 179.
discretion of court to grant. *Harper* v. *State,* 594.
when properly refused. *Id.*
not granted for absence of cumulative testimony. *Id.*
erroneous reason for refusing continuance not prejudicial when. *Id.*

CONTRACTS:

province of court to construe. *Storm* v. *Montgomery,* 172.
right to abandon contract and sue for amount earned. *Fletcher* v. *Verser,* 271.
contract of employment terminated by death. *Love* v. *Peel,* 366.
contract for erection of manufacturing plant subject to test construed. *Ark-Mo Zinc Company* v. *Patterson,* 506.
right to recover payments on rejection of plant. *Id.*

CORPORATIONS:

estopped to plead *ultra vires* after accepting benefit of contract. *Board of Directors, etc.,* v. *Myers,* 14.
validity of corporate acts done by directors at meeting when one director was absent and not notified. *Stiewel* v. *Webb Press Co.,* 45.
whether corporation may be member of partnership, *quaere, Dixie*

CORPORATIONS:—*Continued.*
Cotton Oil Co. v. *Morris,* 113.
notice to agent held notice to corporation. *Carter* v. *Gray,* 273.
annual certificate filed by vice-president. *Myar* v. *Poe,* 465.
authority of corporation by bylaw to provide for election of vice-president. *Id.*

COUNTY:

liability for compensation of commissioners of accounts. *Greenwood District of Sebastian County* v. *Heartsill,* 167.
statute regulating loan of county funds construed. *Martin* v. *State,* 236.
claim against county not demurrable. *Hempstead County* v. *Phillips,* 263.

COUNTY COURT:

jurisdiction to condemn right of way for levee. *Board of Directors of St. Francis Levee District* v. *Redditt,* 154.

COURTS: See CIRCUIT COURTS; JUSTICES OF THE PEACE.

jurisdiction to hold special term must appear. *Beard* v. *State,* 293.
sufficiency of order for special term. *Id.*

COVENANTS:

liability of grantor under covenant of title in case of failure of title. *Board of Directors, etc.,* v. *Meyers,* 14.

CRIMINAL LAW:

indictment not impeached by testimony of grand jury. *Nash* v. *State,* 120.
effect of presentment of indictment in open court. *Id.*
objections not raised below not considered when. *Beard* v. *State,* 293.
error in admitting evidence not ground for reversal when. *Castevens* v. *State,* 453.
presumption that defendant was present when verdict was returned. *Beene* v. *State,* 460.

DAMAGES: See EMINENT DOMAIN.

damages recoverable for breach of covenant of warranty. *Board of Directors, etc.,* v. *Myers,* 14.
damages awarded for personal injuries held not excessive. *Choctaw, O. & G. Rd. Co.* v. *Craig,* 53.
damages awarded to mother of deceased held not excessive. *St. Louis I. M. & S. Ry. Co.* v. *Block,* 179.
damages awarded for deceased's pain and suffering held not excessive. *Id.*
damages recoverable on dissolution of contract of employment. *White Sewing Machine Co.* v. *Shaddock,* 220.

DAMAGES:—*Continued.*

damages for pain and suffering of injured passenger on railway train held not excessive. *St. Louis, I. M. & S. Ry. Co.* v. *Billingsley,* 335.

damages recoverable for breach of contract of sale of goods. *Walnut Ridge Merc. Co.* v. *Cohn,* 338.

damages recoverable for breach of contract to furnish transportation to employee. *St. Louis, I. M. & S. Ry. Co.* v. *Reagan,* 484.

DEEDS: See COVENANTS.

of widow purporting to convey fee held to convey unassigned dower. *Calhoun* v. *Moore,* 19.

patent from United States for purpose of establishing public library held to create fee simple, and not base fee. *Fordyce* v. *Woman's Christian National Lib. Assoc.,* 550.

effect of base fee. *Id.*

DEFINITIONS:

heir at law. *McBride* v. *Berman,* 65.

rape. *Beard* v. *State,* 300, 302.

forcibly. *Id.,* p. 310.

assault. *Id.* p. 310.

ravish. *Id.* p. 311.

charitable trusts. *Woman's Christian Nat. Lib. Assoc.* v. *Fordyce,* 537.

DIVORCE:

decree procured by fraud vacated when. *Corney* v. *Corney,* 289.

allowance of suit money and alimony in former suit does not bar allowance therefor in second suit. *Shirey* v. *Shirey,* 473.

judgment allowing suit money and alimony is final. *Id.*

DOWER:

widow's deed purporting to convey fee held to carry dower merely when. *Calhoun* v. *Moore,* 109; *Griffin* v. *Dunn,* 408.

EJECTMENT:

complaint held sufficient. *Woman's Christian National Lib. Assoc.* v. *Fordyce,* 532.

ELECTION OF REMEDIES:

for vacating judgment. *Arkadelphia Lumber Co.* v. *Asman,* 284.

ELECTIONS:

Kirby's Dig., § 1667, imposing penalty on election officers, held inapplicable to school elections. *Brown* v. *Haselman,* 213.

EMINENT DOMAIN:

damages provable in suit by railroad to condemn right of way. *Bracey* v. *St. Louis, S. F. & N. O. Rd. Co.,* 124.

EMINENT DOMAIN:—*Continued.*

mode of procedure to obtain right of way for levee. *Board of Directors of St. Francis Levee District* v. *Redditt,* 154.

jurisdiction of county court in condemnation suit for right of way of levee. *Id.*

jury trial unnecessary. *Id.*

effect of failure of levee district to prepay damages. *Id.*

EQUITY:

application of maxim that "equity treats that as done which ought to be done." *Stiewel* v. *Webb Press Co.,* 45.

not error to deny relief in equity where plaintiff has another action pending at law. *Arkadelphia Lumber Co.* v. *Asman,* 284.

equity looks at substance of transaction. *Foster* v. *Beidler,* 418.

want of jurisdiction waived when. *Harris* v. *Umsted,* 499.

ESTOPPEL:

of corporation to plead *ultra vires* after accepting benefit of contract. *Board of Directors, etc.,* v. *Myers,* 14.

by acceptance of benefit of contract. *Carter* v. *Gray,* 273.

principal estopped by acts of agent when. *Peoples' Ins. Assoc. of Ark.* v. *Goyne,* 315.

estoppel by acquiesence, see *Love* v. *Peel,* 366.

EVIDENCE:

statement of intestate not proved by plaintiff when. *Wilson* v. *Edwards,* 69.

evidence of language and conduct of street car conductor held inadmissible as part of *res gestae. Dobbins* v. *Little Rock Ry. & El. Co.,* 85.

admissibility of opinion of nonexpert as to speed of street car. *Little Rock Traction & Electric Co.* v. *Hicks,* 248.

parol evidence inadmissible to vary written contract when. *Tillar* v. *Wilson,* 256.

parol evidence of waiver of breach of warranty in insurance policy. *Peoples' Fire Ins. Assoc. of Ark.* v. *Goyne,* 315.

letter admissible as part of *res gestae* when. *Walnut Ridge Merc. Co.* v. *Cohn,* 338.

evidence of value held sufficient when. *Id.*

receipt of stranger inadmissible when. *Id.*

removal of thing complained of as constituting negligence is not evidence thereof. *Ft. Smith Light & Traction Co.* v. *Soard,* 388.

parol evidence admitted to prove separate oral agreement when. *Mayo* v. *Mayo,* 570.

EXEMPTIONS:

exemption laws pertain to remedy, and are subject to *lex fori. Stone* v. *Drake,* 384.

EXEMPTIONS:—*Continued.*

wife or minor child of absconding debtor may claim when. *Hoskins* v. *Fayetteville Grocery Co.*, 399.

sale of exempt property not fraudulent. *Id.*

EXPLOSIVES:

care required in handling explosives. *Waters-Pierce Oil Co.* v. *Knisel*, 608.

FIRE: See RAILROADS.

FISH AND GAME:

express company shipping game beyond State is guilty regardless of its knowledge that package contained game. *Wells Fargo & Company Express* v. *State*, 349.

immaterial that game was killed beyond State. *Id.*

FORMER ACTION PENDING:

when valid defense. *Board of Directors of St. Francis Levee Dist.* v. *Redditt*, 154; *Arkadelphia Lumber Co.* v. *Asman*, 284.

FRAUDS, STATUTE OF:

part performance held to take sale of land out of. *Phillips* v. *Jones*, 100.

merely continuing in possession after oral purchase not sufficient. *Id.*

FRAUDULENT CONVEYANCES:

conveyance of homestead held not to be fraudulent. *South Omaha National Bank* v. *Boyd*, 215.

purchaser held to be innocent when. *Id.*

sale of exempt property not fraudulent. *Hoskins* v. *Fayetteville Grocery Co.*, 399.

when purchaser innocent. *Id.*

exchange of property not fraudulent when. *Id.*

GAME: See FISH AND GAME.

GARNISHMENT:

debt due by foreign corporation to nonresident may be garnished when. *Stone* v. *Drake*, 384.

GIFTS: See WILLS.

deposit of money to another's credit held valid gift. *Wilson* v. *Edwards*, 69.

GRAND JURY:

no ground of challenge to grand juror that he served on coroner's jury when. *Sullins* v. *State*, 127.

nor that his name was marked on indictment as witness for State. *Id.*

HOMESTEAD:

conveyance of homestead not fraudulent. *South Omaha Nat. Bank* v. *Boyd,* 215.

probate sale of homestead to pay decedent's debts held invalid. *Griffin* v. *Dunn,* 408.

conveyance of, by widow held an equitable assignment of dower. *Id.*

held also to be an abandonment of homestead. *Id.*

HOMICIDE:

prejudicial error cured on appeal by reduction of punishment when. *Sullins* v. *State,* 127.

instruction as to murder held not prejudicial when. *Beene* v. *State,* 460.

length of time specific intent may be conceived. *Id.*

INFANCY:

right of infant to show cause why judgment should not be vacated. *Jones* v. *Pond-Decker Mfg. Co.,* 194.

female held to attain majority at 18. *Id.*

when infant entitled to statutory new trial. *Id.*

INSTRUCTIONS:

not abuse of discretion to give additional instructions when. *Choctaw, O. & G. Rd. Co.* v. *Craig,* 53.

instruction held not to assume disputed facts. *Nash* v. *State,* 120.

exception in gross to several instructions bad when. *Walnut Ridge Merc. Co.* v. *Cohn,* 338.

should be based on exidence. *Bunch Grain Co.* v. *Law,* 375.

error in refusing to give peremptory instruction in appellant's favor waived when. *Grooms* v. *Neff Harness Co.,* 401.

when no presumption arises that erroneous instruction was cured by others given. *Bourland* v. *McKnight,* 427.

instruction held not to assume disputed fact. *Castevens* v. *State,* 453.

INSURANCE:

effect of failure to pay premium of accident policy. *Aetna Life Ins. Co.* v. *Ricks,* 38.

substantial compliance with condition as to keeping books held sufficient. *People's Fire Ins. Co. of Arkansas* v. *Gorham,* 160; *Security Mutual Ins. Co.* v. *Woodson,* 266.

insurer held to have waived proof of loss when. *Security Mutual Ins. Co.* v. *Woodson,* 266.

insurer bound by agent's knowledge when. *Id.*

company estopped by act of agent to avail itself of breach of warranty when. *People's Fire Ins. Assoc. of Ark.* v. *Goyne,* 314.

competency of parol evidence of such warranty. *Id.*

INSURANCE:—*Continued.*

objection to proof of loss waived when. *Hartford Fire Ins. Co.* v. *Enoch,* 475.

purchaser of personal property subject to lien for purchase money held to have an insurable interest. *Id.*

acceptance of proofs of loss held a waiver of prior forfeiture when. *Id.*

condition waived when. *Id.*

interest runs on policy when. *Id.*

INTEREST:

runs on insurance policy when. *Hartford Fire Ins. Co.* v. *Enoch,* 475.

JUDGMENTS:

presumption on collateral attack that necessary parties were brought in. *Waldron* v. *Taenzer,* 16.

presumption that court had jurisdiction of defendant's person. *Id.*

conclusiveness of judgment on former appeal. *Hollingsworth* v. *McAndrew,* 185.

judgment dismissing complaint held to bar subsequent suit. *Wheeler* v. *Bennett,* 210.

discretion of trial court to render judgment by default. *Ozark Ins. Co.* v. *Leatherwood,* 252.

parties not estopped to deny validity of judgment by pretended special judge. *Arkadelphia Lumber Co.* v. *Asman,* 284.

election of remedies for vacation of judgment. *Id.*

how judgment amended to speak truth. *Id.*

fraudulent decree vacated after term when. *Corney* v. *Corney,* 289.

JURY:

when juror not disqualified by opinion. *Sullins* v. *State,* 127.

when disqualified by opinion. *Id.*

when presumption of prejudice from erroneous overruling of challenge not overcome. *Id.*

JUSTICES OF THE PEACE:

limit of jurisdiction of, in matters of tort. *Storm* v. *Montgomery,* 172.

LANDLORD AND TENANT:

duty of tenant, under contract, to make repairs. *Franklin* v. *Triplett,* 82.

when error to take from jury question whether certain things were "supplies and necessaries" for which landlord had lien. *Bourland* v. *McKnight,* 427.

LARCENY:

necessity of asportation. *Henderson* v. *State,* 333.

evidence held sufficient to prove intent to steal. *Thrash* v. *State,* 347.

LARCENY:—*Continued.*

effect of unexplained possession of stolen goods. *Gunter* v. *State,* 432.
instruction held not to assume fact in dispute. *Castevens* v. *State,* 453.

LEVEES: See EMINENT DOMAIN.

levee district estopped to plead *ultra vires* when. *Board of Directors, etc.,* v. *Myers,* 14.
contract to build levee not enforced specifically. *Leonard* v. *Board of Dir. of Plum Bayou Levee Dist.,* 42.
act limiting indebtedness of Plum Bayou Levee District construed. *Altheimer* v. *Board of Directors of Plum Bayou Lev. Dist.* 229.
statute prohibiting issuance of evidences of indebtedness construed. *Id.*
authority of board to issue non-negotiable evidences of debt. *Id.*
held not to be municipal corporations. *Id.*
remedy of remainderman for taking of land for levee purposes without compensation. *Crawford* v. *Board of Directors of St. Francis Lev. Dist.,* 606.

LIMITATION OF ACTIONS: See ADVERSE POSSESSION.

resale by purchaser at judicial sale held not a judicial sale within the statute. *Phillips* v. *Jones,* 100.
five years statute does not run against one in possession. *Id.*
burden is on one who pleads statute. *Calhoun* v. *Moore,* 109.
possession of part under tax deed conveying entire tract held to convey title. *Jones* v. *Pond-Decker Mfg. Co.,* 194.
payment on debt held to stop running of statute. *Nunn* v. *McKnight,* 393.
effect of part payment on running account. *Id.*
effect of part payment on stated account. *Id.*
instructions as to effect of part payment held properly refused. *Id.*
on sale of homestead by widow statute begins to run against heirs. *Griffin* v. *Dunn,* 408.
effect, under the five-year statute as to judicial sales, of accrual of right of action after the day of sale and before the five years expire. *Id.*

MASTER AND SERVANT:

servant held not to have assumed latent risks. *Archer-Foster Construction Co.* v. *Vaughn,* 20.
master liable for negligence of vice-principal. *Id.*
liability of master for failure to warn servant. *Id.*
finding that railroad was liable for injury to brakeman from dangerous coupling sustained. *Choctaw, O. & G. Rd. Co.* v. *Craig,* 53.
whether servant assumed risk a question for jury when. *Id.*
finding that servant was not guilty of contributory negligence sustained. *Id.*

MASTER AND SERVANT:—*Continued.*

proximate cause of railroad wreck considered. *St. Louis & S. F. Rd. Co.* v. *Hill,* 76.

duty of railroad to construct and maintain safe bridges. *Id.*

no presumption of negligence from occurrence of accident. *Id.*

when contract of employment dissolved. *White Sewing Machine Co.* v. *Shaddock,* 220.

effect of dissolution of contract. *Id.*

damages recoverable on dissolution of such contract. *Id.*

burden of proof of negligence in matter of furnishing safe place. *St. Louis, I. M. & S. Ry. Co.* v. *Andrews,* 437.

when master not liable for injury from defective ladder. *Id.*

damages recoverable from master for failure to furnish transportation to employee. *St. Louis S. W. Ry. Co.* v. *Reagan,* 484.

doctrine of *respondeat superior* inapplicable where agent of charity was negligent. *Fordyce* v. *Woman's Christian Nat. Lib. Assoc.,* 550.

MAXIMS:

equity treats that as done which ought to be done. *Stiewel* v. *Webb Press Co.,* 45.

expresso unius est exclusio alterius. Altheimer v. *Board of Dir. of Plum Bayou Levee District,* 235.

all things are presumed to have been rightly done. *Waldron* v. *Taenzer,* 19.

caveat emptor. Pewett v. *Richardson,* 67.

MINES AND MINING:

patent for placer claim of land containing lode of valuable metal not invalid when. *Carter* v. *Gray,* 273.

MONOPOLIES:

anti-trust act of 1905, § 7, requiring corporations to make affidavit, construed. *State* v. *International Harvester Co.,* 517.

MORTGAGES:

right to redeem mortgaged land sold under power limited to one year. *Merryman* v. *Blount,* 1.

right of beneficiary to purchase at trustee's sale. *Id.*

appraisers not required to enter on land to appraise it. *Id.*

complaint alleging that appraisers did not enter upon and view the mortgaged land held bad. *Id.*

MUNICIPAL CORPORATIONS:

right to private alley acquired by adverse possession when. *Clay* v. *Penzel,* 5.

NEGLIGENCE: See RAILROADS.

liability of one creating pond alongside highway without placing

NEGLIGENCE:—*Continued.*
barriers. *Strange* v. *Bodcaw Lumber Co.*, 490.
immaterial that county judge gave permission to create pond. *Id.*
no defense that person creating pond had no authority to enter for purpose of erecting guard rails. *Id.*
duty of person creating such pond defined. *Id.*
effect of there being concurring causes of injury. *Id.*
care required in handling explosives. *Waters-Pierce Oil Co.* v. *Knisel*, 608.
burden of proving negligence. *Id.*

NEW TRIAL. See APPEAL AND ERROR.
right of infant to statutory new trial. *Jones* v. *Pond & Decker Mfg. Co.*, 194.
destruction of papers by burning of court house not accident entitling party to new trial. *Fellheimer* v. *Eagle*, 201.

OFFICES AND OFFICER: See COLLECTORS.

PARTIES:
necessary parties in suit for partition. *Waldron* v. *Taenzer*, 16.
necessary parties in action for causing death. *McBride* v. *Berman*, 62.
amendment of complaint by substitution of plaintiff held proper. *St. Louis, I. M. & S. Ry. Co.* v. *Block*, 179.
no misjoinder of parties in suit for specific performance when. *Carter* v. *Gray*, 273.
when assignor of chose in action is necessary party. *Collier* v. *Trice*, 414.

PARTITION:
necessary parties in suit for partition. *Waldron* v. *Taenzer*, 16.

PARTNERSHIP:
evidence held not to establish formation of partnership. *Dixie Cotton Oil Co.* v. *Morris*, 113.
whether a corporation may form partnership with another, *quaere*. *Id.*
retiring member not liable for subsequent debts of firm when. *Id.*
partnership and cotenancy distinguished. *Harris* v. *Umsted*, 499.

PAYMENT: See LIMITATION OF ACTIONS.

PENALTIES:
penal statutes strictly construed. *Brown* v. *Haselman*, 213.
statute imposing penalty on election officers held inapplicable to school elections. *Id.*
penal statutes and statutes imposing burdens unknown at common law should be strictly construed. *State* v. *International Harvester Co.*, 517.
anti-trust act construed. *Id.*

PLEADING:

complaint held bad as containing negative pregnant. *Merryman* v. *Blount*, 1.

remedy for indefiniteness is by motion. *Phillips* v. *Jones*, 100.

complaint amendable by substitution of party plaintiff when. *St. Louis, I. M. & S. Ry. Co.* v. *Block*, 179.

demurrer does not lie to claim against county. *Hempstead County* v. *Phillips*, 263.

immaterial averments need not be proved. *Strange* v. *Bodcaw Lumber Co.*, 490.

PRINCIPAL AND SURETY:

on bond of building contractor discharged where obligee fails to retain 25 per cent. of price as stipulated. *National Surety Co.* v. *Long*, 523.

effect of delay of obligee in notifying surety of principal's default. *Id.*

RAILROADS: See MASTER AND SERVANT; CARRIERS.

evidence held to sustain finding that fire was caused by negligence of railroad company. *St. Louis, I. M. & S. Ry. Co.* v. *Thompson-Hailey Co.*, 12.

measure of railroad's duty in regard to fire. *Id.*

negligence of traveler at crossing a question for jury when. *Scott* v. *St. Louis, I. M. & Ry. Co.*, 137.

instruction as to liability of railroad to traveler run over by car held abstract and misleading. *St. Louis, I. M. & S. Ry. Co.* v. *Cain*, 225.

question of contributory negligence of traveler at highway crossing properly left to jury when. *St. Louis & S. F. Ry. Co.* v. *Wyatt*, 241.

verdict finding railroad negligent in case of stock killed by train upheld when. *St. Louis S. W. Ry. Co.* v. *Hutchinson*, 247.

RAPE:

indictment for, held sufficient. *Beard* v. *State*, 293.

REAL PROPERTY:

remainderman cannot complain of conveyance by life tenant when. *Crawford* v. *Board of Directors of St. Francis Levee Dist.*, 606.

RECEIVING STOLEN PROPERTY:

indictment for, held sufficient. *Thrash* v. *State*, 347.

REFEREE:

conclusiveness of decision of. *Ark-Mo Zinc Co.* v. *Patterson*, 506.

REFORMATION OF INSTRUMENTS:

sufficiency of evidence to prove mistake as ground for reformation. *Tillar* v. *Wilson*, 256; *Stinson* v. *Ray*, 592.

ROADS AND HIGHWAYS:

right to private way acquired by adverse possession. *Clay* v. *Penzel,* 5.

SALES OF CHATTELS:

warranty of quality notwithstanding opportunity of inspection. *Pewett* v. *Richardson,* 66.
remedy of vendee on breach of warranty. *Id.*
purchaser of chattel with knowledge of pending suit not innocent purchaser when. *Grooms* v. *Neff Harness Co.,* 401.
remedy for breach of express warranty against incumbrances. *Mason* v. *Bohannan,* 435.
delivery of chattel to carrier held delivery to vendee when. *Equitable Mfg. Co.* v. *Templeton,* 456.
delay of carrier no ground for rescission. *Id.*
effect of nondelivery of bill of lading. *Id.*
vendor held not to have waived vendee's breach when. *Ark. & Tex. Grain Co.* v. *Young & Fresch Grain Co.,* 603.
resale of chattel to vendee after he declined to perform contract held no waiver. *Id.*
unnecessary that vendor give notice of intent to resell when. *Id.*

SCHOOLS AND SCHOOL DISTRICTS:

statute imposing penalty on election officers held not to apply to school elections. *Brown* v. *Haselman,* 213.

SPECIFIC PERFORMANCE:

equity will not enforce contract to build levee. *Leonard* v. *Board of Dir. of Plum Bayou Levee Dist.,* 42.
bill alleging part performance held sufficient. *Phillips* v. *Jones,* 100.
indefiniteness in bill reached by motion. *Id.*
parties properly joined in suit for, when. *Carter* v. *Gray,* 273.

STATUTES:

when mandatory. *Martin* v. *State,* 236.
Acts 1905, c. 166. directing county court to require "good and sufficient bond" from borrower of county funds, held mandatory. *Martin* v. *State,* 236.

STATUTES CITED:

43 Eliz. c. 4.....537, 555

CONSTITUTION OF UNITED STATES:

Art. 6..... 314

ACTS OF CONGRESS:

Rev. Stat. §§ 2325, 2326. 583
22 Stat. at L. 155..... 552
Act of Cong. May 25, 1900 353

ENGLISH'S DIGEST:

p. 715, § 12..... 567

SAND. & H. DIGEST:

§ 3049 537
3052-5 537

KIRBY'S DIGEST:

§ 113 417
114 417
115 417
118 417
123, 124, 126 417
144 578
628 171
636 171
843 469
848 466
859 466
937 557
943 .....545, 566
959 387
1236 194
1487 505
1492 505
1532 297
1603 433
1604 433
1605 433
1667 214
1829 348
1830 348
2005 .....298, 300, 302
2008 310
2207 122
2220 130
2228 .....299, 456
2229 299

KIRBY'S DIGEST:—Cont.

2366 131
2605 456
2674 291
2704 412
2903 159
2904 159
2955 157
2957 157
3093 74
3224 289
3228 547
3620 351
3654 104
3695 388
3756 199
4375 a 164, 269
4402 505
4431 .....199, 201, 289
4571-4 149
4944-5 158
4963 234
5060 412
5061 365
5137 148
5416 .....3, 4
5543 557
5586 .....148, 149
5772 19
5975 19
6000 418
6093 150
6098 178
6239 64
6248 .....198, 199
6253 213
6290 64
6804 62
6873 445
7086 581
7591 215
7947 .....33, 451

CONSTITUTION OF 1874:

ART. 2, § 8 314
2.....10 314
7.....28 158

CONSTITUTION OF 1874:—Cont.
7.....40 176
7.....46 591
12.... 9 157
16.... 5 ...539, 556, 570
16.... 6 570
SCHED. § 2.....74, 418
CRIMINAL CODE:
§ 123 307
CRIMINAL CODE:—Cont.
127 307
129 308
137 308
OTHER ACTS:
1893, Act of Feb. 15, § 19. 158
1905, c. 31..... 232
1905, Act Jan. 23, § 7.... 518
1905, Act March 13, ...588

STREET RAILROADS:

reasonableness of rule prohibiting passenger from standing on front platform. *Dobbins* v. *Little Rock Ry. & Elec. Co.*, 85.
control over passengers. *Id.*
instruction as to right of passenger to recover for wrongful ejection from car approved. *Id.*
conductor not authorized to prosecute passenger for disorderly conduct. *Id.*
liability of assignee of street railroad for assignor's torts. *Little Rock Traction & Electric Co.* v. *Hicks*, 248.
admissibility of opinion of non-expert as to speed of car. *Id.*
not contributory negligence to permit stock to run at large. *Id.*
instruction as to negligence of street railway in starting car suddenly approved. *Little Rock Ry. & El. Co.* v. *Doyle*, 378.
instruction as to burden of proving contributory negligence approved. *Id.*
liability for obstructing drainage. *Ft. Smith Light & Traction Co.* v. *Soard*, 388.
liability of assignee of street railroad for damages caused by assignor. *Id.*
subsequent removal of thing complained of as negligence not evidence thereof. *Id.*

SUNDAY:

in suit against telegraph company for failure to transmit telegram no defense that contract was entered into on Sunday. *Arkansas & La. Ry. Co.* v. *Lee*, 448.

TAXATION:

unsurveyed private land is taxable. *Buckner* v. *Sugg*, 442.
sufficiency of description of land in assessment. *Id.*
description in tax assessment aided by extraneous evidence when. *Id.*
failure of clerk to record delinquent list of land with notice and certificate held fatal to tax sale. *Birch* v. *Walworth*, 580.

TELEGRAPHS AND TELEPHONES:

special damages for breach of telegraph company's contract not recoverable unless the company had notice. *Western Union Tel. Co.* v. *Hogue,* 33.
form of action to recover such damages held immaterial. *Id.*
telegraph company held not to have had notice of special damages. *Id.*
action held to lie in this State for negligence in transmitting message to person in another State. *Arkansas & La. Ry. Co.* v. *Lee,* 448.
acceptance of message for delivery held sufficient. *Id.*
no defense that contract to deliver message was made on Sunday. *Id.*

TENANCY IN COMMON:

partnership distinguished from. *Harris* v. *Umsted,* 499.
effect of sale by cotenant. *Id.*
agreement as to formation of, construed. *Id.*

TRIAL: See INSTRUCTIONS.

erroneous instructions not cured by correct ones when. *St. Louis, I. M. & S. Ry. Co.* v. *Thompson-Hailey Co.,* 12.
statement by prosecuting attorney in argument not proper ground of complaint if made in reply to statements of appellant's attorney. *Smith* v. *State,* 25.
expression of opinion by prosecuting attorney held not prejudicial. *Id.*
necessity of objection to improper argument. *Choctaw, O. & G. Rd. Co.* v. *Craig,* 53.
not improper to permit jury to inspect street car when. *Dobbins* v. *Little Rock Ry. & El. Co.,* 85.
how objection to incompetent evidence raised. *Lovell* v. *Sneed,* 204.
improper argument harmless when. *Grooms* v. *Neff Harness Co.,* 401.
effect of stipulation as to "sole issue" involved. *Gibson* v. *Wilson,* 582.

TRUSTS:

effect of purchase of land or chattels with another's money. *Wilson* v. *Edwards,* 69.
loan for improvement of land held to create no trust. *Butterfield* v. *Butterfield,* 164.
sufficiency of evidence to establish resulting trust. *Foster* v. *Beidler,* 418.

VENUE:

statute relating to change of venue from one justice of the peace to another is inapplicable to proceeding before mayor to destroy prohibited liquors. *Betts* v. *Ward,* 16.

WATERS:

negligence in building pond along highway, see NEGLIGENCE.

WIDOW:

effect of conveyance by, of deceased husband's homestead. *Griffin* v. *Dunn*, 408.
effect of assignment by widow of her quarantine right. *Id.*

WILLS:

bequest held to be in lieu of settlement. *Bromley* v. *Atwood*, 357.
parol evidence admissible to prove that devise was forgiveness of debt. *Id.*
sufficiency of such parol evidence for that purpose. *Id.*

WITNESSES:

impeachment of witness by proof of pendency of indictment. *Smith* v. *State*, 25.
statement of intestate not provable when. *Wilson* v. *Edwards*, 69.
testimony of deaf mute taken by interpreter. *Dobbins* v. *Little Rock Ry. & El. Co.*, 85.
witneess not impeached by admission of conviction of infamous crime. *Thrash* v. *State*, 347.
ground of disqualification of party as to transactions with decedent is fact that he is party. *Collier* v. *Trice*, 414.

7122 066